

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE, YES/NO. YES NO.

(2) OF INTEREST TO OTHER JUDGES, YES/NO. YES NO.

(3) REVISED. YES NO.

26.2.2010
DATE

[Signature]
SIGNATURE

Reportable

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JS455/07

In the matter between:

SOLIDARITY obo MRS R M BARNARD

Applicant

and

SOUTH AFRICAN POLICE SERVICES

Respondent

Judgment

- [1] This application is brought on behalf of Mrs R M Barnard, a Captain in the South African Police Services. She claims relief for unfair discrimination. Her cause of action is based on the principal allegation that she was denied promotion on two occasions for the sole reason that she is white.

The Provisions of the Employment Equity Act, 55 of 1998

- [2] This matter is to be decided in terms of the provisions of the Employment Equity Act, 55 of 1998. It is necessary therefore to set out its relevant provisions.

[3] Section 2 sets out the purpose of the Act and states:

"2. Purpose of this Act. – *The purpose of this Act is to achieve equity in the work-place by –*

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce."

[4] Section 6 of the Act provides as follows:

"6. Prohibition of unfair discrimination. – *(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race.....*

(2) It is not unfair discrimination to –

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

[5] Section 10 provides that disputes concerning the relevant Chapter of the Act may be referred in writing to the CCMA. It provides further that the CCMA must attempt to resolve the dispute through conciliation. If the dispute remains

unresolved after conciliation, the section provides that any party may refer the dispute to the Labour Court for adjudication.

[6] Section 11 provides as follows:

*"11. **Burden of proof.** – Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair."*

[7] Sections 5 to 11 of the Act are contained in Chapter II under the Head **"Prohibition of unfair discrimination"**.

[8] Chapter III of the Act deals with affirmative action.

[9] Section 13 provides as follows:

*"13. **Duties of designated employers.** – (1) Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.*

(2) A designated employer must –

(a) consult with its employees as required by section 16;

(b) conduct an analysis as required by section 19;

(c) prepare an employment equity plan as required by section 20;

(d)

[10] Section 15 reads as follows:

- “15. Affirmative action measures.** – (1) *Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.*
- (2) *Affirmative action measures implemented by a designated employer must include –*
- (a) *measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;*
- (b) *measures designed to further diversity in the workplace based on equal dignity and respect of all people;*
- (c) *making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;*
- (d) *Subject to subsection (3), measures to –*
- (i) *ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and*
- (ii) *retain and develop people from designated groups and to implement appropriate training measures, including*

measures in terms of an Act of Parliament providing for skills development.

- (3) the measures referred to in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas.*
- (4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.”*

[11] Section 20 provides as follows:

- “20. Employment equity plan.** – (1) *A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer’s workforce.*
- (2) An employment equity plan prepared in terms of subsection (1) must state –*
 - (a) the objectives to be achieved for each year of the plan;*
 - (b) the affirmative action measures to be implemented as required by section 15(2);*
 - (c) where under representation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in*

the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;

- (d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;*
- (e) the duration of plan, which may not be shorter than one year or longer than five years;*
- (f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;*
- (g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;*
- (h)*

(3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's –

- (a) formal qualifications;*
- (b) prior learning;*
- (c) relevant experience; or*
- (d) capacity to acquire, within a reasonable time, the ability to do the job.*

(4) When determining whether a person is suitably qualified for a job, an employer must –

- (a) review all the factors listed in subsection (3); and*
- (b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors."*

[12] A footnote to the term “numerical goals” in subsection 20(2)(c) reads as follows:

“Guidelines regarding the factors to be taken into account in determining numerical goals will be included in a Code of Good Practice. However, the factors listed in section 42 (a) (Assessment of compliance) are relevant to setting numerical goals in each organization.”

[13] The factors so listed in section 42(a) include “*the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer’s workforce in relation to the –*

- (i) demographic profile of the national and regional economically active population;¹*
- (ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees.”*

[14] Finally, section 50 deals with the powers of the Labour Court in resolving disputes in terms of the Act. The section reads in part:

“50. Powers of Labour Court. – (1) Except where this Act provides otherwise, the Labour Court may make any appropriate order including –

- (a)*
- (b)*

¹ It is unclear whether the population statistics used to establish the requisite targets in respect of each demographic group were based on population figures as a whole or figures relating to only economic active persons. It is also unclear whether the manner in which white women are catered for is entirely in accordance with the provisions of the Act. However these issues were not raised before me and it is unnecessary for me to deal with them any further.

(c)

(d) *awarding compensation in any circumstances contemplated in this Act;*

(e) *awarding damages in any circumstances contemplated in this Act;*

(f)

(j) *dealing with any matter necessary or incidental to performing its functions in terms of this Act.*

(2) *If the Labour Court decides that an employee has unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including –*

(a) *payment of compensation by the employer to that employee;*

(b) *payment of damages by the employer to that employee;*

(c) *an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;*

....”

[15] The need for the provisions of the Employment Equity Act in the post-apartheid South Africa and, in particular, the justification for affirmative action have been recorded in a number of judgments of our courts.² I understand there to be no controversy in this matter over these issues. Nor should there be.

² See, for example, Fourie v Provincial Commissioner SAPS (North West Province) [2004] 9 BLLR 895(LC).
See too; Minister of Finance and another v Van Heerden [2004] 12 BLLR 1181(LC) at paragraphs [22] to [32].

The Employment Equity Plan of the Respondent

[16] It is common cause that pursuant to the provisions of the Act, the respondent had prepared an Employment Equity Plan.

[17] It was also common cause that the plan was the product of consultations with employee representatives in the appropriate bargaining forum. Its contents were not put in issue by the applicant.

[18] In the preamble to the Employment Equity Plan the following is stated:

"This Employment Equity Plan is therefore geared to:

Promote the Constitutional right of equality and the exercise of true democracy,

- Eliminate unfair discrimination in employment within the South African Police Service;*
- Ensure proper and effective implementation of Employment Equity within the South African Police Service to redress the effects of past practices;*
- Achieve a diverse workforce broadly representative of the South African community; and*
- Promote economic development and efficiency in the workforce."*

[19] Under the head "Executive Summary," the following is, amongst other things, stated:

"The transformation process will help to expedite the promotion of diversity and the successful implementation of the Employment Equity Plan based on equal dignity and respect for all, and ensuring reasonable accommodation available for people with disabilities. Effective procedures have been implemented to monitor and evaluate reasonable progress towards Employment Equity in every sphere of employment in the South African Police Service with the objective of achieving service delivery improvement which permeates across all sectors of Human Resource practices".

- [20] In terms of the plan it is the National Commissioner who *"is responsible for the championing of the Employment Equity Plan as well as the overall management and implementation of the plan"*.
- [21] The dispute resolution mechanism provided for in the plan is a recital of the provisions of section 10 of the Employment Equity Act. In other words there is no internal dispute resolution mechanism as appears to be required by section 20(2)(g) of the Employment Equity Act.
- [22] However, as will become apparent below, it is important that in adopting the dispute resolution mechanism set out in the Employment Equity Act, the Respondent in consultation with its employees has accepted the notion of conciliation by the CCMA as a necessary part of the plan.

[23] The Employment Equity Plan sets out "*numeric targets*". The overall idea is to ensure that representation at all salary levels is in accordance with "*national demographics*". However a note in the relevant section of the plan states "*although SAPS will diligently pursue the ideal numeric target set for the 2002 reporting period, realistic targets based on projections of workforce movement and possible growth of the organization are set for evaluation purposes.*"

The Relevant Facts

[24] The material facts relied upon by the applicant in support of her claim and which I accept as established in evidence are the following:

[24.1] Barnard, a white female, commenced service with the Respondent on 6 January 1989 as a constable. She was promoted to the rank of Captain in 1997. After serving as Branch Commander, Detective Services, at the Hartebeestpoort station for some years, she was transferred to the National Inspectorate ("the Inspectorate") previously the National Evaluation Service ("the NES") at the rank of Captain.

[24.2] Barnard is currently employed in the Internal Audit division on salary level 8, still at the rank of Captain. As at the date of trial she earned R205 000,00 per annum.

[24.3] Barnard's duties in the Inspectorate included investigating complaints from the public concerning police conduct on a national level and

reporting the findings to the Minister, National Commissioner and the Divisional Commissioner: National Evaluation Service.

[24.4] During 2005 the Respondent created a new post of Superintendent of the NES, the function of which was to ensure optimal utilization of human, logistical and financial resources in the NES. The specific job description was to "evaluate and investigate priority and ordinary complaints nationally".

[24.5] The post was approved by the then Divisional Commissioner of the NES, Commissioner Rasegatla, and advertised as post 6903, a "non-designated" post in the NES with the rank of Superintendent at salary level 9.

[24.6] On 3 November 2005 Barnard was interviewed for the post together with six other candidates (four blacks and two whites). On assessment she received an average rating of 86,67 %, the highest score obtained by any candidate.

[24.7] The following four candidates were recommended for the post in order of preference:

[24.7.1] Barnard (white female);

[24.7.2] Capt JF Oschmann (white female);

[24.7.3] Capt Achendorf (coloured female);

[24.7.4] Capt Shibambu (black male).

- [24.8] The difference between Barnard's score and that of Capt Shibambu, the fourth rated candidate, was 17,5 %. In its recommendation the selection panel stated that given the difference between the scores of Barnard and that of Capt Shibambu, service delivery would be adversely affected if the latter were to be appointed. The panel also stated that representivity in the NES would not be affected as Barnard was already a member thereof. The recommendation stated further: *"The panel agrees that the appointment of Captain Barnard will definitely enhance service delivery"*.
- [24.9] The panel's recommendation was discussed at a meeting with the Divisional Commissioner the following day. The upshot was that Divisional Commissioner Resegatla recommended that post 6903 not be filled because, *inter alia*, "appointing any of the first three preferred candidates will aggravate the representivity status of the already under-represented Sub-Section: Complaints Investigation" and that "such appointment will not enhance service delivery to a diverse community".
- [24.10] Post 6903 was left vacant and in fact withdrawn.
- [24.11] The reason Barnard was not appointed to post 6903 was that she was white.

[24.12] Three months after post 6903 was withdrawn a white male Superintendent was "*laterally transferred*" to the Complaints sub-section.

[24.13] The same position was advertised, again as a "non-designated post" (post 4701), during May 2006. Barnard applied again for the post.

[24.14] Barnard was again short-listed and was interviewed on 26 June 2006, this time with seven other candidates, four African males, one African female, one "coloured" male and one white male.

[24.15] The panel recommended for appointment (one of) three candidates, being in order of preference:

[24.15.1] Barnard (with an assessment score of 85%);

[24.15.2] Capt Mogadima (with an assessment score of 78%);

[24.15.3] Capt Ledwaba (with an assessment score of 74%).

[24.16] The record of the panel's deliberations includes the following comments:

"Capt Barnard a white female is recommended as the panel's first choice candidate for the post. She has proven competence and extensive experience at National level in the core functions of the post and was rated the highest by the promotion panel. She obtained an average rating of 85.33% whereas the second choice

candidate, Capt Mogadima, obtained a rating of 78%, (7.33% less). The appointment of Captain Barnard will not enhance representivity on salary level 9 but it will not aggravate the current Divisional Representivity figures as she is already part thereof. Appointing the candidate on salary level 9 will however enhance representivity on salary level 8 in respect of the over-representation of white females on that level. Irrespective of the difference in percentage between the first and second choice candidates, Capt Barnard was the only candidate that during the interview displayed an unique blend of passion and enthusiasm to deal with members of the community that are unsatisfied with the services rendered by the South African Police Service. During the interview, she also displayed a high level of commitment towards the SAPS and an eagerness to contribute towards enhanced service delivery."

[24.17] Again, a meeting was held at divisional level to discuss the panel's recommendations. Commissioner Rasegatle supported Barnard's appointment. The minute of the meeting records Commissioner Rasegatle's opinion as follows:

"Div Comm Rasegatla was of the opinion that failing to recognize and appoint this candidate would really send a wrong signal to the candidate. Appointments and promotions are also made to address service delivery, and if the candidate in two years constantly applies for the post and is constantly rated and recommended as the best candidate, it clearly indicates that she is

the best candidate for promotion. Other candidates who would have improved representivity within the Division had approximately one year to improve on themselves to compete with the recommended candidate. However, she still beat them.”

The panel’s conclusions are recorded as follows:

“The panel strongly believed that in the interest of service delivery, and having denied this candidate the opportunity for promotion during the previous promotion phase, that the candidate should be appointed as recommended by the respective promotion panel.

The panel agreed that the candidate is already in the Division and the overall representivity profile of the Division will not be aggravated by her promotion.”³

[24.18] On 7 June 2007 the office of the National Commissioner issued an instruction reminding interview panels that they should focus on service delivery when they recommended appointments.

[24.19] On 10 July 2007 Divisional Commissioner Rasegatla recommended to the National Commissioner that Barnard be appointed to post 4701. The recommendation reads as follows:

³ According to the relevant minute a member of the panel, Director Mamogaie, did not disagree with the recommendation but “*was not satisfied with the motivation*”.

**"POST 4701: SUPERINTENDENT: COMPLAINTS
INVESTIGATIONS**

No. 0430604-0 Capt RM Barnard

The candidate is recommended as the panel's first choice candidate for the post. She has proven competence and extensive experience at National level in the CORE functions of the post and was rated the highest by the promotion panel. She obtained an average rating of 85.33% whereas the second choice candidate, obtained a rating of 78%. The appointment of the candidate will not enhance representivity on salary level nine but it will not aggravate the current Divisional Representivity figures as she is already part thereof. Appointing the candidate on salary level nine will however create an opportunity to enhance representivity on salary level eight in respect of the overall representation of white females on that level.

The same post was advertised during 2005 (Phase 2/2005/6) but not filled due to representivity. Capt. Barnard was rated in first position in the previous promotion phase and was recommended by the promotion panel and is again rated first by the promotion panel during the current promotion phase.

In terms of the provision of par 13(3) of National Instruction 1/2004 she was not promoted during the previous promotion phase despite the fact that she was the best candidate. As a result, the post was withdrawn and was re-advertised during the current promotion phase. During the current promotion phase she was again among

the shortlisted candidates and was, once again rated the best candidate.

Failure to recognize and appoint this candidate would really send a wrong signal to the candidate. Appointments and promotions are also made to address service delivery, and if the candidate in two years constantly applies for the post and is constantly rated and recommended as the best candidate, it clearly indicates that she is the best candidate for promotion.

Other candidates who would have improved representivity within the Division had approximately one year to improve on themselves to compete with the recommended candidate. However, she still beat them.

National Evaluation Service strongly believes that in the interest of service delivery, and having denied this candidate the opportunity for promotion during the previous promotion phase, that the candidate should be appointed as recommended by the panel.”

[24.20] The National Commissioner did not approve the recommendation and withdrew post 4701. The relevant decision is recorded as follows:

“Your recommendations 8/1/1 dated 2006-07-10 and the meeting with all provincial Commissioners and divisional Commissioners on 20 July 2006 refer.

After due consideration of your recommendations, the National Commissioner has decided not to approve your recommendations for posts 4702/4701/4710 due to the following reasons:

- *Your recommendations do not address representivity; and*
- *The posts are not critical and the non filling of the posts will not affect service delivery. The posts should be re-advertised during the phase 2-2006/7 promotion process, during which process you should attempt to address representivity.”*

[24.21] Barnard filed a complaint in terms of the Respondent’s grievance procedure in respect of her non-appointment to post 4701.⁴ At that stage, the Applicant requested promotion backdated to 1 December 2005.

[24.22] The written reply to her grievance stated in essence that the recommendation in respect of the latter post did not “address representivity” and that the post was not critical and further that leaving it vacant would not affect service delivery.

[24.23] Barnard then referred a dispute to the CCMA, and the dispute was certified unresolved on 11 April 2007 after a conciliation meeting which the Respondent did not attend.

⁴ Barnard testified that the mediation process which formed part of the grievance procedure was not properly followed. I invited the Respondent to obtain instructions and to address me in this regard. The Respondent chose not to place any further facts in this regard before the court.

General Principles

[25] The following principles have informed my decision:

[25.1] The provisions of the Employment Equity Act and an Employment Equity Plan must be applied in accordance with the principles of fairness and with due regard to the affected individual's constitutional right to equality. It is therefore not appropriate to apply, without more, the numerical goals set out in an Employment Equity Plan. That approach is too rigid. Due consideration must be given to the particular circumstances of individuals potentially adversely affected.⁵ In this regard the need for representivity must be weighed up against the affected individual's rights to equality and a fair decision made.⁶

[25.2] Obviously (and this was not an issue in the trial) individuals from non-designated groups (and perhaps from designated groups too) will be adversely affected by the implementation of employment equity plans. But both as a matter of substance and procedure implementation of employment equity plans should be effected with due regard not only to the individual's right to equality but also to the dignity of affected individuals. This is particularly so when it comes to the application and effective use of internal dispute resolution procedures and statutory conciliation procedures.

⁵ This would include the person's employment history, record of performance, skills and qualifications and other factors.

⁶ See; Minister of Finance and Another v Van Heerden [2004] 12 BLLR 1181(LC) at paragraphs [22] to [32]. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004(7) BLLR 687(LC) at paragraphs [72] to [77].

[25.3] Accordingly, the extent to which the implementation of employment equity plans may discriminate or adversely affect individuals is limited by law. In this case at least the following considerations are relevant. First, the terms of the Employment Equity Act require the application of its provisions to be done in a manner that is both rational and fair. Second, due recognition must be given to the affected individual's rights to equality. Third, in the implementation of an employment equity plan, due recognition must be given to the right of affected persons to dignity.

[25.4] Where a post cannot be filled by an applicant from an under-represented category because a suitable candidate from that category cannot be found, promotion to that post should not ordinarily and in the absence of a clear and satisfactory explanation be denied to a suitable candidate from another group.⁷

[25.6] There must be a rational connection between the provisions of the Employment Equity Plan and the measures adopted to implement the provisions of that plan.

[25.7] In appropriate circumstances at least, the efficient operation of the Public Service or what is termed "*service delivery*" is a relevant factor

⁷ See; Coetzer and Others v Minister of Safety and Security and Another [2003] 2 BLLR 173(LC). And see; Gordon v Department of Health: KwaZulu-Natal [2008] 11 BLLR 1023(SCA) especially at para [28]. The facts of these cases are different from the present case. In Coetzer there were no black candidates who applied for promotion. In Gordon there was no relevant Employment Equity Plan in place. However in my view and notwithstanding these factual differences the principle applied should also be applied in the present matter.

to be taken into account in the implementation of an employment equity plan.⁸

[26] The Respondent bears the onus to show that the unfair discrimination alleged by the Applicant is fair. This means that the Respondent must allege sufficient evidence to show, on a balance of probabilities, that its decision was fair. In order to do so the Respondent should place before the court sufficient evidence to enable it to understand this reasoning behind and justification for its decision so that the court is in a position properly to decide the matter.

Analysis of the Evidence:

[27] The evidence showing the reason and justification for the decision of the National Commissioner is minimal. The minute recording the decision taken by the National Commissioner at the meeting held in his office and taken by the National Commissioner reads, rather starkly, as follows:

“Recommendations do not address representivity. The posts are not critical and will not affect service delivery. Posts 4702/4701/4710 should be re-advertised”.

[28] In argument it was accepted by the applicant that:

[28.1] The National Commissioner of the Respondent has the final discretion to approve recommendations for appointment to all posts, including the

⁸ See Coetzer and Others v Minister of Safety and Security and Another [2003] 2 BLLR 173(LC) at paras [32] and [33].

disputed posts, which discretion must be exercised in accordance with the Respondent's Employment Equity Plan and policy, the requirements of the Public Service Act, 1994 and the Employment Equity Act.

[28.2] Decisions of selection panels and the relevant Divisional Commissioner are recommendations which do not bind the National Commissioner;

[28.3] Affirmative action is constitutionally enshrined;

[28.4] The Respondent is obliged in law to implement its Employment Equity Plan.

[29] It was contended on behalf of the Respondent that section 15 of the Employment Equity Act states that affirmative action measures are "measures designed to ensure that suitably qualified people from designated group have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated level. In other words it was consistent with the Employment Equity Act for the Employment Equity Plan to seek to achieve representivity at salary levels, in this case salary level 9, rather than in a division as a whole.

[30] Post 4701, the post to which Barnard sought promotion, was a post at a level (level 9) where black males and females were underrepresented and white males and females were overrepresented. Barnard's appointment to this level would

have aggravated this overrepresentivity (of white males and females) and, it follows, the underrepresentivity (of black males and females)⁹ as well.

- [31] Whilst this argument is correct, it does not exclude the need to consider related factors relevant to the implementation of the plan. For example it would surely be relevant to consider that Barnard's promotion would have improved representivity at level 8.
- [32] It was accepted on behalf of the Respondent, at least in argument, that where a post could not be filled by an applicant from an underrepresented category because a suitable candidate from that category could not be found, promotion to the relevant post should not be denied to a suitable candidate from another category. However, it was contended on behalf of the respondent that it was not only the applicant that was not appointed to the relevant post, but other, suitable black candidates were also denied promotion. Therefore, the argument went, no discrimination on account of race took place. But this argument loses sight of the fact that the allegation of discrimination has broader implications. It may be accepted that on the evidence and in the absence of an affirmative action policy, Barnard would have been appointed. She was not, this on account of her race. That is enough to establish discrimination. The fact that other suitable black candidates were not appointed does not change the fact of discrimination. Nor does the fact that they were not appointed, in itself, render the non-appointment of Barnard fair.

⁹ However it should also be borne in mind that representivity at salary level 8 would have been enhanced and representivity in the division would have remained unaffected.

[33] It appears common cause that the National Commissioner could, had he so decided, have implemented the Employment Equity Plan directly by employing a suitably qualified black candidate to the post. Instead the National Commissioner declined to do so. It cannot be said, in my view, that the non-appointment of any candidate to the post was in fact a fair and appropriate method of implementing the Employment Equity Plan which was fair to the applicant. The non-appointment is no more than just that, a non-appointment. In my view, having decided not to implement the Employment Equity Plan by appointing a recommended black candidate it was unfair in those circumstances not to appoint the Applicant, a member of a designated group in terms of the Employment Equity Act and the best candidate for the job.

[34] Given the rather sparse information placed before this court in regard to the reasons for the National Commissioner's decision that it is reasonable to assume that he at least did not regard the other black candidates who were recommended as suitable. Whatever the witnesses may have said is of lesser importance because they did not make the decision.

[35] If this is not the case, then there is simply insufficient evidence relating to the Commissioner's reasons for his decision on record to enable me to find that the Respondent has discharged its onus to establish that the decision was both rational and fair. What is clear, and this is an important consideration, is that the National Commissioner decided not to appoint either of the recommended black candidates. Whatever his view of suitability they were recommended to him as suitable. Not to appoint Barnard in these circumstances, when she was manifestly the best and recommended as the preferred candidate, is unfair and

irrational. This is particularly so because no satisfactory explanation was given for the failure to appoint a black candidate to the post.

[36] Quite apart from that, there is no evidence that the countervailing right of the Applicant to equality was taken into account and, if so, to what extent. Nor is there any evidence that her personal work history and circumstances were taken into account by the National Commissioner. It is apparent however that these factors were important factors motivating the recommendations of the selection panel and the Divisional Commissioner.

[37] In my view the failure to appoint Barnard, coupled with the non-appointment of either of the other two black and recommended candidates was not shown to be a rational method of implementing the Employment Equity Plan. The solution adopted by the National Commissioner did not, on the evidence before me show such a rational connection. If the other black candidates were deemed not suitable (the only positive and reasonable conclusion to be drawn from the evidence if any conclusion is to be drawn at all) then it was unfair to Barnard not to appoint her. If there was some other reason for the non-appointment of the two black candidates then this was not apparent from the evidence and there is accordingly no basis to find that the Respondent has discharged its onus to show fairness.

[38] The Respondent's problems are compounded by what are in my view serious procedural lapses. There can be no doubt that the application of affirmative action policies will adversely affect some employees. However, both the letter and spirit of our Constitution dictate that such policies should be applied with due

respect to the dignity of those affected. Against the background of those requirements the procedural lapses, namely, the failure of the Respondent to engage effectively in the mediation and conciliation procedures provided for within the Respondent and provided for by the provisions of the Employment Equity Act is simply unacceptable.

[39] Particularly in cases such as the present but also as a general rule, mediation and conciliation processes play an important role in preserving employment relationships and in fostering relationships based on dignity and mutual respect. It was incumbent upon the Respondent in this case to make use at least of the conciliation procedures to explain fully to Barnard exactly why she was not promoted and to attempt to reach some common understanding and even consensus. This the Respondent did not do.

[40] Mediation procedures which form part of agreed procedures between employer and employee and a statutory conciliation procedures such as those provided for in the Employment Equity Act are there for a purpose. Quite apart from considerations of fairness, our law requires that they be utilized fully and properly and not merely regarded as matters of form.

[41] The Applicant contended that her non-appointment was also unfair because service delivery was adversely affected. She gave direct evidence in this regard. Commissioner Burger also testified to this effect. That service delivery would be enhanced by Barnard's appointment was also stated in the recommendations before the National Commissioner, that is, both in the recommendation from the selection panel and in the recommendation from the Divisional Commissioner.

As against this, all that appears in the National Commissioner's decision is that the relevant post was "*not critical*" and that service delivery would not be affected. It is not entirely clear what the words "*not critical*" mean in the present context. Certainly on the facts the Respondent saw fit to fill the vacant post at least temporarily. The post was advertised more than once. At the very least it must be accepted that the post was a necessary one.

[42] The Respondent's own Employment Equity Plan notes that service delivery improvement is one objective of the plan. The National Commissioner's instruction of 7 June 2007 referred to above is also reflective of the Respondent's policy in this regard. Having regard to these considerations it is difficult to understand how a failure to fulfill a necessary post by any candidate at all could be said to be rationally justified by the need for an efficient Police force. However, I must state that this consideration is not to my mind a decisive consideration. I would have reached the same overall conclusion even in the absence of my comments in this regard. The considerations in regard to efficiency or service delivery do however lend added weight to the conclusion that there is an absence of a rational connection between the decision reached by the National Commissioner and the overall objects of the Employment Equity Plan.

Conclusion

[43] In conclusion, the admitted documentation together with the evidence establishes, at least on the probabilities:

[43.1] Despite being the best candidate for the post, Barnard was not promoted to that post.

[43.2] The failure to promote Barnard was a decision based on her race and constituted discrimination.

[43.3] The principal consideration applied was the numerical target at salary level 9 dictated by the Employment Equity Plan of the Respondent.

[43.4] It is not apparent that consideration was given to the mitigating effects of the Applicant's possible promotion, namely, the alleviation of under-representation of designated groups at salary level 8.

[43.5] It is not apparent that consideration was given to the Applicant's right to equality and dignity. There appears to have been no consideration of her personal work history and circumstances.

[43.6] As a separate conclusion and having regard to the facts the Respondent has failed to discharge the onus of showing that the proven discrimination was fair.

[43.7] The failure to promote the Applicant was unfair and therefore not in compliance with the provisions of the Employment Equity Act.

[43.8] The fact that other candidates (whether suitable or unsuitable) were not promoted does not mitigate or alter the above findings.

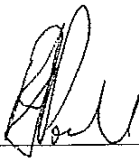
Relief

[44] Coetzer's case, cited above,¹⁰ is authority for the proposition that it is competent for this court to make an order promoting Barnard. I intend to do so. However as it is the decision of the Commissioner of 27 July 2006 that formed the subject matter of these proceedings, I intend to make the order retrospective only to that date. I do not believe that a sufficient basis has been laid for making the order retrospective to any earlier date.

Accordingly I make the following order:

1. The Respondent is directed to promote the Applicant to the post of Superintendent with effect from 27 July 2006.
2. The Respondent is ordered to pay the Applicant's costs.

DATED AT JOHANNESBURG THIS 24th DAY OF FEBRUARY 2010.



P J Pretorius AJ

¹⁰ At paras [41] to [45].

Appearances:

For the applicant: Adv J G Grogan

Instructed by: Serfontein Viljoen & Swart Attorneys

For the respondent: Adv W R Mokhare

Instructed by: The State Attorney