A QUESTION OF QUOTAS

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A strict allocation of appointments in accordance with race and gender, which are arbitrary, capricious and display naked preference is prohibited by s 9(3) of the Constitution.

Countries with a history of racial, religious, ethnic and/or gender discrimination can expect to face the thorny issues of correcting their historically unfair employment practices when a point of transition arrives. This can be a hornet's nest for employers and legal practitioners as they try to reconcile redress with the fundamental principles of rights embodied in the constitution. In South Africa these issues reached a high point in 2016 when two superior courts ruled respectively on two cases involving disputes on the appointment of staff. The courts framed the questions of employment or promotion of previously disadvantaged persons in terms of two specific parameters: quotas and targets. The former, the court argued, is rigid and, as such, may fail to take into account the demographic conditions of a particular locality which is germane to representivity. The latter, on the other hand, is flexible and thereby allows for changes in the appointment of staff as and when necessary to achieve the goals of employment equity. The judgements are particularly relevant to government departments and other employers for whom quotas and targets have been a grey area since employment equity legislation was introduced.

2016 Has been an interesting and prominent year for the affirmation of a working democracy in South Africa. The superior courts have inspired much public confidence by reaffirming the independence and authority of the judiciary in relation to and over other arms of state. In so doing, decisions and conduct of the Legislature and the Executive have come under close scrutiny by the courts with unlawful actions effectively set aside. Through these robust court interventions, other institutions supporting and advancing democracy have become eminently prominent in the daily discourse of ordinary South Africans (such as the Office of the Public Protector[1]).

In asserting constitutionally protected rights, individuals have turned to these courts to resolve disputes. One such dispute that came to the fore was the vexing issue that permeates government policy in the context of appointments: *whether s9 of the Constitution[2] permits the redress of past discrimination by introducing quotas in workplace/employment policies. Or put differently, how do policies that must ensure representivity of previously disadvantaged persons do so without offending the constitutionally protected right to equality[3]?*

On 2 December 2016, the Supreme Court of Appeal handed down judgment in *Minister of Justice v The SA Restructuring & Insolvency Practitioners Association[4] (Insolvency Practitioners)*. This follows less than six months after the seminal judgment by the Constitutional Court in *Solidarity and Others v Department of Correctional Services and Others[5]*.

These two judgments are particularly important because they-

1. effectively interrogate government policy pursuant to statutory enablers aimed at promoting substantive equality, in relation to s9 of the Constitution; and
2. settle the question of whether quotas are permissible in formulating policies on affirmative action.

SOLIDARITY AND OTHERS v DEPARTMENT OF CORRECTIONAL SERVICES AND OTHERS

The Department of Correctional Services (Department) refused to promote or employ individuals who did not meet its prescribed targets, based on national demographics,as provided for in the Department's Employment Equity Plan (Plan). ➤➤

In terms of s21 (1) of the Employment Equity Act[6] (Act), affected employers are required to, among others, "prepare and implement an employment equity Plan which will achieve reasonable progress towards employment equity in that employer's workforce".

The 2010 Plan of the Department contained numerical targets based on national demographics to be achieved by the Department within a five year period. The Department implemented its recruitment and promotion policies which prescribed these "ideal racial and gender targets" as formulated in the Plan:
"9.3% for White males and females;
79.3% for African males and females;
8.8% for Coloured males and females;
2.5% for Indian males and females."

In 2011, the Department advertised vacant posts in the Western Cape. There were 10 applicants for these posts (five coloured women, four coloured men and one white male). Nine of the 10 were recommended for appointment but eight were not appointed due to the prescribed targets.

The unsuccessful applicants launched a challenge in the Labour Court based on unfair discrimination. The Court ruled that the Plan was non-compliant with s42[7] of the Act in that it failed to take into account both regional and national demographics.

The applicants appealed to the Labour Appeal Court (LAC) against the Labour Court's decision because it did not grant the individual applicants any relief and/or declare the Plan invalid. The LAC held that insofar as the Plan was not rigid, it was lawful. Therefore, according to the Court, the deviations permitted in the Plan which rendered the numerical targets flexible did not constitute quotas.

The LAC applied the "Barnard principle" set out by the Constitutional Court in *South African Police Service v Solidarity obo Barnard*[8] which states that an employer may refuse to appoint a candidate who falls within a category

> **. . . the policy was unconstitutional and irrational in that quotas in any form for the purpose of affirmative action are unconstitutional**

of persons that is already adequately represented at a certain occupational level. In the present case, the court had to consider whether the application of the Barnard principle is applicable to white people only and whether it can also be applied in respect of gender. It ruled that the principle is not limited to white people but rather to all candidates irrespective of race or gender.

The submission that the Department's Plan be declared null and void due to its non-compliance with s42(a) was dismissed by the court because the Plan had already run its course at that stage (rendering it moot), and therefore there was no need for an order declaring its invalidity.

However, the court did confirm that 'quotas', are not permitted under the Act, reiterating the distinctions, set out in Barnard, that a quota is 'rigid' as opposed to numerical targets, which are flexible. Because the Plan made provision for deviations from the set targets, the targets could not be said to be rigid and therefore did not constitute quotas.

Most importantly, the court held that the Department acted unlawfully and in breach of its obligations under s42 of the Act insofar as it failed to consider regional demographics in assessing the levels of representation. The court confirmed that s42 (a) does not exclude national departments from its application.

MINISTER OF JUSTICE V THE SA RESTRUCTURING & INSOLVENCY PRACTITIONERS ASSOCIATION[9]

The issue of quotas once again came under scrutiny by the Supreme Court of Appeal (SCA) in the appointment of provisional liquidators by the Minister of Justice and Constitutional Development (Minister).

The Western Cape High Court, as court a quo, had ruled[10] that the new policy issued by the Minister on the appointment of provisional liquidators amounts to a quota system and is therefore unconstitutional.

The Applicants (the Minister and the Chief Master of the High Court of South Africa), had argued that the new appointment policy aims to promote the representivity of previously disadvantaged persons in the profession of Insolvency Practitioners. Implementation would have meant that 40% of appointments would be allocated to African, Coloured, Indian and Chinese females; 30% to African, Coloured, Indian and Chinese males; 20% to white females and 10% to white males.

The SCA placed reliance on the test formulated by the Constitutional Court in *Minister of Finance & Another v Van Heerden*[11]: In essence, the"defender" of a policy must show that "the measure is contemplated by s 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. The enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality."

The court accepted that the policy was aimed at protecting and developing previously disadvantaged practitioners who suffered under the previous system which was skewed in favour of previously advantaged practitioners.

However, it found that the policy was unconstitutional and irrational in that quotas in any form for the purpose of affirmative action are unconstitutional. Remedial action, it states, must operate in a progressive manner so as not only to benefit those practitioners who were disadvantaged in the past but such remedial action must not trump the rights of previously advantaged practitioners. The SCA also relied on the Barnard case which ruled that remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination but equally they must not unduly invade the human dignity of those affected by them. Thus the court had regard for the proposition that "when dealing with remedial measures, it is not sufficient that they may work to the benefit of the previously disadvantaged."[12]

The court held that the impugned policy embodied strict allocation of appointments in accordance with race and gender, which were"arbitrary, capricious and displayed naked preference, which is prohibited by s 9(3) of the Constitution"[13]. It stated that the policy's arbitrariness is borne out by the requirement that the Master must make appointments in accordance with a rigid quota.

On the issue of the rationality of the policy, the SCA was not convinced that there was a rational basis upon which the policy was formulated. No proper explanation regarding how the ratio in the policy was determined, and no reliable figures were presented to show the number of practitioners in each category. There was also no consideration for the nature, value or complexity of an estate, for the demographic of practitioners or for their knowledge or skills. In these circumstances the policy was not formulated,"on a rational basis properly directed at the legitimate goal of removing the effects of past discrimination and furthering the advancement of persons from previously disadvantaged groups."[14]

The concurring judgment[15] held that, given the purpose of the insolvency legislation, the actions of the Minister in determining the policy, and the actions that the Master must undertake in terms of that policy, must be in accordance with the interests of creditors.

As the policy had no regard for this purpose, and on its face does not recognize or serve the interest of creditors, it was outside the legitimate powers vested in the Minister, and in breach of the principle of legality. In any event, the court confirmed that, the implementation of race-based quotas is not a legitimate affirmative action criterion, and is in fact prohibited.

This ruling confirms that the policy, as formulated, would have deprived competent provisional liquidators with requisite expertise and experience, of their rights on the basis of race.

This case thus settles the issue: **"s15 (3) of the Employment Equity Act 55 of 1998 permits preferential treatment and numerical goals, but disallows quotas."**[16] NA

REFERENCES:

1 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11

2 Equality
1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subs (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subs (3) is unfair unless it is established that the discrimination is fair.

3 Section 9 of the Constitution supra

4 (693/15) [2016] ZASCA

5 CCT 78/15; [2016] ZACC

6 No 55 of 1998

7 42. In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must, in addition to the factors stated in section 15, take into account all of the following:
(a) 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;
(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;
(iii) economic and financial factors relevant to the sector in which the employer operates;
(iv) present and anticipated economic and financial circumstances of the employer; and
(v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;
(b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;
(c) reasonable efforts made by a designated employer to implement its employment equity Plan;
(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and
(e) any other prescribed factor.

8 [2014] ZACC 23

9 (693/15) [2016] ZASCA 196 (2 December 2016)

10 South African Restructuring And Insolvency Practitioners Association v Minister of Justice And Constitutional Development and Others; InRe: Concerned Insolvency Practitioners Association NPC and Others v Minister of Justice And Constitutional Development and Others (4314/2014, 17327/2014) [2015] ZAWCHC 1; [2015] 1 All SA 589 (WCC); 2015 (2) SA 430 (WCC); 2015 (4) BCLR 447 (WCC); [2015] 4 BLLR 329 (WCC)

11 [2004] ZACC 3; 2004(6) SA 121 (CC) para 137

12 Para 32

13 Para 32

14 Para 47

15 Wallis JA (Mpati P, Swain and Mathopo JJA concurring)

16 Para 32(sic)