

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

Case Number :D322/04

In the matter between

**PUBLIC SERVICE ASSOCIATION OF
SOUTH AFRICA**

1ST APPLICANT

Obo

CAPTAIN LOUIS HELBERG

2ND APPLICANT

and

THE MINISTER OF SAFETY & SECURITY

1ST RESPONDENT

THE SOUTH AFRICAN POLICE SERVICE

2ND RESPONDENT

JUDGMENT

1. This is an application for a default judgment brought by the applicants against the respondents. The Statement of Case was served on the respondents by registered mail. There has been no response from the respondents. The matter was accordingly set down for the default judgment.
2. The applicant is employed by the South African Police Service and stationed in The Commercial Branch in Durban. He holds the rank of a Captain. The applicant is serving in the specialised branch of the South African Police Service.
3. The applicant testified that in 2000 he applied for promotion to the rank of Superintendent. He was not promoted. He then requested information regarding the process that was followed. He approached the CCMA to get the documents he needed.
4. The response he received about his unsuccessful application is that he was not found

to be the most suitable candidate. This is contained in a letter dated 19 July 2001 (p9 Arbitration Proceedings). It was also stated that the evaluation was done in accordance with the Head Office Minute number 8/1/1 dated 2000-03-13. This was confirmed in the letter dated 27 July 2001 (Arbitration Proceedings p10). The letter went further to say, "Your application did not weigh favourably against the other applicants who were recommended for the posts you applied for."

5. At CCMA the respondent agreed to supply the documents requested. He proceeded with his grievance to a Step 4 level. The dispute was not resolved. He referred the dispute to the SSSBC. The outcome sought was the promotion to the rank of Superintendent back dated to 1 March 2000.
6. In response to the grievance referred to the SSSBC the SAPS stated that the appointment of other candidates was in accordance with the provisions of the Employment Equity Act, No55 of 1998 and was regarded as a fair discrimination in terms of Section 6(2)(a) thereof. It was also stated that the applicant was not recommended after the respondent had applied the measures contained in Head Office letters dated 2000-03-13, 2000-07-17 and 2000-07-19.
7. The applicant testified that the respondent did not produce any Equity plan and did not have any plan at the time. The applicant was only advised in 2002 that he was not recommended because of the Equity Plan. In a letter dated 19 July 2000, Div Com Stander of the Head Office in Pretoria, provided The Employment Equity Plan to be followed. In that letter he pointed out that the representivity level of black males, black females and white females can be improved. It was further stated that the personnel who acted in Superintendent posts must be considered for the advertised posts but they should not be accommodated at the expense of other race groups.
8. In a letter dated 17 July 2000, Div Commissioner Stander wrote in paragraph 3 of that letter that:

"... I am aware of the current reality and that the Employment Equity Plan of the South African Police Service was not in effect at the time when recommendations were made, nevertheless the plan must be used as a guide."

It is therefore clear that the respondent relied on the Equity Plan that did not exist at the time in order to exclude the applicant. Applicant could not be promoted because he is a white male.

9. The applicant testified that in the year 2000 he acted in the post of Senior Superintendent. Some of the people who were appointed had not acted for a period of 12 months in those positions or higher ranks. One Mr Mbatha had not been short listed but was appointed. Some of the people who were appointed have obtained marks lower than that of the applicant. The applicant testified that there was still room for the appointment of 5 white males. Only one white male was promoted.
10. The applicant has submitted that the respondent's failure to promote him was an unjustified discrimination. He further stated that the Equity Plan could not be relied upon as it did not exist at the time. He accordingly sought the assistance of the court for promotion to the post of Superintendent.
11. The respondent did not appear to gainsay the applicant's evidence. I have to decide the matter only on the version of the applicant.
12. The onus is on the applicant to prove the discrimination. (See *Transport and General Workers Union & Another v Bayete Security Holdings (1999) 20 ILJ 1117(LC) at page 1118 par 4*. There is no doctrine of legitimate expectation in promotion. The fact that a person has acted in the position does not on its own entitle the person to promotion. That may well be the position if there is a contract entitling a person to the appointment after acting for a certain period of time. What is always expected is that the best candidate be appointed.
13. I am satisfied on the evidence that the applicant was discriminated against on the basis of race. The question is whether such discrimination is outlawed in terms of Section 6 of The Employment Equity Act . Section 15 permits discrimination to fulfil affirmative action measures.
14. I can appreciate the actions of the respondent in trying to have all races represented. What has not been disputed in the present case is that when the respondent failed to promote the applicant there was no affirmative action plan for the South African Police Service. The respondent therefore could not implement any measures under affirmative

action when no plan existed.

15. In the circumstances I find that the respondent discriminated unfairly against the second applicant.

16. In the result I make the following order:

- (a) The respondent is directed to promote the second applicant to the rank of Superintendent as from 31 July 2000 with all the benefits.
- (b) The respondent is ordered to pay the 1st applicant's actual expenses in connection with this application.

Ngcamu AJ

Date of last hearing : 19 November 2004

Date of judgment : 26 November 2004