

Supreme Court of Appeal of South Africa

MEDIA SUMMARY – JUDGMENT DELIVERED IN SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 17 September 2008

Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

MARTIN GORDON

v

DEPARTMENT OF HEALTH: KWAZULU-NATAL

The Supreme Court of Appeal (SCA) today reversed a decision of the Labour Court and found that the appointment of an applicant to the post of Deputy Director at Greys Hospital, Pietermaritzburg, unfairly discriminated against the appellant.

The appeal arose from the appointment of a black candidate (the successful appointee) supposedly on affirmative action grounds instead of the appellant, a white candidate, found to be the most suitable by a selection panel. The appellant approached the Labour Court claiming that the failure to appoint him was based solely on his race and colour and as such amounted to unfair discrimination within the meaning of Item 2(1)(a) of Schedule 7 of the Labour Relations Act 66 of 1995. The Labour Court rejected the claim holding that the appointment did not discriminate unfairly against the appellant, hence his appeal to the Labour Appeal Court. The Labour Appeal Court dismissed the appeal on the basis that the successful appointee had a direct and substantial interest in the proceedings and that the failure to join him non-suited the appellant.

The Supreme Court of Appeal found that the appellant had sought protective promotion which posed no direct implications for the successful appointee and

that this ruled out any interest, direct and/or substantial, which the successful appointee may have in the proceedings.

The SCA then considered the unfair discrimination claim and found that the appointment of the black candidate in the absence of a plan or programme was ad hoc and therefore arbitrary. The SCA found that ad hoc and arbitrary conduct was not contemplated in the phrase 'measures designed to . . .' in s 8(3)(a) of the Interim Constitution. On this basis the SCA concluded that the appointment of the black candidate discriminated unfairly against the appellant and as such violated Item 2(1)(a) of Schedule 7 of the Labour Relations Act.