

ADONIS, TANYA

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The Employment Recruitment and Promotion Process: Legal Regulation and Practice

Supervisor: Prof. Alan Rycroft

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The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understand the regulations governing the submission of MPhil dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

Signed at Cape Town this 14th day of September 2015

Tanya Adonis

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The Employment Recruitment and Promotion Process: Legal Regulation and Practice

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II. List of Abbreviations

The following is a list of the most commonly used abbreviations in this dissertation

CCMA	Commission for Conciliation, Mediation and Arbitration
LC	Labour Court
LAC	Labour Appeal Court
SCA	Supreme Court of Appeal
CC	Constitutional Court
LRA	Labour Relations Act
EEA	Employment Equity Act
BCEA	Basic Conditions of Employment Act

The Employment Recruitment and Promotion Process: Legal regulation and practice

Chapter 1: Introduction

Recruitment is an integral part of any organization. It forms the foundation upon which every other practice is built. It is a process which is often regarded lightly and not given the due consideration it deserves. It is therefore pertinent to have a recruitment process in place which ensures legal compliance, as well as the longevity of the business.

The concept of legal compliance in the employment recruitment and promotion process has proved at best inconspicuous. The process has allowed for much legal debate, which spans from the CCMA all the way through to the Constitutional Court. The process has also allowed for much jurisprudence to be developed regarding the implementation and application of the statutes governing it.

This dissertation will focus on the limitations placed on management prerogative by labour law the procedural and substantive fairness requirements. It will do so by exploring case law, risk management measures and what is required to ensure a contract of employment is legal and binding on both parties.

It is important to read this dissertation in the light of how labour law overlaps with and impacts on management prerogative. This view is necessary to understand how the push-pull dynamic between these two factors in recruitment and promotion have molded the process to encompass issues that substantively outweigh their procedural counterparts and vice versa.

It is necessary in this dissertation to expound on the fundamental law governing the recruitment and promotion process and will explore concepts of management prerogative, amongst others.

The objective of this dissertation is to investigate the ambiguities imposed by procedural and substantive fairness and will venture into risk management measures and contractual obligations as a failsafe for employers to demystify the process.

1.1 Regulating managerial prerogative

(a) What is meant by the term managerial prerogative?

The word prerogative indicates a right or privilege exclusive to a particular individual or class.¹ In *BTR Dunlop Ltd v National Union of Metalworkers of SA* the court expounds prerogative in the labour context as '*the right to trade includes the right to manage that business, often referred to as the managerial prerogative.*'² Strydom³ in her article submits that the term prerogative is most commonly found in constitutional and labour law. Constitutionally it refers to the discretion conferred to the state and the authority which it holds. This discretion however is limited by the common law. As it is the organ which both gives expression to and yet at the same time limits the discretion. In the context of labour the prerogative refers to the discretionary 'right to manage' an organization. She asserts that prerogative in this sphere has two categories of decision making: Category one refers to decision making pertaining to human resources. Category two refers to decisions which are economic or business in nature. She submits that an overlap often occurs between the two categories, where a required decision in one category will affect another. For instance, decisions such as relocation or new investments often have a direct impact on job security. Prerogative is quite broad in one-person operations.

Companies, being juristic persons, are obliged to exercise their prerogatives as employers through natural persons. A company's powers are normally exercised through its board of directors. Directors can then elect to delegate power. Management of the company would then encompass the directorate as well as those to whom power has been delegated.

Close Corporations are juristic persons consisting of between one to ten members. The managerial power in this instance is original in nature and the members can delegate their power or members may choose to exercise prerogative personally.

Management in the private and public sectors is normally comprised of a collection of managers which form a hierarchy with varying and cumulative levels of decision making power as one travels higher up the hierarchy. Davies and Fredland summarise the need for decision makers as

¹ See Angus Stevenson, Oxford Dictionary of English 3 ed (2010) sv prerogative

² See *BTR Dunlop Ltd v National Union of Metalworkers of SA* (1992) 13 ILJ (IC) (2) *supra* note 8 at 705C

³ Strydom EML '*The Origin, Nature and Ambit of Employer Prerogative (Part 1)*' (1999)

follows: “*Except in a one man undertaking, economic purposes cannot be achieved without hierarchical order within the economic unit*”⁴. The prerogative conferred on managers which allows them to manage employees finds its origin in the power balance between the two parties. As Strydom submits, the employer normally commands capital, information and access to legal advice, whereas the employee works in order that he or she may survive. This power monopoly experienced as an advantage by the employer does not however provide a legal right to the employer to manage employees. Neither is the converse applicable to employees in terms of them obeying instructions. Strydom submits that the employer prerogative finds its legal foundation in the contract of employment.

The pluralist view is that an employer’s prerogative can be limited by collective bargaining. Employer prerogative is strengthened when the economy is weakest as a weak economy results in a scarcity of jobs, as submitted by Flanders.⁵ It is submitted that employers have found that a unitarist approach may harm business. This is especially the case where employees are represented by a well-organized trade union. Employers have therefore subsequently adopted a pluralist view of industrial relations, which has been incorporated into labour legislation which affords employees the right to associate in trade unions and which also promotes collective bargaining. Apart from this Strydom submits that employer prerogative is also limited in a number of ways in the common law. For instance an employer may not unilaterally alter the terms and conditions of employment stipulated in the contract of employment. The prerogative is also limited by a plethora of statutes which include, but are not limited to the Basic Conditions of Employment Act, the Occupational Health and Safety Act and the Labour Relations Act. Strydom concludes her article with the submission that the employers’ prerogative is comprised of those decisions that the law allows and which trade unions are content to leave at the employers’ discretion, or those decisions which the trade union has been unable to subject to collective bargaining.

⁴ Davies P, Freedland M ‘*Kahn-Freunds labour Law and the Law*’ 3ed (1983) at 18

⁵ Flanders A ‘*Management and Unions: The Theory and Reform of Industrial Relations*’ (1970) at 136-139

(b) where this concept comes from;

Storey⁶ in his book analyses managerial prerogative. He submits that there are two key strands of middle class ideology, namely private property rights and the rights of contract. He further defines the managerial prerogatives in relation to related terms of ‘management rights’ and ‘management functions’. The rights function is normally derived from property rights of ownership of plant and equipment with manager’s acting as trustees for the legal owners. However preservation of managerial functions is more related to a demarcation claim. It relates to functional tasks which helps give this occupational class its distinctiveness. These tasks relate to the control functions and this therefore delineates the occupational group horizontally and vertically, therefore maintaining a hierarchical division of labour. The spirit of managerial prerogative pervades a wide realm of managerial thinking and assertiveness.

One example is the Conservative Party of the United Kingdom which had, in the 1960s, an idealistic hope of incorporating and defining managerial prerogatives in their Code of Good Practice, thus indicating their support of the doctrine. They made the following submission: *“Their fundamental prerogatives – so often the subject of dispute and disruptive negotiation – would be clearly set out in the Code of Good Practice. These would become recognized and established principles – whether or not management rights were incorporated in a collective agreement.”*⁷ This was however never included in the final code.

Management control has been seen to tie into the question of management control over the labour process. Storey submits that in all countries and in all social systems control was the essential managerial function, since the earliest days of nascent industrialism. He further submits that despite the ‘managerial problem’ of recruitment, there was a further problem of developing and sustaining a disciplined and industrial workforce. John Woodward sees management ideology as serving *“a positive function in sustaining management as a social institution.”*⁸ Historically the emergence of managerial prerogative was prompted by the new circumstances

⁶ Storey J *“Managerial Prerogative and the Question of Control”* (1983) Redwood Burn Ltd

⁷ Conservative Political Centre (1968), *‘Fair Deal at Work, The Conservative Approach to Modern Industrial Relations’*, Conservative Political Centre, London

⁸ Woodward J, *‘Industrial Organisation: Theory and Practise’*, (1965) Oxford University Press

prevailing in nascent industrial capitalism. Storey submits that the doctrine of ‘managerial prerogative’ attempts to lay claim to wide ranging rights. And its emergence historically was prompted by new circumstances which prevailed in the future potential of industrial capitalism. The idea of prerogatives was something which was already partially formed, for instance royal prerogative has been imposed for centuries. In this day and age ‘managerial prerogative’ is more of an emotive term that often leads to misunderstandings. For instance in trade union circles it can raise suspicions and protests that the user is implying support of unilateral managerial action. Although it may be wise to exclude the term from all forms of collective bargaining, the use of the term can be a useful shorthand phrase for an important element in collective bargaining situations. Wood defines managerial prerogatives as “*the name for the remaining portion of managements original authority and is therefore the name for the residue of discretionary powers left at any moment in the hands of managers. Every act which a manager or his subordinates can lawfully do, and without the consent of the worker organization is done by virtue of this prerogative.*”⁹

Storey submits that there are 4 pillars on which managements view on managerial prerogative rests. The first stems from the rights attached to ownership of the property and managers as owners must have control of their own capital assets and this concept is derived from the common law. The second rests on the statutory law of ownership responsibility and this responsibility has been claimed to be the reason why authority must be concentrated in management hands. The third is the ‘economic efficiency’ argument, which contains various strands that all seem to argue that it is in everyone’s interests, everyone being consumers, shareholders, the nation, and workers that managers be left to manage as they see fit. The fourth centers on the notion that there are persons who are naturally identifiable as ‘leaders’ and others who perform best when led. The trade unions view refers not so much to a right but more a duty of management to do the job for which they are paid. The trade unions congress made the following statement: “is management’s job to lead... what is required is not a diminution in managerial authority but a new conception of how this authority should be exercised”¹⁰

⁹ Wood, LC, “*A study of managerial prerogatives as a system of ideas*” unpublished Phd Thesis, University of Wisconsin

¹⁰ Trade Unions Congress (1967), ‘*Trade Unionism*’, TUC, London

Managerial prerogative is a concept well entrenched in history and in the minds of management, workers and trade union alike. The concept has been established and cultivated by industrialism and capitalism and has roots which ensure its longevity and existence in the working relationship for as long as this relationship will exist.

(c) Critics of the concept

Jordaan¹¹ in his article submits that ownership of or control of industrial capital does not give the employer a legal right to or power to ‘manage’ employees or exercise control over them. This right to control property only extends to the objects owned or controlled and does not extend to the right to manage or control persons. This right to manage and direct the employees’ labour is derived from contractual justification. However contract theory alone does not provide adequate explanation for the right to manage. The hallmarks of contract are equality and liberty. By regarding the employers right to manage the law of contract has legitimized that control as having been consented to by the employee. Aside from that statutes were built which criminalized breaches of contract by employees, making such breaches punishable by fines and imprisonment. This was finally repealed in 1974 in South Africa.

Jordaan submits that, amongst others, socialization of the law is a limitation on managerial prerogative. Socialization entails a process of legislative and administrative intervention that strips the legal institutions regulating private property of their unitary, private and individual centered character. He refers to the following quote by Pound

“Those who conceive that the law is entering upon a new stage of development...speak of that stage...as a stage of socialization of law (with) the emphasis upon social interests; upon the demands or claims or desires involved in social life rather than upon the qualities of the abstract man in vacuo or upon the freedom of the isolated individual... (W)e think of law not negatively as a system of hands off while individuals assert themselves freely, but positively as a social institution existing for social ends. Thinking thus (the question becomes) what claims or demands or want of society are involved in such a controversy?”¹²

¹¹ Jordaan B, *Managerial Prerogative and Industrial Democracy* (1991) 11 Industrial Relations, pp 2

¹² Pound *“The Spirit of the Common Law”* (1931) Boston: Marshall Jones, pp. 195, 197

The employment relationship offers the best illustration of the socialization process. Statutory developments and interventions have sought to protect the employees against arbitrary exercise by employers and have superimposed the interests of society over the powers and activities traditionally regarded as part of the employers domain.

The unfair labour practice concept has impinged on areas traditionally regarded as falling within the management's prerogative, e.g. the denial of access to trade union to conduct a strike ballot. Employee's individual employment rights have served as further limitation on managerial prerogative. The concept of unfair dismissal is entrenched in the fact that employee's employment is more than an entitlement to wages. This is a concept which was well developed by the industrial court in the 1980's. The employer's contractual rights extend only as far as the duties and responsibilities to which the employee has agreed and signed. Therefore the employer cannot unilaterally change conditions of employment or compel the employee to accept and carry out an instruction which is unlawful and unreasonable. The employer views the developments in Industrial Relations as having curtailed their management prerogative. However the industrial courts have stressed that it will not get involved in the running of the employers business so long as the employer is acting in good faith. Only in the area of dismissals for misconduct or incompetence/incapacity will the court get involved to test the merits of the decision to terminate.¹³

Jordaan submits that managerial prerogative or the right to manage is ill defined, however it is a right that is fundamentally restricted, both in the interests of employees and society at large. He further submits that the right to manage is motivated and supported by economic and other factors outside the legal framework and this is what gives the employer its bargaining strength. Also the empowering of employees by means of rights and sanctions equaling the employer in the legal or economic terms does not derogate nor create a basis for employers to believe their right to manage nugatory. Jordaan submits that a principled reliance on managerial prerogative is a unitarist approach and power-centered in its conception and execution. He submits that

¹³ Jordaan B, '*Managerial Prerogative and Industrial Democracy*' (1991) 11 Industrial Relations, pp 4,5

unitarism cultivates an adversarial industrial relations climate; whereas, a pluralist approach fosters joint decision making and economic cooperation.

(d) The meaning of managerial prerogative in SA today.

Thomson¹⁴ in his article submits that there is effectively no such thing as managerial prerogative. His reason for this submission is because some labour law systems globally submit that there are certain matters over which unions have no say, for instance, an investment decision. However the same does not apply in the South African context as the union can push for a collective agreement on 'any matter of mutual interest between the employer and employee' and the union/employees can engage in a protected strike in support of such. He submits that it is this right to strike or alternatively litigate on anything impacting the employment relationship, as the signal to the absence of managerial prerogative in our system of labour law. As no employer decision affecting employment is immune. However he further submits that our system is characterized by voluntarism. And although unions can negotiate on any matter in employment, the employer generally still holds the most power and therefore generally has their way. That is a function of power not law.

He submits that an operational requirements dismissal falls outside the ambit of collective bargaining in that it is a rights issue. This is because operational requirements are economic and not legal in nature. Work practices can be unilaterally altered however, work practices can be transformed into conditions of service, or, more generally, bargaining matters. And if management gives consensus, then the conversion has occurred. And the reverse is possible, which means that management can bargain for more unilateral action space. He submits that a dispute over restructuring which could include a host of matters such as, mergers, relocations and downsizing, amongst others. And circumstances may be altered, for instance, the employer may wish employees to work differently and that may include changes to conditions of service. This

¹⁴ Thomson C, "*Bargaining, Business Restructuring & the Operational Requirements Dismissal.*" (1999) pp 758, 759

resulting management engagement on change should take the form of bargaining (unless it is managed under a broader consultative process).

However retrenchment as a response to deteriorating market conditions would not form part of this category. Despite this, if job losses come into question: *“power may not be used to effect or resist dismissals; the dismissals if disputed must be adjudicated; and the employer must be able to show the Labour Court that the operational requirements of the business justify the envisaged business changes and consequent job losses.”*¹⁵ This indicates that management prerogative is intact when it comes to issues of economics affecting the business. When dismissals are contemplated, if they are not being proven to be done for fair reasons then the prerogative can be curtailed. Therefore as Thomson argues, the underlying issue in dispute remains essentially economic. However there is not a clear right or wrong answer to the question of whether a business change is necessary to the point of justifying a dismissal. Also the courts instinctively avoid involving themselves where a business line decision needs to be made, and they therefore give employers a hefty grace in making a decision based on economic merits. So effectively, as long as the employer can prove the economic merits of decisions to dismiss then the employer’s prerogative will be intact and undefeated.

1.2 The extent to which the law limits managerial prerogative in the recruitment process

The common law gave employers unlimited rights and unhindered managerial prerogative via the law of contract. The employer also had the prerogative to hire whoever it wanted and effectively fire whoever it didn’t want. However the development of statute has significantly restricted the employer prerogative. For instance the Employment Equity Act includes in its definition of employee an applicant for employment. This is a fundamental submission to the limitation of the employer prerogative as this offers certain rights to a job applicant rights such as, the chapter two right not to be unfairly discriminated against whether directly or indirectly. Section 187 of the Labour Relations Act describes unfair labour practices as encompassing unfair conduct by the employer which relates to amongst others, the promotion, of an employee. This curtails the employers prerogative relating to promotions as this is normally a grey area and one in which recruitment best practices are often overlooked. It serves to regulate unfair

¹⁵ Ibid pg 762

promotions. The challenge in the recruitment and promotion process however is that selections are normally done confidentially. This means that the results are potentially not compliant with statutory requirements and applicants fall victim to such misdemeanors as favoritism and nepotism, amongst others. Clarity with regard to statutory compliance is therefore necessary as even applicants for jobs can challenge employer's employment decisions.

1.3 Applicable legislation

Almost all legislation impacts on the process of recruitment and promotion in some way, shape or form. The Constitution specifies that everyone has the right to fair labour practices as well as an inherent right to dignity. The Occupational Health and Safety Act specify that an employer must provide a safe work environment for employees. However the legislation which I will be focusing on in this dissertation is the Labour Relations Act and the Employment Equity Act.

Chapter 8 of the Labour Relations Act deals with unfair treatment in the workplace and more specifically unfair labour practices. The act defines unfair labour practices as “Unfair conduct of an employer relating to the promotion, demotion, probation or training of an employee or the provision of benefits.”¹⁶

The aforementioned synchronizes succinctly with the Employment Equity Act chapter one definition of an employee which includes an applicant for employment in its definition. The act further mandates the prohibition of unfair discrimination in any employment policy or practice on any listed¹⁷ or arbitrary ground.

1.4 Methodology

The methodologies employed in the writing of this dissertation are desk based and case study methods. The desk based study involved a great deal of online research as well as the sourcing of external library materials such as books and articles, as well as published government

¹⁶ The Labour Relations Act 66 of 1995, S186(2)(a)

¹⁷ The Employment Equity Act 55 of 1998 , S6(1)... “including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth....”

documents, such as statutes. These books, articles and statutes have been used to research the origin and need for recruitment and promotion best practices. The second component of research methodology is that of case study focusing on the analyses of various case law, policies and decisions which affect and have affected the evolution of the recruitment and promotion process.

1.5 Limitations of dissertation

The limitations of this dissertation are that it will not cover the various forms of employment, namely; fixed term contracts of employment, indefinite contracts of employment, part time contracts of employment and also labour brokering. It also will not cover the post placement process, such as, the statutory or contractual terms of probation, amongst others, as well as the Promotion of Administrative Justice Act and its effects on the recruitment and promotion process.

Chapter 2: Procedural fairness in recruitment

Procedural fairness can be considered the right of an employee in respect of the procedure followed in the process of discipline or dismissal. Procedural fairness is important because it ensures an employee an opportunity to state their case and defend themselves in light of allegations brought against them. It also ensures that the employer is consistent in the administration of its disciplinary procedures and practices to ensure that no favouritism or nepotism takes place and therefore compromises the procedure.

2.1 What does procedural fairness entail?

2.1.1 Does an employer have to advertise every vacancy?

There is no law which says that a job has to be advertised before it can lawfully be offered to a person. It is possible to imagine many situations where advertising is not necessary or appropriate:

- in a small family business, where a parent appoints a son or daughter to a position in the business;
- in a situation where a company has undertaken to re-hire ex-employees who were retrenched;

- in a company where an individual has been employed on a casual basis for an extended period and now a permanent position has become available;
- where a company offers a permanent position to a person who has completed a learnership (apprenticeship / articles of clerkship) with the company and it is impressed by the person;
- where a holiday student intern impresses the company and it makes a direct approach to her /him;
- where friends decide to start a business together;
- where the costs of advertising are not warranted.

Despite the fact that there are no laws requiring advertising of vacancies, there may nevertheless be sound reasons to advertise as a matter of policy. These reasons include:

- in large enterprises the employer may not be able to predict which existing employee might want to apply for an available post as promotion;
- the employer in a large enterprise might expose itself to an allegation of unfair labour practice in its promotion policy if it does not advertise vacancies;
- governmental departments and public bodies are obliged to abide by the rules of administrative fairness, which include openness, transparency, a lack of bias, an obligation to avoid nepotism¹⁸, a duty to make decisions which are rational and fair;
- in a democracy it is important that not only elected officials are accountable, but also that appointed officials are qualified to perform public functions and will do so without corruption. A process of advertising helps create the perception that public bodies are open and accountable;
- Shareholders have an interest in the best employees being appointed.

¹⁸"Nepotism" is defined as favouritism in appointment or advancement based on family relationship.

2.1.2 Do all applicants have to be shortlisted and interviewed?

The Employment Equity Act defines a suitably qualified individual as having one or a combination of the following; a formal qualification, prior learning, relevant experience, capacity to acquire, within a reasonable time, the ability to do the job.¹⁹

Section 4 further requires that when an employer determines whether or not a person is suitably qualified then the employer needs to review the aforementioned factors, and whether the individual has the ability to do the job or a combination of those factors.²⁰ With this said an employer only need shortlist and interview candidates which meet the requirements of being suitably qualified. The reason for this is that appointing an individual to a role for which s/he is not suitably qualified, especially where there are applicants who are suitably qualified, may constitute unfair discrimination and, if the unsuccessful applicant is an existing employee, may also constitute an unfair labour practice. With that said in *Ndlovu v CCMA*²¹ the court found that where an applicant alleges that they were suitably qualified for the role and therefore should have been interviewed and possibly appointed to a role that, that applicant then needs to produce evidence substantiating such claim. The arbitrator in the preceding arbitration hearing said the following:

"There is no doubt in my mind that the applicant is eminently qualified for a senior position in the ranks of Government. It is also quite clear that he has rendered sterling service to his employer. Is he, therefore, on the aforementioned basis entitled to a senior position? If indeed he is so entitled, does he stand head and shoulders above everyone else who is so qualified? There is no evidence to persuade me that the answers to these two questions should be in the affirmative. Considering the applicant's stated intention to obtain a severance package as far back as 1996, I question the wisdom of promoting him. It appears to me that the clamour for a senior post is intended to justify a demand for a more generous severance package. It appears to me that any employer who acts conservatively in order to avoid being saddled with an

¹⁹ The Employment Equity Act 55 of 1998, S20 (3)(a),(d)

²⁰ Ibid S20 (4)(a),(b)

²¹ *Ndlovu v CCMA & others* [2000] 12 BLLR 1462 (LC)

exorbitant severance package is not committing an unfair labour practice. Such an employer, in my view, can legitimately claim to be inspired by a desire for proper governance. In sum, I am not convinced that the respondent committed an unfair labour practice in failing to promote the applicant. It is nowhere evident that the applicant was entitled to the promotion deserved. It is also not clear that the successful applicants was or were not more deserving than the applicant. No evidence was led to show that the respondent was capricious or arbitrary in its decision."

Hence based on the above submission made by the arbitrator the court found nothing wrong with the arbitrators reasoning and that although the applicant has proved their suitability in terms of qualifications and skills that only constitutes one aspect and another aspect that needs to be discharged is that the decision to appoint someone else to the post in preference to the applicant was unfair. This would require comparing the qualities of the two candidates, and the decision by the employer to appoint one instead of the other needs to be rational and if it is then there can be no question of unfairness. The court dismissed the application with costs. Therefore where an applicant seeks to prove an unfair labour practice as it relates to promotion it is insufficient to show that they were sufficiently qualified. The employee must also show that the employer's decision to appoint someone else was irrational and therefore unfair.

2.1.3 Do shortlisted candidates have to be treated the same?

Procedural fairness is concerned with equal treatment and avoiding privileging some applicants over others. All shortlisted candidates have therefore to be treated the same in the administration of the recruitment policy and procedure. What this means is that if the procedure requires that all applicants are interviewed and then undergo a psychometric evaluation, then this is the process that needs to be followed with all shortlisted applicants. A failure to do so will result in unfair discrimination and can constitute an unfair labour practice. The case of *SAPS v Safety and Security Bargaining Council & others*²² laid down clear principles when determining unfair conduct relating to promotions. Firstly there is no right to promotion in the ordinary course, only

²² *SAPS v Safety and Security Bargaining Council & others* (LC Case no: P426/08; judgment date 27/10/2010)

a right to be given a fair opportunity to compete for a post. The exceptions are when there is a contractual or statutory right to promotion. Secondly any conduct that denies an employee a fair opportunity to compete for a post constitutes an unfair labour practice. Thirdly if the employee is not denied the opportunity to compete for a post, the only justification for scrutinizing the selection process is to determine whether the appointment was arbitrary or motivated by an unacceptable reason. Fourth, the consequence of this principle is that as long as the decision can be rationally justified, mistakes in process of evaluation do not constitute unfairness, justifying and interference with the decision to appoint. Lastly, as there is no right to promotion, the appropriate remedy, as a general rule, is to set aside the decision and refer it back so that a fair opportunity is given. The appropriate remedy would therefore be the fair opportunity to compete as this is where the interest lies, as opposed to compensation or appointing another applicant to the post. There are however two exceptions: this principle does not apply to discrimination or victimization cases in respect of which different and compelling constitutional interests are at stake. It also does not apply if the applicant proves that but for the unfair conduct, they would have been appointed.²³ The case therefore indicates and lays down clear case law supporting that all shortlisted candidates must be treated the same, as all shortlisted candidates need to be given a fair opportunity to compete.

2.1.4 Does an employer have to engage in targeted selection?

Targeted selection is an interviewing method used to evaluate candidates' competencies which is based on their past behavior and as a measure to gauge whether they are the right individual for the job. The employer needs to ensure however that each candidate interviewed is asked the same questions as this allows for an equal comparison of the quality of answers. This interviewing technique is one which is favoured by many employers who prefer the concept that past performance predicts future performance.²⁴

Boyatzis in his book *The Competent Manager*²⁵ submits that there are certain characteristics or abilities that enable an individual to demonstrate appropriate specific actions which lead to specific results, these are results required by the organization in order for it to function

²³ November 2010 Public Newsletter - Worklaw

²⁴ <http://www.job-interview-site.com/targeted-selection-interview-questions-and-answers.html>

²⁵ Boyatzis R "*The Competent Manager*" (1982) John Wiley & Sons, Inc.

effectively. He submits that these characteristics or abilities can be called competencies and that these competencies represent the capability that, that individual brings to the job situation.²⁶ Competencies may be a motive, trait, and aspect of the person's self-image or social role, skill, or a body of knowledge which he or she uses. However organizations are not limited to the aforementioned as the only competencies. There are many other common competencies which organizations use, for instance; communication, teamwork, leadership, focus, adaptability and problem solving, amongst others. Organizations then often build competency profiles prior to the commencement of the recruitment process as these profiles often determine how the advertisement will be set out. These profiles are normally derived from the current demands of the job. The National Qualifications Framework (NQF) which was established in terms of the South African Qualifications Authority Act 58 of 1995, utilizes the concept of competency into an eight level framework which recognizes and categorizes competence at all levels of an organization. Competency based assessment is integral to selection training and promotion. The focus is more on outcomes than pre-requisite levels of education which have acted as barriers to entry to a position. Education levels and education must be shown to have a direct link to an individual's ability to do the job.

If targeted selection is not used is it fair? It is submitted that targeted selection aims to be an objective methodology, providing a record of scoring, so that the fairness of the decision can be later justified, if necessary. However it can be that other methodologies can be used that treat all short-listed candidates in a way that gives them an equal opportunity to be considered.

2.1.5 Can an employer deviate from the job advertisement?

A situation can arise where an applicant does not meet a minimum requirement for a post but remains interesting to the employer. Can such a person be short-listed alongside applicants who do meet the minimum requirements? In *Sedibeng District Municipality v South African Local Governing Bargaining Council and Others*²⁷ it is made clear that an employer does not need to

²⁶ Ibid pg 12

²⁷ *Sedibeng District Municipality v South African Local Governing Bargaining Council and Others* (JR 1559/09) [2012] ZALCJHB 45 (31 May 2012)

specify every aspect of the recruitment process in the advertisement and that every consideration taken into account in the appointment of a candidate need not appear in the advertisement. The judgment states:

*...I agree, that not every consideration that is taken into account needs to appear in the advertisement, though it is certainly preferable to mention upfront a factor that might completely disqualify a candidate. However, I am inclined to agree that the arbitrator did misdirect himself in emphasising the importance of the criterion not being advertised, whereas the real issue in dispute between the parties was whether, or alternatively to what extent, the municipality could have regard to the outcomes of the polygraph tests in deciding on the appointments....*²⁸

In *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others*²⁹ the applicant knew that a valid driver's licence was a pre-requisite for applying for the advertised post as the advertisement clearly stated that one of the requirements for the role was a valid driver's licence. Despite this the applicant third respondent submitted a CV which stated that she was in possession of a valid driver's licence, only for the applicant to later, after appointing the third respondent, find out that the third respondent did not have one. The third respondent was then subsequently dismissed. The Labour Appeal Court found that the commissioner had not properly applied his mind to the facts submitted, as the commissioner found that although the applicant had committed an act of misconduct, it was not so severe because the applicant made a mistake by not checking her CV before she sent it, as the CV was supposed to reflect learners licence and not drivers licence. The applicant credited this mistake on her CV to the fact that another individual had typed up her CV. The commissioner therefore set aside the dismissal. The court found that if the commissioner's award were to stand it would "make nonsense of an employer's right to set minimum and functional standards for each

²⁸ Ibid para 26

²⁹ *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others*²⁹ [2011] ZALAC 16; JA 56/06 (3 August 2011)

*position it wants to fill.*³⁰ The court found that dismissal was fair. The two cases point clearly to the fact that where a requirement advertised is inherent to the operation of the job then the employer is by no means allowed deviation from the advertisement. However had an employer not mentioned a particular requirement as inherent in the advertisement, to then subsequently add an additional requirement post the advertising phase would be unfair and the employer should then start the process all over and re-advertise the job.

The fundamental reason why an employer should not ignore a minimum requirement is that there could be others who would have applied for the post had they known that a stated minimum requirement was in fact flexible. The procedurally fair response is for the employer to withdraw the advertisement and to re-advertise the post with that minimum requirement withdrawn or stated as simply a desirable attribute.

2.1.6 Is it possible to prevent pre-decisions?

As has been noted above, procedural fairness requires all applicants to be given an equal opportunity to compete for the post. This requirement is eroded if a decision has already been made ahead of the interview process. In the private sector there may be little other applicants can do if there was no racial or gender discrimination involved. The public sector is different and administrative fairness prohibits the prejudging the decision.

One way in which pre-selection can be avoided is by ensuring that the same procedure is followed correctly each and every time. With that said if the pre-selected individual is an individual who is in line with the affirmative action goals of an organization then as long as that person is suitably qualified, even though they were not the strongest candidate, they could still be the successful and justifiable candidate. But this would need to be guided throughout the recruitment process and the company should make a targeted statement in its advertisement. However targeted statements may only be used in reference to designated groups. The company will then further need to prove the numerical goal set to recruit individuals from that specific category of designated groups. If the company cannot do this and cannot prove that the reason

³⁰ Ibid para 41

for earmarking a candidate for a particular job was not due to favoritism then it definitely sets the grounds for an unfair discrimination or unfair labour practice suit.

The original practice of targeted selection required that scoring of each candidate should be done in silence to avoid a dominant or senior person on the selection committee swaying the scoring by remarks made immediately after that interview. Only when all members of the selection committee have completed their assessment should the scores be revealed. If there is a divergence in scoring then it allows individual members of the committee to justify their scoring, persuading others of the merits of the candidate. In this way a consensus decision can be reached without a pre-decided candidate automatically being scored highest.

If the committee is unethical in its practices, nothing will really prevent pre-discussions and lobbying, or the leaking of the interview questions to the preferred candidate.

2.2 Does the LRA require procedural fairness in recruitment?

2.2.1

The LRA under section 186 (2) deals with unfair labour practices, and specifies unfair conduct by the employer relating to promotions, amongst others; however it does not deal with applicants for appointment. The unfair labour practice provisions regulate conduct between the employer and *existing* employees. The LRA focuses on an employer's conduct in the promotions process to determine whether it is deemed fair or unfair conduct. This means that although employees' are not entitled to promotion, an employer's conduct during the promotion process may be brought into question. The fairness of the employer's conduct will be measured in terms of its own procedural policies and practices. However the courts are reluctant to get involved in the substantive reasons for an appointment, as the appointment is often based on the performance of the employee during the interview. In order to ensure procedural fairness the employer actually needs to follow its own internal procedures. Just because an employee is acting in a position it does not mean that the employee will automatically be appointed to that position. The employee

still needs to be heard in a final interview process according the recruitment process of the employer.

2.2.2 What do the cases say about procedural requirements?

In *Mlambo and Others v National Prosecuting Authority and Others*³¹ the court upheld an arbitration award that the non-promotion of the applicants was in fact not an unfair labour practice. The court's reason for coming to this conclusion was because the applicants did not meet a minimum requirement for the role, that minimum requirement being the possession of a driver's license. What this case substantiates is that it will not be unfair to refuse promotion to employees who lack a requirement for the job.

In *Ndlovu v CCMA and Others*³² the applicant referred a dispute at the CCMA regarding his non-promotion, under the banner of an unfair labour practise. The arbitrator in the matter found that he was indeed qualified and that he had a record of impeccable service. However there was no evidence submitted to the arbitrator whether the other applicants to the position were more or less qualified for the role and why the applicant was the most suitably qualified and should therefore have received the role. The arbitrator therefore found that no evidence was lead to show that the employer was arbitrary in its decision not to appoint the applicant. This matter was then brought under review to the labour court and the judge found that there was a rational objective connecting the evidential material submitted to the arbitrator connecting the decision to which the arbitrator arrived and he therefore would not interfere with the arbitration award. The application was therefore dismissed with costs. This case suggests that if an employee intends bringing an unfair labour practise claim relating to promotion, that employee also needs to submit evidence in support of the claim that the employer was unfair in promoting someone else above that individual. But this is in practice a difficult onus to discharge. Where will an applicant get evidence that they did indeed far surpass the other applicants? Usually this information is solely in the hands of the employer. If targeted selection was used, the unsuccessful applicant

³¹ *Mlambo and Others v National Prosecuting Authority and Others* (LC C437/11 21)

³² *Ndlovu v CCMA & others* [2000] 12 BLLR 1462 (LC)

could make application for the scoring sheets to be subpoenaed. But short of this, it is invariably very difficult to prove an unfair promotion.

2.2.3 What is the effect of employer error?

In *Bosman v SA Police Services*³³, Bosman was selected by a selection committee as the second best candidate for the job and a black woman had been selected as the first choice. The SAPS Provincial Commissioner however found that Bosman was the first choice; despite this the committee still decided to appoint the black female applicant because of representativeness of the population group. Subsequently at the arbitration the committee was unable to provide proof that the appointment of a black woman would have promoted representativeness and that the black woman was the best candidate. There was no proof that her appointment would have been an affirmative action appointment. The commissioner found that the appointment of the black woman was unfair and ordered the employer to promote Bosman as he proved to be the best candidate and therefore had the right to be promoted. This case serves to reiterate that a failure by the employer to prove it had been following its own procedures in the promotion of an employee will and could result in their decision being overturned and the employer's prerogative in the decision being overridden.

2.3 Does the EEA require procedural fairness in recruitment?

2.3.1 The definition of 'employee' includes applicants for jobs

Unlike the definition of employee in the LRA, the EEA includes an applicant for employment in its definition of employee in terms of Section 6, 7 & 8. This means that applicants for employment are protected from being unfairly discriminated against whether directly or indirectly, unless the discrimination is in order to take affirmative action measures or based on an inherent requirement of the job.³⁴ It also protects an applicant for employment against medical testing unless it is permitted by legislation and justifiable. The EEA also protects applicants for employment against psychometric testing, unless such test has been scientifically shown to be valuable and reliable. This means that employers need to be sure to follow legislative

³³ *Bosman v SA Police Services* (2003) 5 BALR 523

³⁴ The Employment Equity Act No 55 of 1998 S6(1),(2)(a),(b)

requirements when making appointments as well as ensuring fairness. It will however be more difficult for an applicant for employment to prove as they have less access to information pertaining to appointments and may very often not know who the other applicants were.

2.3.2 EEA's concern: discrimination rather than procedure

When the Employment Equity Act is considered, sections 6, 7 & 8 specifically deal with procedural fairness in the recruitment process. However the Act is more concerned with discrimination than it is with procedure. The reason for this submission is because the act is primarily concerned with equity in the workplace and securing that right to equity for all employees. The focus of the EEA is to see that if discrimination has taken place and if so whether such discrimination was unfair. Discrimination in terms of the EEA will be considered fair if it promotes affirmative action measures in the workplace and if it is for an inherent requirement of the job. This concern with discrimination as opposed to procedure can be seen in *National Education Health & Allied Workers Union & another v Office of the Premier: Province of the Eastern Cape*.³⁵ The judge in this case makes mention of the discrimination as opposed to procedural focus of the EEA when he makes the following finding:

Turning back to the issue of procedural complaint by the applicant, I agree with Mr Wade for the respondent that the core of the case so far made by the testimony of Mr Khelekheta has to do more than anything else with the complaint about the procedural aspect of how the recruitment of the third respondent was effected. That does indeed pose a challenge to the case of the Applicant as this court jurisdiction is limited to adjudicating over discrimination claims in terms of the provisions of the EEA. I also agree that no case has been made in terms of the allegation of discrimination.

There is thus flexibility in the procedure as long as that flexibility is enforced, so as to meet an equity goal. The unsuccessful applicant in this case felt that the appointment of the successful candidate constituted unfair discrimination against the applicant. However the employer in this case had proved with expert evidence that the appointment of the successful candidate was in fulfilment of the employment equity targets which the employer had set for itself.

³⁵ *National Education Health & Allied Workers Union & another v Office of the Premier: Province of the Eastern Cape & another* (2011) 32 ILJ 1696 (LC)

2.4 Remedies for procedural unfairness

As has been noted above, in the case of *SAPS v Safety and Security Bargaining Council & others*³⁶, the appropriate remedy, as a general rule, is to set aside the decision and refer it back so that a fair opportunity is given. The appropriate remedy would therefore be the fair opportunity to compete as this is where the interest lies, as opposed to compensation or appointing another applicant to the post. But there are a range of possibilities which the court could order.

2.4.1 Substitution of successful applicant

In *Coetzer & others v Minister of Safety and Security & another*³⁷ the applicants all worked in the bomb squad division of SAPS and had applied for promotions. The applicants were all white males and were subsequently turned down because the posts were only for designated groups. However although SAPS had an Employment Equity Plan, the plan required that each division of the SAPS had to create its own Employment Equity Plan, but the bomb squad division of the SAPS did not. The National Commissioner refused to promote them despite the fact that no other applications had been received from members for designated groups for the positions to which the applicants had applied. The applicants therefore approached the Labour Court for relief and laid a claim that they were unfairly discriminated against on a racial basis. The court looked at the Employment Equity Plan put together by the SAPS along with the Constitution. What the court found was that Section 205-208 of the Constitution deals with the police force, stating that there must be a balance between affirmative action plans and other objectives. One of these is that there must be an effective police force. The court also found that if an employer relies on affirmative action that it must show that it does not conflict with the Constitution. As the bomb squad did not have its own affirmative action plan, the SAPS therefore could not use this as a defence. The applicants subsequently were successful and the court overturned the employer's decision and promoted the applicants. This case illustrates that when relying on affirmative action requirements as a reason for not appointing or promoting an individual that the employer needs to ensure that it does not conflict with other sections of the Constitution. Also where only

³⁶ *SAPS v Safety and Security Bargaining Council & others* (LC Case no: P426/08;judgment date 27/10/2010)

³⁷ *Coetzer & others v Minister of Safety and Security & another* (2003) 24 ILJ 163 (LC) ; 2003 (2) SA 368 (LC)

representivity is taken into account at the cost of operational efficiency, then that decision may be considered unfair.

2.4.2 Requiring the process to begin again

In *Khumalo & another v MEC for Education, KwaZulu-Natal*³⁸ applicant, Mr Khumalo, applied for a position as Chief Personnel Officer. After undergoing the interviewing and selection process Mr Khumalo was then appointed. Another candidate who had applied, Mr Ritchie, had been declined. After lodging a grievance and the grievance failing, Mr Ritchie then referred a dispute to the General Public Servants Sectoral Bargaining Council and contended that he should have been shortlisted and appointed because he met the requirements for the post. The matter between Ritchie and the department was then referred to arbitration as conciliation had failed. The MEC then contended that due to the documentation regarding Mr Khumalo's interview and appointment going missing the department could therefore not formulate a defence and as such offered to settle the dispute by granting Ritchie a protected promotion, which meant that he received a salary increase but his title and promotion remained the same, which Ritchie accepted. After being approached by the union regarding various grievances and inconsistencies relating to Mr Khumalo's appointment and Mr Ritchie's protected promotion, the MEC approached the Labour Court to adjudicate the matter. The court granted an order declaring that Khumalo's promotion to Chief Personnel Officer and the protected promotion of Ritchie "was not lawful, reasonable or fair and was accordingly invalid." Mr Khumalo's appointment and Mr Ritchie's protected promotion was then set aside and the MEC was ordered to re-advertise the role.

The case was then taken to the Labour appeal Court as the employees felt that the court a quo had erred in its findings and subsequent order. The Labour Appeal Court agreed with the Labour Court, in that based on the facts submitted it was correct in setting aside Khumalo and Ritchie's appointments. What this case illustrates is that if and when the integrity of an appointment or promotion has been compromised, the setting aside of that appointment even after many years is an appropriate remedy for the bias caused by the irregular appointment.

³⁸ *Khumalo & another v MEC for Education, KwaZulu-Natal* (LAC DA 3/2011; Judgment 29 August 2012)

2.4.3 Compensation

In *Kwadukuza Municipality v South African Local Government Bargaining Council and Others*³⁹ the third respondent and employee of the applicant sought to apply for a promotion. However the municipality had not advertised the position and had promoted individuals into the vacant posts without following its own recruitment procedure, of which advertising the positions were part of that procedure. The third respondent successfully challenged and won an arbitration award claiming an unfair labour practice regarding the employer's conduct in this matter and the fact that he was not given a fair opportunity to apply. The arbitrator in the matter then awarded the third respondent with a 'protected promotion' which meant that the third respondent would still perform in his current capacity and receive compensation and benefits equal to that of the promoted role. Although on review the Labour Court agreed with the arbitrator that the third respondent's case should succeed, the court felt that the arbitrator had erred in its application of the correct compensation in a matter of this nature. The court relied upon an earlier judgment in *Fose v Minister of Safety and Security*⁴⁰ which ruled that no punitive element should be imposed in an award in light of public policy and constitutional considerations which underlie imposing such award, and therefore found that no punitive award should be made. Instead the court awarded lump sum compensation which took the form of general damages as appropriate to compensate for injuria, to the value of R5,000. This case indicates that a protected promotion would only be suitable relief where the employee can prove that he/she would have been the successful candidate for promotion.

³⁹ *Kwadukuza Municipality v South African Local Government Bargaining Council and Others* (D187/2006)[2008] ZALC 93; [2008] 11 BLLR 1057 (LC) ; (2009) 30 ILJ 356 (LC) (10 July 2008)

⁴⁰ *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC) at para [69]-[72]

Chapter 3: Substantive fairness in recruitment

3.1 What does substantive fairness entail?

Employers for many years have been able to use their managerial prerogative to appoint who they wanted regardless of whether he/she was the best person for the job. This unfairness also served to empower injustices in society and would often perpetuate a cycle of poverty. However in the mid 1980's the concept of unfair labour practice was introduced and for the first time employers were required to justify their decisions on rational and objective grounds free from discrimination

In *Mlambo and Others v National Prosecution Authority and Others*⁴¹ the court found that the applicants had failed to establish that an arbitrator's finding was unreasonable which concluded that the non-promotion of the applicants was fair. The reason for this was because it was a precondition for the jobs to which they had applied that they had drivers licenses'; they unfortunately did not have drivers licenses. The applicants conceded that the court should not readily get involved in disputes relating to promotions unless the applicants could prove bad faith or improper motive. This is not the case as the employer's reason, based on the applicants failing to meet a minimum requirement as set out in the advertisement, was both reasonable and fair. What this indicates is that it is not unfair to refuse promotion when an applicant fails to meet a minimum requirement needed in order to perform the role, and reliance on minimum requirements and screening criteria in the recruitment process is indeed substantively fair.

In *McPherson v UKZN & another*⁴² the applicant had been working at the respondent university on a 5 year contract and had applied for a role advertised to "any permanent member of staff" at the level of senior lecturer. The post he had applied for was head of the School of Physics which was effectively his old post renamed in the new merged structure. He was however not considered for the role. He then referred a dispute to the CCMA but it was not resolved in conciliation. The employer argued that its exclusion of temporary/contract staff did not amount to unfair discrimination under section 6(1) and (2) of the Employment Equity Act 55 of 1998. It argued that its Employment Equity Policy needed to be measured against the operational requirements of the university. The court found that employer had a substantial number of

⁴¹ *Mlambo and Others v National Prosecution Authority and Others* (C 437/11)[2012] ZALCCT 26 (21 June 2012)

⁴² *McPherson v UKZN & another* [2007] JOL 20803 (LC)

temporary staff in its employ. It therefore found that the eligibility requirement was discriminatory to the members of staff who had been employed on a temporary basis. Justification for discrimination in law focuses on the purpose and reason for the discrimination. The judge in the case said this:

“As I consider the reasons preferred for inherent operational requirements of the [employer], I find none that I can regard as permanent attributes or quality, forming an essential element of such requirements. The reasons given, in my view, come across as requirements based on the preferences of the first respondents senior employees.”

The judge therefore ordered compensation to the applicant to the value of 6 months remuneration, as he had already found alternative employment elsewhere. This case illustrates that where an employer is going to reserve a recruitment process to internal permanent employees then it also needs to be able to provide legitimate operational reasons for doing so.

3.2 Substantive fairness under the LRA

3.2.1 Does the highest scoring employee have to be appointed?

In *Van Dyk v Kouga Municipality*⁴³ Mr Van Dyk the applicant laid a claim of unfair discrimination on the grounds of his race or sex when he was not appointed to the position of platoon officer in the fire department of the respondent. The applicant applied for the position in 2009 of Platoon Officer in the fire department of Kouga Municipality, a position which the applicant had held for 6 years between 1997 and 2003. The applicant however resigned in 2003, therefore when applying for this position of platoon officer in 2009, he was then an external applicant. The applicant was shortlisted along with another two candidates, one of which was a coloured female, Ms A Rossouw, who was employed at the time as a senior fireman. However one of the requirements advertised on the advertisement was a graduate certificate issued by the South African Fire Services Institute. Of all applicants shortlisted only the applicant had the qualification when the interviews took place. After the interviews Rossouw was the highest scoring applicant and therefore was appointed to role. The reason the panel gave as to why she was selected despite the fact that she never had the graduate certificate as specified in the

⁴³ *Van Dyk v Kouga Municipality* (P 476/09) [2012] ZALCPE 3; [2012] 9 BLLR 952 (LC) (10 April 2012)

advertisement was because the panel had relied on section 20 (3) of the Employment Equity Act which states the following:

“20(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.”

The respondent therefore explained that its reason for shortlisting Rossouw was because they believed that even though she did not hold the graduate certificate required by the post she had the capacity to acquire the ability to do the job within reasonable time. The court found in favour of the respondent, and made the following statement in the judgment:

“It is true that Rossouw would not have been appointed if she had not been short-listed. It is also true that, at the time of the interviews, the applicant was the best qualified candidate. However, Rossouw’s short-listing was done on the basis that she had the capacity to acquire the minimum qualification, and in the interviews even Barnard clearly did not regard her as unsuitable. The reason for her short-listing in terms of the criteria under section 20 (3)(b),(c) and (d) of the EEA was legitimate, in the absence of any legal pre-requisite that she had to have the graduation certificate to perform the platoon officer’s job.”⁴⁴

What this illustrates is that failure to appoint the most qualified candidate will not be considered unfair where shortlisting is done on the basis that the individual appointed is from a designated group and has the capacity to obtain within a reasonable time, the minimum qualification.

3.2.2 What is the extent of managerial prerogative?

In *Ethekweni Metropolitan Municipality: Durban Metropolitan Police Services v Khanya and Others*⁴⁵ the respondents had applied for a post of sergeant with the applicant. The post was initially advertised as Circular 183 and was later amended and re-advertised as circular 189 now with an additional minimum requirement of a code 15 motorcycle licence. The applicants then

⁴⁴ Ibid para 20

⁴⁵ *Ethekweni Metropolitan Municipality: Durban Metropolitan Police Services v Khanya and Others* (DA9/2012) [2014] ZALAC 48 (18 September 2014)

lodged an unfair labour practice dispute with the South African Local Government Bargaining Council for conciliation relating to “non-shortlisting”. The matter was not resolved and then referred to the CCMA for arbitration. One of the respondents said that he was not shortlisted due to his disability and therefore could not obtain a code 15 motorcycle license. His main contention was that it was “unfair and discriminatory”, and due to the fact that he was bringing a claim of unfair discrimination as regulated by the Employment Equity Act, the CCMA did not have jurisdiction. Nevertheless the arbitration award dealt with his claim. The Labour Court then found that the arbitration award was reviewable for not finding in favour of the respondent, Mr Khanya, was also awarded compensation. The applicant then appealed to the Labour Appeal Court who found that the Labour Court’s review of the arbitration award was erroneous as the CCMA did not have jurisdiction over discrimination claims. The court made the following statement:

The Court a quo correctly found that it remains the employer’s prerogative to set the standard for its employees (although in this case the employers hand was forced by its employees who won an arbitration award requiring the employer to force the requirement of a code 15 motorcycle licence for the position of Sergeant). The setting of the requirement of code 15 licence for the position of Sergeant does also not conflict with the provisions of either the Constitution or the LRA. Certainly to require code 15 licence for the post of Sergeant as an essential requirement is and cannot amount to unfair labour practice as contended by the aggrieved employees.⁴⁶

This case held that it is an employer’s prerogative to set minimum standards for jobs for the operation of its business. However in setting these minimum requirements it may not conflict with the provisions of the Constitution or the Labour Relations Act.

However this judgment is out of line with the previous decisions which dealt with inherent requirements of the job. In *Dlamini & others v Green Four Security*⁴⁷ the court accepted that the company’s ‘clean shaven rule’ was a justified inherent requirement for a job that required uniformity and discipline. However it would be difficult to argue that a security guards job could not be competently carried out unless clean shaven. The sentiment was not carried out in the

⁴⁶ Ibid para 34

⁴⁷ *Dlamini & others v Green Four Security* [2006] 11 BLLR 1074 (LC)

*Department of Correctional Services & another v POPCRU*⁴⁸ the famous dreadlocks saga, the department failed to establish that its short hair policy which unnecessarily restricted religious and cultural practice had any impact on the performance of the employees' duties and so could not be considered an inherent requirement. However despite this decision it is possible that wearing a corporate uniform and complying with dress code could in certain circumstances be regarded as an inherent requirement of the job. Branding and corporate image are justifiably important aspects of some employment.

To be free of Diabetes was stated as an inherent requirement of the job for a firefighter. This was contested in *IMATU & another v City of Cape Town*⁴⁹ the court here found that the inherent requirement defense needed to be applied restrictively. The municipality failed to justify its unfair discrimination in the form of a blanket ban. The court found that although firefighting is a hazardous occupation to simply excluding all insulin dependent diabetes sufferers from the occupation on this ground was not justifiable. The court warned against assigning characteristics which are generalized assumptions about groups of people to each individual who is a member of that group, irrespective of whether the particular individual displays any susceptibility to hypoglycemic episodes. This illustrates that an employer may need to check the health status of a particular applicant or employee as opposed to diagnosing diabetes as prevention for the individual to perform the job.⁵⁰

In *Arries v CCMA*⁵¹ the applicant, Ms Arries, lodged a claim of an unfair labour practice when she had not been promoted despite having applied for various senior roles over the period September 2000 to April 2002.⁵² She then lodged a grievance, the commissioner issued an award declaring that the employer, Beacon Island Hotel, had not committed an unfair labour practice and that Ms Arries was accordingly not entitled to relief. Ms Arries then appealed to the Labour Court and sought for that arbitration award be reviewed and set aside. The court referred to

⁴⁸ *Department of Correctional Services & another v Police and Prisons Civil Rights Union (POPCRU) and Others* (107/12) [2013] ZASCA 40 (28 March 2013)

⁴⁹ *IMATU & another v City of Cape Town* (2005) 26 ILJ 1404 (LC)

⁵⁰ Charles Ngwenya & Loot Pretorius 'Conceiving Disability, and Applying the Constitutional Test for Fairness and Justifiability: A commentary on *IMATU v City of Cape Town*' (2007) 28 ILJ 747-768

⁵¹ *Arries v Commission for Conciliation, Mediation & Arbitration & Others* (2006) 27 ILJ 2324 (LC)

⁵² *Ibid* para 4

*Public Servants Association on behalf of Botes & Others v Department of Justice*⁵³ in which said it was said that when considering whether an employer had acted unfairly in failing or refusing to promote an employee that one must consider the reasons for the actions of the employer and only interfere with the employers discretion if it has acted frivolously, capriciously or unreasonably. The court mentioned the fact that of the many legal principles that the court had referred to in the matter, the aforementioned principle, amongst others, was also used by the commissioner as ones which he needed to assess in the matter that had been set before him. The court found that commissioner's award was sustainable on both the facts submitted to the commissioner. The court agreed with the commissioner's reasoning for the refusal to promote Ms Arries. The relevant considerations were (a) whether the employer's decision was based on unacceptable, irrelevant or invidious comparisons ; or (b) that the decision was arbitrary, or capricious, or unfair; or (c) that the employer had failed to apply its mind to the promotion of the applicant; or (d) that the employer's decision not to promote the applicant was motivated by bad faith, or (e) that it was discriminatory. The court found this to be a proper approach on the part of the commissioner. The court agreed with the commissioner's findings that he could not find any grounds upon which to interfere with the employer's exercise of discretion. The application was therefore dismissed. A clear indication is given in this case of the extent to which a commissioner would have to consider and measure the employer's decision against various grounds before interfering with the employer's exercise of discretion. Unless it has been proved that the employer had acted capriciously, frivolously or unreasonably then the commissioner should not interfere with the employer's exercise of discretion.

3.3 Substantive fairness under the EEA

3.3.1 Non-discrimination on grounds of age, HIV status, pregnancy, race, gender, sexual orientation, culture, conscience

The Employment Equity Act under section 6(1) prohibits unfair discrimination on the grounds of age, HIV status, pregnancy, sexual orientation, culture and conscience, amongst others. In dealing with the issue of what would be considered substantively fair in the aforementioned

⁵³ *Public Servants Association on behalf of Botes & Others v Department of Justice* (2000) 21 ILJ 690 (CCMA) at 698G

scenarios it is necessary to consider the leading case of *Hoffman v SAA*⁵⁴. In the case the appellant, Mr Hoffman, had applied for the position of flight attendant. The appellant was selected as one of 12 applicants to be employed out of 173 applicants. The applicant's selection was subject to a pre-employment medical examination which included an HIV test. The appellant was then refused appointment on the basis of his HIV status. The court found this decision on the part of SAA to amount to an unfair labour practice as it constituted impairment on the applicant's dignity. The court also found that the refusal to employ the applicant was an infringement on his Section 9 Constitutional right to equality. The court establishes that to exclude all HIV positive applicants from employment as cabin attendants, despite the information provided by current medical knowledge regarding the applicant's ability to perform the job without endangering the health and safety of passengers, was manifestly unfair. This practice would make such candidates vulnerable to discrimination on the basis of prejudice and unfounded assumptions, which is precisely what the Constitution seeks to avoid. SAA had argued that the safety of its passengers and staff was its main concern. However this was refuted by the fact that it had cabin attendants currently in its employ that were HIV positive who therefore posed the same hazards. For this reason the court found that SAA's reasons for not appointing the applicant failed and found in favour of the applicant.

This case illustrates that an employer needs to be able to show how an individual's HIV status will have a direct influence on that individual's ability to perform the job and how it therefore constitutes an inherent requirement for the individual to be HIV negative.⁵⁵ Only then will the employer have discharged the onus of proving substantive fairness. Also in *Bootes v Eagle Ink Systems*⁵⁶ the court confirmed that dismissal of employees because of their HIV status is discrimination unless the employer can show that being free of HIV is an inherent requirement of the job.

⁵⁴ *Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000)*

⁵⁵ Alan Rycroft & Ronald Louw 'Discrimination on the Basis of HIV: Lessons from the Hoffman Case' (2000) 21 ILJ 856-866

⁵⁶ *Bootes v Eagle Ink Systems KZ Natal (Pty) Ltd (2007) 16 LC 8.29.7; [2007] JOL 20651 (LC)*

In *Woolworths v Whitehead*⁵⁷ the respondent, Ms Whitehead, applied for a position as an HR Generalist and advised the employer that she was pregnant. Ms Whitehead, after a telephonic conversation with the recruiter for the position, was left with the impression that the job was hers. Ms Whitehead was offered a position but she was not offered the permanent position of HR Generalist. The position was offered to another candidate who was more suitably qualified and experienced for the position. Ms Whitehead was subsequently offered a fixed term position on account of her being pregnant. Ms Whitehead brought a claim in the Labour Court that she had been dismissed by the applicant in this case after she had been appointed as the human resources: information technology generalist. She claimed that the dismissal had been unfair and sought compensation. The Labour Court dismissed her claim but granted her relief on the basis of the claim of an alleged unfair labour practice that the appellant had committed an unfair labour practice by not appointing Ms Whitehead as human resources: information and technology generalist but that they had instead appointed someone else. Because there was no cross appeal to the Labour Court's dismissal of the dismissal claim, the Labour Appeal Court was not concerned with this. However, the LAC said in its reasoning said that its decision was based not on the fact the applicant brought forth a case that continuity would be an issue, but gave more weight to the fact of the case brought forward by the applicant that the successful candidate was substantially more sufficiently qualified. It is interesting to note the court's decision for its ruling that it is not unfair discrimination when choosing a more suitably qualified candidate over a suitably qualified but pregnant candidate. Key to note is that where an employer has not yet made an offer it reserves the right and prerogative to change its mind. Also, although continuity was not the substantial factor tipping the scale in this decision it however did not dispute that continuity may be an issue.

In *Swart v Mr Video*⁵⁸ the applicant, Ms Swart, brought a claim of an unfair discrimination. This was due to Ms Swart being three years older than the age limit specified by an advertisement placed by the respondent, which Ms Swart had applied to.¹¹⁰ The respondent also submitted that its main two reasons for not appointing the candidate was because the salary was low and only younger people who use the position as stepping stone in their careers would accept the salary.

⁵⁷ *Woolworths (Pty) Ltd v Whitehead* [2000] (3) SA 529 (LAC)

⁵⁸ *Swart v Mr Video (Pty) Ltd*[1997] 2 BLLR 249 (CCMA)

The second reason submitted by the respondent was that compatibility is important and that an older person may be reluctant to take instruction from a younger person. The respondent submitted this second reason as the main reason for refusing to appoint Ms Swart. The commissioner found that discrimination can be justified when it is based on inherent requirements of the job, however the commissioner could not find any in the case. The commissioner found that the employer committed an unfair labour practice and cited Schedule 7 item 2(1) of the Labour Relations Act which refers to an unfair labour practice as:

“unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility”

And not only had the respondent discriminated against Ms Swart on the basis of age but also on the basis of marital status and family responsibility. This is due to the employer representative's statement that he was reluctant to employ Ms Swart on account of her being married and having children.⁵⁹ When deciding on his award in the matter the commissioner consulted the Labour Relations Act Schedule 7 (2) definition which includes an applicant for employment in the definition of employee.⁶⁰ This meant that a discriminatory refusal to employ was regarded as an automatically unfair dismissal. The commissioner awarded Ms Swart 3 months compensation. Proving age as an inherent requirement of being able to do a job is vital in proving the substantive fairness of discrimination based on age.

In *SA Airways v Janse van Vuuren*⁶¹ the question was investigated whether it is an inherent requirement of the job of an airline pilot that s/he be under the age of 60? It was argued by the employer that any distinction or preference against pilots above the age of 60 was based on the

⁵⁹ Ibid para 11

⁶⁰ The Labour Relations Act 66 of 1995, Schedule 7 (2)(1)

⁶¹ *SA Airways (Pty) Ltd v Jansen van Vuuren & another* (2014) 35 ILJ 2774 (LAC)

inherent requirement of the job of a pilot. On the evidence it was established that it was not age but rather fitness to fly that was an inherent requirement of the job as a pilot.⁶²

In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*⁶³ it was argued that persons in leadership positions in the church such as ministers, cannot live in a homosexual relationship as it was an inherent requirement that a spiritual leader must support church doctrine. While this may be true for a minister is it an inherent requirement for a music teacher at the church? The court was not persuaded that the church had shown that it was part of the job description that he was to become a role model for Christianity. The court found that at best he was a mentor of the post-school students on a personal and not necessarily spiritual level. There was no evidence brought that the applicant wanted to influence the students or any other church member. The applicant in fact wanted to keep his homosexual relationship to himself as he found it to be a private matter. The court found that it would not have been devastating to the church to keep the complainant on in his teaching position.

3.3.2 Affirmative action

In *SAPS v Solidarity obo Barnard*⁶⁴ a new post was created in the SAPS during 2005, the post was superintendent of the NES, the function was to ensure optimal utilization of human logistical and financial resources in the NES. Barnard was interviewed for the post along with six other candidates (four blacks and two whites). She obtained the highest score by any candidate on the assessment, receiving an average rating of 86,67%. The difference between Barnard's score and that of any black candidate was 17,5%. The selection panel in its recommendation stated that given the difference between the scores, service delivery would be adversely affected if the latter were to be appointed. Representivity within the NES would not be affected as Barnard was already a member thereof, as stated by the panel. The recommendation was stated further: "*The panel agrees that the appointment of Captain Barnard will definitely enhance service delivery*". A meeting was held with the Divisional Commissioner the following day at which the panel's recommendation was discussed. The Divisional Commissioner Resegatla recommended that the post not be filled because "*appointing any of the first three preferred candidates will aggravate*

⁶² Craig Bosch 'Section 187(2)(b) and the Dismissal of Older Workers – is the LRA Nuanced Enough?' (2003) 24 ILJ 1283-1304

⁶³ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2009) 30 ILJ 868 (EqC)

⁶⁴ *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); 2014 35 ILJ 2981 (CC) (2 September 2014)

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*”. The post was left vacant and in fact withdrawn. The reason Barnard was not appointed to that position was because she was white. The same position was then subsequently advertised to which Barnard again applied. She was again shortlisted and invited for an interview along with seven other candidates, four African males, one African female, one “coloured” male and one white male. Again the selection panel recommended her appointment. A meeting was again held at the divisional level to discuss the panel’s recommendations. The Commissioner supported Barnard’s appointment but the national commissioner did not approve of the recommendation and withdrew the post, because the appointment did not address representivity. This decision was first contested in the Labour Court in *Solidarity obo Barnard v SA Police Services* (LC case no. JS455/07 dated 24/02/2010). The Labour Court held that she had been unfairly discriminated against and that the provisions of the EEA and an employment equity plan must be applied in accordance with the principles of fairness and with due regard to the affected individuals constitutional right to equality and the need for operational efficiency. The court felt that the approach of applying numerical goals set out in an employment equity plan without considering all relevant factors was not appropriate and that, that approach was too rigid. Due consideration must be given to the particular circumstances of individuals potentially adversely affected. This decision was appealed to the LAC in *South African Police Services v Solidarity obo Barnard* (JA24/2010)[2012] ZALAC 31 (2 November 2012), and the LAC reversed the LC’s decision. The LAC held that it is misconstrued to implement restitutionary measures contained in the EEA and an employment equity plan, as being subject to an individual’s right to equality. The employer is the only party answerable regarding service delivery matters, and it is not open to compromise service delivery. The LAC’s decision was then appealed to the SCA in *Solidarity obo Barnard v SAPS* (165/2013)[2013] ZASCA 177 (28 November 2013). In a unanimous decision of 5 judges, the SCA overturned the LAC’ view and found that there had been unfair discrimination. It held that the mechanical application of targets falls foul of the EEA; A flexible and ‘situation sensitive’ approach is required. The SCA held that the fact that no appointment is made it does not necessarily mean that no discrimination took place.

Finally the Constitutional Court considered the matter in *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23. The majority judgment supported by 7 judges started with the constitutional requirements for an affirmative action measure: The measure must –

- a. Target a particular class of people who have been susceptible to unfair discrimination;
- b. Be designed to protect or advance those classes of persons; and
- c. Promote the achievement of equality.

The CC concluded that once the measure in question passes the above test, it is not unfair and may be implemented. The constitution is explicit that affirmative action measures are not unfair. It does not however derogate from the court's power to interrogate whether the measure is implemented lawfully. The manner in which a properly adopted restitution measure is implemented can be challenged – there is no valid reason why courts are precluded from deciding whether a valid Employment Equity Plan has been put into practice lawfully. It needs to be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. The CC found that the SAPS affirmative action policy complied with these requirements. Further the National Commissioner exercised his discretion not to appoint Ms Barnard rationally and reasonably and in accordance with the criteria in the affirmative action measure, in pursuit of employment equity targets envisaged in section 6(2) of the Act. In para 32 the Constitutional Court acknowledged that this is difficult and emotional terrain and impacts on dignity rights, para 32 states:

Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society.

The judgment took the line that affirmative action, if founded in a policy that complies with the Constitution and is applied lawfully and rationally, is not unfair. In terms of managerial prerogative, this means that once the AA policy complies with the Constitution, there is greater freedom for employers to make AA appointments.

Chapter 4: Risk management measures

There are many factors that could pose a risk in the recruitment process. How the employer has overcome this is by doing various tests and checks. However jurisprudence has been developed over the years which govern the manner in which these risk management measures are administered so that it does not infringe on the candidates rights. The following chapter will explore these degree to which these measures have been curtailed and the manner in which they can legally be administered.

4.1 Medical testing

4.1.1 What the EEA allows

Section 7 of the Employment Equity Act has states the following regarding medical testing:

- (a) Medical testing of an employee is permissible only when legislation requires testing or when this is justifiable for various reasons.
- (b) HIV testing is prohibited unless such testing is determined to be justifiable by the Labour Court

In *Joy Mining Machinery v National Union of Metalworkers of SA & others*⁶⁵ the applicant sought to test its staff for HIV. The applicant employed approximately 800 employees. The reason for this was so that the applicant could determine the incidence of the disease amongst its staff so as to be better able to deal with the pandemic. It proposed for the testing to be voluntary, anonymous and that the ELISA saliva test is used. The applicant then applied to the Labour Court for an order granting it permission to carry out a HIV test in terms of section 7(2) of the Employment Equity Act 55 of 1998. The court in reaching its decision considered the justifiability of testing. This was tested against various norms and values, such as the standard of reasonableness and legality. It found that justifiability under the Employment Equity Act would be informed by the Code of Good Practice: Key Aspects of HIV/AIDS and Employment published December 2000. The court also considered the more general test for medical testing set out in Section 7(1)(b) of the Employment Equity Act. The court also considered how the following would have an impact on the factual circumstances of the case: the prohibition on

⁶⁵ *Joy Mining Machinery, A Division of Harnischfeger (SA)(Pty)Ltd v National Union of Metalworkers of SA & others* (2002) 23 ILJ 391 (LC)

unfair discrimination, the need for HIV testing, the purpose of the test, the medical facts, employment conditions, social policy, the fair distribution of employee benefits, the inherent requirements of the job, and the category or categories of jobs or employees concerned. In arriving at a proper decision regarding the court also wanted to be informed of: the attitude of the employees, whether the test is intended to be voluntary/compulsory, the financing of the test, preparations for the test, i.e. whether the employees are able to give their informed consent, pretest counselling, the nature of the proposed test and procedure, and post-test counselling. In formulating the order the court paid attention to: the declaration permitting testing, imposing conditions relating to (a) the provision of counselling, (b) the maintenance of confidentiality; (c) the period which the authorization for any testing applies; and (d) the category or categories of jobs or employees in respect of which authorization for testing applies. It also paid attention to measures preventing the possibility of unfair discrimination, pre-test briefing to ensure informed consent, pre-test counselling, the nature of the proposed test and details of the procedure for conducting it, post-test counselling, proof of consent by minors and persons suffering from a legal disability and service of the order so that the employees concerned and their trade union or representatives will be fully apprised of their rights. The Labour Court granted the order sought. It is clear that the onus will be on the employer to take every length to ensure anonymity and support to its staff if it is seeking to implement HIV testing at the workplace.

In *Irvin & Johnson Ltd v Trawler & Line Fishing Union & others*⁶⁶ the applicant who employed approximately 1100 employees in its trawling division sought an order declaring that the arranging of voluntary and anonymous HIV testing of these employees did not fall within the ambit of section 7(2) of the Employment Equity Act 55 of 1998. Alternatively the applicant sought an order that the testing is justifiable as contemplated in section 7(2), subject to certain conditions set out in the notice of motion. The applicant sought to provide pre and post-test counselling to the employees. The tests the applicant sought to use are the Elisa and the Abbott tests, the Abbott test is a rapid test using a small blood sample obtained via a pinprick, the Elisa test involves drawing samples of blood for testing in a pathology laboratory. The tests would be conducted voluntarily and with consent of the individual employees. The employees would also be required to sign consent forms prior to testing which will be held by the independent

⁶⁶ *Irvin & Johnson Ltd v Trawler and Line Fishing Union & others* (2003) 24 ILJ 565 (LC)

professional testing agency Isibindi. The tests would be anonymous and results will be fed to the applicant by the percentage and number of employees in the various age and job categories who test positive. The applicant advised that no employee will be discriminated against based on their HIV status and that no prejudicial inference will be drawn from the refusal of an employee to submit to testing. The court analysed the provisions of the Employment Equity Act and found that when section 7(2) prohibits the testing of an employee to determine that employee's HIV status, what it is prohibiting is a test which is designed to enable, or which will have the effect of enabling the employer to ascertain the HIV status of an employee. The court advised that for the testing which the applicant seeks a declaratory order that such testing does not fall within the ambit of section 7(2), then there are two grounds under which such an order can be notionally supported. Firstly the proposed testing would need to be anonymous and secondly it would need to be voluntary. The court submitted a concern regarding the pulling of results for the age group 16-25 as the age group numbers were very small. The applicant advised that they were willing to combine the age group to include up to age 35 or alternatively combine shore based and seagoing for the age group 16-25 to maintain anonymity. The court found this to eliminate any reasonable possibility that an individual's HIV status could be deduced from the statistical information. The court found that Section 7 as a whole did not apply to voluntary testing only compulsory testing. The court submitted that an individual employee should be entitled to waive their protection according to section 7 of the act. However this does not mean that an employee waives their right to protection against unfair discrimination as contemplated by section 6 of the act. The court concluded that the voluntary and anonymous testing which the applicant wished to arrange for its employees did not fall within section 7(2) and the applicant therefore did not require the authority of the court before allowing its employees to be tested. The court granted the order declaring that the anonymous and voluntary testing did not fall within the ambit of section 7(2) of the Employment Equity Act 55 of 1998.

In *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood & Allied Workers Union & others*⁶⁷ the applicant applied to the Labour Court for a declarator stating that the voluntary and anonymous testing of its employees for HIV did not fall within the ambit of section 7(2) of the Employment Equity Act 55 of 1998. The court placed the Employment Equity

⁶⁷ *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood & Allied Workers Union & others* (2003) 24 ILJ 974 (LC)

Act in SA constitutional setting. It considered which rights would be affected, the nature of those rights, counteracting rights and the limitation on those rights. The court also noted that the fundamental right to control one's body was also limited by other counteracting rights. The court advised that when limiting the rights of employees to control their bodies that employers need to ensure that other counteracting rights are not limited, such as the right to dignity, privacy, fair labour practices, to choose a trade, occupation or profession or to access the courts, that those rights are not violated. The court found that the limitation under discussion was the obligation of employees to submit to testing for HIV by order of the Labour Court. And because the main aim of the Employment Equity Act is to achieve equity in the workplace the testing may not be discriminatory in any way. With this said another purpose of the Employment Equity Act is to prevent unfair discrimination in the workplace and this is in tune with the constitutional right to equality. The starting point established for determining the justifiability of in terms of section 7(2) is the same as testing the limitation on any fundamental right, i.e. it must be constitutional. Hence meeting the requirements of section 36 of the constitution and be balanced against section 12(2)(b) and (c) rights and all other rights, thus giving effect to the values of an open and democratic society based on human dignity, equality and freedom. The Labour Court may assess the quality and content of the tests, and whether the method of testing is capable of achieving the objectives with minimum infringement on fundamental rights. The purpose for limiting the section 12 rights and the importance thereof depends on the reason for testing. The purpose motivating the reason for testing or the effect of such testing cannot be unfairly discriminatory. Also the court found that if the purpose of the testing is an end in itself and unrelated to the management of the business, it will not be justifiable as it would be, amongst others, an invasion of privacy. The court noted that it is a constitutional requirement for testing that the consent to testing be informed and that it be voluntary. The court found it unnecessary to apply a purposive interpretation to section 7(2), because there is stronger support of the view that voluntary HIV testing does not fall within the ambit of section 7(2) is founded in the Constitution. It also found that section 7(2) is not a limitation on the right of employees to exercise control over their bodies in terms of section 12(2)(b) of the Constitution and to be subject to experiment in terms of section 12(2)(c), if employees voluntarily give informed consent to HIV testing, even if such testing is at the instance of the employer. Accordingly if an employee consents to HIV testing it is not open to the Labour Court to interfere with such employee's exercise of control over their

bodies. It therefore becomes apparent that if employees consent to be tested for HIV there is no need for an application to the Labour Court to determine the justifiability thereof. However adversely if employees refuse to consent to testing or consent without being fully informed then such testing will be automatically prohibited by section 7(2) read with section 12(2)(c) of the Constitution. Then it will be a matter for the Labour Court. The court found that the only material fact in the matter at hand is that employees gave their informed consent to being tested for HIV and that once there was consent there is no limitation of the right. The court also held the view that even if the testing was anonymous but was not done by the informed consent of the employees then it would be a contravention of section 12(2)(c) of the Constitution. The court accordingly granted an order that the anonymous and voluntary testing of employees for HIV did not fall within the ambit of section 7(2) of the Employment Equity Act.

What is obvious from the above cases is that the approach to HIV testing of employees has become very relaxed in recent years. The only requirement as can be seen in all cases presented is that the testing needs to be consensual and anonymous in order to meet the Constitutional and Employment Equity requirements.

4.2 Psychometric testing

4.2.1 What the EEA allows

The Employment Equity Act has been amended, the section 8 in the Act prior to 2013 has been amended by section 4 of the new Act 47 of 2013 and subsection (d) has been added. Subsection (d) reads as:

“(d)has been certified by the Health Professions Council of South Africa established by section 2 of the Health Professions Act, 1974 (Act No. 56 of 1974), or any other body which may be authorised by law to certify those tests or assessments.”

The Act was amended by the deletion of the word “and” at the end of subsection (b) and the insertion of the word “and” at the end of subsection (c), so as to link it to the new subsection (d) as a minimum requirement for compliance with this section of the Act. This suggests that governments concern is not only with the scientific formulation and soundness of psychometric

assessments but due to their nature of psychometric evaluation there it also needs to ensure that it is medically sound, therefore countervailing with section 7 rights.

There is no jurisprudence developed on psychometric evaluations however in *Sidebeng District Municipality v SA Local Bargaining Council & others*⁶⁸ an unfair labour practice claim was brought to the Commissions for Conciliation, Mediation and Arbitration by two employees regarding the fact that they had not been promoted. Before the interview process had begun all applicants underwent a competency and polygraph test, to which they had consented in writing. Also the candidates were all asked after the interview whether they objected to the competency and polygraph tests. The municipality argued that the polygraph was a reasonable and fair criterion to take into account when considering appointing. However the employees contended that the failure to pass the polygraph was the sole reason for their non-appointment. A witnesses on behalf of the municipality contended that the test was used to indicate honesty and integrity and would therefore be important enough to change a decision based on interview scores. The arbitrator found that the employees were more suitably qualified in terms of skills and experience than the employees appointed. He found that the employees were not appointed because they failed the polygraph test. The commissioner also found that to introduce the polygraph test as part of the criterion when it had not been advertised that applicants would need to undergo a polygraph test, was unfair. The commissioner then ordered the applicant to pay the employees the salaries and benefits that they would have received had they been appointed with effect from 1 October 2007. On review however, the court agreed with the municipality's reasoning that it was not obliged to spell out every aspect of the interview process in the advertisement. The court held that not every consideration that is taken into account needs to appear in the advertisement. However the court found that using a polygraph test as a basis for deceit in isolation of any other information placing a question mark over an individual's integrity is unfair. The court found that it is certainly preferable to mention upfront a factor in the process that might disqualify a candidate. The court therefore found that the municipality had committed an unfair labour practice relating to promotion in relying exclusively on the result of a polygraph test to determine the honesty of candidates and made a subsequent order of compensation. Even though the use of polygraph testing is permitted, it is preferable to mention the testing as part of the

⁶⁸ *Sidebeng District Municipality v South African Local Governing Bargaining Council and Others* (JR 1559/09) [2012] ZALCJHB 45 (31 May 2012)

process to candidates upfront, and sole reliance on polygraph tests as the qualifying or disqualifying criteria in appointment and as a test of integrity is unfair.

4.3 Criminal & credit checks

Often times an employee's reputation could have a knock on effect on the reputation of the employer. Therefore it is pertinent that prospective employees are forthcoming regarding any prior criminal records or in the case of financial position any credit judgments against them. This has a subsequent impact on the employer and puts a heavier burden on the employer to do all necessary checks on prospective employees to ensure information provided is true and correct as possible litigation to remedy where this action has not been taken is very costly.

In *Department of Home Affairs and Another v Ndlovu & others*⁶⁹ Mr Ndlovu applied for a position at the applicant employer and presented in his CV that his degree was complete. However it later emerged that his degree was not complete and that he had only completed it some two years after applying for the position to which he was then subsequently appointed. The employee also signed a statement declaring that all information provided by him is complete and correct, and that he understands that any false information supplied could lead to his application being disqualified and his discharge if he is appointed. He was then subsequently charged with gross dishonesty, alternative gross negligence; misrepresentation; and a breach of the obligation of good faith, trust and confidence owed to the employer. The employee then contended that he had disclosed that he did not have the degree in his interview; he could not however explain why he had misrepresented this information in his CV. The employee then challenged his dismissal at the bargaining council, the arbitrator at the bargaining council found the dismissal to be fair. The Labour Court however found in favour of the employee, stating that it was clear from the evidence that the without a doubt the employee had disclosed to the panelists in the interview that he did not have a Bachelor of Technology Marketing Degree. The Labour Appeal Court however did not agree with the decision of the Labour Court finding that there was no evidence on which the Labour Court could rely to reach its conclusion and held that the misrepresentation was so serious that dismissal was a fair outcome. This indicates that misrepresentation by an employee of information relating to qualifications will be considered sufficient evidence upon which to sanction dismissal. This would be the case even if the employee has performed

⁶⁹ *Department of Home Affairs and Another v Ndlovu and Others* (DA11/2012)[2014]ZALAC 11 (27 March 2014)

effectively in the role according to the job standards, and it is only discovered at this later stage. The courts considers it to be the duty of the employer to provide evidence of such a claim unless it is proven based on the breach that dismissal is the only reasonable conclusion in the circumstance.

In *SAPS v Safety and Security Bargaining Council & others*⁷⁰ an applicant for promotion was aggrieved at the fact that the candidate who had been successfully appointed to the position to which he had applied, did not disclose that he had a valid verbal warning on file. The successful candidate further advised that he had a clean disciplinary record during the period of his current rank. The aggrieved applicant found this non-disclosure to have compromised the selection panel's ability to apply its mind to this aspect and therefore rendered the panel's recommendation of the successful candidate invalid. The aggrieved applicant argued that this therefore constituted an unfair labour practice relating to promotion, which prejudiced his career progression within SAPS. The arbitrator found in favour of the applicant and found that SAPS had indeed committed an unfair labour practice and ordered SAPS to promote the grievant. The award was taken under review to the Labour Court where the presiding judge Cheadle set down compromising principles, these were: (a) There is no right to promotion in the ordinary course; only a right to be given a fair opportunity to compete for a post; (b) Any conduct that denies an employee the opportunity to compete for a post constitutes an unfair labour practice; (c) If the employee is not denied the opportunity of competing for a post then the only justification for scrutinizing the selection process is to determine whether the appointment was arbitrary or motivated by an unacceptable reason; (d) As long as the decision can be rationally justified, mistakes in the process of evaluation do not constitute unfairness justifying an interference with the decision to appoint; (e) As a general rule the appropriate remedy is to refer the decision back in order to allow the complainant a fair opportunity to compete. The only exception would be where there has been discrimination or victimization and where there are other compelling constitutional interests at stake or if the applicant proves that but for the unfair conduct; he or she would have been appointed. However in *Noonan v Safety and Security Sectoral Bargaining Council and Others*⁷¹ the judgement was taken on appeal at the Labour Appeal Court and the court disagreed with the principles laid down in the Labour Court judgment and found the

⁷⁰ *SAPS v Safety and Security Bargaining Council & others* (LC Case no: P426/08; judgment date 27/10/2010)

⁷¹ *Noonan v Safety and Security Sectoral Bargaining Council and Others* (PA 1/11) [2012] ZALAC 9 (1 June 2012)

approach to the non-disclosure and its consequences were not material unless it affected the opportunity for promotion. The court held that this was not the case in this instance. The court found that where a candidate misleads a selection panel they prevent the panel from performing their task, that he or she defeats the purpose of having a selection panel and illegitimately advantages him or herself. This therefore also disadvantages all other candidates. The court therefore found that SAPS in failing to check the disciplinary record of the appointee and then appointing him constituted an unfair labour practice, and found that the aggrieved applicant should be compensated for the procedural unfairness.

4.4 The consequences of fraud during the recruitment process

There is a reasonable expectation from employers that the candidate applying for a role will provide the employer with accurate and truthful information. Such information as would be relevant to the decision to employ the individual. However this does not leave the employer completely off the hook in terms of doing relevant checks to verify information supplied by applicants.

In *Grobler v Anglo Platinum Frank Shaft*⁷² the applicant was previously employed by Impala Platinum Rustenburg. However, whilst in employment the applicant was charged with Gross Negligence in the performance of his duties which resulted in his dismissal from Impala Platinum. After his dismissal the applicant started his own business which he ran for a 12 month period. The applicant then approached an employee of Impala Platinum regarding whether there were any employment opportunities at Impala Platinum. This employee then asked the applicant for a copy of his CV which he could give to the mine overseer. The applicant did mention to this employee that he was previously dismissed from Impala Platinum. The applicant was advised after an interview and his application for employment that he was successful. After signing his offer of employment and attending Induction the applicant returned to his shaft. Whilst attending to administration requirements related to the applicants employment it was discovered that the applicant was previously dismissed from Impala Platinum. The applicant was then informed that his employment would not be processed and that he needs to report to the human resources department. The applicant was then informed that his employment was withdrawn due to his failure to disclose important information regarding his disciplinary record with Impala mine. The

⁷² *Grobler v Anglo Platinum Frank Shaft* [2008] 2 BALR 147 (CCMA)

applicant the referred an unfair dismissal dispute to the CCMA. A witness testifying on behalf of the respondent advised that at the interview the applicant was asked why he had left his previous employment to which the applicant had answered that he was looking for better opportunities. Additional witnesses under cross examination confirmed that the applicant had the opportunity to disclose the fact that he was dismissed from Impala Platinum but failed to do so. It was held that for various reasons there were procedural defects regarding the procedure followed by the employer prior to dismissing the applicant. The arbitrator found that the dismissal was procedurally unfair but substantively fair. The reason for the finding of substantive fairness is because the applicant had failed to disclose vitally important information regarding the termination of his employment with his previous employer. Despite the arbitrator finding that the dismissal was procedurally unfair the arbitrator did not award compensation because against the background of the applicant being the architect of his own fate he is therefore not entitled to any compensation.

It is therefore important that employers always follow due process in verifying all information supplied by applicants, and that should they fail to do that, in remedying this failure the employer must follow due procedure as it relates to discipline and give the applicant a fair opportunity to defend themselves in the disciplinary process.

Chapter 5: The legal contract of employment

Following the interview process a contract of employment is entered into between the employer and the successful applicant. A lack of certainty or clarity in this contract can result in future disputes. For example in *MOSSAWU on behalf of Two Members and Jet Store Menlyn* (2006) 27 ILJ 2743 (CCMA) the applicants were not provided with particulars of their employment in writing, as required by s 29 of the BCEA 1997. The commissioner accepted that they were justified in believing that they had been properly employed and would receive pay at the rate of casual workers. To avoid such disputes it is important that there is understanding about this phase of the process.

5.1 Legal requirements for the formation of a lawful contract of employment

Every employer is required by law, according to section 29 of the BCEA, to provide the employee with written particulars of employment no later than the first day of commencement of employment. Although this is obligatory, the BCEA provides for no remedy as s 93 does not include a breach of s 29 as an offence. It would seem that the only remedy for breach of s 29 is for an aggrieved employee to refer an unfair labour dispute to the CCMA or bargaining council. .

5.1.1 What has to be agreed?

In *Jack v Director-General Department of Environmental Affairs*⁷³ the court held the following:

‘Historically, the requirements for a contract of employment were derived from the statutory definition of “employee”. It is logical to follow that approach as there cannot be a contract of employment unless the parties thereto are employer and employee either at common law or as defined in statutes. At common law, a contract of employment (*locio condition operarum*) was a consensual contract whereby an employee undertook to place his personal services for a certain period of time at the disposal of an employer who in turn undertook to pay him the wages or salary agreed upon in consideration for his services.’⁷⁴

Section 29 of the Basic Conditions of Employment Act specifies that the employer must provide the employee with the following in writing at the commencement of employment:

(a) *the full name and address of the employer;*

⁷³ [2003] 1 BLLR 28 (LC) at paras 11-12

⁷⁴ As was expressed in *Smith v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A) at 56E-F

- (b) the name and occupation of the employee, or a brief description of the work for which the employee is employed;*
- (c) the place of work, and, where the employee is required or permitted to work at various places, an indication of this;*
- (d) the date on which the employment began;*
- (e) the employee's ordinary hours of work and days of work;*
- (f) the employee's wage or the rate and method of calculating wages;*
- (g) the rate of pay for overtime work;*
- (h) any other cash payments that the employee is entitled to;*
- (i) any payment in kind that the employee is entitled to and the value of the payment in kind;*
- (j) how frequently remuneration will be paid;*
- (k) any deductions to be made from the employee's remuneration;*
- (l) the leave to which the employee is entitled;*
- (m) the period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate;⁷⁵*
- (n) a description of any council or sectoral determination which covers the employer's business;*
- (o) any period of employment with a previous employer that counts towards the employee's period of employment;*
- (p) a list of any other documents that form part of the contract of employment, indicating a place that is reasonably accessible to the employee where a copy of each may be obtained.*

By signing the contract of employment the employee then agrees to the terms and conditions as set out from point (a) to (p) as these are statutory elements that need to be agreed upon by both parties and therefore serves as a tool to regulate the relationship.

⁷⁵ In *Hamandawana v Dispute Resolution Centre & others* (2014) 35 ILJ 1312 (LC) the court considered the provisions of the BCEA and found that the Act did not deem indefinite employment to be the normal type of employment relationship in the absence of a written agreement stating otherwise. The Act was neutral on the question, leaving it for the parties to determine.

In *Wyeth v Manqele*⁷⁶ the main issues which the court held that needed to be decided upon was whether a contract of employment existed and whether the respondent was an employee. In determining whether a contract existed the court cited the parole evidence rule which states:

*“when a contract has been reduced to writing, the writing is in general regarded as the exclusive memorial of the transaction and no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such documents be contradicted, altered, added to or varied...”*⁷⁷

The court however found that, that did not in any way materially change the purpose of the contract and found that a contract had definitely been concluded when the appellant defaulted before the commencement date. The court relied on the definition of employee in s 213 of the LRA and read that right in conjunction with section 23 of the Constitution. After perusal of previous statutes’ definitions of employee it was found that it was not contemplated that a person became an employee only after they commenced employment.⁷⁸ Also Section 186(1)(a) defines “dismissal” as meaning that –

*“... an employer has terminated a contract of employment with or without notice . . .”*⁷⁹. The ultimate conclusion arrived at by the court was that section 213 of the LRA definition of employee *“can be read to include a person or persons who has or have concluded a contract or contracts of employment the commencement of which is or are deferred to a future date or dates.”*⁸⁰

In *Mokethi v General Public Service Sectoral Bargaining Council and others*⁸¹ the court found that in order to establish whether an employment contract existed the first question to be asked is whether the applicant by definition could be seen as an employee. Section 213 of the LRA defines an ‘employee’ as:

‘(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) Any other person who in any manner assists in carrying on or conducting the business of the employer.’

⁷⁶ *Wyeth SA (Pty) Ltd v Manqele & others* [2005] 6 BLLR 523 LAC

⁷⁷ see *Union Agreement v Vianini Pipes (Pty) Ltd* 1941 AD 34 at 47

⁷⁸ See S 1(a) of the Labour Relations Act 2 of 1983

⁷⁹ *Wyeth SA (Pty) Ltd v Manqele & others* [2005] 6 BLLR 523 LAC at para 26

⁸⁰ *Ibid* para 52

⁸¹ *Mokethi v General Public Service Sectoral Bargaining Council & others* [2011] LC, JR 1563/10

The court found that it was irrelevant that the applicant reported to the station and received a uniform and attended induction, received an appointment card and was introduced to the other staff, as the existence of a contract or acceptance of an offer had not been established.⁸² The court came to this conclusion because the post to which the applicant had allegedly been appointed had not been advertised neither had any application been received for it. This went against all procedures set down in the Public Service Act, 1994 which prescribes preemptory processes for appointment which include advertisement and selection processes. The court accepted the general principle of the common law that a contract need not be reduced to writing in order to be binding. The court found that the applicant did not discharge the onus and failed to show any elements of an alleged oral agreement. The court found that typical elements of a contract would be salary and benefits offered, commencement date of the agreement and the job description and found that the applicant showed none of that. This illustrates that in order to prove that the status of employee exists without a written contract, the individual at least needs to prove that a certain salary had been offered or paid and that they had been employed to fulfill a certain function or job, and that there was a specified date upon which they would assume their duties.

5.1.2 In what form must the agreement be?

Section 200A of the Labour Relations Act states that a person working for or rendering a service to another is presumed to be an employee regardless of the form of the contract if one or more of the following factors are present:

- (a) the manner in which the person works is subject to the control or direction of another person;*
- (b) the person's hours of work are subject to the control or direction of another person;*
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;*
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;*
- (e) the person is economically dependent on the other person for whom he or she works or renders services;*
- (f) the person is provided with tools of trade or work equipment by the other person; or*
- (g) the person only works for or renders services to one person.*

⁸² See para 40

However the Act also states that an exception to the above exists where an individual earns higher than the threshold as contemplated by Section 6(3) of the Basic Conditions of Employment Act.

The only manner in which an employer would be able to rebut that an individual is an employee, is by showing that even though the individual fits into one of the categories in section 200A that the individual is in fact an independent contractor. In *SABC v Mckenzie*⁸³ it was held that the following are the features of a genuine independent contractor:

- a. specified work is done or a specified result is produced (as opposed to an employee who renders personal services);
- b. the independent contractor is not obliged to perform the work personally, unless specifically agreed upon (as opposed to an employee who is at the beck and call of the employer to render personal services);
- c. the independent contractor is bound to produce the contractual work (as opposed to an employee who may be told by the employer that it does not want services to be rendered);
- d. the independent contractor is notionally on the same footing as the employer (as opposed to an employee who is subordinate to the will of the employer);
- e. the death of the independent contractor does not necessarily terminate the contract of work (as opposed to the death of an employee, which terminates the employment contract);
- f. a contract of work terminates when the work is completed (as opposed to a contract of employment which terminates on the expiration of the period of service).⁸⁴

If the above characteristics are proved to be present then the employer would have successfully rebutted the section 200A presumption.

In *Palmer and AAA Speedy Locksmith*⁸⁵ the applicant signed an agreement with the respondent nominating him as the preferred supplier of locksmith services on behalf of the respondent in the Durban area. The applicant worked for the respondent approximately two hours a day and was allowed to perform work for other companies as well. The applicant also determined the fees payable by clients and provided invoices on the respondent's invoices and was then subsequently paid a percentage of turnover. The applicant complained that he needed to be on call 24 hours

⁸³ *SABC v McKenzie* (1999) 20 ILJ 585 (LAC)

⁸⁴ *Ibid* para 9(1), (6)

⁸⁵ *Palmer and AAA Speedy Locksmith* (2005) 26 ILJ 2462 (CCMA)

but that he did not receive enough work to compensate for this. Some negotiations took place but no new contract was signed. The applicant's services were subsequently terminated and he then claimed he had been unfairly dismissed. In the arbitrator's award he found that the applicant earned more than the amount stipulated in section 6(3) of the BCEA and the presumption of employment as contained in section 200A of the LRA did not apply to the applicant. The arbitrator also summarized the following regarding his findings on the nature of the contract:

- (a) the applicant determines what to charge the customer and earns a percentage of the charge, he therefore does not earn a set wage;
- (b) the applicant is not supervised by the respondent as the respondent is based in another city to the respondent;
- (c) although the applicant drove a company vehicle it was a vehicle which he rented from the company; and
- (d) the need to be available 24 hours had to do with the nature of the business in that he needed to assist a customer when a problem arose and neither party could foresee when and if a problem would arise.

In light of the above reasons the arbitrator found the applicant was not an employee of the respondent. The reasons detailed by the arbitrator also effectively rebutted the section 200A requirements rebutting points (a), (d), (e), (f) & (g). The agreement needs to be in a form which cannot be challenged by section 200A of the LRA, as section 200A only requires one or more of the factors listed are present for the presumption that the individual is an employee to be rebutted.

5.1.3 Consequences of an illegal / unlawful contract

In *Kylie v CCMA*⁸⁶ the appellant, a sex worker, after being dismissed without a prior hearing lodged a claim of unfair dismissal with the CCMA. A dispute regarding the jurisdiction of the CCMA was referred to the Labour Court. The Labour Court found the employment contract to be illegal, in the sense that the activity performed by the individual is an illegal activity in terms of the Sexual Offences Act 23 of 1957. Section 3(a) and (c) of this Act makes brothel keeping a criminal offence and includes persons who reside in a brothel and share in any monies taken

⁸⁶ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA 10/08)[2010] ZALAC 8; 2010 (4) SA 383 (LAC)

there in. Section 20(1)(a) of the Act states that unlawful carnal intercourse for reward constitutes a criminal offence which attracts a criminal penalty of imprisonment of no more than three years and a fine of no more than R6000. The court a quo invoked the principle

*ex turpi cause non oritur action which 'prohibits the enforcement of immoral or illegal contracts'. Thus, if a contract is illegal, courts must regard the contract as void and hence unenforceable.*⁸⁷

Regarding whether this limited an individual's section 23 Constitutional right to fair labour practices, the court a quo found that an individual engaged in illegal employment would not be granted such right as it would undermine a fundamental constitutional value of the rule of law by sanctioning or encouraging legally prohibited activity. However in the Labour Appeal Court it was found that the term 'everyone' in section 23(1) of the Constitution follows on the wording in section 7(1) which provides that the Bill of Rights enshrines the right of 'all people in the country' and therefore supports a broad approach to the scope of the right guaranteed in the Constitution. The court referred to *Khosa v Minister of Social Development*⁸⁸ in which the following statement was made:

*"The word 'everyone' is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system."*⁸⁹

The appeal succeeded on the basis that the court found the applicant to meet the threshold requirements to receive protection in terms of the section 23 Constitutional rights.

What becomes clear from the Kylie judgment is that even where a contract is by definition is illegal the question of consequences then rests on whether there was an employment relationship and in terms of that relationship the employee therefore falls within the scope of the Labour Relations Act. Also one would need to consider whether there was a breach of the individual's constitutional right(s). The mere existence of the right to fair labour practices trumps the existence of an illegal contract if fair labour practices had not been followed.

The Employment Services Act 14 of 2014 (ESA) became operational on 9 August 2015. One of the features of this Act which will impact on employers immediately is Section 8. In terms of this section no employer may employ a foreign national within RSA prior to such foreign national

⁸⁷ Ibid para 7

⁸⁸ *Khosa v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC)

⁸⁹ Ibid para 111

producing an applicable and valid work permit, issued in terms of the Immigration Act. Regulations will be forthcoming to require employers to satisfy themselves that there are no other persons in SA with suitable skills to fill a vacancy, before recruiting a foreign national. The preparation of a skills transfer plan by employers in respect of any position in which a foreign national is employed will also be include in the Regulations.

ESA does offer some protection to foreign nationals: An employee who is employed without a valid work permit is entitled to enforce any claim that the employee may have in terms of any statute or employment relationship against his or her employer or any person who is liable in terms of the law. This codifies the law established in *Southern Sun Hotel Interests (Pty) Ltd iro Southern Sun Waterfront Hotel v CCMA & others* (LC Case No: C255/09; C362/09; Date of judgment: 21 June 2011) which held that an "illegal foreigner" (or undocumented immigrant) is an employee for the purposes of the LRA. Even where the work itself is illegal and not only the contract of employment, the CCMA retains jurisdiction.

5.2 How must acceptance of the contract be made?

An individual can knowingly and willingly accept certain terms of a contract, or in contrast be coerced into signing a contract which they do not understand. In the latter instance determining the true nature of that contract would have to be tested against the statute and relevant jurisprudence on the matter. The submission behind this is that even though an employer may have an individual sign a contract specifying that the nature of the relationship is not that of an employment relationship just because the individual accepts this in writing by signing the contract, it still does not necessarily mean that, that individual is classified as an independent contractor.

In *Shezi & another v Gees Shoes*⁹⁰ the applicants referred a dispute alleging that they had been unfairly dismissed. The respondent rebutted the dismissal stating that the applicants were independent contractors and therefore not employees. The duties of the applicants entailed checking the soles used in the manufacture of shoes and after checking repacking them in boxes

⁹⁰ *Shezi & another v Gees Shoes* CC (2001) 22 ILJ 1707 (CCMA)

and placing them in a store room. The arbitrator drew the following conclusions after evaluating the facts:

“1 The applicants are provided their tools of the trade by the respondent, namely the tables and the premises in which to work. If it were not for the provision of these tables and premises by the respondent, the applicant would have no means of production.

2 The respondent controls the applicants in the sense that it designates what it is they do, where they do it, and how they do it. The applicants corroborated each other in respect of the duties of Ivan, the supervisor, and the uncorroborated testimony of Mr Sivasunker in this regard must be rejected.

3 The applicants presented invoices for payment, but it was clear that this was a clumsy attempt to circumvent the definition of remuneration in the Act, with the parties to the transaction rather regarding the payments made as salary in its ordinary sense.

4 The applicants have placed their entire productive capacity in the hands of the respondent, and are not allowed to market their services anywhere else.

5 The applicants are not regarded as separate business entities or juristic persons, either in terms of labour law or income tax law, and the only reason that the respondent did not deduct PAYE in respect of the applicants was that their wages were too pitiful to qualify for taxation. Even the receiver balks at taxing starvation wages.”⁹¹

Based on the above summarized facts the arbitrator found that the applicants had successfully proved on a balance of probabilities that they were employees as defined by section 213 of the LRA, and were therefore entitled to protection under the Act. The arbitrator also found that the employees were dismissed as contemplated under section 186(a) of the Act and discharged the onus imposed on them by section 192(1) of the Act, in that they proved the existence of their dismissal. The arbitrator found the dismissals to be both procedurally and substantively unfair and awarded compensation.

However in *Callanan v Tee-Kee Borehole Casings (Pty) Ltd & another*⁹² the applicant had resigned from the respondents and commenced to render services for the respondents through the medium of a Close Corporation. Although the applicant had formed the close corporation to ease

⁹¹ Ibid p1715

⁹² *Callanan v Tee-Kee Borehole Casings (Pty) Ltd & another* (1992) 13 ILJ (IC)

his tax burden the Close Corporation was actively engaged in business of the applicant's own accord and the business was not therefore just merely a medium through which the applicant's remuneration was paid. Upon reviewing the financial takings of the Close Corporation it was found that only 22% of the gross sales turnover for the year was derived from earnings taken from the respondent, the applicant could therefore not claim that he was economically dependent on the respondent as he had other avenues of income into his business.⁹³ The court found that the applicant was an employee of his Close Corporation and not of the respondent and therefore was not entitled to relief in terms of section 46(9) of the LRA.

The employer's prerogative has been restricted to a large degree in the formation and content of employment contracts. It has even been restricted in whether or not it is as the employer deems the relationship to be that of an employment relationship. The law limits what needs to be agreed and also governs who would receive protection from the law and goes as far as to protect employees in illegal contracts as seen in *Kylie v CCMA*⁹⁴

Chapter 6: Conclusion

The law of Master and Servant, derived from an exploitative, colonial and classist world, entrenched managerial prerogative. This facilitated appointment and dismissal at will, overriding notions of fairness and equity. Strydom⁹⁵ submits:

The common law's subscribing to the concept of freedom of contract which allows the employer to discriminate when selecting people for employment, brings it into direct conflict with the Constitution which specifically prohibits unfair discrimination on arbitrary grounds such as race and gender. In addition, the common law's emphasis on lawfulness, which is particularly evident in the employer's right to dismiss by merely giving the required notice, is contrary to the Constitution which affords everyone the right to fair labour practices in the conduct of labour

⁹³ Ibid p1551

⁹⁴ *Kylie v Commission for Conciliation Mediation and Arbitration and Others (CA 10/08)[2010] ZALAC 8; 2010 (4) SA 383 (LAC)*

⁹⁵ Strydom EML 'The Origin, Nature and Ambit of Employer Prerogative (Part 2)' 11 S. Afr. Mercantile L.J. 311 1999

*relations. Clearly, legislation was necessary to bring the employment relationship in line with the Constitution and to address the unequal bargaining power between the parties.*⁹⁶

Legislation however has taken cognizance of the unequal bargaining relationship between employer and employee and has placed limitations and has sought to prevent the exploitation of employees and promote job security. Strydom submits that one of the forms that statutory limitations take is that it regulates the employer's ability to enter into contracts of employment. The employer still reserves the right of whom they will employ, as long as it they are not statutorily prohibited from doing so or required to employ other applicants.

One area where an employer's prerogative is intact is in the area of economic interest of the business. For instance an employer is not prohibited from deciding how much staff it needs to employ in relation to the size of its business. It also is able to choose and the roles which the organization requires in order for its operation to run effectively. The employer regulates working time, when employees will be able to take meal intervals and any annual leave, by agreement with the employee; however it goes without saying that the employer sets the tone of such agreement.

When determining which candidate to employ an employer needs to be able to prove that they had selected the most suitably qualified individual and if they had not their reason should be based on either the fact that the individual appointed would be able to acquire the skills and experience in a reasonable time, or the individual meets their quota requirements in terms of their employment equity plan. The employer's prerogative in recruitment has also been significantly restricted in that applicants for employment are now also considered employees under the EEA. However where employers maintain prerogative is that decisions are generally made confidentially and in the case of targeted selection it does not curb the panel from discussing who their favorite is prior to the interview process starting and therefore "rigging" the scores in favor of the said candidate.

What is evident however is that courts do not want to get involved in appointing applicants and overriding employment decisions which involve the promotion of staff. The courts would instead review the process and then refer the matter back to the employer instead of telling the employer

⁹⁶ Ibid p 313

which candidate to employ. So for the most part it seems that the biggest area in which an employer's prerogative regarding who they would prefer to promote has remained intact, as long as it is fair and justifiable in law, as per Section 187 of the LRA. Failures by the employer to prove its decision as fair and justifiable will result in it losing an unfair labour practice suit.

Decisions made by employers need to conform to standards set in the constitution and all other labour legislation and not by any means discriminate. Employer prerogative has specifically been eradicated in the area of discrimination. Our statutes take a specifically hard line against any form of discrimination whether direct or indirect and even more so for discrimination on any of the listed grounds. Employers however could use this very principle to justify discrimination against certain race groups not contained in the definition of designated groups of such individuals do not address quota requirements as set out in their employment equity plan.

Recruitment and promotion in employment is a widely regulated area in the law and employer's cognizance must be drawn to compliance. Redressing past injustices and eradicating any form of discrimination is at the height of the agenda with regard to limiting the employer's prerogative. When all is said and done the employer does effectively have the final say on all recruitment and promotion decisions but in order to steer clear of reputation destroying lawsuits it is in the best interest of the employer to comply with the law in this area and instead work with the principles contained in this law and build a reputation as an employer of choice.

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