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EMPLOYMENT ALERT

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EMPLOYMENT EQUITY PLANS: QUOTAS V NUMERICAL TARGETS

In the case of Solidarity v Minister of Safety and Security & 3 others (handed down on 26 January 2016), the Labour Court (LC) made important findings regarding the validity of employment equity plans. It made findings in relation to the difference between numerical goals and quotas. It also made findings regarding the use of national versus regional demographics to determine whether an employment equity plan promoted the achievement of equality.

CDH
CLIFFE DEKKER HOFMEYR

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The employee contended that in terms of the agreement between the parties when the contract was concluded, the employer was obligated to re-employ him in an alternative permanent position.

The employee in this case, entered into a fixed term contract of employment with the appellant, the employer, in terms of which he would be employed as the chief financial officer for a period of three years. The parties also recorded that upon expiration of this period, the employer would endeavour to suitably accommodate the employee in a permanent alternative position.

Upon the expiry of the three year period, the employer refused to re-employ the employee. The employee contended that in terms of the agreement between the parties when the contract was concluded, the employer was obligated to re-employ him in an alternative permanent position. The employer initially approached the High Court on an urgent basis for an order to interdict the former employee from accessing its premises as an employee in circumstances where the fixed term contract had expired. The employee filed a counter application in which he sought to assert his right to be re-employed and to rectify the contract in in order to give true meaning to the intention of the parties. The basis for the rectification was that during the negotiation of the contract it was understood by all involved that the word 'endeavour' in fact meant an obligation by the employer to re-employ the employee after the expiry of the fixed term contract.

The High Court granted an order for rectification of the agreement and the employer lodged an appeal to the Supreme Court of Appeal (SCA). Before the SCA, the employer argued that the High Court lacked jurisdiction to hear the employee's complaint because the employee was essentially requesting a re-instatement, which was a labour matter that could only be brought before a Labour Court.

The SCA had to determine whether the High Court had jurisdiction to hear a matter concerning a contractual agreement to employ a person, or whether such jurisdiction was excluded by s157 of the Labour Relations Act, No 66 of 1995 (LRA).

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Section 157(1) of the LRA provides that:

> *'subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.'*

The argument before the SCA was that the matter fell within the provision of s186(2)(c) of the LRA, which provides that a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement, constitutes an unfair labour practice and as such, falls within the exclusive jurisdiction of the Labour Court.

The SCA rejected this argument and the employer's submission on the basis that the remedy sought by the employee was specific performance of a contractual term and was not based on any provisions of the LRA.

The SCA further explained that the provisions of the LRA did not arise in this case as the remedy sought by the employee was not 're-instatement' to a position previously held with the employer;

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Accordingly, it is important to bear in mind that s157(2) of the LRA should not be misunderstood to mean that the High Court has jurisdiction to determine issues which, in terms of s157(1) of the LRA, fall exclusively under the jurisdiction of the Labour Court.

nor did the employee seek renewal of the expired agreement. What the employee sought was specific performance of the agreement.

The Constitutional Court in the case of Gcaba v Minister for Safety and Security 2010 (1) SA 238 (CC) clarified the issue concerning the overlap in jurisdiction of the Labour Court and the High Court in respect of employment matters by explaining that the Labour Court has exclusive jurisdiction in terms of s157(1) of the LRA over those matters which the LRA prescribes should be determined by it. That Constitutional Court, however, endorsed the concurrency of jurisdiction between the two courts in terms of s157(2) of the LRA which provides that *'the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of Republic of South Africa, 1996, and arising from, inter alia, employment and from labour relations.'*

Accordingly, it is important to bear in mind that s157(2) of the LRA should not be misunderstood to mean that the High Court has jurisdiction to determine issues which, in terms of s157(1) of the LRA, fall exclusively under the jurisdiction of the Labour Court. Furthermore, the fact that the relief sought relates to an employment issue does not necessarily mean that it will always be rooted in the provisions of the LRA for the exclusive determination by the Labour Court.

Katlego Letlonkane and Samiksha Singh

EMPLOYMENT EQUITY PLANS: QUOTAS V NUMERICAL TARGETS

Solidarity challenged the SAPS plan on the basis that the plan failed to differentiate between national and regional demographics and that it took into account the national census population and not the regional economically active population.

In the case of Solidarity v Minister of Safety and Security & 3 others (handed down on 26 January 2016), the Labour Court (LC) made important findings regarding the validity of employment equity plans. It made findings in relation to the difference between numerical goals and quotas. It also made findings regarding the use of national versus regional demographics to determine whether an employment equity plan promoted the achievement of equality.

The LC found that employers must ensure that their workforces are both nationally and regionally representative.

The South African Police Service employment equity plan (SAPS plan) for the period 2010 – 2014 consisted of numerical targets in each of the four categories of personnel. The SAPS plan set out two types of targets for each racial and gender category, namely 'ideal' and 'realistic' percentages of the workforce. The SAPS plan failed to set out how the 'realistic' percentage of the workforce was reached but the Minister of Safety and Security indicated that reliance was placed on national census figures.

Solidarity challenged the SAPS plan on the basis that the plan failed to differentiate between national and regional demographics and that it took into account the national census population and not the regional economically active population. Furthermore, the plan was attacked on the basis that, because of the failure to take into account the regional economically active population, the numerical targets amounted to quotas.

The LC found that it was legitimate to rely on national demographics in terms of the Employment Equity Act (EEA) and the Constitution but that it was not sufficient to simply rely on national census figures of the general population for the purposes of the EEA. The LC found that employers must ensure that their workforces are both nationally and regionally representative.

The LC held that quotas referred to numerical goals that the employer was required to adhere to 'come what may'. However, where the employer's employment equity plan made provision for numerical goals which did not pose an absolute bar to the application of the goals, such an employment equity plan would be considered to be fair. The SAPS plan did not provide for circumstances in which deviation of its employment equity plan would be acceptable and, as such, it failed to promote the achievement of equality. The numerical targets in the SAPS plan therefore amounted to quotas which were impermissible.

Given that the period of implementation of the plan had passed, the LC granted declaratory relief and held that the issue of the SAPS plan's implementation would turn on what happened in the case of specific appointments.

This case illustrates the importance of flexibility in achieving the numerical targets contained in an employer's employment equity plan. An inflexible adherence to numerical targets amounts to a quota system. This is unfair. In addition, in setting the numerical targets, employers are obliged to consider both national and regional demographics of the economically active population in order to promote the achievement of equality.

Kirsten Caddy and Khanyisile Khanyile

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