

Employment Law

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SOUTH AFRICA

CCMA reaffirms stance on navigating Employment Equity: Breaking barriers with nuance



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**EMPLOYMENT LAW
ALERT**

CCMA reaffirms stance on navigating Employment Equity: Breaking barriers with nuance

On 1 July 2024, the Commission for Conciliation, Mediation and Arbitration (CCMA) issued an arbitration award that dealt with an unfair labour practice dispute that involved the failure to promote an employee in *Solidarity obo Jacobus Fredrick van der Berg v South African Police Service and Another PSSs321-23/24 [2024]*.

The employee, Jacobus Frederick van der Berg, applied for a position that constituted a promotional opportunity. Despite scoring the highest in the evaluation process, he was not appointed. Another employee, who scored lower than Van der Berg, was appointed. The only reason furnished by the employer for its decision was that the lower scoring employee was a more suitable candidate.

During the arbitration, the employer's version indicated for the first time that there were equity considerations that were taken into account in making the appointment and accordingly, due to Van der Berg's race and gender,

he was not eligible for the position. The advertised position did not reflect that it was an equity position and at no time prior to the arbitration did the employer express that race was a crucial factor in determining the most suitable candidate for the promotion. Furthermore, Van der Berg sought clarity on the reasons for the significantly lower score that was provided by General Masha, in contrast with the higher scores provided by two brigadiers, which ultimately reduced Van der Berg's average score.

The commissioner's assessment of the evidence resulted in a finding where the employer's failure to promote Van der Berg constituted an unfair labour practice. The Commissioner stated that the equity reasons from the employer were belated and, more importantly, the employer failed to apply equity requirements in a nuanced way and the employer's conduct imposed an absolute barrier in respect people from a particular race group regarding the promotion position. The Commissioner awarded Van der Berg the promotion retrospectively.

Key takeaways

This case highlights the importance of transparency and careful consideration in relation to promotion and employment positions. When dealing with employment equity considerations, employers must apply their employment equity plans in a nuanced manner that aligns with the objectives of the Employment Equity Act 55 of 1998. People from certain race groups or overrepresented categories must not be prohibited from applying for positions and their applications must not be dismissed solely based on race, irrespective of other relevant considerations. This approach is in line with a recent Labour Court judgment in *Solidarity OBO Erasmus v Eskom Holdings SOC LTD (C1001/18) [2024] ZALCCT 18 (24 May 2024)*. To read our alert on this judgment, click [here](#).

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