Employment Law

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SOUTH AFRICA

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Breaking barriers: Navigating nuance in employment equity

In the matter of *Solidarity OBO Erasmus v Eskom Holdings SOC LTD (C1001/18) [2024] ZALCCT 18 (24 May 2024)* the applicant, Erasmus, had been employed by the respondent, Eskom, since 1988. In 2004, Erasmus was promoted to project manager, and in 2017, he was transferred to his current position as the senior advisor outage co-ordinator.

On 3 April 2017, Eskom began recruitment for the position of manager for site outage execution at Peaking Power Station for the group technology division (the post), in line with Eskom's employment equity plans for each of its divisions, including the group technology division. The post required managing the outage execution section to meet Eskom's business objectives in that area. Erasmus applied for the post, and Eskom followed its recruitment process to appoint a suitable candidate. However, Erasmus was not successful because the guidelines provided by Eskom's employment equity manager stipulated that the person appointed to the post must be an African male or a female from any race.

In 2018, regarding his unsuccessful application, Erasmus requested information from Eskom under section 18(1) of the Promotion of Access to Information Act 2 of 2000, but Eskom refused. Solidarity then referred an unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on behalf of Erasmus. In August 2018, after concluding the conciliation proceedings, the CCMA issued a certificate of outcome indicating that the matter remained unresolved. Solidarity subsequently approached the Labour Court on behalf of Erasmus.

Labour Court

In the Labour Court, the issue was whether Erasmus had been unfairly discriminated against and whether an absolute barrier had been created through the practice of only shortlisting candidates from underrepresented categories of persons.

Section 15(4) of the Employment Equity Act 55 of 1998, as amended (EEA) stipulates that:

> *"Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups."*

The Labour Court found that Eskom's shortlisting stage, which prevented Erasmus from applying due to him being from an overrepresented community, amounted to an absolute barrier. The Labour Court stated that the inflexible and blunt instrument practiced at the shortlisting stage must be recognised as an absolute barrier to the ability of members of non-designated groups to compete with employment equity candidates from the inception of the recruitment process. No nuance in the practice is observable.

Breaking barriers: Navigating nuance in employment equity

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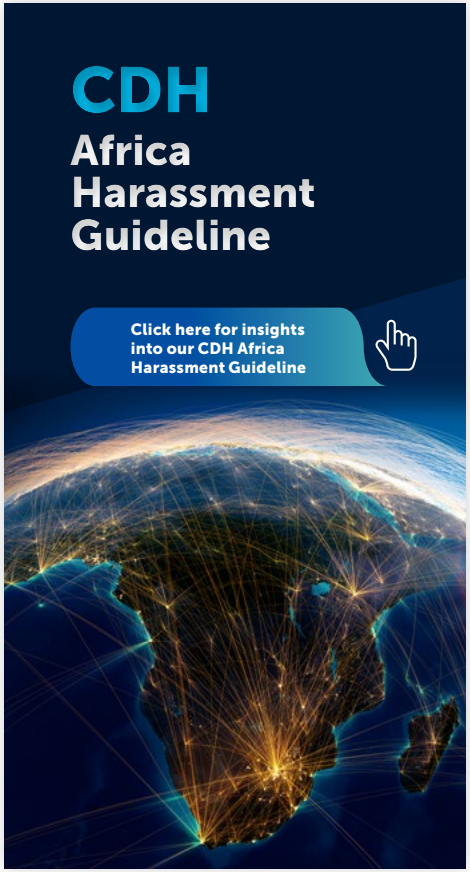

The Labour Court further found that on the evidence established, Eskom's employment practice could not qualify as affirmative action under the EEA. The Labour Court stated that there are numerous ways to consider equity targets during the process of interviewing suitable candidates for a position without excluding certain categories of persons and preventing them from demonstrating their worth to an employer. Such practices infringe on their right to dignity.

The Labour Court found that Erasmus had been unfairly discriminated against and that Eskom's practice of not shortlisting members of non-designated groups for advertised posts amounted to an absolute barrier. Furthermore, the measure of excluding members from overrepresented communities was not an affirmative action measure as contemplated by the EEA. Lastly, the Labour Court noted that it would not usurp the role of the employer by promoting Erasmus. Instead, it ordered Eskom to pay compensation in an amount that was just and equitable to Erasmus, and also ordered Eskom to remedy the unfair practice adopted in its recruitment processes.

Key takeaway

Employers need to apply their employment equity plans in a nuanced manner to give effect to the objectives of the EEA. This nuanced approach requires employers to implement employment equity policies in a manner that does not prohibit members of overrepresented communities from applying for available positions within the organisation. Additionally, the Labour Court's order that Eskom take remedial steps to address the unfair practice of not shortlisting candidates from overrepresented groups supports the argument that employers should not be complacent but should actively ensure that their employment equity plans are applied appropriately.

Fiona Leppan, Kgodisho Phashe, and David de Goede

Update: Union representation in litigation disputes

Over the years, the question of whether an aggrieved employee may be represented in litigation proceedings by any trade union has been the subject of some uncertainty. That was until 2022, when the question was considered by the Labour Appeal Court (LAC) in *NUMSA & Others v Afgri Animal Feeds (Ltd)* (2022) 43 ILJ 1998 (LAC) where the LAC found that employees have the right to be represented by a trade union of their choice in litigation proceedings, regardless of whether the trade union's constitution covers the industry in which the employees are employed. However, for collective bargaining rights, a trade union cannot bargain collectively with the employer in an industry outside of its scope (as the court saw this as a separate issue). To read our 2022 alert about this matter, click here.

The employer appealed to the Constitutional Court and on 21 June 2024 the court delivered its judgment. The Constitutional Court disagreed with the reasoning of the LAC judgment and the employer's appeal was successful. In short, the Constitutional Court held that a trade union has no authority to represent dismissed employees who are precluded from becoming members of the trade union in terms of its constitution. This is consistent with the earlier judgment of the Constitutional Court in respect of a trade union seeking organisational rights.

The reasoning of the Constitutional Court can be summed up in the following paragraphs from the judgment:

> *"One of the effects of legal personality is that a trade union, as a body corporate, may perform any act in law which its constitution requires or permits it to do. The constitution sets out the union's powers – a prescribed requirement for registration under section 95(5) of the LRA [Labour Relations Act 66 of 1995]. The constitution corresponds with the articles of association of a company and may be enforced in like manner. Where a trade union performs any act that deviates from or is contrary to its constitution, that act is ultra vires (beyond its powers) and null and void. In such a case, an individual may approach a court to interdict the ultra vires act ...*

Update: Union representation in litigation disputes

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> *There is no ground for drawing a distinction between a trade union's representation of employees when enforcing organisational rights and representation in an unfair dismissal dispute, as submitted by [the trade union]. That distinction is both illogical and at odds with the principle that a trade union has no powers beyond those conferred by its constitution."*

This judgment is obviously significant because it clarifies that the right of employees to be represented by trade unions of their choice in both arbitration and Labour Court proceedings is not unfettered. A trade union must confine membership to workers in industries that accord with its constitution. Where employees fall outside of the scope of a particular industry, the trade union can neither admit such employees as members nor represent them in litigious proceedings.

To read the Constitutional Court judgment, click here.

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