A right to affirmative action

The Cape Town Labour Court recently gave a landmark judgment on affirmative action and the procedure for unfair discrimination claims (*Harmse vs City of Cape Town* [2003] JOL 11047 (LC)).

Harmse, a coloured male, applied for three posts but was not short-listed for any. He approached the Labour Court, arguing that the City discriminated against him unfairly on the basis of race, political belief and/or lack of relevant experience. Further, in short-listing candidates for the first level appointments, the City failed to meet its obligation to review all factors listed in s 20(3) of the Employment Equity Act, 1998 (EEA). These factors are formal qualifications, prior learning, relevant experience and a capacity to acquire, within a reasonable time, the ability to do the job. He also argued that it contravened s 20(5) by unfairly discriminating against him on the grounds of his lack of relevant experience. As a result, it failed to meet its goal to achieve the equitable representation of suitably qualified persons from designated groups.

Section 20(5) of the EEA prohibits an employer from unfairly discrimination solely on the grounds of a person's lack of relevant experience. Harmse claimed that, on a proper application of s 20(3)–(5), he was suitably qualified for all the jobs for which he applied.

The City brought an application of exception on the grounds that his claim did not disclose a cause of action and was 'vague and embarrassing'. It argued that giving 'lack of relevant experience' as a reason for not short-listing him was not a form of unfair discrimination prohibited by s 6(1) of the EEA. Prior to this, the prevailing view was that affirmative action 'is a shield, not a sword', meaning that although the EEA provides for a duty to implement affirmative action, the duty is confined to 'designated employers' and there is no right to affirmative action. Under this view, the link between affirmative action and unfair discrimination claims would exist only in s 6(2)(a) of the EEA, which says that employers may use 'affirmative action measures consistent with the purposes of the EEA, as a defence against allegations of unfair discrimination'.

The Court decided against the City and came to important conclusions:


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- It said that s 5 places a duty on all employers to implement affirmative action. It took the view that the duty to eliminate unfair discrimination in s 5 (read with s 20) therefore incorporates a duty to implement affirmative action, which extends to all employers and not only to designated employers. Sections 20(3)–(5) of the EEA apply to all employers. These sub-sections introduce, define and regulate the concept of 'suitably qualified'.
- The decision on whether a member of a designated group is 'suitably qualified' is an 'employment policy or practice' as defined in s 1 and is used in s 6. Thus, determining whether a person is suitably qualified falls under one of the requirements for a claim of unfair discrimination laid down in s 6.
- The list of grounds on which discrimination may take place is not exhaustive and can thus include 'lack of relevant experience'. As such, unfair discrimination on the basis of lack of relevant experience may possibly be pursued under s 20(5) of the EEA (if that section contains an independent cause of action), or under s 6 (which contains the general prohibition of unfair discrimination).

Finally, the Court held that:

> *if an employer fails to promote the achievement of equality through taking affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within one of the designated groups not*

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Disconnecting basic municipal services – continued

As indicated in *LG Bulletin* 2003 5(2): 11, a third judgment was handed down early this year dealing with the disconnection of municipal services, namely *BG Beck & Eight Others v Kopanong Local Municipality* (case no. 3772/ 2002, unreported). This controversial judgment was handed down in the Orange Free State Provincial Division and is currently on appeal.

Facts

The High Court granted the applicants a provisional order in November 2002 prohibiting the Kopanong Local Municipality (hereafter 'the Municipality') from preventing the applicants and members of the Edenburg community from purchasing pre-paid electricity on the grounds that their municipal accounts were in arrears for other municipal services. The provisional order was extended on a few occasions and the Court heard arguments at the end of February 2003 to finalise the matter.

It is important to note that the applicants did not purchase electricity from the Municipality, but from a community vendor acting as a cash coupon distribution outlet. They were thus not indebted to the Municipality in respect of their electricity consumption. However, they were indebted to it for their water accounts, which they had decided not to pay until the Municipality did something to improve the quality of its service delivery in their community. It was in response to this non-payment strategy that the Municipality blocked the cash sale of electricity coupons by the community vendor. A further four factual disputes were raised before the Court, but are not discussed here as they were not material to the adjudication of the matter.

Issues and rulings

The Court had to decide whether it was legally permissible for the Municipality to withhold the purchase of pre-paid electricity by the applicants because of their failure to pay their water accounts. In defining the issue before it, the Court did not take into account the unique nature of the municipal service in question, but defined the issue as whether the Municipality was entitled to 'withhold the provision of one service to a resident in order to enforce payment of arrears owing to the municipality by such a resident in respect of another service'. The cash purchase of pre-paid electricity is a specific type of service rendered to a community.

After interpreting relevant sections in the Electricity Act, 1987, the Municipal Systems Act and the Constitution, the Court concluded that a municipality is the 'last point of the service delivery chain' and it is therefore its constitutional imperative to act as 'a community service provider'. The Court also considered the judgment given in *Senekal Inwonersvereniging en 'n Ander v Plaaslike Oorgangsraad Senekal/Matwabeng* 1998 3 SA 719 (O) at length. In that instance, it was found that the discontinuation of electricity supply to residents who were indebted only in respect of the water component of their municipal services account was unlawful. (In this case, it must be noted, electricity was supplied on a regular credit basis and not on a pre-paid cash basis.)

The Court then referred to section 97(1) of the Municipal Systems Act, which deals with the content of a municipality's credit control and debt collection policy as well as its understanding of the terms 'municipal service account' and 'municipal service'. The Court interpreted this section to mean that a municipality should put an end to the provision of any service (of whatever

nature) when the municipal service account, due and payable by the consumer in favour of that municipality, is unpaid. The Court held that the Municipality was constitutionally compelled to take action in terms of the Municipal Systems Act against consumers indebted to it in respect of the municipal service rendered.

The Court further held that a municipal service account should be treated and settled, as 'a composite but single account for various services rendered' and it cannot be split by partially settling one service component and not the other. Therefore a municipal service account is 'a composite bill of services' and a municipality 'provides a single municipal service'. The Court went further and defined a municipal service as follows:

> *A municipal service consists of multiple facets. It is a package of a wide range of facets, which together form an integral and indivisible single service.*

As a municipality is compelled to terminate municipal services when the consumer is in arrears, and as a municipal service account is a composite bill of municipal services provided by a municipality, the Court ruled that the Municipality's action in this matter was permissible by law.

Comments

The disconnection of basic municipal services due to non-payment cuts to the core of service delivery by a municipality. It is therefore of concern when a judgment such as this adds to the pitfalls of the municipal practice in this regard.

In not defining the issue before it correctly, the Court's starting point in its ruling was incorrect. The issue before the Court was quite similar to that in *Hartzenberg and Others v Nelson Mandela Metropolitan (Despatch Administration)* 2003 JOL 10652 (SE), discussed in *LG Bulletin* 2003 5(2): 12. In the latter judgment the unique nature of the municipal service in question was taken into account, as it was on a pre-paid cash basis and not on a regular credit basis.

When the Court interpreted section 97(1) of the Municipal Systems Act, it did not apply the interpretation to the matter at hand. If it had, it would have been clear that pre-paid electricity is not a municipal service for which a municipal service account could be in arrears as it is not payable by the consumer in favour of the municipality. Although the water supply rendered to the applicants fits within the interpretation given to section 97(1) of the Act, the electricity supply is not subject to the municipal service account.

In ruling that a municipal service account cannot be split when settled, the Court ignored current standard municipal practice of consumers negotiating such payment terms with their municipality.

When defining a municipal service in order to support its argument, the Court clearly did not take note of the fact that the national legislature gave a definition for a municipal service in the Local Government Laws Amendment Act, 2002 (see *Local Government Law Bulletin* 2002 4(4): 11).

What is applauded here is the fact that the applicants decided to appeal against this judgment. Further updates will be provided in later issues of the *LG Bulletin* to keep you abreast of developments in this case.

key points

- It is legally permissible for a municipality to terminate the supply of pre-paid electricity when consumers' payments for other municipal services are in arrears.
- A municipality is compelled by law to terminate a municipal service for non-payment.
- A municipal service account is a composite but single account for various services rendered and it cannot be split by partially settling one service component and not the other.
- The judgment is currently on appeal.

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