Does the managerial prerogative still apply during the recruitment process?

By Johanette Rheeder

An employer's managerial prerogative (or the right to decide and to manage) relates to the ability and choice a manager or an employer can make to appoint an employee of his or its choice. The term "prerogative" denotes that the person holding the prerogative, has a right that others – the employee or job applicant - does not have. This right is weighed up against the question as to whether a job applicant has a right to be appointed in a position and can he or she therefore challenge the managerial prerogative of the employer or manager and demand to be appointed? Therefore, to what extent, if any, has the decision making power of the employer being curtailed by the labour rights and claim to fairness by employees or applicants?[1]

The right to appoint belongs to the employer. However, this right is not absolute. The employer must comply with the principles of fairness and can also not contravene legislation, for example the EEA or the Basic Conditions of employment Act. This right is also limited by the right of the job applicant not to be unfairly discriminated against or being subjected to unfair medical and psychometric tests.

One of the first unfair discrimination cases in South Africa is that of ***Hoffmann v SAA***[2]. In this case, SAA applied its managerial prerogative not to appoint Hoffmann due to his HIV status and based its decision on, amongst other, economic reasons. The Constitutional Court found that, as the present case demonstrates, people with HIV have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. The Constitutional Court found that Hoffmann's dignity has been tarnished and the fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify the exclusion from employment as cabin attendants of *all people* who are living with HIV. In this case, the managerial prerogative of the employer not to appoint was curtailed by the right of Hoffmann not to be discriminated against and to have his dignity protected.

In practice, the employer, subject to legal obligations and fairness, retains the prerogative whom to appoint. Affirmative action is not an automatic right that employees have.[3] The court, in the *Dudley case,* stressed that affirmative action is collective in nature. It is not a right but rather a means to achieve equality in the workplace. The employee can therefore not sue the employer for not appointing him or her as an AA candidate. The employer can use AA as a shield to explain why preference is given to a designated employee over a non designated employee.

In ***George v Liberty Life Association of Africa Ltd***[4], the employee applied for appointment to a position that was advertised within the company, according to its recruitment policy. Although the applicant was a suitable candidate for the position, an affirmative action candidate from outside the employer's business was appointed to the post. The court held that: 'in exercising its managerial prerogative to recruit and appoint an employer has not only to take its own internal values, such as efficiency, economic realities and employee loyalty, into account, but, because it is part of the large society and because of economic reasons, concern about being socially responsive and probably simply being a good corporate citizen, it may validly look at external values such as affirmative action. The court also found that the procedure for appointment was flawed, as recruiting internally and externally was done at the same time. This means that an employer must use a fair procedure in applying affirmative action. At the workplace, the employer has a prerogative to vary the manner in which employment is done, the prerogative must however be applied fairly and within the law.

In ***Department of Justice v CCMA & others***[5] it was found that in the context of an unfair labour practice section 186(2) of the Labour Relations Act), the employee does not have a remedy against unfair conduct on the part of the employer in respect of appointments or filling a vacant posts as it is not in the list of unfair labour practices. That means that if the dispute is about an appointment (or, in most cases, a non-appointment), the CCMA does not have jurisdiction. In this case, the Department of Justice advertised (internally and externally) the post of Chief State Law Advisor. Requirements for the post included admission as an advocate and the possession of an LLB degree. From the many applications, a shortlist of four candidates was drawn up. After interviewing these four applicants, the selection committee stated that it was not in a position to recommend any one candidate for appointment to the post. The post was advertised again and the entire process was repeated; eventually, one candidate was appointed for a fixed term of 12 months. One of the present State Law Advisors was aggrieved by this fixed-term appointment; he was of the view that he complied with the requirements. From the perspective of this aggrieved employee, the issue in dispute was the fact that the employer had not promoted him. From the perspective of the employer, however, the dispute related to an appointment to the post. The Labour Appeal Court held that the decision not to appoint the employee to the post amounted to a decision not to promote him, and that this decision therefore fell within the ambit of the unfair labour practice decision. However, at the same time, if someone from *outside* the organisation (who is not an 'employee' for the purposes of the definition of the unfair labour practice definition, was not appointed, that non-appointment did not constitute a dispute about a promotion. The Court put it as follows: "difference arises from the fact that, each one of the two candidates has a different relationship with the decision-maker. The one is an employee of the decision-maker whereas the other has no existing employment relationship with the decision-maker.'

If the applicant cannot establish a fact such as a promotion to allow the case to fall within the ambit of an unfair labour practice, then the issue will be about the failure to appoint, which cannot be regulated by the CCMA or the Labour Court. This dispute is in essence one of "interest" and not one of "right." The employee or applicant has an interest to be appointed, but no right which can be judicially enforced by way of action in the CCMA or the Labour court, unless it can be shown that some unfair labour practice took place in the process.

The employer's managerial prerogative to appoint the most suitable candidate still maintains, however, within the framework of fairness and legal principles as set out in labour law.

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[1] See also The concept of the managerial prerogative in the South African Law by John Kinamugire, 2009, http://www.thembosdev.com/managerial_prerogative_in_sa_labour_law.pdf

[2] (2002) 11 CC 6.12.3

[3] Dudley v City of Cape Town (2004)25 ILJ 305 (LC)

[4] (1996)17ILJ 571 (IC)

[5] (2004) 13 LAC 1.11.6 Butterworths