

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**The South African Police Services v Public Servants Association**

**Case CCT 68/05**

**Decided on: 13 October 2006**

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**MEDIA SUMMMARY**

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*The following explanation is provided to assist the media in reporting this application and is not binding on the Constitutional Court or any member of the Court.*

On 18 May 2006 the Constitutional Court heard an application for leave to appeal to this Court against a decision given in the Supreme Court of Appeal (SCA). The issue concerns the interpretation to be given to the word ‘may’ in regulation 24(6) of the Regulations for the South African Police Service (SAPS) promulgated under the South African Police Service Act 68 of 1995. The regulation provides:

“If the National Commissioner raises the salary of a post, she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent-

- (a) already performs the duties of the post;
- (b) has received a satisfactory rating in her or his most recent performance assessment; and
- (c) starts employment at the minimum notch of the higher salary range.”

The High Court held that the use of the word ‘may’ in regulation 24(6) was unambiguous and should be given its ordinary permissive meaning. A declaratory order was accordingly issued to the effect that regulation 24(6) vests in the National Commissioner a discretion either to advertise the post or continue to employ the incumbent employee in the upgraded post.

The Public Servants Association then appealed to the SCA. Three judges of the SCA held that interpreting the regulation consistently with the right to fair labour practice and the right not to be unfairly dismissed required the retention of the incumbent in a post when that post was upgraded. Two judges held that the appeal should fail and that the word ‘may’ should be given its ordinary permissive meaning.

Sachs J writing for the majority in the Constitutional Court held that the Commissioner did have a discretion whether to advertise or not, but could not exercise that discretion in a manner which could lead to the redundancy of a satisfactory incumbent. Accordingly, the regulation had to be read in a way that neither produced the rigidity of outcome that would flow from the view of the majority in the Supreme Court of Appeal, nor carried the risk of consequent redundancy implicit in the minority approach. Sachs J’s judgment was concurred in by Madala J.

Yacoob J filed a separate judgment concurring with the judgment and order of Sachs J. He felt it necessary to elaborate on the circumstances in which the case was brought and prosecuted before the High Court, on why he considered that the conclusion of the Supreme Court of Appeal that

the Commissioner had a discretion was wrong, and on the basis for the interpretation of the regulation in so far as that interpretation had implications for the power of the Commissioner to dismiss the incumbent. The judgments of Sachs J and Yacoob J were concurred in by Langa CJ; Moseneke DCJ; Mokgoro J; Skweyiya J; Van der Westhuizen J. Nkabinde J concurred with the judgment of Sachs J and the additional reasons set out in the judgment of Yacoob J that are consistent with the judgment of Sachs J.

Justice O'Regan dissented. In her view, the interpretation of regulation 24(6) adopted by the majority of judges in the Supreme Court of Appeal, and not that proposed by Sachs J and Yacoob J, is correct. Accordingly, the provision should be read to permit the Commissioner not to advertise a newly re-graded post, despite the general obligation requiring that all vacant posts should be advertised, in circumstances where an incumbent of a post has been satisfactorily performing the tasks attached to it. Where there is such an incumbent, the Commissioner is obliged to appoint the incumbent to the newly re-graded post on the minimum salary range attached to the new post. In her view, this interpretation best accords with the language and context of the regulation, when construed in the light of the constitutional right to fair labour practices.