IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN **REPORTABLE**

Case no: D398/1998

Heard on: 25/03/2004

Delivered on:26/04/2004

IN THE MATTER BETWEEN

MARTIN GORDON **APPLICANT**

And

DEPARTMENT OF HEALTH,
KWAZULU NATAL **RESPONDENT**

JUDGMENT

PILLAY D, J

1. I am required to decide whether the appointment of one Mr R Z Nkongwa to the post of Deputy Director: Administration Greys Hospital (the post) constituted unfair conduct, alternatively, unfair discrimination as contemplated in Item 2(1)(a) and 2(1)(b) of Schedule 7 of the Labour Relations Act 66 of 1995 (the LRA).

2. On the 11th April 1996 the respondent advertised the post. The requirements for the post included an appropriate Bachelors Degree or equivalent qualification. Extensive experience in hospital administration was a recommendation. The duties included:

"Performing leadership functions, such as guidance and advice to subordinates on the interpretation and applying directives and policy. Planning of work programmes, personnel administration and determining work, work procedures and methods. Exercising control over activities." (sic)

3. The applicant and Mr Mkongwa, amongst others, applied for the post. A selection panel which was constituted by Dr L Ramiah (Chief Medical Superintendent), Dr M Nyembezi (Regional Director), Mr E T Mthetwa (Assistant Director) and Mr F P Motha (Deputy Director) recommended the appointment of the applicant. The Secretary of Health, Kwa Zulu Natal, Dr Green–Thompson endorsed their recommendation.

4. The panel's recommendation and the Secretary's endorsement were submitted to the Provincial Services Commission (the Commission). The office of the Commission added its support for the applicant in a memorandum to the Commission in the following terms:

"In view of the fact that Grey's Hospital is predominantly white, and so is the community it serves, the Office supports the Department's request even though it does not promote affirmative action. Mr Gordon is in possession of a Standard 10 Certificate but is deemed to possess an RVQ 13 qualification since he was already in the Officer cadre as at 10 June 1994."

5. By letter dated the 17th December 1996 the Commission informed the respondent that it did not recommend the promotion of the applicant. Its reasons were minuted as follows:

"The Commission considered this item and did not recommend the proposal of the Office and directed that Mr R. Z. Mkongwa be promoted to the post because of his academic qualifications, experience and the Constitutional imperative to promote representativeness in the Public Service, with effect from 1st July 1996".

6. The Commission had the power to make recommendations, give directions and conduct enquiries with regard to *inter alia* appointments, promotions and the promotion of efficiency and effectiveness in departments. (sections 213(1)(a)(ii) and (iii) of the Interim Constitution (Act No 200 of 1993), read with Kwa-Zulu Natal Provincial Service Commission Act 6 of 1994 (the PSCA)).

7. Any recommendation or direction of the Commission had to be implemented within six months. (section 210(3) read with section 213 (2), of the Interim Constitution) The respondent accepted the Commission's recommendation not to appoint the applicant and implemented its directive to appoint Mr Mkongwa.

8. The applicant is aggrieved by his non-appointment and alleges that he has been discriminated or unfairly treated. He claims the difference between what he actually earned and what he would have earned if he was appointed, from 1st July 1996 to 28th February 2003 when he retired.

9. The applicant relied on sections 8 and 212 of the Interim Constitution and Schedule 7 of the LRA. He also cited the following cases in support of his proposition that an employer must have an overarching plan when making affirmative action appointments and that it cannot do so on an *ad hoc* basis: *Public Servants Association of SA v Minister of Justice* 1997 (3) SA 925 (T), *Eskom v Hiemstra NO & Others* 1999 (10) BLLR 1041 (LC), *Coetzer & Others v Minister of Safety and Security* 2003 (3) SA 368 (LC), *IMATU v Greater Louis Trichardt Transitional Local Council* 2000 (21) ILJ 1119 (LC). As the respondent did not have such a plan it did not implement affirmative action fairly. Accordingly, it failed to discharge the onus of proving that the discrimination was not unfair.

10. The respondent relies on sections 8(3)(a), 210(1)(a)(iii) and (iv), 213(1)(a)(ii) and (iii), 212(2)(b) and (4) of the Interim Constitution and section 11(1)(b) of the Public Service Act of 1994, Proclamation 103 of 1994 (the PSA).

11. It was common cause that the respondent had no affirmative action plan in place. In order to decide whether the applicant was discriminated against, whether such discrimination was unfair or whether he was otherwise unfairly treated I need to consider whether the appointment of Mr Mkongwa was substantively fair. The procedural fairness of the appointment was not challenged.

12. The decision to appoint Mr Mkongwa was made on or about 17 December 1996. As the Final Constitution (Act No 108 of 1996) only came into effect on the 4 February 1997, the cause of action arose when the Interim Constitution applied. Moreover, the PSCA read with Chapter 13 of the Interim Constitution which established the Commission, also applied. In terms of Schedule 6, Item 24 of the Final Constitution the Commission continued to function until it was abolished by an Act of Parliament passed in terms of section 75 of the Final Constitution. This was effected by the Public Service Commission

Act No 46 of 1997 with effect from the 15 December 1997.

13. Section 8 of the Interim Constitution provides:

"(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3)(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. . . . "

14. When interpreting section 8 a court of law shall promote the values which underlie an open and democratic society based on freedom and equality. Furthermore, in the interpretation of any law a court shall have due regard to the spirit, purport and objects of the Bill of Rights. (section 35 (1) and (2) of the Interim Constitution)

15. In the application for the certification of the Constitution the Constitutional Court announced its approach to the interpretation clause read with the Constitutional Principles. (*Ex Parte Chairperson of the Constitutional Assembly: In Re Certification Of The Constitution Of The Republic Of South Africa,* 1996 (4) SA 744 (CC); 1997 (1) BCLR 1 (CC)) These principles had to be applied purposively, teleologically and without technical rigidity to realise the commitment to create a new order based on a sovereign and democratic constitutional State in which all citizens are able to enjoy and exercise their fundamental rights and freedoms. If there is a choice between two or more interpretations, then such interpretation as was conducive to this objective should be preferred.

16. In *Nortje and Another v Attorney-General, Cape, and Another* 1995 (2) SA 460 (C) a full bench of the Cape Division observed that there is general agreement that, because of fundamental distinctions between ordinary legislation and a constitution, many (but

certainly not all) of the traditional rules of interpreting statutes will be inappropriate when interpreting national legislation.

17. Items 2(1) and (2) of Schedule 7 of the LRA were enacted to give effect to section 8 in the field of employment law. It draws its meaning from the Interim Constitution and must be interpreted consistently with it.

18. The right to equality is substantive and not merely formal (*Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) at 477 to 478; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 60 to 62; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC)). It is implied in section 8 (1) that in order to give effect to it, measures may be necessary to enable disadvantaged people to enjoy the right to equality. Equally, it is implied from subsection (2) that such measures as are applied to give effect to subsection (1) cannot discriminate unfairly against any person. (*Harksen v Lane NO and Others* 1998 (1) SA 300 at para 43)

19. This interpretation is consistent with Constitutional Principle V in Schedule 4 to the Constitution which provides:

"The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender."

20. Now, assume that section 8(3)(a) did not exist. The absence of an explicit constitutional provision authorizing affirmative action does not necessarily prevent the development of affirmative action. A broad constitutional clause on equality supported by a constitutional court can authorize the implementation of affirmative action to achieve equality. The development of affirmative action, although fraught with controversy in the United States of America, illustrates this approach. (J Faundez Affirmative Action: International Perspectives (ILO) 1994 at 28).

21. The controversy is typified in the case of *Regents of the University of California v Bakke* (1978). Eight justices of the United States Supreme Court were equally divided about

whether the affirmative action programme of the University violated the equality clause in the Civil Rights Act of 1964. Affirmative action was saved by the ninth judge in that case.

22. Faundez at 18 expatiates on the philosophy underlying a formal as opposed to a substantive approach to equality thus:

"The meaning of the principle of equality before the law has been the subject of considerable controversy in the history of legal and political theory. In practice however, the interpretation which has prevailed is the one associated with Locke's political philosophy, according to which legal equality is said to refer to the equal capacity which individuals have to acquire and enjoy legal rights. Legal equality, under this view, is distinguished from equal treatment because whether individuals are in fact treated equally depends on factors which are beyond the domain of allocation. Legal equality is in this respect purely formal, as it is not concerned with the way rights are in fact allocated.

The positivistic approach to the interpretation of the principle of equality before the law stems from the natural reluctance of courts to become involved in matters which they consider politically sensitive. Courts which approach judicial review in a less formalistic way, that is, courts which are prepared to look at the content of the law in terms of the law's objectives, do not find their tasks easy because of the need to find a stand-point, external to the law, from which to assess its constitutionality. Because of the lack of consensus as to what constitutes a legitimate stand-point, it is often alleged that the process of judicial review of legislation is more political than judicial, as courts substitute their own policy judgement for that of the legislature. This allegation is especially powerful and persuasive when judicial review touches upon highly sensitive areas of state action over which public opinion is deeply divided. This is the case of affirmative action and, as the materials below show, it explains why in the United States the Supreme Court has found it so difficult to offer a straight forward answer to the apparently simple question: Is affirmative action consistent with the equal protection clause of the Constitution?"

23. Unlike the United States of America, in South Africa we do have section 8 (3)(a). It expressly authorizes affirmative action. It is a guide to and an explanation of section 8 (1) and (2). This is confirmed by Constitutional Principle V above.

24. Section 8 (3)(a) was a necessary precaution to avoid a formal, positivistic interpretation being given to the right to equality before the law and equal protection of the laws.

25. The absence of affirmative action plans or other measures contemplated in subsection

3(a) cannot frustrate the objectives of subsections (1) and (2). It could not have been the intention of the Constitutional Assembly to freeze the operation of subsections (1) and (2) until affirmative action measures are in place. Nor does the wording of section 8 lend itself to such an interpretation.

26. The existence or otherwise of such measures can also not change the essential content of the rights and protections in subsections (1) and (2). In other words if there is no affirmative action plan, it cannot mean that a disadvantaged person can have no right to substantive equality in terms of section 8 (1). Or, that a privileged person will be unfairly discriminated against in terms of section 8 (2) if substantive equality is afforded to a disadvantaged person.

27. Support for this approach to section 8 emerges in the following quotation from an article by Catherine Albertyn and Janet Kentridge titled “Introducing the Right to Equality in the Interim Constitution” published in the South African Journal on Human Rights.

“An important question about section 8(3)(a) is whether it is a guide to the interpretation of subsection 8(1) and 8(2) or an exception to them. If we understand these sections to entail a commitment to substantive equality, then it seems that section 8(3)(a) simply makes explicit the fact that substantive equality permits treatment which is differentiated according to the needs of the recipient. Our argument here is that the Constitution is best understood as subscribing to a substantive conception of equality. Hence the legality of measures designed to undo inequality is implicit in the very notion of equal protection of the law. On this reading, it was not strictly necessary to include section 8(3)(a) but it was included for the avoidance of doubt, as a cautionary measure. It avoids litigation on the question of whether affirmative action is consonant with the promise of equal protection of the law by stating in advance that measures designed to redress inequality are permissible. This interpretation accords with the meaning attributed to the word “unfair” in Part 4 above. It also makes sense of the inclusion of section 8 (3)(b), the restitution of land rights clause, immediately following section 8 (3)(a). It is the interpretation which is the most coherent in principle with the values underpinning this Constitution’s commitment to equality.”

28. Section 8 (3)(a) is neither an exception to subsection (1) nor is it tautologous. I am accordingly in respectful disagreement with Swart J in *Public Servants Association* (above at 295 D - E) where he took the view that section 8 (3)(a) was an exception. Regrettably, the learned Judge despite being referred to *Bakke* did not relate it to the

reason for our Constitution being explicit about affirmative action.

29. In the absence of section 8 (3)(a) the development of equality jurisprudence could have been stunted at the level of debating whether affirmative action is constitutionally tenable or whether it was a form of reverse discrimination. By including it, the Constitutional Assembly clearly wished to put that debate to rest.

30. I turn to consider whether the case law supports the proposition that an affirmative action plan is a prerequisite for making any affirmative action appointments.

31. In *Department Of Correctional Services v Van Vuuren* (1999) 20 ILJ 2297 (LAC) the issue in dispute was whether the appellant had acted *ultra vires* by implementing the terms of an affirmative action policy before it was registered.

32. *Eskom v Hiemstra* (above) came before Landman J as a review of an arbitration award. He found that the arbitrator's findings and conclusions were reasonable and justifiable. The arbitrator set aside an affirmative action appointment because a document tendered at arbitration as an affirmative action policy was not an affirmative action measure as contemplated in Item 2(2)(b) of the LRA. The learned Judge agreed saying that it required detailed amplification and individualized plans for each operating division (at para 31).

33. The facts in *Independent Municipal and Allied Workers Union v Greater Louis Trichardt* (2000) ILJ 1119 (LC) are also distinguishable from this case. Mlambo J set aside the appointment of an of an affirmative action candidate as the parties had concluded a collective agreement in terms of which they undertook *inter alia* to formulate, implement and monitor an affirmative action programme. In the absence of such a programme in those circumstances the Court found the appointment on affirmative action grounds to be illegitimate. (at para 22 – 25)

34. The learned Judge also went further to consider whether the appointment could be justified on other grounds. He found the respondent's reliance on Item 2(2)(b) of Schedule 7 to be "lamentable" as the explanation did not disclose what other criteria were

considered when making the appointment. More specifically, whether merit, qualifications or potential to develop played a role. (at para 30 –32).

35. In *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) Penzhorn AJ found that by appointing a black candidate rather than a white female who had been recommended for the position the Technikon had ignored the requirements of its own affirmative action policy document by disregarding the respective merits of the candidates. Furthermore, it paid the black candidate a higher salary than his head of department.

36. In *Coetzer* (above) the respondent relied on an employment equity plan to justify racial discrimination which was conceded during the hearing. Landman J found as a fact that there was no such plan for the explosives unit where the applications were made. (at para 39)

37. Furthermore, the learned Judge took the view that a State employer must also show that the affirmative action measures are in harmony with other Constitutional provisions. He accepted section 205 as a further constitutional imperative that had to be considered in that case when making an affirmative action appointment.

38. The context in which the plans or policies were in issue in the above decisions of the Labour Court are distinguishable from this case. Nothing from the afore-going cases suggest that an affirmative action plan is a prerequisite for making an affirmative action appointment. It is not a prerequisite for giving effect to section 8 (1). The applicant's proposition is therefore not supported by the weight of judicial opinion. On the contrary the learned Justices of the Labour Court and Labour Appeal Court looked beyond the policies, plans or measures to consider other bases on which the appointments might be justified.

39. However, the submission seems to find some foundation in *Public Servants Association.* The respondents argued in that case that the case of process of promoting a representative public administration is permitted and required by sections 212 (2)(b) and 212 (4) which requires suitability to be taken into account even if it offended section 8 (2).

40. The learned Judge responded as follows:

"The argument must consequently be, as I see it, that employment of s 212 of the Constitution would not amount to unfair discrimination for purposes of s 8(2) of the Constitution. I do not think that these contentions are justified unless the interpretation of the respondents regarding 'suitability' in s 212(4) of the constitution and 11(1)(b) of the Public Service Act is upheld (which I have not done). Otherwise it would mean that the provisions of s 212, standing alone, are a warrant for discrimination as seen in s 8(2) and consequently does not amount to unfair discrimination. I do not think s 212 can be read in that light. Even taking into account measures apart from merit, as envisaged in s 212(5), in order to for instance promote a representative public service, this is not an automatic licence to discriminate against others."

41. He then proceeded to consider and reject certain measures relied on by the respondent as constituting its affirmative action programme. Unlike Swart J, as will emerge below, I agree with the respondents in that case as regards the interpretation of "suitability". It follows on his analysis that reliance on section 212 would not amount to discrimination if the respondents' interpretation of the word "suitability" is adopted.

42. The word "measure" includes within its meaning "act, bill, enactment, law, resolution, statute" (The Collins Dictionary and Thesaurus, Published by Collins, 1987.) It follows that another provision or part of the Interim Constitution or a statute which is not in conflict with section 8 of the Interim Constitution could contain a measure. An affirmative action or employment equity plan is a measure. It is but one of several measures that may achieve the objectives of section 8 (1).

43. I do not suggest that affirmative action measures are redundant. On the contrary, comparative jurisprudence illustrates that even in the absence of a constitutionally entrenched affirmative action provision, many jurisdictions provide specifically for it, either in special legislation (Australia and Canada), administrative enactments (India), executive orders (USA) or by voluntarily adopting an affirmative action programme or plan that complies with minimum formalities, such as being in writing and dated. (USA, Canada) (Faundez (above) at chapter 3 and 4)

44. The obvious value of having measures is that firstly a measure that complies with the

formalities of being in writing and dated prevents arbitrary decision making. If it is in writing it is a safeguard against an employer relying on affirmative action to support an arbitrary decision.

45. Secondly, public debate and consultation promote acceptance of the measures.

46. Thirdly, public debate and scrutiny by Parliament, equality and human rights commissions such as in the United States of America and Canada and the Department of Labour and the courts in South Africa generate guidelines for interpreting and improving the measures and ensuring that they are constantly capable of achieving their aims. (Mureinik in 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31)

47. Fourthly, a written and dated plan allows for periodic review and assessment by these institutions, by those who implement them and by those affected by them. (Faundez (above) at 29).

48. The test for whether a decision to appoint or not to appoint a person is whether there is a rational connection between the reasons and the decision to appoint or not to appoint a person. If the appointment / non-appointment is in terms of a documented measure, it could facilitate proof that there is a rational connection.

49. An appointment based on an affirmative action plan does not bar judicial scrutiny. The plan must be designed to achieve the adequate protection and advancement of those disadvantaged by unfair discrimination to enable them to enjoy fully and equally all rights and freedoms. [Murenik, *Public Servants Association*, *Coetzee* and *Stoman* (above)]

50. In the absence of an affirmative action plan in this case I turn to consider the constitutional provisions relied on by the respondent to determine whether they justify the appointment. Section 212 of the Constitution reads as follows:

"(1)There shall be a public service for the Republic, structured in terms of a law to provide effective public administration.

(2)Such public service shall -

(a) be non-partisan, career-orientated and function according to fair and equitable principles;

(b) promote an efficient public administration broadly representative of the South African community;

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3) Employment in the public service shall be accessible to all South African citizens who comply with the requirements determined or prescribed by or under any law for employment in such service.

4) In the making of any appointment or the filling of any post in the public service, the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer concerned, and such conditions as may be determined or prescribed by or under any law, shall be taken into account.

5) Subsection (4) shall not preclude measures to promote the objectives set out in subsection (2)."

51. Subsections 212(2)(a) and (b) are objectives or ends in themselves. Their achievement is not dependent on there being in existence measures contemplated in subsection 5 to promote their achievement. If it transpires that any decision of the respondent is likely to undermine the objectives of section 212(2) then such decision cannot be implemented.

52. It is common cause that the making of appointments and the filling of the vacant posts is governed by s 11 of the PSA, which provides:

"Appointments and filling of posts

(1)In the making of any appointment or the filling of any post in the public service –

(a) no person who qualifies for the appointment, transfer or promotion concerned shall be favoured or prejudiced;

(b) only the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer in question, and such conditions as may be determined or prescribed or as may be directed or recommended by the Commission for the making of the appointment or the filling of the post, shall be taken into account."

53. Chapter BVI Part 1 of the Public Service Staff Code elaborates on section 11 thus:

"(iv) Efficiency, refers to the degree to which a candidate's total abilities, attributes, knowledge, skill and potential will ensure optimal performance of the duties of a relevant post.

v) Suitability, which relates to the total profile of a candidate, weighed against –

- the relevant post and

personnel requirements;

- the total quality of the wo

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for purpose of comparison of candidates in order to determine the most suitable candidate."

54. The plain meaning of efficiency and suitability is that the candidate must be capable of being effective and appropriate for the job. Nothing from section 11 or the Code suggests that affirmative action criteria may not be included within the meaning of efficiency and suitability.

55. *Public Servants Association* (above) captures the controversy concerning the interpretation of these words. In concluding that section 11 did not permit race or gender to be taken into account, the learned Judge reasoned as follows (at 291 D – 292 D)

55.1 Section 11 is a verbatim re-enactment of section 10 of the Public Service Act of 1984. The legislature must have been aware that the word "suitability" in the section had acquired a specific meaning. Section 11 (1)(b) is virtually a re-enactment of section 212 (4) of the Interim Constitution. If the legislature in framing the Interim Constitution had intended a meaning different from section 10, it would have said so.

55.2 The respondent's interpretation was new. Up until then all the respondents, departments (including the Department of Justice) and all employee organisations had interpreted "suitability" to exclude race and gender. This was apparent from the way in which suitability was applied in the staff codes. There it was seen exclusively from the point of view of the merits required to meet the job requirements, nothing else - and certainly not race or gender. The interpretation of the parties of the concept of suitability was "highly indicative and relevant".

55.3 If the respondent's interpretation was correct there was no need for section 212 (5) of the Interim Constitution or section 3 (5)(a)(vii) of the PSA to override section 212 (4) of the Constitution and section 11 (1)(b) of the PSA to promote *inter alia* representivity.

56. In my view there is a significant difference between the meaning attributed to section 10 of the Public Service Act of 1984 and section 212 (4) of the Interim Constitution. The 1984 Act predated democracy and the values enshrined in the Interim Constitution. The Interim Constitution was promulgated by the Constitutional Assembly. It is therefore not ordinary legislation. The method of interpreting the Interim Constitution is prescribed in section 35.

57. Section 11 therefore has its roots not in section 10 but in section 212 (4) of the Interim Constitution. National legislation must be interpreted consistently with the Constitution. Section 11 must be interpreted consistently with section 212 (4). As subordinate legislation the Code must also be interpreted consistently with the Interim Constitution.

58. The learned judge omitted to have regard to the injunctions in section 35 of the Interim Constitution (discussed above). He also omitted to consider section 229 of the Constitution which directs that all laws are "subject to this Constitution". Nor did he have regard to the guidelines for interpreting the Bill of Rights in *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

59. Merit is a requirement distinct from suitability.

60. Whatever the interpretation of the parties in that case had been, if it was inconsistent with a constitutional interpretation then it cannot prevail. Moreover, a mistaken belief in the correctness of an interpretation can hardly be relevant to the proper interpretation of

section 212 (4) of the Interim Constitution and 11 (1)(b) of the PSA.

61. Section 212 (5) of the Interim Constitution is necessary for a similar reason that section 8 (3)(a) is needed, namely to clarify section 212 (4). Otherwise, a positivistic interpretation might prevail.

62. Section 3(5)(a)(vii) of the PSA which provides as follows is necessary to operationalise section 212 (5):

"The Commission may in accordance with s 212(5) of the Constitution and notwithstanding the provisions of s 11, give directions regarding measures to promote the objectives set out in s 212(2) of the Constitution."

63. It identifies the Commission as the body responsible for giving directions. It also contemplates measures to achieve the broader objectives of section 212 (2), notwithstanding the criteria in section 11, which are limited to appointments and filling of positions. There is no qualification of the measures in section 3 (5)(a)(vii). They may include, and need not be limited to, measures that take into account race and gender.

64. I am in respectful agreement with Van der Westhuizen J in *Stoman* when he says that the requirement of representivity is often linked to the ideal of efficiency. I join him in rejecting the opinion of Swart J insofar as the latter views efficiency as completely separate and antagonistic to the requirement of representivity. I too disagree with the proposition that affirmative action can apply only if candidates all have broadly the same qualifications and merits.

65. As regards the requirement of experience I defer to the following observations of Mlambo J in *IMATU* above (at para 31):

"…..if the playing field is leveled, i.e. where all groups are considered, candidates from groups previously disadvantaged by unfair discrimination will always come second especially if one considers experience. Candidates previously advantaged by unfair discrimination invariably possess the necessary experience which candidates from groups previously disadvantaged by unfair discrimination would not normally possess. In view of this situation it would be prudent therefore in affirmative action appointments to

consider the qualification and potential to develop as crucial and that successful candidates from previously disadvantaged groups are the best from those groups.

66. If experience is a compelling consideration transformation of the public service could be held to ransom. That is not to say that experience is not a relevant criterion. How important a criterion it is depends on the nature of the job, the risks attendant on it and whether the candidate has the potential for acquiring the experience in a reasonable time.

67. On the facts of this case, the applicant received an unfair advantage over Mr Mkongwa. Firstly, through no endeavour or effort on his part he met the requirements of an RVQ 13. Here, I refer to the agreement reached by the Chamber of the Public Service Bargaining Council at Central Level on the 8 February 1995 which exempted personnel in the (administrative) officer cadre in the Occupational family Administrative and Human Sciences Personnel from having a qualification with an RVQ 13 for promotion, if they were in service in the officer cadre on the 10 June 1994. The applicant qualified for the exemption simply by being in service on that date.

68. The agreement was triggered by the observation by a trade union party to the Bargaining Council that the requirement of a RVQ 13 defeated the aim of making the public service more representative as disadvantaged groups were denied tertiary education. The agreement does not reflect this motivation. Accordingly, the applicant qualified for the exemption. However, in order to give effect to the spirit and purpose of the agreement, which is minuted and not in dispute, regard must be had to its motivation.

69. Secondly, racial discrimination entrenched over decades, secured for the applicant the managerial experience that he acquired in his previous positions since his employment by the respondent on the 1st October 1970.

70. To have appointed him to the position would have had the result that these inequities would have been perpetuated. It would also not have achieved the objectives of section 212 of the Interim Constitution.

71. Mr Mkongwa had demonstrated his potential. He qualified himself academically whilst

employed by the respondent. He had some experience in administration. Professor Ndlovu, who was one of the Commissioners who directed that Mr Mkongwa be appointed, also professes in Public Administration. He testified that Mr Mkongwa's academic qualification equipped him to overcome any practical experience that he had been deprived of. For these reasons he was found to be suitable within the meaning of section 11 of the PSA and section 212 of the Constitution.

72. I agree with the respondent's further submission that it cannot be assumed that because Mr Mkongwa lacked actual experience comparable to that of the applicant that his appointment would necessarily lead to inefficiency in the public service.

73. The Court is confined to assess whether the decision of the Commission in directing the appointment of Mr Mkongwa and recommending the non-appointment of the applicant was rational. From the information before the Commission it would appear that Mr Mkongwa had the highest academic qualifications amongst the Black candidates. He did not have as much experience as the applicant. Nor had he operated at a similarly senior level as the applicant.

74. It is not clear why the panel concluded that he did not reveal good leadership and organizational qualities. Let me accept this to be the case. The Commission obviously did not consider it a sufficiently compelling reason to subvert the constitutional imperatives. Importantly, the reports submitted by the panel to the Commission do not manifest any regard being had to the constitutional imperatives of section 212 by the panel.

75. The applicant was not the most suitable person for the job as effect would not have been given to the constitutional imperatives of promoting equality and transforming the public service. Consequently, his non-appointment is not discriminatory.

76. I accordingly find that there is a rational connection between the reasons and the decision to appoint Mr Mkongwa and not to appoint the applicant. As race was a factor that affirmed Mr Mkongwa, it was an affirmative action appointment.

77. In the circumstances the applicant's claim falls to be dismissed.

78. With regard to costs the matter is important to the development of equality law in the public service. Therefore no order as to costs should be made.

79. I take this opportunity to record my concern that neither party referred me to any international or foreign law. Section 35 (1) of the Interim Constitution provides that a court:

"shall where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law."

Order:

The claim is dismissed with no order as to costs.

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PILLAY D, J

26 APRIL 2004

For the Applicant: Mr Madondo

Instructed By: Shepstone & Wylie Tomlinsons Incorporating Msimang, Rutsch & company

For the Respondent: Mr Seggie

Instructed By: Llewellyn Cain Attorneys