IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: CA 1/05

In the matter between

Lilian Dudley **Appellant**

And

The City of Cape Town **1st Respondent**

Ivan Toms **2nd Respondent**

JUDGMENT

ZONDO JP

Introduction

[1] This is an appeal from a judgment of the Labour Court in which the Labour Court, per Tip AJ, upheld four exceptions, referred to as being based on Grounds B, C, D and E taken by the first respondent in that Court to the appellant's statement of claim in proceedings instituted by the appellant against the first and second respondents. Leave to appeal to this Court against the judgement of the Labour Court was granted by that Court. This appeal relates to

the exceptions based on Grounds B and C about which more will be said later in this judgement.

[2] One question for determination is whether an applicant for employment who is a member of "the designated group" as defined in section 1 of the Employment Equity Act,1998 (Act 55 of 1998) ("**the EEA**"), who complains that a designated employer as defined in the EEA to whom such applicant for employment had made an application for employment has failed to comply with one or other of its obligations relating to affirmative action under Chapter III of the EEA may institute court proceedings to enforce such obligations prior to the exhaustion of the monitoring and enforcement procedure provided for in Chapter V of the EEA. This question relates to the exception based on Ground C. The obligations referred to in this regard are a designated employer's obligations to prepare an employment equity plan and/or to adhere to employment equity principles and/or to comply with its other specific obligations in terms of Chapter III of the EEA. Another question to be decided is whether or not a designated employer's failure to accord such applicant for employment preference in the filling of a vacant position constitutes unfair discrimination. This question relates to the exception based on Ground B. Before these questions can be considered, it is necessary to refer to the facts of the case.

The facts

[3] The facts of this case were set out in great detail in paragraphs 7 to 13.3 the judgment of the Labour Court. I do not propose to repeat that exercise but propose to simply quote that part of the judgment

of the Labour Court in which that Court set out the facts of this case.The reference to the applicant therein is a reference to the appellant in this appeal. It reads as follows:

> **"[7] In February 1998 the applicant was appointed to the position of Specialist: Health Service Support on the staff of the Cape Metropolitan Council ("CMC"). In December 1999 she was seconded to the position Acting Head: Municipal Health Service within the CMC. Her responsibilities in that position embraced a number of policy, planning and research matters.**
>
> **[8] During December 2000 the CMC and a number of municipal substructures merged to become the City. As already indicated, the applicant was appointed to the post of Interim Manager: Health in February 2001. This was one of sixteen posts of Interim Manager: Health in February 2001. This was one of sixteen posts which together formed the City's interim executive management team. There was only one woman on this team, being the applicant; she was also one of its four black members. She was responsible inter alia for the overall management and strategic direction of the City's medical services as well as budget and business planning processes.**

[9] **When the position of Director: City Health was advertised in November 2001, its principal function was described as being "to ensure the efficient management of Health Services through an effective District Management system. According to the statement of case, this position was in all material respects the same as the position of Interim Manager: Health which the applicant occupied at the time.**

[10] **After her unsuccessful application for the position of Director: City Health, the applicant wrote to the city manager on 24 December 2001 recording her view that she was not only properly qualified but had demonstrated her competence whilst in the positions previously held by her. She requested a number of details relating to the appointment process:**

1. What were the competencies for the position?

1.1 Which of the competencies did I lack?

2. What were the required qualifications for the position?

2.1 **In which respects do my qualifications not meet these requirements?**

3. What were my scores for the psychometric assessment?

3.1 Were my scores higher or lower than the successful candidate?

4. Was due consideration given to the provisions of the Employment Equity Act in terms of this appointment?

4.1 If yes, why were these provisions not followed?

5. Were the guidelines provided by the Human Resources Department for this appointment followed? If not, kindly provide the reasons for this.

In addition, please provide me with a copy of the recruitment policy which guided this appointment."

[11] **In his reply dated 8 January 2002, the city manager set out the City's position in the following terms:**

The competencies/criteria identified as well as assessed for this position are as outlined in the application pack.

It is evident from the panel interview that you did not 'lack' in any of the areas assessed: the scores obtained are all on a competent level.

The City has targeted safety and health as critical deliverables; consequently the requirement for the behavioural competencies in the health portfolio demanded a level above competence. This need was further supported by the complexity of the evolving health service provided by and still to be provided by the City of Cape Town, as well as the

fact that HIV/AIDS and TB is one of the key priorities of this Council.

Drawing on extensive research in the field of competency assessment, it is accepted that, at strategic managerial level, all applicants need professional/technical competence, qualifications and prior experience. However, these are not the prime distinguishing criteria but rather it is the behavioural competence component that serves as the distinguishing factor in selection at this level. Compared to the appointed candidate, your ratings on these factors were consistently lower.

The critical nature of this position demanded a higher level of competence and hence the appointment was guided by the service delivery requirements of the position.

With specific reference to your questions posed:

1. The competencies/criteria identified, as well as assessed for this position are as outlined in the application pack.

1.1 It is evident from the panel interview that you did not 'lack' in any of the areas assessed; the scores obtained are all on a competent level.

2. As stated in the advertisement an 'appropriate tertiary qualification' was asked for.

2.1 Your qualification most certainly met the required standard.

3. In terms of the 'psychometric' assessment, a one-on-one feedback session will be held with yourself. This session will be arranged by Mr Wim Myber gh as per his contract with the City.

3.1 The above mentioned session refers.

4. Due consideration was given to Equity and communicated to the organization and applied to the appointment process. It is really important to stress an organisational approach to transformation rather than looking at a post in isolation. Appointments for the entire Directorate were looked at in respect of reaching the Equity Target and here 4 out of 6 appointments are from previously disadvantaged groups.

5. Processes and procedures used during these appointments were in accordance with the adopted Recruitment and Selection Policy. A copy of the said document is attached as per your request.

[12] The Recruitment and Selection Policy referred to in this letter was adopted by the City with effect from August 2000. It includes a number of provisions relating to affirmative action and employment equity. I recite several of them as set out in the applicant's statement of case:

"**2.4 All aspects of the staffing, structuring, recruitment, selection, interviewing and appointment of employees will be non-discriminatory and will afford applicants equal opportunity to compete for vacant positions, except as provided in this policy with reference to affirmative action and employment equity.**

2.6 The City of Cape Town is an employment equity employer and, as such, preference will be given to suitably qualified candidates who are members of designated groups as defined in section 1 of the Employment Equity Act of 1998 as consisting of black people, women and people with disabilities.

<u>Elimination of unfair discrimination</u>

3.1 The City of Cape Town shall take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice …

<u>Affirmative Action</u>

3.5 As a designated employer the City of Cape Town must, in order to achieve employment equity, implement affirmative action measures for people from designated groups as defined in section 1 of the Employment Equity Act of 1998 'Designated groups' means black people, women and people with disabilities…

3.6 Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workplace of the employer.

3.7 Affirmative action measures include, but are not limited to, the following:

(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

(b) **measures designed to further diversify in the workforce based on equal dignity and respect of all people;**

(c) **making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workplace of the employer;**

(d) **measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce of the employer;…**

<u>General principles governing selection</u>:

Selection criteria shall be objective and related to the inherent requirements of the job and realistic future needs of the organisation.

The central guiding principle for selection shall be competence in relation to the inherent requirements of the job provided that selection shall favour, as determined by the targets, suitably qualified applicants as defined in section 20(3) of the Employment Equity Act.

4.2.7.1.1 **The selection decision**

The selection decision is based on the assessment of the candidates in conjunction with section 20(3) and particularly 20(3)(d) of the Employment Equity Act and in the context of organizational requirements.

Targets, based on the economically active population of the metropolitan area, will be set to guide the preferential order of appointment within the organization.

[13] **Aspects of the City's senior management levels have been described by the applicant in her statement of case in the following way:**

13.1 The city manager and the entire 'first reporting line' of top management were appointed before the position of Director: City Health was advertised. The "first reporting line" consists of ten executive directors, also known as strategic executives. They are all male. The city manager and all but two of these strategic executives are

white. On this basis, the applicant avers that women, black persons and, in particular, black women were not equitably represented in the City's 'first reporting line'.

13.2 The post of Director: City Health falls within the 'second reporting line'. The applicant alleges that this level of management also did not comprise an equitable quotient of women and black persons. She further alleges that 51 positions fall into this management category and that, ultimately, 42 were filled by men and nine were women, of whom four were black. In all, 26 of these positions were filled by white persons.

13.3 The applicant alleges that the City has failed to comply not only with the requirements of the Employment Equity Act 55 of the 1998 ("the EEA") but also with its own policy in that, at the time of the appointment here at issue, it had not yet set targets to serve as guidance for the preferential appointment of previously disadvantaged individuals. She alleges also that the City had not prepared an employment equity plan, as required by section 20 of the EEA".

[4] It is necessary to quote in full paragraphs 34 to 46 of the appellant's statement of claim because the areas of the appellant's statement of claim in respect of which the first respondent took exception fall within those paragraphs. Paragraphs 34-46 read thus:

34. The criteria applied by the City in selecting [the second respondent] and not the Applicant for appointment to the post and the manner in which they were applied:

34.1 resulted in direct discrimination against the Applicant;

<u>alternatively</u>

34.2 reflected a bias in favour of white persons and/or men and against black persons and/or women.

35. But for the fact that the Applicant is a black woman, she would have been selected for appointment to post.

36. The Applicant met all the advertised requirements for the post and was suitably qualified therefore, in terms of s20(3) of the EEA and in terms of the City's policy.

37. The selection requirement alleged by the City of "above competence" in respect of "the behavioural competencies" did not justify the selection of Toms and the non-selection of the Applicant. It was not an advertised or legitimate requirement for the post. To the extent, if any, that it was permissible to have regard to this alleged requirement, the Applicant in any event, had the necessary level of competence.

38. The City's decision to appoint Toms and not to appoint the Applicant breached its obligation:

38.1 in terms of section 5 of the EEA, to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice;

38.2 in terms of section 6 of the EEA not to unfairly discriminate, directly or indirectly, against an

employee in any employment policy or practice on the grounds of race, ethnic origin or colour and/or on the ground of gender or sex.

<u>Affirmative Action</u>

39. The City's decision to appoint [the second respondent] and not the Applicant, breached its obligation to implement affirmative action measures in terms of Chapter III of the Employment Equity Act, in particular its obligations in terms of section 13(1) read with sections 15(1), 15(2)(d), 15(3), 20(1), 20(2), 20(3), 20(4) and 20(5) thereof.

40. The said decision was also in breach of the affirmative action obligation set out in the City's own policy as referred to above, in particular in that it failed to prefer her for appointment, notwithstanding that she was suitably qualified and a black woman.

41. In addition, the aforesaid breaches of the City's affirmative action obligation amounted to discrimination on the basis of race and/or gender in breach of section 6 of the EEA.

<u>Constitutional obligations</u>

42 As an organ of state, the City is obliged in terms of section 7(2) of the Constitution of the Republic of South Africa, Act No 108 of 1996 ("the Constitution") to respect, protect, promote and fulfil the rights in the Bill of Rights.

43 . The City's failure to implement affirmative action obligations and to appoint the applicant.

a. **breached its obligation to respect, protect, promote and fulfil the Applicant's right to equality, including her right to the full and equal enjoyment of all rights and freedoms, as contemplated in section 9(2) of the Constitution;**
b. **constituted unfair discrimination on the ground of gender and/or race in that, particular, the Applicant was a better candidate than Toms;**
c. **infringed the Applicant's constitutional right to fair labour practices (in terms of section 23(1) of the Constitution); and**
d. **infringed her constitutional right to dignity, in terms of section 10 of the Constitution.**

<u>Unfair labour practice</u>

44. **The procedure which resulted in the decision to appoint [the second respondent] and not the Applicant:**
    a. **failed to comply with the City's own policy;**
    b. **was arbitrary, irrational, unprofessional and unfair to the Applicant;**
    c. **was discriminatory against black women and failed to give effect to the City's affirmative action obligations.**

45. The City's failure to appoint the Applicant and its decision to appoint Toms constituted an unfair labour practice in terms of item 2(1)(b) of Schedule 7 of the Labour Relations Act, No 66 of 1995 ("the LRA").

46. In as much as the facts pertaining to this cause of action directly overlap with the facts pertaining to the other causes of action referred to above, the Applicant

contends that it is expedient for this Honourable Court to arbitrate this dispute pursuant to its powers in terms of section 158(2)(b) of the LRA."

[5] It will be seen from the above that the appellant's alleged causes of action were:

(a) unfair discrimination;

(b) affirmative action;

(c) constitutional obligations, and;

(d) unfair labour practice.

[6] In the judgment of the Labour Court it was said that Ground A of the first respondent's exception was not persisted in. For that reason nothing more needs to be said about it. As I have already pointed out, the Labour Court upheld the exception on the bases of Grounds B, C, D and E. In its Heads of Argument in this Court the first respondent pointed out that the appellant only appeals against the decision of the Labour Court relating to Grounds B and C of the exception. The appellant did not take issue with this statement. Accordingly, the appeal will be dealt with on the basis that it concerns only Grounds B and C of the first respondent's exception to the appellant's statement of claim. I propose to quote Grounds B and C of the exception in full. They read as follows:-

"**Ground B**

10. In her Statement of Case the applicant alleges inter alia, the following

10.1 That she was a better candidate than the second respondent (para 43.2);

10.2 But for the fact that the applicant is a black woman, she would have been appointed to the post (para 35);

10.3 The first respondent's selection of the second respondent and not the applicant reflected a bias by the first respondent in favour of white persons and/or men and against black persons and/or women (para 34.2);

10.4 The first respondent's conduct as aforesaid constituted direct discrimination (para 34.1);

10.5 That in the circumstances the second respondent's appointment should be set aside and the applicant appointed to the position (para 47.1 to 47.2.)

11. On the other hand, the applicant also alleges the following:

11.1 First respondent was obliged to implement affirmative action measures in terms of the EEA and because its own internal policies required it to so do (paras 38, 39, 40);

11.2 **Applicant should have been given preference over second respondent because she is black and a woman (para 40);**

11.3 In failing to give her preference first respondent breached its obligation to implement affirmative action (para 40);

11.4 First respondent's failure to apply affirmative action in applicant's favour amounted to discrimination on the basis of

race and/or gender in breach of section 6 of the EEA (para 41).

12. **The first respondent submits that an employer's failure to apply affirmative action by failing to advantage or prefer a member of a designated group who has applied for employment cannot in law constitute unfair discrimination in terms of sections 6. (1) and (2) of the EEA.**

13 The applicant's claim as referred to in paragraphs 11.1 to 11.4 above accordingly discloses no cause of action.

Ground C

14 The applicant inter alia alleges as follows:

14.1 The first respondent, both in respect of the applicant's appointment and generally, failed to prepare a proper employment equity plan and/or to adhere to employment equity principles and/or to comply with its obligations in terms of Chapter III of the EEA. (See inter alia paras 32, 33 and 39).

14.2 In the circumstances the applicant seeks an order directing the respondent to:

14.2.1 take such steps as the court may direct to prevent the same unfair discrimination or a similar practice occurring in future in respect of other employees (para 47.5.1);

14.2.2 prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in the respondent's workforce (para 47.5.2).

15. The first respondent submits that this Court has no jurisdiction to entertain a claim such as that referred to in paragraphs 14.1 and 14.2 above in circumstances where the complainant has failed to exhaust the monitoring, enforcement and compliance procedures set out in Chapter V of the EEA.

16. In either event the applicant pleads no facts in support of her alleged entitlement to seek relief on behalf of persons other than herself. The first respondent denies that she has the *locus standi* to so do."

[7] Part of the appellant's case was that the first respondent was obliged in terms of the EEA or in terms of the first respondent's recruitment and selection policy to prefer her to the second respondent when it was considering who had to be appointed to the position and that its failure to prefer her constituted unfair discrimination in breach of the EEA and in breach of its own recruitment and employment policy.

[8] It will be seen from the terms of the first respondent's exception under Ground B that its point was that the appellant's claim as set out in paras 11.1 to 11.4 of her statement of claim disclosed no cause of action because in law an employer's failure to apply affirmative action which happens when the employer fails to advantage or prefer a member of a designated group who has applied for employment cannot constitute unfair discrimination in terms of section 6(1) and (2) of the EEA.

[9] With regard to Ground C, the appellant's case was that the first respondent was obliged to carry out its obligations set out in Chapter III of the EEA in respect of the preparation of a proper employment equity plan and/or to adhere to employment equity principles and/or to comply with its obligations in terms of chapter III of the EEA. The appellant sought an order compelling the appellant to take the necessary steps to prevent "**the same unfair discrimination or a similar practice and to prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in the first respondent's workplace**".It will also have been seen that the first respondent's exception to this was that the appellant had no right to institute court proceedings to enforce any of the affirmative obligations of a designated employer under chapter III of the EEA before the exhaustion of the monitoring and enforcement procedure provided for in Chapter V of the EEA.

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[10] With regard to Ground C, it is important to note the terms of the exception taken by the first respondent. The terms of the exception are that the appellant has no right in law to institute Court proceedings for relief based on a complaint that a designated employer has acted in breach of its obligations under chapter III of the EEA until and unless the monitoring and enforcement procedure provided for in Chapter V of the EEA has been exhausted. The appellant contended that she had such a right. The Labour Court upheld the first respondent's exception in this regard.

Decision of the Labour Court

[11] The Labour Court dealt with Grounds B and C together from par 40 to par 80 of its judgment. It gave the issues much consideration. I do not consider it necessary to set out the Labour Court's reasons for its conclusion in this regard. Those reasons can be read in the Labour Court's judgment which is reported as **Dudley v City of Cape Town (2004) 25 ILJ 305 (LC).**The Labour Court, as already stated, upheld all the first respondent's exceptions including those based on Grounds B and C. Subsequent to the judgment of the Labour Court, the Appellant made an application to the Constitutional Court for leave to appeal to that Court against the judgment of the Labour Court. The Constitutional Court dismissed that application and insisted that the Appellant first pursue an appeal to this Court before she could approach the Constitutional Court. The judgment of the Constitutional Court in this regard is reported as **Dudley v City of Cape Town and Another (2004) 7 BLLR 623 (CC)**.

The appeal

[12] A reading of the first respondent's terms of its exception as based on Grounds B and C as set out earlier in this judgment will have revealed that they both relate to those parts of the appellant's claim which relates in one way or another to chapter III of the EEA. The one based on Ground B is that an employer's failure to apply affirmative action in failing to prefer or advantage a member of a designated group who has applied for employment cannot in law constitute an unfair discrimination in terms of sec 6(1) and (2) of the EEA. The other one which is based on Ground C is that the appellant has no right to institute court proceedings based on the

employer's alleged breach of its obligations under chapter III of the EEA without first exhausting the monitoring and enforcement procedures provided for in chapter V of the EEA. It is convenient to start with the exception based on Ground C and thereafter deal with the one based on Ground B.

The Exception based on Ground C

[13] A consideration of the exception based on Ground C requires a consideration of various provisions of the EEA.

[14] The question that I consider now is the first respondent's exception that it is not competent to institute court proceedings to enforce a designated employer's obligations relating to affirmative action under Chapter III of the EEA until the monitoring and enforcement proceedings provided for in Chapter V of the EEA have been exhausted. In terms of sec 1 of the EEA the term "**designated group**" means black people, women and people with disabilities. In sec 1 there is also a definition of the term "**designated employer**." For present purposes it is not really necessary to quote that definition. It suffices to say that the first respondent falls within that definition The purpose of the EEA is given in sec 2 as being: "**to achieve equity in the workplace …"** The methods provided for in sec 2 to achieve that purpose are given as being:

> **"(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and**
>
> **(b) implementing affirmative action measures to redress the disadvantages in employment experienced by**

designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace."

[15] Chapter II of the EEA deals with unfair discrimination in general and bears the heading: "**Prohibition of unfair discrimination**." Chapter III deals with, and bears the heading,: "**affirmative action**". Chapter IV deals with the Commission for Employment Equity. Chapter V deals with monitoring, enforcement and legal proceedings.

[16] Sec 5 – which falls under chapter II – bears the heading: "**Elimination of unfair discrimination."** It reads:

"Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice."

Sec 6 of the EEA bears the heading:

"Prohibition of unfair discrimination." Sec 6(1), and (2) read as follows:

"6. Prohibition of unfair discrimination

(1) **No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.**

(2) It is not unfair discrimination to –

a) take affirmative action measures consistent with the purpose of this Act; or

b) **distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."**

[17] Sec 9 of the EEA provides that for purposes of sections 6, 7 and 8 "**employee**" includes an applicant for employment. I have just dealt with sec 6(1) and (2) of the EEA. There is also sec 6(3) which deals with the harassment of an employee. Sec 7 deals with medical testing. Sec 8 deals with psychometric testing.

[18] Sec 10 of the EEA deals with disputes that arise under Chapter II. The heading is: "**Disputes concerning this Chapter**." Sec 10(1) excludes from the word "**dispute**" any dispute "**about an unfair dismissal which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.**" Sec 10(2) provides thus:

> **"(2) Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination."**

A dispute that is referred to the CCMA then becomes the subject of conciliation by the CCMA in terms of sec 10(5). In terms of sec 10(6) if the dispute remains unresolved after conciliation, it may be referred to the Labour Court for adjudication. However, if, for whatever reason, the parties wish to have the dispute resolved through arbitration, they may refer the dispute to arbitration by mutual consent.

[19] Sec 11 deals with the burden of proof. It reads:

> **"Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair."**

It is clear that unfair discrimination disputes falling under chapter II of the EEA can be referred to the Labour Court for adjudication and this can be done by an individual. The phrase "**any party to a dispute concerning this Chapter**" in sec 10(2) obviously includes an individual as well as a group.

Affirmative action – Chapter III

[20] Chapter III applies to designated employers only unless the contrary is provided for in a particular case under the chapter (sec 12). Sec 13 deals with duties of designated employers. It bears a heading to that effect. Sec 13 provides as follows:

> **"(1) Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.**
>
> **(2) A designated employer must –**
>
> **(a) consult with its employees as required by section16;**
>
> **(b) conduct an analysis as required by section 19;**
>
> **(c) prepare an employment equity plan as required by section 20; and**

(d) Report to the Director–General on progress made in implementing its employment equity plan, as required by section 21."

Sec 14 allows an employer who is not a designated employer and, therefore, does not bear the obligations placed by Chapter III upon designated employers to, of its own volition, arrange with the Director-General to assume the same responsibilities as are imposed upon designated employers under Chapter III.

[21] Sec 15 deals with affirmative action measures. Sec 15(1) reads as follows:

"(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer."

Sec 15(2) gives a list of affirmative action measures. It seems that the list might not be exhaustive because the verb "**include**" is used. Sec 15(2) reads as follows:

"(2) Affirmative action measures implemented by a designated employer must include –

(a) **measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;**

(b) **measures designed to further diversify in the workplace based on equal dignity and respect of all people;**

(c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workplace of a designated employer;

(d) **subject to subsection (3), measures to –**

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

(ii) **retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.**

(3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.

(4) 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."

[22] Sec 16 deals with the consultation of employees by a designated employer. Sec 16(1)-(3) reads as follows:

"(1) A designated employer must take reasonable steps to consult and attempt to reach agreement on the matters referred to in section 17 –

(a) with a representative trade union representing members at the workplace and its employees or representatives nominated by them; or

(b) if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.

(2) The employees or their nominated representatives with whom an employer consults in terms of subsection (1)(a) and (b), taken as a whole, must reflect the interests of –

(a) **employees from across all occupational categories and levels of the employer's workforce;**

(b) **employees from designated groups; and**

(c) employees who are not from designated groups.

(3) This section does not affect the obligation of any designated employer in terms of section 86 of the Labour Relations Act to consult and reach consensus with a workplace forum on any of the matters referred to in section 17 of this Act."

[23] Sec 17 deals with matters about which a designated employer must consult employees or their representative trade union. It reads:

"A designated employer must consult the parties referred to in section 16 concerning –

(a) the conduct of the analysis referred to in section 19;

(b) the preparation and implementation of the employment equity plan referred to in section 20; and

(c) a report referred to in section 21."

[24] Sec 18 deals with the disclosure of information by a designated employer. It obliges a designated employer, who is engaged in consultation in terms of Chapter III of the EEA, to disclose to the consulting parties "**all relevant information that will enable those parties to consult effectively**". Sec 18(2) provides that, unless the EEA provides otherwise, the provisions of sec 16 of the Labour Relations Act, 1995 (Act 66 of 1995) applies, with the changes required by the context, to the disclosure of information. This would include the dispute resolution procedure contained in sec 16.

[25] Sec 19 deals with the analysis. Sec 19(1) and (2) read:

"(1) A designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment in order to identify employment barriers which adversely affect people from designated groups.

(2) An analysis conducted in terms of subsection (1) must include a profile, as prescribed, of the designated employer's workforce within each occupational category and level in order to determine the degree of underrepresentation of people from designated groups in various

occupational categories and levels in that employer's workforce."

[26] Sec 20 deals with the employment equity plan. Sec 20(1) reads:

"A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce."

What sec 20(1) does is to place an obligation on a designated employer to prepare and implement an employment equity plan. Sec 20(2) sets out what should be contained in an employment equity plan. The contents of an employment equity plan must include the following:

"(a) the objectives to be achieved for each year of the plan.

(b) the affirmative action measures to be implemented as required by section 15(2);

(c) **where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;**

(d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals.

(e) …..

(f) The procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;

(g) **The internal procedures to resolve any dispute about the interpretation or implementation of the plan;**

(h) The persons in the workforce, including senior managers, responsible for monitoring and implementing the plan;

(i) ….”

[27] Sec 20(3) sets out when it may be said that a person is suitably qualified. It reads:

“(3) For the purposes of this Act a person may be suitably qualified for a job as a result of any one of or any combination of that person’s –

(a) formal qualifications

(b) prior learning

(c) relevant experience

(d) capacity to acquire, within a reasonable time, the ability to do the job.”

[28] Sec 20(4) reads:

“(4) When determining whether a person is suitably qualified for a job, an employer must –

(a) review all the factors listed in subsection(3);

and

(b) **determine whether that person has the ability to do the job in terms of any one of or any combination of those factors."**

Sec 20(5) reads:

"(5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience."

[29] Sec 21 deals with the submission of an employment equity plan report by a designated employer. Sec 22 deals with the publication of the employment equity plan report. Sec 24 reads:

"24. Designated employer must assign manager –

(1) Every designated employer must –

(a) **assign one or more senior managers to take responsibility for monitoring and implementing an employment equity plan;**

(b) **provide the managers with the authority and means to perform their functions; and**

(c) **take reasonable steps to ensure that the managers perform their functions."**

[30] Section 25 bears the heading: **"Duty to inform".**

Sec 25 reads:

"(1) An employer must display at the workplace where it can be read by employees a notice in the prescribed form, informing them about the provisions of this Act.

(2) A designated employer must, in each of its workplaces, place in prominent places that are accessible to all employees –

(a) the most recent report submitted by that employer to the Director-General;

(b) **any compliance order, arbitration award or order of the Labour Court concerning the provisions of this Act in relation to that employer; and**

(c) any other document concerning this Act as may be prescribed.

(3) An employer who has an employment equity plan must make a copy of the plan available to its employees for copying and consultation."

[31] In terms of sec 27, when a designated employer reports in terms of sec 21(1) and (2), it must submit a statement, as prescribed, to the Employment Conditions Commission established by sec 59 of the Basic Conditions of Employment Act, 1998 on the remuneration and benefits received in each occupational category and level of that employer's workforce. Sec 27(2) provides that, where disproportionate income differentials are reflected in the statement referred to in sec 27(1), a designated employer must take measures to progressively reduce such differentials subject to such guidance as may be given by the Minister of Labour in accordance with ss(4).

[32] Chapter V deals with monitoring, enforcement and legal proceedings and bears a heading to that effect. Sec 34 deals with monitoring by employees and trade union representatives. It reads:

> **"Any employee or trade union representative may bring an alleged contravention of this Act to the attention of –**
>
> **(a) another employee;**
>
> **(b) an employer;**
>
> **(c) a trade union;**
>
> **(d) a workplace forum;**
>
> **(e) a labour inspector;**
>
> **(f) the Director-General; or**
>
> **(g) the commission."**

[33] Sec 35 gives a labour inspector authority to enter premises, question people and inspect as provided for in sections 65 and 66 of the Basic Conditions of Employment Act, 1998. Sec 36 deals with the role of a labour inspector when he has reasonable grounds to believe that a designated employer has failed to take certain steps specified in paragraphs (a) – (j) of sec 36 which must be read, for that purpose, with sections 16,19, 20, 21, 22, 23, 24, 25 and 26 of the EEA. Those steps are to:

> "**(a) consult with employees as required by section 16;**
>
> **(b) conduct an analysis as required by section 19;**
>
> **(c) prepare an employment equity plan as required by section 20;**
>
> **(d) implement its employment equity plan;**
>
> **(e) submit an annual report as required by section 21;**
>
> **(f) publish its report as required by section 22;**

(g) prepare a successive employment equity plan as required by section 23;

(h) assign responsibility to one or more senior managers as required by section 24;

(i) inform its employees as required by section 25; or

(j) keep records as required by section 26."

[34] Section 36 is to the effect that, when a labour inspector has reasonable grounds to believe that a designated employer has failed to do any of the things set out in (a) – (j) above, he "**must**" request and obtain a written undertaking from the designated employer to take those steps within a specified period. If a designated employer refuses to give the written undertaking requested, in terms of sec 37 the labour inspector may issue a compliance order to the designated employer. If the designated employer fails to comply with the labour inspector's compliance order and does not object to the compliance order in terms of sec 39 of the EEA, in terms of sec 37(6) "**the Director-General <u>may</u> apply to the Labour Court to make the compliance order an order of the Labour Court**". If a designated employer objects to the compliance order in terms of sec 39 of the EEA, it must make representations to the Director-General who has power to cancel, vary, or confirm the compliance order. The Director-General may require the designated employer to comply with the confirmed part of the compliance order where part of it is confirmed. A designated employer who is aggrieved by a compliance order of the Director-General may appeal to the Labour Court against such a compliance order.

[35] Sec 42 deals with the assessment by the Director-General of compliance by a designated employer with provisions of the EEA. It sets out a number of matters which it says "**the Director-General or any person or body applying this Act must … take into account …".** Sec 43 empowers the Director-General to conduct a review to determine whether an employer is complying with the EEA. Sec 44 deals with the outcome of the Director-General's review. Sec 44 reads:

> **"Subsequent to a review in terms of section 43, the Director-General may –**
>
> (a) **approve a designated employer's employment equity plan; or**
>
> **(b) make a recommendation to an employer, in writing, stating –**
>
> **(i) steps which the employer must take in connection with its employment equity plan or the implementation of that plan, or in relation to its compliance with any other provision of this Act; and**
>
> **(ii) the period within which those steps must be taken; and**
>
> **(iii) any other prescribed information."**

[36] Sec 45 provides that, if an employer fails to comply with a request made by the Director-General in terms of section 43(2) or a recommendation made by the Director-General in terms of section 44(b), the Director-General may refer the employer's non-compliance to the Labour Court.

[37] Sec 46 deals with a possible "**conflict of proceedings**." Sec 46(1) and (2) read:

> **"(1) If a dispute has been referred to the CCMA by a party in terms of chapter II and the issue to which the dispute relates also forms the subject of a referral to the Labour Court by the Director-General in terms of section 45, the CCMA proceedings must be stayed until the Labour Court makes a decision on the referral by the Director-General;**
>
> (2) **If a dispute has been referred to the CCMA by a party in terms of Chapter II against an employer being reviewed by the Director-General in terms of sec 43 there may not be conciliation or adjudication in respect of the dispute until the review has been completed and the employer has been informed of the outcome."**

[38] Sec 47 makes provision to the effect that different proceedings relating to one employer's non-compliance with the EEA may be consolidated. Sec 48 permits a commissioner in terms of the EEA to make any appropriate arbitration award that gives effect to a provision of the EEA. Sec 50 bears the heading: "**Power of Labour Court.**" Sec 50(1)(f) provides that the Labour Court "**may make any appropriate order including an order:**

> **(f) ordering compliance with any provision of this Act; including a request made by the Director-General in terms of section 43(2) or a recommendation made by the Director-General in terms in section 44(b);**"

[39] Sec 50(h) provides that the Labour Court may make any appropriate order including an order "**reviewin**g" the performance or purported performance of any function provided for in the EEA or any act or omission of any person or body in terms of the EEA on any grounds that are permissible in law.

Sec 50(2) provides:

> "(2) **If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances including –**
>
> (a) **payment of compensation by the employer to that employee;**
>
> (b) **payment of damages by the employer to that employee;**
>
> (c) **an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;**
>
> (d) **An order directing an employer other than a designated employer to comply with Chapter III as if it were a designated employer.**
>
> **(e) …"**

[40] Sec 52 deals with a dispute resolution procedure. Sec 52(1) reads:

> **"(1) If there is a dispute about the interpretation or application of this Part, any party to the dispute may refer it in writing to the CCMA."**

At the CCMA the dispute is conciliated. If the dispute remains unresolved after conciliation, it may be referred to the Labour Court for adjudication. Parties may, by mutual consent, refer to arbitration a dispute that otherwise should be referred to adjudication.

[41] Sec 53 deals with State contracts and the role of compliance with chapters II and III of the EEA in the award of State contracts. Sec 60 deals with the liability of employers for the acts of their employees in cases where the employees commit acts which would have constituted a breach of provisions of the EEA if they had been committed by a designated employer.

[42] I have stated above that chapter III of the Act deals with affirmative action. I have above also alluded to the fact that chapter II of the EEA – which deals with the prohibition of unfair discrimination - contains a dispute resolution procedure. That dispute resolution procedure is available to "**any party to a dispute concerning**" that chapter. (sec 10(2)). That dispute resolution procedure culminates in the adjudication of a dispute by the Labour Court if conciliation fails to achieve a resolution. What is very striking about Chapter III is the fact that no dispute resolution procedure is provided for in that chapter. It is difficult to think that the drafters of the Act remembered to include a dispute resolution procedure in Chapter II for disputes concerning that chapter but suddenly forgot to include a dispute resolution procedure in Chapter III, when they came to the latter chapter. The more plausible explanation for their omission to include such a

procedure in chapter III is that they did not forget to include it but deliberately omitted to do so for some reason.

[43] Chapter IV deals with the Commission For Employment Equity. No dispute resolution procedure is provided for therein. Chapter V deals with monitoring, enforcement and legal proceedings. Such obligations as are placed upon a designated employer by some or other provisions of Chapter III can all be enforced by the use of the enforcement procedure provided for in Chapter V. It is not necessary to go into details in this regard but I am satisfied that all such obligations as are placed upon a designated employer under Chapter III can be enforced by using the enforcement procedure provided for in Chapter V. It seems to me that this would explain why the drafters did not include a dispute resolution procedure in Chapter III notwithstanding the fact that they included one in Chapter II. They did not do so because the idea was that the enforcement procedure provided for in Chapter V should be used instead or at least should be exhausted first before there could be a resort to the institution of court proceedings.

[44] A reading of sec 36(1) which is in Chapter V of the EEA reveals that a designated employer's failure to comply with sections of the EEA in respect of which a labour inspector may seek a written undertaking to comply are all sections which fall under Chapter III, namely, sections 16, 19, 21, 22, 23, 24, 25 and 26. Sec 37(2)(b) of the EEA also gives an indication that Part A of Chapter V is about the enforcement of the provisions of Chapter III. Sec 37 (2)(b) reads:

"**(2) A compliance order issued in terms of subsection (1) must set out -**

(a) …….

(b) **those provisions of chapter III of this Act which the employer has not complied with and details of the conduct constituting non-compliance."**

Sec 38 gives another indication that the enforcement procedure in Chapter V is largely, if not exclusively, about Chapter III of the EEA. Sec 38 reads:

"A labour inspector may not issue a compliance order in respect of a failure to comply with a provision of Chapter III of this Act if …."

No Chapter other than Chapter III is referred to. Part B of Chapter V deals with legal proceedings. Sec 46(1) provides that "**(i)f a dispute has been referred to the CCMA by a party in terms of Chapter II and the issue to which the dispute relates also forms the subject of a referral to the Labour Court by the Director – General in terms of sec 45, the CCMA proceedings must be stayed until the Labour Court makes a decision on the referral by the Director-General."**

[45] Section 46(1) makes it clear that it is in respect of Chapter II that a referral of a dispute by a party is contemplated and the referral to the Labour Court under sec 45 would be by the Director-General. Sec 46(2) contains a provision almost similar to that of sec 46(1) save that it relates to a case where the employer is being "**reviewed by the Director-General in terms of section 43**" of the EEA.

[46] It also needs to be noted that the drafters of the EEA included a dispute resolution procedure in Part C of Chapter V. This is in sec 52. Once again how could the drafters have remembered to include a dispute resolution procedure in Chapter II, forgotten to include one in Chapter III but once again suddenly remembered to include one in Chapter V? That can simply not be! The fact of the matter is that they intended that any interested party who is aggrieved by a designated employer's failure to comply with any of its obligations under chapter III would take steps to have the enforcement procedure provided for in chapter V invoked and they did not intend that such an interested party could simply ignore that procedure and institute court proceedings. That is the policy choice that was made by the legislature. It may be good or it may be bad but the legislature was entitled to make that policy choice.

[47] On behalf of the appellant much reliance was placed on the provision of sec 50(1)(f) in support of the contention that the appellant had a cause of action based upon the provisions of affirmative action in the Act and had a right to institute court proceedings to compel the first respondent to comply with its obligations under Chapter III of the EEA. Sec 50(1)(f) reads as follows:

> **"Powers of the Labour Court**
>
> **(1)- Except where this Act provides otherwise, the Labour Court may make any appropriate order including-**
>
> **…**
>
> **(f) ordering compliance with any provision of this Act including a request made by the Director-**

General in terms of section 43(2) or a recommendation made by the Director-General in terms of section 44(b);"

The appellant's argument was that, if she thought that the first respondent was failing to comply with any of its obligations under chapter III, she had a right to institute proceedings in the Labour Court for an order such as is provided for in sec 50(1)(f) of the Act.

[48] I am unable to uphold the appellant's contention. In my view, if the drafters of the Act had intended that anyone who believed that a designated employer was failing to comply with its obligations under Chapter III could approach the Labour Court, prior to the exhaustion of the enforcement procedure provided for in Chapter V of the EEA, they would have provided a dispute resolution procedure in Part A of Chapter III in the same way that they provided such a procedure in Chapter II. The drafters of the EEA decided that, for non-compliance with a designated employer's obligations under Chapter III, the enforcement procedure set out in Chapter V would have to be exhausted first. In this regard it needs to be noted that such enforcement procedure leads to an adjudication process by the Labour Court if this becomes necessary.

[49] Generally speaking, the provisions of sec 50(1) of the EEA deal with powers of the Labour Court in those matters in which it has jurisdiction and there is a cause of action. Sec 50(1) does not, generally speaking, purport to deal with the jurisdiction of the Labour Court and with causes of action. That is, for example, in a case such as where the Director-General refers a matter of non-

compliance to the Labour Court in terms of the enforcement procedure set out in Chapter V. The only possible exception to this general thread in sec 50(1) is sec 50(1)(h) but even that may arguably be said to relate to powers and not causes of action and jurisdiction. There is in this case no reliance upon sec 50(1)(g) of the EEA. In the circumstances I conclude that sec 50(1)(f) is of no assistance to the appellant. In the light of the above I conclude that it is not competent to institute proceedings in the Labour Court in respect of an alleged breach of any obligation under chapter III of the EEA, prior to the exhaustion of the enforcement procedure provided for in Chapter V of the EEA.

Exception based on Ground B

[50] The next question for consideration is whether a designated employer's breach of its obligation either under its own selection or affirmative action policy or under the affirmative action provisions of Chapter III of the EEA in filling a vacant post, for example in failing to prefer a black woman candidate to a white male candidate constitutes unfair discrimination. In this case part of the appellant's claim is that the first respondent had an obligation in terms of its recruitment and selection policy and in terms of Chapter III of the EEA to prefer her to the second respondent for appointment because she was a woman and was black. The first respondent's failure, contends the appellant, to prefer her for appointment constituted unfair discrimination.

[51] When the appellant complains that the first respondent failed to give her preference in terms of its selection policy, the appellant is in effect saying that the first respondent failed or refused to put her

ahead of white male candidates in its consideration of who should be appointed to the position. The advantage and benefits which whites gave themselves under apartheid and the disadvantage and hardships to which blacks were subjected under that system can at some level be compared to a race which had black and white participants. Imagine that in such a race the black athletes would be shown one starting line and they would all line up at that starting line. White athletes would be shown a different starting line – one that is just for them. Their starting line would be a number of metres ahead of the starting line set aside for blacks. The athletes – both black and white- would be running different distances to the same finishing line. The whites would run a distance that would be some metres shorter than the distance that the black athletes would run because the white athletes' starting line would have been some metres closer to the finishing line than the starting line for blacks. From this example it is obvious that those in charge of the race – and therefore those in charge of the country under apartheid did not want black athletes to win and wanted whites to win. Obviously, with the white athletes enjoying such an advantage, most of them would reach the finishing line ahead of either all or most of the black athletes. Of course, there would be cases where, despite having started the race some distance behind the white athletes, some black athletes would not only completely close the gap between them and the fastest running of the white athletes but they would outrun all the white athletes.

[52] The purpose of affirmative action is inter alia to achieve employment equity in the workplace. I need to go back to the example given above in respect of a running race and use it to

explain what the appellant in effect means when she complains that the first respondent's conduct in failing to give her preference constitutes unfair discrimination. What the appellant means in effect is, that, like in the running race example given above, the first respondent should have placed her some distance ahead of the other candidate's starting line. What happens when no preference is given? In such a case the athletes may well all be placed on the same starting line so that they are given an equal distance to run. If that is done, the athlete who believes that he should have been given a separate and special starting line ahead of others is not being unfairly discriminated against by being treated in the same way as the others. In fact such athlete is not even being discriminated against in the first place, not to speak of being discriminated against unfairly. The fact that the employer's failure to give an employee preference in the filling of a position does not constitute unfair discrimination does not mean that such employee would have no cause of action at all. For example, if such employee's employer was obliged to give him or her preference in terms of a collective agreement, the failure to give him or her preference would constitute a breach of such agreement even though it would not constitute unfair discrimination. Accordingly, in so far as the appellant's statement of claim includes a claim to the effect that the first respondent failed to give her preference in the filling of the post in question as required either by the statutory provisions relating to affirmative action or as required by its recruitment and selection policy and that such failure to give her preference constituted unfair discrimination based on race or gender, the first respondent's exception was correctly upheld by the Labour Court.

[53] I am aware that the judgement of the Learned Acting Judge in the Court below was contrary to the earlier judgment given by the Labour Court in **Harmse v City of Cape Town [2003] 6 BLLR 557 (LC)** with which he said he disagreed. To the extent that the Harmse judgment is in conflict with this judgment, it was, of course, wrongly decided. Subsequent to the judgment of the Labour Court in this matter, the judgments in **PSA on behalf of Karriem v SAPS & Another (2007) 28 ILJ 158 (LC); Cupido v Glaxosmithkline SA (Pty) Ltd (2005) 26 ILJ 868 (LC)** and **Thekiso v IBM South Africa (Pty) Ltd [2007] 3 BLLR 253 (LC)** were given and they all followed Tip AJ's judgment now on appeal.

[54] This judgement does not affect the appellant's claim that the first respondent unfairly discriminated against her on grounds of race or colour or gender in that the only reason why she was not appointed to the position in question is that she was black or was a woman or both. That is, where that claim is not based on an alleged breach of an obligation relating to an affirmative action on the first respondent's part or is not based on the first respondent failing to give the appellant preference but is simply based on the allegation that the first respondent's reason for not appointing the appellant was because of the appellant's race, colour or gender or any combination of those factors.

[55] In its judgment the Labour Court decided that what can loosely be referred to as "**the right to affirmative action**" is not an individual right. I have examined the exceptions that had been taken by the

first respondent to the appellant's statement of claim which the Labour Court was called upon to decide in terms of the pleadings. That issue fell outside the exceptions that had been taken. In this judgment I have confined myself to those two grounds upon which the exception was taken which this Court was called upon to decide. Accordingly, that point has not been dealt with in this judgment as it falls outside the issues that in terms of the pleadings the Court *a quo* was called upon to decide. It will also be seen from the judgment of the Labour Court that the Labour Court seems to have decided in effect that court proceedings based on an employer's failure to comply with its affirmative action obligations are not competent. In this judgment I have decided that the institution of court proceedings in regard to an alleged breach of a designated employer's obligation under Chapter III of the EEA prior to the exhaustion of the enforcement procedure provided for in Chapter V of the EEA is not competent. I have not decided the question whether, if and when the appellant has exhausted the enforcement procedure provided for in Chapter V, she can at that stage institute court proceedings. We have refrained from deciding that point simply because it fell outside the terms of the exception taken by the appellant.

[56] In the light of all the above it seems to me that the appellant's appeal falls to be dismissed. With regard to costs I am of the view that the requirements of the law and fairness dictate that in a case such as this one there should be no order as to costs.

[57] In the result the appeal is dismissed with no order as to costs.

Zondo JP

I agree.

R Pillay AJA

I agree.

Kruger AJA

Appearances

For the Appellant	:	Mr A Schippers SC
Instructed by	:	ABE Glam & Associates
For the Respondent	:	Mr L.A. Rose-Innes SC (with Mr C Kahanovitz)
Instructed by	:	Herold Gie Attorneys
Date of judgment	:	21 August 2008