IN THE LABOUR COURT OF SOUTH AFRICA

AT JOHANNESBURG

Case Number: J399/98

In the matter between

Andreas Dierks	Applicant
and	
University of South Africa	Respondent

JUDGMENT

OOSTHUIZEN AJ

[1] Andreas Dierks, the Applicant in this matter, was described by his promoter, Professor E. Sheffler ("Sheffler") as a *cum laude* student and a brilliant creative thinker, who was unconventional but challenging. He had enrolled as a doctoral student with the Respondent in 1994 and at the time of the hearing he was writing his doctoral dissertation.

[2] The Respondent had employed the Applicant in terms of certain fixed term contracts between January 1995 and December 1997.

[3] Having referred this matter to the Labour Court in terms of s191(5)(b)(ii) of the Labour Relations Act 66 of 1995 on the ostensible grounds that the Respondent had dismissed him unfairly for operational requirements, the Applicant claims an order declaring his dismissal an unfair dismissal in terms of the Act, and that the Respondent be ordered to reinstate him not later than 1 January 1998, alternatively, re-employ him in reasonably suitable work on such terms as this court may deem fit as from 1 January 1998, together with compensation in terms of s194.

[4] Despite the reference to operational requirements this is a matter which essentially involved reasonable expectation and the expiry of fixed term contracts.

[5] It was common cause that the Applicant had been employed by the Respondent in terms of two fixed term contracts, one for the duration of 1995, and the second for the duration of 1996, in the Old Testament Department (“the Department”) of the Respondent, prior to the fixed term contract entered into between the parties for certain periods during 1997.

[6] It was in 1997 that the Applicant was employed by the Respondent in terms of a fixed term contract for two specific periods, namely 1 March 1997 to 30 April 1997, and from 1 July 1997 to 31 December 1997.

[7] Kloppers, whom the Applicant was to replace in the Department, would be absent from the Department for the periods March/April 1997 and July 1997 to May 1998 while on study leave.

[8] During the latter part of 1996 a report ("the Report") was published by a Joint Working Committee consisting of representatives of the Respondent's management and a union being the Academic & Professional Staff Association, ("APSA"), which having investigated the issue, made recommendations regarding the fair and equal treatment of existing temporary academic employees at the Respondent to bring temporary employment practices in line with acceptable and fair labour practices.

[9] A relevant extract from this report, which was dated 20 February 1996, concerned recommendations 2 and 3 in relation to temporary employees whose names appeared on list B. This list played a significant part in the evidence presented by both parties.

[10]List B was defined as:

"Employees whose temporary appointment or fixed term contracts have least been renewed once at UNISA."

Recommendations 2 & 3 stated:

"Recommendation 2:

The Employees listed on List B should only be **re-appointed in exceptional circumstances** where a 'bona fide' need exists. Therefore should a temporary operational need not exist, these persons must be given 30 (thirty) days written notice of the expiry of his/her (sic) contract period. Should the service of an employee be terminated, another employee may not be employed in the same job for the same year. **Where there are vacant posts within a department, people listed on list B must be invited to appear before a**

selection committee before the end of November. Should the selection committee not find the candidate appointable 'bona fide' termination procedures must be effected without delay. Should a selection committee find a candidate **appointable**, the relevant department shall be responsible for the total funding of the post."

"Recommendation 3:
The working group strongly urges all heads of departments, centres, bureaus, units, clinics or institutes to **seriously re-assess whether the operational needs filled by the current temporary employees are in fact temporary or permanent needs**, and to adapt their human resources planning accordingly (**permanent needs must be filled by permanent employees**)."
(My emphasis)

[11] The Applicant's name appeared on list B.

[12] Mr. C.J. Ginsburg ("Ginsburg"), Ms. S Oosthuizen ("Oosthuizen"), Ms. R van Schalkwyk ("van Schalkwyk"), and Ms. Wouters ("Wouters"), whose names also appeared on list B were appointed to permanent positions with the Respondent.

[13] The Applicant was aware of recommendations of the Report published in 1996.

[14] The parties agreed in terms of their final pre-trial minute that:

"The crisp dispute between the parties was whether the Respondent by its conduct or in writing created a legitimate expectation in the mind of the Applicant that his fixed term contract entered into with the Respondent for 1997 would be renewed or that he would be offered full-time employment with the Respondent after 1997."

[15] In seeking clarity on the "crisp dispute" between the parties, I was advised that the words "legitimate expectation" did not have any significant connotation (see also *Administrator of the Transvaal & Others v Traub & Others (1989)*

10 ILJ 823 at 835H), but that it was used in the sense of "reasonable expectation" as it appeared in s186(b) of the Act which provides:

"186. Meaning of dismissal. - "Dismissal" means that-

(a) …

(b) an employee **reasonably expected** the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it,

(My emphasis)

[16] Mr. G Higgins, who appeared on behalf of the Respondent, agreed at the commencement of proceedings, that if the court found that a reasonable expectation had been engendered in the Applicant it was the end of the matter as far as the enquiry into an unfair dismissal was concerned, as the Respondent was relying on the expiry of the fixed term contract and no other reason for termination. As a result, no "fair procedures" in consequence of any "fair reason" were followed as required by Section 188 of the Act.

[17] The Applicant was the first to give evidence of the facts to support his contention that he had a reasonable expectation as alleged. He told the court that after his first appointment for a fixed term (1995) he had applied for a permanent post.

[18] The Respondent had advised him by letter dated 8 September 1995 that his application was unsuccessful in the following terms:

"Dit spyt my om u mee te deel dat u aansoek om ‘n permanente aanstelling by die Universiteit van Suid Afrika nie suksesvol was nie. **U is egter aanstelbaar gevind**. Indien ‘n vakature **in die nabye toekoms** in die departement beskikbaar raak, sal u aansoek in heroorweering geneem word."

(My emphasis)

[19] This letter, particularly the above quotation, was presented

as support for the Applicant's contention that he had a reasonable expectation of permanent employment in the future.

[20] By letter dated 30 November 1995, the Applicant was advised by the Respondent that his appointment as a part-time junior lecturer in the Department was to be renewed for the period 1 January 1996 to 31 December 1996, and that his salary and conditions of employment would remain unchanged.

[21] A paragraph in the letter stated:

"U aandag word daarop gevestig dat u aanstellingstydperk op 31 Desember 1996 verstryk en u kan dus nie automaties aanspraak maak op ‘n heraanstelling, hetsy op tydelike, kontrak of permanente basis na verstryking van die bovermelde aanstellingstydperk nie."

[22] However, the letter also mentioned that a number of factors were of “deurslaggewende belang” in all appointments as well as renewals of contracts at the University. These factors included:

"1) die jaarlikse beskikbaarheid van Universiteitsfondse
die funksionele behoeftes van die Universiteit
departmentele aktiwiteite en werkslading, inaggenome die tydperk waarbinne dit moet geskeid asook die deurlopende aard daarvan
1)die bydrae wat 'n tydelike of kontrakpersoneellid gedurende sy/haar aanstellingstydperk op akademiese-, navorsings-, gemeenskaps- en departementele vlak lewer, met dien verstande dat interpersoonlike verhoudinge binne die departement ook oorweging geniet."

[23] The Applicant informed the court that during 1996 he was more comfortable and became more involved with his work in lectures and consultations with students. His duties included translating documents involving the three languages of English, German and Afrikaans.

[24] He felt that his responsibilities in 1996 had increased over those in 1995 particularly in respect of his consultations with

students while other lecturers were absent.

[25] He had also presented two papers during 1996 (as opposed to one in 1995), which made him feel more confident, academically mature and better known by his colleagues.

THE REPORT

[26] As already mentioned, it was during 1996 that the Report on temporary academic employees (teaching and research staff) was published and distributed. The Joint Working Committee, which issued the report, was appointed in terms of the recognition and substantive agreement between the Respondent and AFSA to:

"investigate all aspects in respect of temporary academic (teaching and research) staff to ensure fair and equal treatment of existing temporary academic employees in the university as well as to bring temporary employment practices in line with acceptable fair labour practices."

[27] This publication came to the Applicant's attention. He said that he became aware of a particular extract relating to List B (which has been quoted above) forming page 8 of the Report as it was placed in his pigeonhole. He could not recall the exact date, but indicated that it was at the close of 1996 and before he entered into his final fixed term contract for 1997.

[28] Although he had read the document he had placed no importance on it in the sense that he explained on more than one occasion that he was not a labour lawyer, or versed in labour law, and that he did not see any link between the content of the recommendations 2 and 3 and the conclusion of the subsequent fixed term contract for 1997.

[29] He indicated that he was confident as he had been advised that he was employable ("aanstelbaar") in 1995, that he could rely on this, and he had been given an assurance that he would

be considered if there was a vacancy. He said he took note of the Report, was "positively touched" by it and was very optimistic.

[30] However, despite stating that he believed that he should have been brought before a selection committee and given a chance for appointment on a permanent basis, he took no steps in contacting senior members of his Department. He felt that the onus was on the Respondent to invite him to appear before any selection committee, and that it was not for him to approach the Respondent.

[31] It was agreed that recommendation 2 placed an obligation on the Respondent to invite a temporary employee on list B to appear before a selection committee before the end of November "where there are vacant posts within a department".

[32] The evidence on whether in fact there was a vacancy at the relevant time (November 1996) was not entirely clear.

[33] The Applicant said that there was a vacancy but qualified this by saying that the Dean of the Faculty proposed not to fill the post. Sheffler, who gave evidence for the Applicant told the Court that a request for a junior lectureship post by the department during 1996 had been "shot down" by the Faculty Executive Committee.

[34] Professors' van Dyk ("van Dyk") and Wessels ("Wessels") who testified for the Respondent, were adamant that the post was frozen for 1997. They also said that neither the Applicant nor Sheffler pursued any right which may have been acquired to have an interview by virtue of recommendation 2. It was common cause that van Dyk had discussed recommendation 2 with Sheffler who told the Court that he did not appreciate at that time that there was an obligation on the Respondent to invite the Applicant if a vacancy existed as he had not studied the report.

[35] Incomplete documentation was submitted to the Court to support the allegation that the post was frozen.

[36] The pleadings of the Applicant allege that-

At the time a vacant junior lecturing post existed and was advertised in the Old Testament Department"

[37] In reply the Respondent stated-

While a vacant junior lecturing post did exist in terms of the department structure, it was not advertised."

[38] It was submitted by the Respondent's representative that I should ignore this pleading as the evidence was not in accordance with the Respondent's allegation.

[39] My finding is that on the probabilities there was no vacant post for the purposes of recommendation 2. Apart from the evidence of van Dyk and Wessels and the gloomy background at the Respondent, the conduct of both the Applicant and Sheffler was entirely inconsistent with the existence of any vacancy.

[40] In any event, if a vacancy did exist at that time, its existence did not appear to me to influence the mind of the Applicant in strengthening his expectation. Whether there was any contractual or equitable obligation or otherwise on the Respondent to interview the Applicant on account of the existence of a vacancy is a separate issue. It was not pleaded as "the crisp dispute" and accordingly I have not addressed it as a relevant issue. Moreover, I have indicated that I am not satisfied that a vacancy for the purposes of List B existed at the material time.

[41] Interposed in the Applicant's evidence in support of a

reasonable expectation were references to talk on the "grapevine", in "hallways", "galleries" and "passages", which indicated that it was a tradition at the Respondent that once one was appointed on a temporary basis, one had "a foot in the door" and that one should become permanently employed. It was also said that one had merely to "hang in" to eventually get a permanent appointment.

[42] Subsequently, i.e. during 1997, the Applicant also had discussions with others pertaining to two other employees whose names appeared on List B, namely Oosthuizen and van Schalkwyk. They became permanent employees. However, as at the end 1996 he was not aware of any permanent employment that had taken place as a consequence of the report.

FIXED TERM CONTRACT: 1997

[43] After obtaining the extract from the Report, the Applicant was approached by van Dyk, who was the acting Head of the Department, with an offer to take on the duties of Klopper during 1997. He accepted and said that he felt that he would remain employed until at least May 1998 when Klopper returned and that while his temporary employment was continuing he was entrenching himself in the Department.

[44] The Applicant also said that he was glad about the development and believed it was in accordance with the Respondent's tradition of retaining the service of temporary employees until a permanent post became available.

[45] Although he said that he could not recall the discussion, the Applicant indicated that it could be correct that van Dyk had told him approximately two weeks previously that there was no position available for him during 1997. (According to van Dyk's evidence he went to see the Applicant in late September and told him that he was sorry that he could not appoint him for 1997).

Indeed by letter dated 25 November 1996, Mr. G.P. du Plessis ("du Plessis"), the Head of the Respondent's Personnel Department wrote to the Applicant and confirmed that the Applicant's services would be terminated in accordance with the expiry of his fixed term contract on 31 December 1996.

[46] In terms of a letter dated 19 December 1996 the Applicant was formally offered the position as a fixed-term contract employee (part-time) in the Department for a fixed term from 1 March 1997 until 30 April 1997 and from 1 July 1997 until 31 December 1997 at a salary of R42516.00 per annum.

[47] Van Dyk testified and the Applicant conceded in cross-examination that Klopper's absence created exceptional circumstances for the Applicant's re-appointment. Van Dyk also testified that he ensured that the contract (unlike previous standard yearly renewals) was tailored to the specific operational requirements of the department in that the Applicant's duties were required during the actual period of Klopper's absence during 1997.

[48] The letter of appointment stated that:-

" On behalf of the Council of the University of South Africa, I have pleasure in offering you a position as fixed term contract employee (part-time) in the Department of Old Testament for a fixed term from 1 March 1997 until 30 April 1997 and from 1 July 1997 until 31 December 1997 with a salary of R42 516,00 per annum.

T he purpose of this appointment is to help with the teaching of Biblical Studies III while Ms. F. Klopper is away on study leave.

Your duties will be:
Administrative duties related to the teaching of Biblical Studies III
The teaching of Biblical Studies III
Assisting in the marking of assignments and examination papers within the

Department as a whole.

The terms and conditions of service applicable to this position are set out in the attached document. Your attention is specifically drawn to clause 2 of the said document."

(My emphasis)

[49] The Applicant signed a letter of acceptance on 15 January 1997 stating that he had read the letter of appointment as well as the attached documents and fully understood them. He accepted the appointment and undertook to abide by the terms and conditions as stipulated therein.

[50] The terms and conditions stated *inter alia*:

"3. DIENSTERMYN

3.1. 'n Vastetermyn-kontrakwerknemer se dienstermyn word bepaal deur die duur van die bepaalde tydelike opersionele behoefte of die verwagte duur van die projek.

3.2. 'n Vastetermyn-kontrakwerknemer se aanstellingsbrief meld die duur van die kontrak uitdruklik.

3.3. 'n Vastetermyn-kontrakwerknemer se dienskontrak word slegs hernu as 'n tydelike operasionele behoefte ten tye van die vervaldatum van die vastetermynkontrak steeds bestaan of die projek nog nie voltooi is nie, onder voorbehoud dat 'n vastetermyn-kontrakwerknemer se kontrak nie meer as een maal hernu sal word nie.

3.4. 'n Vastetermyn-kontrakwerknemer is op geen tydstip outomaties geregtig op 'n permanente aanstelling of die voorsetting van diens in watter hoedanigheid ook al aan die Universiteit nie.

3.5. 'n Vastetermyn-kontrakwerknemer mag om 'n permanente pos aan die Universiteit aansoek doen onder die voorbehoud dat hy/sy sodanige pos

alleenlik sal bekom onderhewig aan die bestaande werwings-, keuring- en plasingsprosedures wat op permanente akademiese personeel betrekking het.

9. DIENSBEËINDIGING

9.1. Die kontrak deur die vastetermyn-kontrakwerknemer beëindig word met tien (10) werksdae geskrewe kennisgewing.

9.2. Die kontrak mag deur die Universiteit beëindig word op watter gronde ook al soos deur die reg erken, met (10) tien werksdae geskrewe kennisgewing.

9.3. Die kontrak verval outomaties sonder verdere geskrewe of mondelinge kennisgewing op die datum vermeld in die aanstellingsbrief."

(My emphasis)

[51] The Applicant also agreed in cross-examination that he had read and understood all the provisions. However, he felt that the new contract had not altered the position as his contract had been renewed once before. He believed that the new contract should not annul his expectations which had been previously established by the factors mentioned above. He felt that to now rely on the contract pertaining to the absence of Klopper was somewhat late as his expectations already existed. He also said that his responsibilities during 1997 while replacing Ms. Klopper had increased.

[52] van Dyk, however, testified that he made it quite clear to the Applicant that the substitution for Klopper was the last thing the Respondent could do for him. He had no doubt that the Applicant fully appreciated that there could be no expectations of a further renewal.

[53] His evidence that he had painted a "bleak" picture in regard to the Applicant's prospects during his discussions with him

until the Klopper contract had come about, was not disputed. At that stage, the Applicant was aware of the report and the fact that Klopper would be returning to work in May 1998.

[54] Although the Applicant was not employed during the months January and February 1997, he responded to an invitation to present a paper during that period at a seminar organised by the Research Committee of the Department. He had previously indicated that he was willing to do so.

[55] He told the Court that his responsibilities during 1997 while replacing Ms. Klopper had increased. In describing the increase in his responsibilities, the Applicant said that he was now consulting students to a greater extent, setting up tutorial assignments and letters for the following year, giving overall assessments on the quality of assignments, and setting up exam questionnaires. He stated that he honestly felt that once his achievements became known, with his new methods and new approach, that he would be considered for a permanent position.

MEETING WITH PROFESSOR K.F. MAUER

[56] A meeting of considerable significance took place between four professors, namely Professor K.F. Mauer ("Mauer"), Sheffler, van Dyk and Wessels on 10 October 1997. Indeed the Applicant said that he placed great expectations on what was conveyed to him by Sheffler as a result of that meeting.

[57] Having met on a previous occasion at the Holiday Inn to discuss the department's requirements for 1998, the three departmental professors decided to meet Mauer who was the Acting Registrar (Personnel) of the Respondent. As far as van Dyk and Wessels were concerned, they wished to raise the issue of employment for Father Bernard Mokwenya ("Mokwenya"), a temporary employee, who had been offered a position at Vista University. However, Sheffler who was concerned about the Applicant's future

with the Respondent, testified to the effect that the nature of future employment of both the Applicant and Mokwenya were matters for discussion with Mauer.

[58] During the course of the meeting with Mauer, Sheffler mentioned that besides Mokwenya there was another person, namely the Applicant, in the department who had had his contract renewed on two occasions and was now employed in his third year. Mauer's reaction to this information is in dispute.

[59] Sheffler maintained that Mauer said that the Applicant should be immediately appointed in a permanent position without the need for an interview by a selection committee as required by recommendation 2.

[60] It should be mentioned at this stage that the Report not only contained a list B which was governed by the procedures set out in recommendation 2 and 3 but also a list A which stated:-

"List A:
Employees whose temporary appointment or fixed term contracts have at least been renewed twice consecutively at UNISA.

Recommendation 1:
The working group recommends that the employees in List A be given permanent status as from 1 January 1997, as they have *de jure* acquired such status. Their permanent appointments must be confirmed immediately on expiry of a current contract. No selection or confirmation procedures shall be followed in respect of these employees."
(My emphasis)

[61] Set out thereafter was a list A of "affected employees". The Applicant's name did not appear on the list.

[62] It will be noted that Recommendation 1 refers to employees whose names appear on List A, their "acquired status" and

permanent appointment as from 1 January 1997.

[63] Sheffler related in giving evidence that Mauer had said at the meeting that the Applicant should first be permanently appointed and thereafter a post would be identified for Mokwenya which would be advertised on the departmental notice board.

[64] When the subject of the Applicant had been raised at the meeting, van Dyk said he had explained to Mauer that the Applicant had been appointed for a third term on a specific contract for a specific purpose, (i.e. to replace Klopper) and that the period of the contract had been interrupted by time gaps. Mauer had responded that the interruptions were not relevant. Indeed this is correct interpretation in terms of a provision of the Report which provides for such interruptions.

[65] When cross-examined on the meeting, Sheffler was emphatic that Mauer had said that the Applicant "should" be appointed and not "might" be appointed as contended by the Respondent.

[66] In relating what he recalled as having taken place at the meeting, Mauer said that he was under the impression that the purpose of the meeting was to discuss Mokwenya. He recalled however, that the issue relating to the Applicant was raised by Sheffler who started to explain to him the background to the matter. Mauer said he became confused but also irritated when told that the Applicant had been appointed in 1995 and that his contract had been extended on two occasions which would have meant on his understanding that the Applicant was a list A candidate. This in turn would mean that he would have to go to Council to explain what had taken place. He said that he asked Wessels to investigate the matter thoroughly and to write to him with a recommendation.

[67] Mauer said the confusion arose because he had three professors trying to tell him what had taken place. He said

that he told the professors that "if" the contract had been extended on two occasions then the Respondent would be obliged in terms of list A to make a permanent appointment. However, he wanted to know the facts. He had asked Wessels as the obvious person (being the Head of Department at that stage) to find out what had happened and whether there had been any infringement of procedure. He said that he was not in the habit of issuing instructions but rather asking for things to be done. He said that if a list A situation arose then it would mean that he would be obliged to take the matter to Senex and Council.

[68] Sheffler told the Court that he left the meeting under the impression that the department's problems had been resolved in the sense that the Applicant would finally acquire a permanent position while the need to appoint Mokwenya had also been addressed. Sheffler recalled a remark from van Dyk to the effect that the concerns of all the professors had been satisfactorily resolved. Sheffler also recalled a remark by Wessels to him which was not disputed immediately after the meeting to the effect that Sheffler should not tell the Applicant about what had taken place at the meeting with Mauer. Sheffler interpreted this to mean that Wessels wished to be the messenger of good tidings.

[69] While Wessels did not dispute the exchange, he explained that he did not regard the development as good news as Mauer was only a link and he did not want to raise the expectations of the Applicant.

[70] Subsequently Wessels telephoned Mauer to say that he had been through the relevant documents and that he (Wessels) did not think that a list A situation had been created. Mauer said that as far as he was concerned that was the end of the matter.

[71] While waiting for developments after the meeting with Mauer,

Sheffler had a discussion with van Dyk in a passage where van Dyk had indicated that nothing had been done. Sheffler said that he then spoke to Wessels who told him that he was taking legal advice and that Mauer did not have knowledge of the law.

[72] It was at this stage (i.e. when he realized that nothing was being done) that Sheffler disclosed to the Applicant what had taken place at the meeting with Mauer on 10 October 1998. He also said that the Applicant had told him that Wessels had indicated to him that things looked bleak for the future. Sheffler said that he realized that Wessels would not be asking for an appointment for the Applicant. Sheffler advised the Applicant to see Mauer.

[73] According to the Applicant, the news from Sheffler had made him feel great as it now appeared that Mauer was acting in terms of the recommendations. He said that he now believed that he would have a permanent job the following year. The only question was why it had taken so long and that he was disappointed in that regard. It should be noted however, that the Applicant only became aware of the existence of the significance of list A towards the end of 1997 when he became actively involved in his future with the Respondent.

[74] At a departmental meeting after the disclosure by Sheffler to the Applicant at which both the Applicant and Wessels were present, Sheffler informed the meeting of the discussion with Mauer and the fact that Mauer had indicated that the Applicant should be appointed.

[75] Wessels responded at that meeting by saying, *inter alia*, that the department was "in the red" and that if the Applicant wished to take the matter further then he would have to take the legal route.

[76] Given the importance that was placed on what Mauer had said

at the meeting on 10 October 1998, both the Applicant and Sheffler arranged independent meetings with Mauer in order to discuss the matter.

[77] Sheffler said that he believed that Mauer had changed his mind and that he wanted to hear from him why this was so. He indicated that at the subsequent meeting with Mauer, they had discussed the matter for approximately one and a half hours. His evidence was that Mauer was sympathetic about the Applicant but that he was obliged to act for the Respondent and the advice was that there was no obligation on the Respondent to engage the Applicant.

[78] According to Mauer he explained to Sheffler the nature of the legal advice which he had received and the fact that in terms of the advice there was no legal obligation on the Respondent to appoint the Applicant permanently. He also explained the serious financial situation which confronted the Respondent. He was under the impression that Sheffler was unhappy about the development but understood the situation.

[79] As a result of Sheffler's suggestion and after a discussion with a member of the personnel department, the Applicant wrote a letter to Mauer who was absent on sick leave. When he returned, the Applicant arranged an appointment and delivered the letter to him personally.

[80] This letter dated 19 November 1997 stated, *inter alia*:

"This letter serves as an enquiry on my prospects for future employment at UNISA from 1998.

…

Furthermore, I would like to draw your attention to a recent departmental meeting in the Department of Old Testament. Here, an earlier meeting which

had been attended by the current Head of the Department of Old Testament, Professors Wessels, as well as Prof. van Dyk, Prof. Sheffler and yourself, was discussed. **It was mentioned that my employment situation was to receive attention and that I should be offered a permanent position in the light of my employment history**. To the best of knowledge, nothing has been undertaken in this regard.

Kindly advise me at your earliest convenience, in writing, whether you are prepared to motivate my permanent appointment to the Council of the University. "

(My emphasis)

[81] According to the Applicant, Mauer was sympathetic to his cause, and indicated that he would try and take the matter up with Senex which was meeting the following week.

[82] Mauer related how he met the Applicant for the first time after Wessels had decided not to take the matter further. He said he had tried to explain to the Applicant that it was impossible for him to do anything for him as he had a job within which he could only move within specific parameters.

[83] In the meantime the department had received a report on the personnel points that had been allocated to it for 1998.

[84] These points relate to the funding which the department can expect from the Respondent for the relevant year. It was common cause that these personnel points indicated that the department was "in the red" which meant that as far as the Respondent was concerned there would not be funds available to finance a permanent appointment for the Applicant. It was also common cause that at the time of the meeting with Mauer on 10 October 1997, the personnel points were late and had not been published although it was unlikely that the department would be "in the black" given the decline in student numbers.

[85] There was no serious challenge to the fact that Mauer himself did not have authority to make an appointment such as a permanent appointment for the Applicant.

[86] The Applicant also took the matter up with the union APSA. In terms of a letter dated 1 December 1997 APSA recorded its views on the matter:-

"Ek het u saak nagegaan en het dit bespreek met die lede van die vakbond se dagbestuur. Ons is van mening dat u nie 'n klinkklare saak het vir die verwerwing van permanente werknemers status nie.

U is wel 2 jaar agtereenvolgends aangestel, dit is vir 1995 en 1996, maar u daarop volgende aanstellings vir 1997 was duidelik nie 'n voortsetting van die vorige twee jaar nie; opsigself dink ons nie dat die onderbreking van 2 maande noodwendig belangrik is nie, maar die intensie om u in 'n tydelike hoedanigheid aan te wend is uitdruklik aan u gestel. In daardie sin ten minste kan dit dus nie as 'n voortsetting van die vorige twee jaar gesien word nie. Verder, is daar geen skriftelike beloftes aan u gemaak nie, en was daar nie 'n duidelike eskalasie in die take wat u verrig het nie. In die algemeen beskou dink ons nie dat 'n prima facie saak gemak kan word dat u in enige ander hoedaingheid as tydelik werksaam was nie.

Om die redes hierbo is die vakbond nie bereid om 'n aansoek vir permanensie, byvoorbeeld aan die CCMA of ander eksterne instansie in 'n materiele sin te ondersteun nie."

[87] The Applicant was disappointed with this response and said that he could find no reason for APSA's failure to take up the matter on his behalf.

[88] Instead of receiving an expected response from Mauer, Applicant received a letter dated 24 November 1997 from Wessels , which recorded *inter alia*:

"Dit is met spyt dat ek u moet meedeel dat dit nie vir die departement Ou

testament moontlik is om u ‘n verdere kontrak aan te bied nie. Wens die daling in studente getalle en die finansiele posisie van die universiteit as geheel, is die departement Ou Testament **vir die eerste keer in die rooi**. Ons is dus nie in die posisie om enige verdere kontrakte aan te gaan nie."

[89] The Applicant consulted his attorney who wrote a letter to Mauer pointing out that his client had a reasonable expectation that he would be appointed as a lecturer on a full-time basis as from 1 January 1998 in the Department, or at least that his fixed-term contract would be renewed. The Respondent was called upon to confirm that the Applicant would be appointed as a lecturer on a full-time basis, alternatively that his fixed-term contract would be renewed after 1 December 1997, failing which the matter would be referred to the CCMA.

[90] It was alleged that the termination of the Applicant’s employment was both procedurally and substantively unfair.

[91] A short reply dated 8 December 1997 from Mr. G.P. du Plessis, the head of the Respondent’s Personnel Department, informed the Applicant’s attorney that:

Notice was taken of the content of your letter and I wish to confirm that, **due to operational reasons**, no employment offer will be made to your client by the university for the academic year 1998.

(My emphasis)

[92] The dispute was referred to the CCMA which endeavoured to resolve the dispute on 3 December 1998. No settlement was concluded.

TRADITION

[93] In further support of his case for establishing a reasonable expectation, the Applicant relied on the contention that it was a tradition at the Respondent that the majority of employees

were initially employed on a temporary basis. As a result, he believed that he was entitled to assume that he might be afforded a permanent position in due course. In this regard, the Applicant said that during 1995 he had discussed employment with Professor Kruger (Head of the Department of Missiology) who had indicated to the Applicant that "we are behind you" but that Blacks were being appointed and that he should "just hang in there". The Applicant, however, could not comment on Kruger's knowledge of the Applicant's departmental structures.

[94] The Applicant said that he could not recall ever in 1996 being aware that he would not be in the department in 1997. When questioned on what facts he based this expectation, he said that it was based on talk in passages where one overheard things. When pressed, he said that he could not say why, but that there was a belief. It was put to him that this was either self-creation or merely a hope. He responded by saying that the hope was always there due to the way things were run at UNISA and the tradition. He never thought that his contract could be suddenly terminated.

[95] However, in elaborating on the talk in the "galleries" in 1996, he said that it was not gloom, but close to it. He was not interested in political talk, but there was a general "aura" which was a pessimistic type of attitude. Moreover, he appreciated that due to the drop in student numbers, there were more stringent measures for personnel. When it was put to him in cross-examination that perhaps he was behaving like an ostrich in this regard, he did not agree.

[96] He spoke about the see-sawing effect of expectations. On the one hand there was "hang in there", "they won’t let you down" and the recommendation of the report which was very positive. The low point was that the procedure was not initiated by the person who he thought was responsible for doing so.

[97] He could not recall that van Dyk or Wessels had indicated during 1997 that there would be any expectation of employment during 1998. As regards Sheffler, he said that he was encouraged by him, but that he did not indicate that there would be something for him. Instead Sheffler had told him that he was with the Respondent and should try and hold onto it.

[98] The evidence of van Dyk and Wessels to the effect that they had never indicated otherwise than his prospects of permanent employment were bleak, was not challenged.

[99] There was also evidence from van Dyk and Wessels that they had accommodated the Applicant during 1995 and 1996 and that the Applicant was allowed to carry out his involvement in a business as a tour-guide. However, the Applicant was not prepared to concede that he was being encouraged to involve himself in an alternative form of employment due to the uncertainty of his position at the Respondent. He said that he did not take the comments by van Dyk, that he should keep "irons in the fire", in the sense that he should take up tour-guiding as a career. He did recall discussions with van Dyk on the issue but regarded them as sympathetic and not advice to look for another job. He agreed that he was told that times were hard and that he should keep the door open. The Applicant also agreed that his trip to Namibia towards the end of 1997 had been allowed at a difficult time for the Respondent as far as departmental duties were concerned.

INCONSISTENT TREATMENT

[100] The Applicant alleged in his pleadings that Oosthuizen (in 1997) and van Schalkwyk (in 1998) were appointed to permanent lecturing posts on the strength of the recommendations contained in the report. Both Oosthuizen and van Schalkwyk appeared on list B. Reference was also made to Wouters and Ginsburg as being other temporary employees referred to in list

B who were appointed on a permanent basis.

[101] In regard to Oosthuizen, the Applicant said that he had discovered in 1997 that she had been appointed permanently as a member of the New Testament Department. He told the Court that it was a different department and as such would have its own ways of going about things.

[102] Professor C Kourie ("Kourie") who gave evidence in support of the Applicant testified as Head of the New Testament Department that there was a definite vacancy in her Department and Oosthuizen had been appointed to fill the position of a junior lecturer in terms of recommendation 2 of the Report. As she believed that the Old Testament Department also had a vacancy, she failed to understand why the Department had not given the Applicant an opportunity to appear before a selection committee. Kourie stated that she had taken the recommendation in the report seriously and accordingly taken immediate steps to carry out the recommended procedures with a result that Oosthuizen had been appointed. She believed that at the end of 1996 there was a vacancy in the Old Testament Department and that the Applicant should have been invited to appear before a selection committee.

[103] Much time was spent in hearing evidence which compared the position of van Schalkwyk to that of the Applicant. The Applicant stated that he had had a conversation with van Schalkwyk during 1997 when he established that she had been offered a permanent appointment for the following year. The Applicant alleged that van Schalkwyk's position had been very similar to his in the sense that she had been appointed on a temporary basis for 1995 and 1996. In a manner almost identical to himself, the Applicant said she had been appointed to substitute for an absent staff member during 1997 and thereafter was offered a permanent appointment for 1998 with the support of APSA. The Head of her Department had also supported the

application. It was common cause that the Department of Missiology was a much smaller department than the Old Testament Department in that it had four or five members on the academic staff as opposed to approximately 18 members in the Old Testament Department.

[104] Moreover the pressures on the Departments differed. One department dealt with numbers of undergraduate students while the other dealt with postgraduate students. It was also common cause that at the time of van Schalkwyk's appointment the Missiology Department was in the red but that a vacancy was created for van Schalkwyk.

[105] The Union, which supported her appointment, based its demand for van Schalkwyk's appointment on the fact that by virtue of her 1997 appointment she had been converted to a list A temporary employee.

[106] Evidence by du Plessis, as Head of the Respondent's Personnel Department together with Wessels and van Dyk drew a distinction between the positions of van Schalkwyk and the Applicant. Apart from the difference in size and the demands on the Department, it was pointed out that there was a staff shortage in the Missiology Department and that prior to a permanent appointment van Schalkwyk was effectively carrying out the duties of a permanent employee. van Dyk conceded that he was not totally versed in the details of that Department but he was under the impression that van Schalkwyk had been used on a permanent basis. In other words he stated that there was an operational need, she had been used in a permanent position and the Department wished to employ her. He also stated that it may have been a temporary appointment as was the Applicant's but there was no temporary responsibility. He believed the conditions were totally different.

[107] Wessels emphasised that there was a need for the

appointment of van Schalkwyk while such a need did not exist with the Department.

[108] Mauer also explained that as far as van Schalkwyk was concerned, there was an operational need and that management had taken something of a chance in directing the Dean of the Faculty to obtain funding from his reserve in respect of the van Schalkwyk post. Thus he concluded that one could not draw a comparison between the Applicant and van Schalkwyk.

[109] In comparing the Ginsburg situation to that of the Applicant, Professor Mauer explained that Ginsburg fulfilled a major operational need in that he translated documents which were exchanged between an institution in Israel and the Respondent. This happened particularly in regard to exam papers. The Applicant did not pursue the comparison with any great vigor.

[110] The issue of Wouters was not pursued by the Applicant.

[111] Du Plessis conducted an "audit" on the employees who appeared on list B. He said that eight of the temporary employees resigned, two were renewed after 1996 on a fixed term basis and there were four permanent appointments. It was not disputed that all the employees on list A were appointed or chose not be appointed.

RESPONDENT'S FINANCIAL SITUATION

[112] The Respondent led evidence by Mauer, van Dyk and Wessels to the effect that the Respondent, at the material time, was going through and is presently going through a stage of transformation. In 1996 there was deficit of R124 million in terms of a budget of R660 million. Approximately 75-80% of the budget related to staff expenditure. It was imperative for the Respondent to reduce such expenditure.

[113] Mauer testified that there was tremendous pressure on the management responsible for staff appointments to address the financial problems facing the Respondent. The mood was one of frustration, anxiety and anger with the relationship between the Administration and the Academic staff being described as "dicey". There was also "bad blood" at the University with individuals being paranoid about what was happening.

[114] du Plessis said that there were approximately 3500 permanent members of staff with 62 academic departments and between 120,000 & 130,000 students.

[115] It was common cause that the selection process differed between appointments for junior and senior academic positions. Much depended on personnel points being available to a department in order to finance the salary requirements of the particular department. For a senior appointment, a department would make recommendations to the Faculties Executive who in turn would approach the Senate Executive Committee who would make a final recommendation to Council. A junior appointment such as that of the Applicant would be approved by Senex and not be referred to the Respondent's Council.

THE LAW

[116] It has been mentioned that the parties identified and described the issue between them.

[117] In essence it amounts to whether, on the facts of the matter, the Applicant has discharged the onus of proving that the termination of his contract of employment falls within the parameters of "dismissal" as defined in Section 186 of the Act.

[118] Section 186(b) which has been set out above is the relevant provision which requires the Applicant to prove:

(i) A reasonable expectation of **renewal of a fixed term contract** of employment on same or similar terms;

but the employer either :
offered to **renew it** on less favourable terms; or
did not renew it.

[119] This provision has its origins in the equity jurisprudence of the Industrial Court based on the concept of legitimate expectation as recognized by the Appellate Division (as it then was):

"It is clear from these cases that in this context "legitimate expectations" are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis. (Attorney-General of Hong Kong case supra at 350c)"

Administrator of the Transvaal & Others v Traub & Others (1989) 10 ILJ 823(A) at 835D

[120] Employers had not been slow to appreciate the significant difference between a contract terminating on the basis of effluxion of time and one terminating on account of misconduct, incapacity or operational requirements. The latter involved a substantive and procedural obstacle course while the former was clinical and neat. The result was that employers continued with the practice of endless renewals of fixed term contracts which usually came to an abrupt end ostensibly due to effluxion of time when often the underlying reason related to poor performance or operational requirements. It was a means of cutting costs and ensuring flexibility.

[121] The Industrial Court had little difficulty in determining that an employer had committed an unfair labour practice by relying on effluxion of time in circumstances giving rise to a reasonable expectation of continued employment on the

part of the employee. (see in general *Marius Olivier: Legal Constraints on the Termination of Fixed Term Contracts of Employment: An Enquiry into Recent Developments (1996) 17 ILJ 6 at 1001)*.

[122] The definition in the 1995 Act has formalised and to some extent changed the approach of the Industrial Court by regarding the specified act or omission of the employer in regard to a renewal as a category of "statutory dismissal" as defined in Section 186 of the Act and quoted above.

[123] Thus the Industrial Court and the subsequent 1995 Act, sought to address the mischief often attached to the fixed term contract by ensuring that the employee was treated fairly.

[124] The notion of reasonable expectation in this context of failure to renew was first raised in *MAWU & Another vs A. Mauchle (Pty) Limited t/a Precision Tools (1980) 1 ILJ 3 at 246C*:

"As the dispute that was before the Industrial Council in essence concerns the **conduct of the Respondent in not renewing the Second Applicant's migrant service contract**, and that is the dispute that is before this Court for determination, the application for amendment of para 3(c) of the memorandum is granted and it is ruled that the issues specified in that paragraph may be raised in these proceedings. "

(My emphasis)

[125] (See also *FGWU & Others v Lanco Co-Operative Limited (1994) 15 ILJ 876 (IC)* and *FGWU & Others v Letabakop Farms (Pty) Limited (1995) 16 ILJ 4 at 888 (IC)*.

[126] In the context of expectation of permanent employment in terms of the unfair labour practice jurisdiction, and with reference to the case *Mtshamba & Others v Boland Houtnywerhede (1986) 7 ILJ at 574A-D*, it was held in *Wood v Nestle (SA) (Pty)*

Limited (1996) 17 ILJ 184 (IC) at 190J:

"From the discussions which the Applicant had with the senior managers of Respondent's management, she formed the **reasonable and legitimate expectation** that she would be required to continue with the EAP programme **and that her status as a fixed-term employee would be changed to that of a permanent employee**."
(My emphasis)

[127] Thereafter, it was Froneman J (as he then was) who held in *Foster v Stewart Scott Inc. (1997) 18 ILJ at 373C (LAC):*

"It would be unwise to attempt to categorize the instances where a failure to consider or grant re-employment will be considered to be **an unfair labour practice**, because the possible factual circumstances under which it could occur are so varied. The principle of a "reasonable expectation" to re-employment seems to be the best and most flexible criterion that can be formulated. (*Cfs 186 (1)(b) of the new Labour Relations Act 66 of 1995*). It is within that context that the **Industrial Court's jurisdiction** in matters relating to a refusal to re-employ should be viewed. (Cf *Zank v Natal Fire Protection Association (1995) 16 ILJ 708 (IC) at 715A-G*)."
(My emphasis)

[128] Thus the link between renewal/re-employment and reasonable expectation applied by the Industrial Court was confirmed by the Labour Appeal Court insofar as it related to the unfair labour practice jurisdiction of the old Act.

[129] Given the agreement of the parties, it is common cause that the relevant contract for consideration is the 1997 fixed term contract in terms of which the Applicant was employed by the Respondent for the two separate periods. The question is whether the Applicant had a reasonable expectation that that particular contract would be renewed as envisaged by the provisions of Section 186(b) or that he would be offered permanent employment.

[130] "Reasonable Expectation" as expressed in Section 186(b) is not defined by the Act but its meaning includes the following considerations:

(i) It essentially is an equity criterion, ensuring relief to a party on the basis of fairness in circumstances where the strict principles of **the law** would not foresee a remedy.
(See Olivier: supra at 1027).

(ii) The Act clearly envisages the existence of a substantive expectation, in the sense that the expectation must relate to the renewal of the fixed-term contract.
(See Olivier: supra at 1028).

(iii) "…. the expectation is essentially of a subjective nature, vesting in the person of the employee. It is not required that the expectation has to be shared by the employer…"
(See Olivier: supra at 1030).

(iv) "Counsel for the Respondent argued that the Courts had to apply an objective test as to whether the Applicant's employment had indeed become permanent and whether he could hold the alleged reasonable expectation of continued employment."
(See Malandoh v SA Broadcasting Corporation (1997) 18 ILJ 544 (LC) at 547D).

[131] A recent case in the Supreme Court of Appeal confirmed that the wording of the contract was only one of the considerations which are taken into account:

"These assurances by the managing director of the Appellant clearly conveyed to the workers that, **despite the strict wording of the temporary contract to the effect that they were to have no expectation of the contract being renewed**, they could in fact entertain such an expectation if they behaved themselves so well during the three month period that management felt happy about them. In fact, not only would their contract be renewed, but Appellant would "come out with a new contract" offering them permanent

employment."

(See *Mediterranean Woollen Mills (Pty) Ltd vs SA Clothing & Textile Workers Union (1998) 19 ILJ 731 (SCA) at 734C*).

(My emphasis)

[132] In my view, it can be deduced from the aforegoing and the use of the word "reasonable" that the Applicant as employee must prove that he had an expectation of renewal and that that expectation was reasonable in that apart from subjective say-so or perception there is an objective basis for the creation of his expectation.

[133] A number of criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Appeal Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business.

(See *Olivier: supra at 1030*).

[134] These factors are not a *numerus clausus*. Indeed, in my view, the identified approach of an evaluation of all the surrounding circumstances entails an analysis of the facts in any given situation for the purpose of establishing whether a reasonable expectation has come into existence on an objective basis.

[135] While it is clear that an employee engaged in a fixed term contract and having a reasonable expectation of renewal of that contract will prove the 186(b) statutory "dismissal" if the employer refuses to renew or offers less favourable terms, it is

not so clear what will ensue if the reasonable expectation is one of permanent employment.

[136] The distinction is one of some significance. It is highlighted by Professor Olivier in his authoritative article on the subject as follows:

"What is required in order to activate the provisions of s186(b) is an expectation that fixed-term contract in question would be renewed on the same or similar terms. It is evident that the Act does not require that or regulate the position where the expectation implies a permanent or indefinite relationship on an ongoing basis.

(See the Wood case discussed above; see also *Colavita v Sun International Bophuthatswana Limited (1995) BLLR 88 (IC) at 93E*; and the obiter remarks made in *FGWU v Letabakop Farms (Pty) Limited 1995 BLLR 23 (IC) at 31B-C*). The reference to **renewal** on the **same** or **similar terms** supports that this is the inference to be drawn from the wording of the subsection. What s186(b) apparently envisages is that an employer should not be allowed not to continue with fixed term employment in circumstances where an expectation of renewal is justified."

(See *Olivier: supra at 1006*)

[137] The main thrust of the Applicant's case was based on the reasonable expectation of permanent employment as opposed to renewal of the fixed term contract.

[138] Indeed, I requested the legal representatives of the parties to specifically argue whether Section 186(b), despite its clear wording, included a reasonable expectation of permanent employment.

[139] Mr R Mayer, for the Applicant argued that to find Section 186(b) was limited to reasonable expectations of renewals of fixed term contracts would be absurd. After all, he argued, if the employee could prove a reasonable expectation to a greater benefit, particularly in the light of findings of the

Industrial Court (See *Wood vs Nestle: supra*), it must follow on the basis of common sense, besides anything else, that permanent employment is included in the provision.

[140] Mr G. Higgins for the Respondent relied on the wording of Section 186(b) by submitting that it did not make provision for the situation where an employee has an expectation of permanent employment.

[141] *Prima facie*, it does seem logical that if a reasonable expectation can lead to a renewal of a fixed term contract, the same expectation should lead to appropriate relief for permanent employment by implication particularly if there is no provision in the Act to address the apparent lacuna. Moreover, the Labour Court appeared to accept a similar argument to that of the Applicant without comment on the distinction between the two expectations (See *Malandoh vs SA Broadcasting Corporation: supra at 549A*).

[142] Yet, there are other considerations which tend to support the Respondent's reliance on the wording of Section 186(b).

[143] Firstly, besides the clear wording of the section, the reason for such a provision is founded to a large extent on the patent unfairness of the indefinite renewals of fixed term contracts (See *Cremark a division of Triple P-Chemical Ventures (Pty) Ltd vs SACWU and Others (1994) 15 ILJ 289 (LAC)* and *Colavita v Sun International Bophuthatswana (1995) BLLR 88 (IC)*.

[144] The exploitative employer is dealt with in this manner. In consequence of such unfairness there is a renewal which will endure for the same period of the previous contract. That seems fair, given that a reasonable expectation is a principle of equity falling short of a right. (See *Administrator of the Transvaal & Others vs Traub (1989) 10 ILJ 823 (A) at 840A-Z.*

[145] Secondly, the employee with a claim for permanent employment is not without remedy. Schedule 7 (Part B) of the Act pertaining to transitional arrangements relating to unfair labour practices stipulates, *inter alia*, in Section 2 that:

"Residual unfair labour practices:

(i) for the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving:

(a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to, race, gender, sex…

(b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;

(c)…

(d) the failure or refusal of an employer to re-instate or re-employ a former employee in terms of an agreement."

[146] Thus, in circumstances where the employee alleges that a reasonable expectation has been created for permanent employment or that the fixed term contract has been converted into one of permanence, it is my view that the employee may seek to rely on unfair labour practice jurisdiction as opposed to the defined unfair dismissal.

[147] In this instance, however, the Applicant has specifically relied on Section 186(b) in identifying the crisp dispute between the parties as well as in the presentation and argument of his case.

[148] In my view, an entitlement to permanent employment

cannot be based simply on the reasonable expectation of Section 186(b), i.e. an Applicant cannot rely on an interpretation by implication or "common sense". It would require a specific statutory provision to that effect, particularly against the background outlined above.

[149] Accordingly, I agree with Professor Olivier's opinion as quoted and find that Section 186(b) does not include a reasonable expectation of permanent employment. This finding means that this Court does not have the jurisdiction to decide the crisp issue insofar as it concerns the reasonable expectation of permanent employment. I shall now turn to the application of the law to the facts of this matter.

ANALYSIS OF EVIDENCE AND ARGUMENT

[150] Mr Mayer for the Applicant argued that two instances formed the crux of the dispute between the parties, namely:

(i) The lack of an invitation to the Applicant to appear before a selection committee in terms of recommendation 2 of the Report towards the end of 1996.

(ii) The failure of the Respondent to apply to the Applicant the recommendation relating to List A.

[151] Both these issues relate to the Applicant's expectation of permanent appointment (as opposed to a fixed term renewal) by virtue of the provisions of the report. Having concluded that Section 185(b) does not include a reasonable expectation of permanent employment, there should be no need for me to consider whether a reasonable expectation of permanent employment was justified on the facts and that the Applicant has discharged that onus. However, if I am wrong in that finding on the law, the evidence of that expectation requires evaluation, which I

intend to pursue.

[152] In arguing for the existence of a reasonable expectation as a precursor to those instances, the Applicant sought support from his three year service, his employability, the "tradition" of the Respondent with the examples given by the Applicant, developing responsibilities and activities within the Department and the presentation of academic papers.

[153] As I understood the Applicant's case, these considerations were not regarded as conclusive but rather significant within the context of the complete picture. It was submitted, however, that in terms of the report the Applicant was entitled to appear before a selection committee as there was a vacancy which fulfilled the required condition to his entitlement.

[154] As already mentioned, I am not satisfied on the probabilities that a vacancy did in fact exist. In my view the surrounding circumstances (leaving aside the disputed documentation), including the financial considerations pertaining to the Respondent and the Old Testament Department, the attitude of the faculty executive during 1996, the dealings between van Dyk and the Applicant together with the conduct of both the Applicant and Sheffler point strongly against and would be inconsistent with the existence of such a vacancy for the purposes of List B. Accordingly, I find that there was no obligation to invite the applicant to an interview as the condition was not fulfilled.

[155] Assuming, however, that such vacancy did in fact exist, I am still not persuaded that the circumstances surrounding recommendation 2, and list B of the report, gave rise to the expectation envisaged by Section 186(b).

[156] On learning that he appeared on List B, the Applicant

chose to do nothing about it. He waited for the Respondent to invite him as required by the provisions of the recommendation. In his dealings with van Dyk when his 1996 contract was about to expire, he did not raise the question which would have revealed an expectation on his part. He said he was touched and optimistic but yet subsequently concluded a fixed term contract without reference to the recommendation.

[157] One does not have to be a labour lawyer, more so if one possesses the intelligence of the Applicant, to take steps in one's interest if the opportunity is staring one in the face. In my view, the Applicant's failure to take any steps is a strong indication that he was either not satisfied at that stage that a vacancy existed or if it did, that he had good prospects. To my mind, such conduct is not evidence of a strengthening of a reasonable expectation.

[158] Mr Higgins for the Respondent argued that the end of 1996 was a crucial time in establishing whether a reasonable expectation existed as it was shortly after the publication of the report that the Applicant was offered a further fixed term contract for 1997. He also pointed out that the Applicant did not mention the selection committee or any expectation in that regard to van Dyk at the time.

[159] Thus, as already mentioned, in my view, no expectation was created or enhanced by the report at the time of its publication to the Applicant.

[160] The fixed term contract for 1997 contained a number of terms which have been recorded above. These were read and understood by the Applicant. They record that the contract will expire at the end of the fixed term period and that the Applicant could have no expectation of a renewal.

[161] It is trite that the wording of the contract does not

suffice to exclude an expectation (See *Mediterranean Woollen Mills (Pty) Limited vs SA Clothing and Textile Workers Union: supra at 734C*). However, the late conclusion of the 1997 contract and the unchallenged evidence of Wessels and van Dyk who were Head of Department and Acting Head of Department respectively regarding the hard times being experienced by the Respondent cannot be regarded as positive pointers to a reasonable expectation for renewal during 1998.

[162] However, Mr Mayer argued for the Applicant that the intimations from such representatives of the Respondent were not sufficient and that the 1997 contract could not negate the expectations accrued from previous periods of employment and the significance of the renewal itself.

[163] He submitted that in the light of the recommendations of the report, the Respondent concluded a third fixed term contract with the Applicant "at its peril". He also submitted that at the very least the Applicant had expectation of employment until Kloppers returned in May 1998. In particular, he said that van Dyk's evidence of a practice of 1 year contract was not consistent with the fixed periods which in fact related to Klopper's absence in 1997.

[164] Mr Higgins, for the Respondent submitted that the report made provision for precisely the situation which faced the Old Testament Department as a result of Klopper being absent on study leave. Recommendation 2 stated, *inter alia*,:

"The employees listed on list B should only be re-appointed in exceptional circumstances when a *bona fide* need exists."

[165] He submitted that Klopper's absence was an exceptional circumstance creating a *bona fide* need.

[166] Mr Meyers argued on more than one occasion that at the

very least, the applicant had a reasonable expectation of renewal for the period of Klopper's absence during 1998.

[167] It appeared to me that this expectation was not pursued with excessive zest as the thrust of the Applicant's case was directed at permanent employment.

[168] The evidence of the circumstances in which the 1997 contract was concluded and the terms of the contract satisfy me that reasonable expectations of a renewal for the period in 1998 or otherwise was not justified. Moreover there was no evidence that the respondent represented by van Dyk or others had given any indication to the applicant that such a renewal was a possibility.

[169] I accordingly find that no reasonable expectation of a renewal of the 1997 fixed term contract was justified.

[170] As regards permanent employment, Mr Higgins pointed out that recommendation 3 called on the Head of Department to:

"… seriously re-assess whether the operational needs filled by the current temporary employees are in fact temporary or permanent needs and to adapt their Human Resource Planning accordingly (permanent needs must be filled by permanent employees)."

[171] The evidence of van Dyk and Wessels was that the operational needs of the Department did not require the services of a permanent junior lecturer.

[172] Thus, having entered 1997 on a fixed term contract as a result of Klopper's absence in the circumstances described above, the question arises whether the Respondent's subsequent conduct or lack thereof influenced an expectation in the mind of the Applicant.

[173] There was undisputed evidence that the Respondent's financial position was gloomy. In addition, Wessels and van Dyk did nothing to brighten the picture or engender positive expectations in the Applicant. Indeed their conduct pointed in the opposite direction. It was not argued that they, who were influential in the Department, generated a significant expectation in any way.

[174] In my opinion, it was not until Sheffler's disclosure to him about the meeting between the Departmental Professors and Mauer, that the Applicant's existing subjective expectations based on the grounds alleged by him may have been strengthened. There was no evidence, besides the fact of the 1997 fixed term contract, that his expectations had been seriously influenced by a particular act or admission of the Respondent until that stage.

[175] At best for the Applicant, Mauer, the Respondent's acting registrar (personnel) had said that the applicant would be appointed on permanent staff as he was a List A candidate by virtue of his second renewal, i.e. for 1997. Leaving aside the undisputed surrounding circumstances in which the 1997 contract was concluded, Sheffler who made the disclosure was aware of the attitudes of both van Dyk and particularly Wessels at the time that he conveyed the information to the applicant.

[176] The reason for the disclosure to the Applicant was that nothing had been done to comply with Mauer's requirements at the meeting. Wessels had explained the reason to Sheffler. In my opinion, nothing being done together with the explanation of Wessels does not enhance an expectation. It creates doubt and the applicant on the probabilities must have been aware of this background.

[177] Thus in my view, the positive disclosure about Mauer's comments must be off-set against the negative context in what it

was made, i.e. the attitude and absence of the support of van Dyk and Wessels.

[178] The departmental meeting when Wessels was confronted by Sheffler must have further dampened any expectation which may have existed in the mind of the Applicant.

[179] Although there was a disagreement between the recollections of the Applicant and Sheffler on the one hand and Mauer on the other as to what was said at their independent meetings with the latter, it appeared to me to be common cause that he did not confirm Sheffler's impression of his alleged commitment to the permanent appointment of the Applicant. This was a commitment which Sheffler believed he had created at his meeting with the Departmental Professors.

[180] Besides his sympathy, it must have been apparent that there were limits as to what he could achieve given the lack of support from van Dyk and Wessels, the legal opinion and the financial position of the department.

[181] It was argued further for the Applicant that the appointment of van Schalkwyk made the Applicant's expectations reasonable as it was a clear example of the Respondent's appointment practices. It was said that the awareness of van Schalkwyk's situation with Sheffler's disclosure gave the Applicant a reasonable expectation.

[182] It cannot be seriously disputed that van Schalkwyk's employment history was similar if not identical to that of the Applicant by virtue of a second renewal of a fixed term contract while recognised as a List B candidate. However, the evidence revealed different circumstances prevailed between the Applicant and van Schalkwyk. There were different departments with differences in structures, requirements, nature of work and senior management's support.

[183] Reliance was also placed on the fact that the renewal for 1997 put the Applicant in a List A situation. Although APSA may have used this argument in support of van Schalkwyk's appointment, I am not convinced that it is a sound interpretation of the relevant provisions. Accordingly I do regard it as a decisive factor in assessing the reasonableness of the Applicant's expectation.

[184] The issue in this case is one of expectation rather than a dispute over a possible right to appointment on account of an alleged conversion from a B listee to an A listee.

[185] In argument, Mr Higgins listed a number of points which he said militated against a reasonable expectation of employment by the Applicant. These, besides those already mentioned, included the evidence of the applicant's previous disappointments, the process of transformation at the respondent, the financial plight of the respondent and the drop in numbers of students in the department.

[186] It was not entirely clear to me when the Applicant made enquiries regarding the other members of List B and established that van Schalkwyk, Oosthuizen, Ginsberg and Wouters had required permanent status.

[187] It is probable that it was after Sheffler's disclosure when the Applicant was taking a serious interest in his future employment.

[188] It is my view that the appointments of van Schalkwyk, Oosthuizen, Ginsberg and Wouters are distinguishable for the reasons I have mentioned and should have been seen in that light by the applicant.

[189] There was also a lack of support from the applicant's

union which could have done nothing to raise the Applicant's expectations.

[190] Although I have commented on each factor separately as that was the manner in which the evidence was presented and argued, I believe that the correct approach is to consider as a conspectus of all the relevant circumstances and decide whether they have created a reasonable expectation of permanent employment in the mind of the applicant during his employment with the respondent. I think not.

[191] Thus, if I am wrong in my conclusion that Section 189(b) does not extend to a reasonable expectation of permanent employment, I find on the facts that the circumstances would not justify a finding that the Applicant's expectations of permanent employment were reasonable as required by that Section.

[192] Having also decided that the facts did not warrant a finding of reasonable expectation of renewal of the 1997 contract (as opposed to permanent employment), I order that:

(1) The application is dismissed.

(2) As the respondent does not persist with its claim for costs, there is no order as to costs.

OOSTHUIZEN AJ

DATES OF HEARING: 23 to 29 September 1998
DATE OF JUDGMENT: December 14, 1998

For the Applicant: Mr R Mayer of Garry Hertberg, Dewey and Partners

For the Respondent: Mr G Higgins of Sampson Okes Higgins Inc.