IN THE LABOUR COURT OF SOUTH AFRICA

Held at CAPE TOWN C23/97

Before Landman J

In the matter between

Ashley Martin Abbott Applicant

and

The Bargaining Council for the Motor Industry (Western Cape) Respondent

JUDGMENT

[1] Ashley Martin Abbott, who describes himself as a Black person, meaning a person belonging to a racial grouping of people known as Coloured, Indian and African, complains of an unfair labour practice. He applied to the Motor Industry Bargaining Council (Western Cape), "the Council", for employment as a designated agent but was unsuccessful. He alleges that the Council discriminated against him on the grounds of his race and trade union affiliation or activities.

[2] He is an office-bearer of NUMSA and represents his union, which is a member of the Council, on the Council. MISA and MIEU are the other union members on the Council. Each union has three votes apiece. SAMIEA is the employer member. SAMIEA has nine votes. NUMSA has assisted Mr Abbott

financially in launching this application. Adv L J Bozalek appears for Mr Abbott. The Council is represented by Adv J J Reinecke SC.

[3] The Council, making allowances for its particular decision making and consensus seeking processes, falls to be treated as any other employer governed by a board or council. Although some submissions were directed to a duty of independent decision-making the Council, it was not suggested that the Council was required to exercise a more judicious decision in appointing an agent that another employer. This was not a review.

[4] Mr Abbott is 42 years old. He comes from a poor family. He left school after achieving a standard 8 certificate in order to assist his family. He is married and has two children. He is a panel beater. He has been a union member and has served his union in a number of capacities. He has recently acquired a qualification in labour relations from the University of the Western Cape. He may be described as a historically disadvantaged person. He came across as an honest witness and a man who had set out to improve the hand which life had dealt him. I accept his testimony about matters within his own knowledge.

Vacancy for another agent

[5] In September 1996 the Council resolved to create and advertise a vacancy for an eighth designated agent. There was some urgency about filling the post as the preference for an experienced person seems to suggest. The qualifications were framed to indicate a preference for some one with experience as an agent or inspector in the Department of Labour. An advert was placed in the press. About 150 persons applied. A sub-committee of representatives examined the applications and agreed on a short list of seven applicants. Mr Abbott's name was among them. The interviewing committee, consisting of representatives of all four members of the Council and an official, met on 25 August 1996 to interview those candidates who were short listed. The seven candidates, including Mr Abbott, were interviewed. On conclusion of this process, and without side caucuses, the representatives drew up a list of 4 candidates in order of preference. The name of a Mr Grace (a white male) previously an inspector in the Department of Labour, who did not belong to a union, appeared on top of the lists of all members save that of NUMSA. Mr Pietersen, representing NUMSA, selected Mr Mohlala followed jointly by Mr Dyanti and Ms Badenhorst (a white female). Mr Abbott did not feature on his list.

[6] The short list was presented to the executive committee of the Council on 7 November 1996. All four members were represented on this committee. NUMSA proposed Mr Mohlala alternatively Mr Dyanti. NUMSA did not propose Mr Abbott. The matter served before the full Council on 27 November 1996. NUMSA proposed Mr Dyanti for the position. There was no seconder although a NUMSA representative could have seconded the motion. A query was raised as to whether the affirmative action policy of the Council had been followed. After discussion the appointment was held in abeyance and the matter was referred to the national office of the Council. The national office reported that the constitution had been complied with and that Mr Grace had been validly appointed. Mr Grace's appointment was confirmed at a meeting of the Council on 22 January 1997. NUMSA did not support this resolution.

[7] Since Mr Grace's appointment, Mr Mohlala and two other Black persons have been appointed as agents. Mr Abbott did not apply for the one post advertised (which led to two appointments).

Alleged discrimination

The law

[8] The Part B of the 7th Schedule to the Labour Relations Act 66 of 1995 caters for what are termed residual unfair labour practices. Item 2(1) provides that:

> For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and employee, involving-
>
> (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race....

[9] An employee specifically includes an applicant for employment. See item 2(2)(a). The expression “any arbitrary ground” may include reasons related to the employee’s trade union affiliation or activities. Discrimination must be proved on a balance of probabilities. An onus or burden of proof may shift to the employer once it is shown that an act of discrimination has been committed. See **Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and others** (1998) 19 ILJ 285 (LC).

[10] Seemingly discrimination need not have any effect on the employee complaining of an unfair labour practice. Item 2 merely refers to an act of omission involving discrimination. Although it is possible for the legislature to have meant this. Further reflection shows that the legislature did not intend to invite litigation, even about unfair discrimination, where it has no effect. Even if it does have an effect on an employee it may be sufficient to remedy the situation by a declaratory order. There must however be some effect of the discrimination on the employee or employees as the case may be.

[11] Although discrimination is outlawed the Schedule allows for it in two instances. In the one case if the inherent requirements of the job require it. Secondly it states that:

> an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. Item 2(2)(b).

[12] Affirmative action of persons belong to disadvantaged groups or

categories is a defence against the principal injunction not to discriminate in employment. But does this mean that affirmative action is then merely a shield for an enlightened employer or does it serve as a sword for a disadvantaged person? It was conceded by Mr Bozalek, in my opinion correctly in this case, that an applicant for employment derives no right from a contractual or negotiated affirmative action policy, as policies envisaged by this sub-item are called. It was however submitted that in assessing whether an applicant was a victim of a residual unfair labour practice the existence and scope of an affirmative action policy and the obligations which it placed on the employer are vital considerations. From an equity and labour relations point of view an employer should be bound by such a policy.

[13] Juridically it seems to me that this policy does not give a right to an applicant for employment, at least one who has no existing relationship with the employer. See **George v Liberty Life of Africa Ltd** (1996) 17 ILJ 571 (IC). The policy seems to stand on the same footing as the terms of the advertisement inviting applications for the job. The policy is, I think, a term of the invitation to treat and good labour relations binds the employer to follow it.

Trade union affiliation

[14] Mr Abbott's direct evidence, concerning the alleged discrimination which resulted in him not being appointed, was based on two grounds. The first related to his trade union affiliation. He stated that Mr Kritizinger, for the employer member, had asked him, at the interview, whether in the light of his NUMSA background he would be able to be impartial. He answered affirmatively. MIEU asked him about 3 times whether he would be impartial as regards other union members. He was also quizzed by Mr Botha. He views this a discrimination against him on the grounds of his union membership.

[15] Mr Botha of MISA, who gave evidence was unable to recall whether this was so. He did confirm Mr Kritzinger's inquiry. I find that the MIEU representative did ask these questions. I do not, however, think that the evidence shows that there was a bias against Mr Abbott's trade union

leanings. Rather there appears to be intra-union rivalry which troubled MIEU to inquire whether their members could expect a fair deal from Mr Abbott. They were apparently not satisfied on this score. Their objection was, however, a personal one and not a principled stand against trade union leanings.

[16] I find no proof of such discrimination at this or any other stage, including the final appointment of Mr Grace, and in consequence the final rejection of Mr Abbott, by the Council on 22 January 1997.

Race

Direct discrimination

[17] Secondly, Mr Abbott alleges that he was discriminated against on the grounds of his race. I think that it cannot be doubted that in the past, the Council, ie the majority of members, practised racial discrimination in favour of white persons, especially males, as did the rest of our society. There came a turning point after 1994 when the Council appointed a Black person, in the broad sense, a Mr Opperman, as an agent (Black persons were being appointed in lower grades).

[18] Mr Abbott cannot complain about being selected for the short list. It gave him a shot at the job. True MISA did not object to him being short listed even though they saw it as a move to spare his feelings as a councilor. They did not regard him as a serious contender and did not intended supporting his candidacy. He was to be a skittle, as indeed were other candidates, to be knocked down later. I do not view this as unfair or unjustified discrimination. Shifting, short listing and selection involve a process of discrimination. It may however not be premised on impermissible motives. The mixture of compromises and consensus seeking is inherent in the Council, composed as it is. It was not dishonest nor discriminatory for MISA (and other members) to allow Mr Abbott's hat to be thrown in the ring.

Affirmative action

[19] There was no an affirmative action policy in place at the time of the interview. The affirmative action policy was accepted on 22 November 1996. It had been mooted at an earlier general meeting but had not been formally adopted. Mr Abbott may therefore not base his claim on an affirmative action

policy. He is confined, at this stage, to arguing his case on the basis that there was discrimination against him on the basis of race.

[20] I do not believe that he can succeed in showing racial discrimination. NUMSA, his own union, is renown for its non-racial stance, and has been for many years. It is highly unlikely that Mr Abbott's absence from NUMSA's preference list was due to his race. NUMSA, for reasons, best known to it, decided that he was not a suitable candidate for inclusion on this list. Mr Vazi, an organiser and councilor, was not able to shed light on this. He was not present at the interview. Mr Pietersen stood in for him. Mr Pietersen was not called as a witness.

[21] The interview committee reported to the executive committee. The committee met on 11 November 1996. Mr Grace's name went forward. By the time that the matter was referred to the full council on 27 November 1996 a special general meeting of the national council had adopted an affirmative action policy. This policy, which was adopted on 22 November 1996, reads:

> The employment profile of this Industry's organisations should reflect the demographics of both the country and the Industry in the long term.
>
> In the short term each office to work actively towards a staff complement of both black and white.
>
> In the event of a deadlock arising between the parties then the matter would be referred to arbitration, where a decision taking into account all relevant requirements including the affirmative action provision would be final.

[22] The affirmative action policy was a recognition that the skewed history of South Africa was also reflected in the make up of the council's staff.

Seventy per cent of the employees in the industry were black persons. Of the seven agents serving them one was black.

[23] At least two views were articulated about the affirmative action policy. Mr Vazi says NUMSA's understanding was that it meant, in the short term, that only blacks should be appointed; white males were not to be considered. Mr Botha, of MISA, was of the opinion that a black person could be appointed if he or she was as good a candidate as another; ie if there were two equally good candidates the Black person would be preferred.

[24] None of these perceptions appear ex facie the affirmative action policy document. The policy made provision for arbitration in the case of a deadlock. MISA and the other members interpreted deadlock to mean deadlock in voting ie a 50/50 situation. Here there was no seconder for NUMSA's proposal of Mr Dyanti and so no vote was taken; a fortiori there was no deadlock. NUMSA, on the other hand, was of the view that there was a deadlock as envisaged in the policy. This matter was sent to the national office and resolved against NUMSA. NUMSA left it at that.

[25] If NUMSA was litigating this would be the end of the matter. But what about the applicants for the job. They did not apply for an affirmative action post but, once it was on the cards, they were entitled, loosely speaking, to its benefits. Only the short terms objectives of the Council's policy need be considered. The policy was aimed at balancing the ratio of black and white employees employed by the Council; in this case agents. This meant in my view that preference was to be given in the appointment of agents to black persons who were reasonably capable of doing the job. This was Mr Bozalek's submission.

[26] Although the candidates were not invited to treat for the post on the basis of affirmative action the situation had changed and the Council, in my opinion, was honour bound to apply affirmative action in making its final selection. Did it do so? A re-evaluation of at least the seven short listed candidates was required. This was not done on the construction which I find to be the true one. Prima facie there is cause for complaint.

[27] But the affirmative action policy does not avail Mr Abbott. He was not in serious contention. He was not considered by any party to be a contender at this stage nor the previous stage; not even by his own union. Mr Vazi explained that it was thought that there would be no support for Mr Abbott; not without some justification. So others were put forward. Mr Dyanti or Mr Mohlala could complain but not Mr Abbott. He cannot rely on the affirmative action policy nor can he complain about racial discrimination. He was too

remote from the action to have been a victim of racial discrimination, if there was any, which I suspect there may have been. He was too far removed from the benefits of the affirmative action policy properly construed.

[28] Some moment was made of Mr Abbott's knowledge of the agreements which the Council enforces. This was done to demonstrate that Mr Abbot's knowledge made him as good a candidate as Mr Grace who had experience in inspection but had next to no knowledge of the specific agreements administered or policed by the Council. This tactic was undoubtedly followed to prove discrimination by inference; which is often the only way in which it may be exposed. Nevertheless it treads a delicate path for although the intention of the legislature is to outlaw discrimination and facilitate equal opportunities (I leave affirmative action aside) and so encourage appointments on merit, it is not the function of the court to ensure directly that the best man or woman for the job is selected. It is the function of this court to strike down discrimination and that must be the focus of my concentration.

[29] Mr Botha of MISA testified that the appointment of Mr Grace was purely on merit. Without intending Mr Grace any slight I am not in a position to say so. Certainly the inference cannot be drawn that Mr Grace was a weaker candidate that Messrs Mohlala, Dyanti and Abbott. It is also uncontested that Grace has performed satisfactorily.

[30] I am unable to rank Mr Abbott and Mr Grace and the other candidates. Nor is it my function to do so. The matter in my view was decided by the best possible indicator. NUMSA did not support Mr Abbott. It is hard for him. He probably feels deserted by his comrades. But it is a sad fact but one which says it all. The appointment of an employee evolves a degree of subjectivity but not of a discriminatory nature. Within the limits explored in this judgment it is for the employer to decide who it wishes to employ.

Indirect discrimination

[31] It was contended as a final submission that the Council was guilty of indirect discrimination against Mr Abbott and other black applicants by the way it framed and advertised the requirements for the post. On the face of it, so it was contended, the preference for experience as an agent or inspector in the Department of Labour is a neutral one but, given our history, there would be few experienced black agents or inspectors in the market. Thus the Council was preferring whites above blacks. There is some merit in this even though NUMSA itself went along with the framing of the requirements for the post in

this way. This simply means that the Council as a whole may have discriminated indirectly against blacks and possibly women. It would have been even stronger if only experienced agents or inspectors were invited to apply. Here there was, from the outset, at least formally, an intention to afford preference and not to exclude those without this experience. The trial was not fought on this battlefield. It would not be proper to make a decision on this without re-opening the evidence and consequently I do not decide the issue. Although, if I were to do so, again Mr Abbott would be at least third in line to reap the benefits of this mishap.

[32] In the premises the application is dismissed. This is not a case where costs should be ordered. I make no order as to costs.

SIGNED AND DATED AT CAPE TOWN THIS 28th DAY OF SEPTEMBER

1998.

A A Landman
Judge of the Labour Court

For the Applicant: Adv L J Bozalek instructed by Chennels Albertyn

For the Respondent: Adv J J Reinecke SC instructed by Hofmeyer Herbstein Inc

Date of hearing: 21, 22, 23,15 September 1998
Date of judgment: 28 September 1998