INTHE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JS 1480/01

In the matter between

YVETTE BIGGS Applicant

and

RAND WATER Respondent

REASONS FOR JUDGMENT

REVELAS, J. The applicant, Yvette Biggs, a white woman in her twenties, had been employed by the respondent as a Water Quantity Administrator at its Head Office in Glenvista since 12 September 2000. Her position was not permanent and her employment contract was renewed from time to time.

During May 2001 the position of the applicant's became permanent and she applied for that position. In other words, she applied for her own post of Water Quality Administrator which she had filled for almost a year.
On 12 September 2001 she was notified that her application was unsuccessful. The person who successfully applied for the position of Water Quality Administrator was a black woman who was an existing employee of the respondent, and employed in a different department.

The applicant's case is that she was automatically unfairly dismissed in terms of section 187(f) of the Labour Relations Act 66 of 1995 (the LRA) and Section 6 of the Employment Equity Act 55 of 1998 (the EEA) in that she was unfairly discriminated against by the respondent on the basis of her race. The relief she seeks is compensation.

The respondent had an affirmative action policy in place and in terms of it the affirmative action process applied to "all women" and according to the applicant she fell within a designated group and the policy equally applied to her.

The respondent's case is firstly, that the employment contract between itself and the applicant, had come to an end by agreement. The contract signed with the Scientific Services Department of the respondent recorded that her employment would terminate from 18

October 2000. Thereafter until the post became permanent the applicant's contract was extended on a monthly basis so that she could assist with the "backlog in administrative work".

It was common cause between the parties that the applicant was dilligent, competent and a great asset in the department where she worked.

The respondent's case is secondly, that in certain respects the black woman Ms Mahlala was more suitable for the position as she had an "N5 certification" and the applicant only had matric. Further, since the demographics of the relevant band within the department reflected that mostly white women were employed, it was fair to appoint Ms Thlaleng Mahlala to the position.

The Respondent in its answer to the applicant's statement of case, stated that the reason for not appointing the applicant was due to the application and employment equity endeavours. It stated that it had sought to appoint a person competent to perform in the position while taking into consideration the spirit of the EEA. In paragraph 19 of its response the respondent "denies that the Applicant was the best candidate" and suggested that she and Ms Mahlala were equally competent but stated that they do not have the "same qualifications, skills and experience."

The evidence lead by the applicant and her witnesses and which was not dented by the cross-examination, strongly suggests that the applicant had a legitimate expectation to be appointed and therefore established a dismissal for the purposes of section 186(b) of the LRA. During the ten month period when the applicant worked in terms of the several fixed term contracts which were extended continuously, she underwent training and induction. She was supported in these endeavours by her line manager, Ms Anne Vincente who also gave evidence at the trial. She was called by the respondent. According to Mrs Vincente's evidence, she recommended to the panel that the applicant be appointed because the applicant introduced systems and procedures as a water quality assistant to the extent that she came inexpendable.

I gained the very strong impression that the applicant changed the functional content of her position into one which was quite different and more effective than it was when she was appointed. Ms Vincente's evidence was that through her good performance, the applicant created systems and procedures to such an extent that the respondent identified an absolute need for the creation of the permanent position. The respondent's contentions that she mainly assisted with the backlog (the respondent's statement of case) is completely incorrect.

Plainly, the applicant discharged the arms of proving that her services

were terminated. Based on all the facts and the continuous extensions of her contract she had a legitimate expectation that a proper and fair process would be followed and fair criteria be applied when she applied for the existing post she had already manned so very competently. Her superiors ensured her that she was by far the best candidate. The respondent's denial of this fact is facile as Ms Vincente's evidence confirmed the evidence of the applicant in this regard.

Dr Kassan, the respondent's General Manager, explained that he was compelled to employ Ms Mahlala despite the interviewing committee's recommendation that the applicant should be appointed. The compelling factor he says he was obliged to take into account was the following sequential racial prefence:

1.

Black females

2. Black males
3. Indians
4. Coloureds
5. People with disabilities
6. White females

It appears that white males are completely out of the question as they were not mentioned. According to Dr Kassan the demographics indicated that too many white females were appointed.

Ms Vincente confirmed that she and Mr Lubout, as line managers, were responsible for the implementation of the respondents affirmative action policies and they were members of the interviewing panel. Dr Hassan overruled the interviewing panel's recommendation that the panel appoint the applicant, without even meeting her or Ms Mahlala or the other candidate and without weighing up various other factors. Important considerations were the candidates qualifications and experience. The fact that the applicant would become unemployed due to his decision and Ms Mahlala already had a position with the respondent when she applied, should also have been considered.

The written motivation memo of the interviewing panel had gone missing and could not be found despite dilligent searches. This was according to the respondent's legal advisor who was called by the

respondent to testify.

According to the Respondent's Equity consultant, the targets for appointing designated group of employees had not yet been reached. The need for racial transformation in this country and the objects and aims of the EEA is trite and need not be set out in any detail in this judgment.

The applicant was treated unfairly in more than one way. Section 186(b) was included in the LRA to prevent the unfair practice of keeping an employee in a position on a temporary basis without employment security until it suits the employer to dismiss such an employee without the unpleasant obligations imposed on employers by the LRA in respect of permanent employees. The applicant's situation fell squarely with the purview of section 186(b). In this context, Ms Mahlala who already had a job, gained another at the expense of the applicant.

The respondent did not furnish a written policy to support its view that it is entitled to discriminate between black and white females. The applicant's case is that no provision existed for the preferential treatment between members of a designated group-in this case, females-within the respondent or the EEA. The applicant also made the point, and correctly so, that Dr Kassan's classification and considerations were not supported by any collective agreement or

policy document. No documentation as to Ms Mahlala's qualifications were produced.

In my view Dr Kassan's conduct in overruling the panel's recommendation without even meeting any of the candidates was so arrogant that it could not justify the discrimination which he implemented. The other employee shortlisted was Indian, according to Ms Vincente.

Basically the respondent's case was that it indeed discriminated against the applicant, but was legally entitled to do so, because it had done so fairly. This was of course not its case initially. Then it had been that Ms Mahlala was more suitable and qualified for the position. The respondent used the applicant's skills, initiative, templates and other methods with which she created a fine post, only to put her out on the street and replace her with a person Dr Kassan did not even interview. He acted solely upon the names and race of the persons involved. Such conduct is rationally not capable of being construed as fair discrimination. If Dr Kassan's method of appointing employees is to be accepted as fair then the applicant should have been advised not to apply or the advertisement in question should have stated that whites and indians need not apply for the position. In fact, the applicant should have been dismissed long ago.

The applicant was turned down only because of her race in a process

which was devoid of any fairness or foundation in the respondent's policies. The respondent failed to justify the discrimination against the applicant in terms of Section 2(2)(b) of Schedule 7 of the LRA.

The applicant sought compensation. To award her the maximum compensation, namely an amount equal to 24 months' remuneration would not be realistic, since the applicant was only appointed for ten months.

In the circumstances I awarded the applicant 10 months' remuneration, and costs against the respondent.

_____

E.

Revelas

Date of hearing: 24 October 2002

Date of judgment: 11 December 2002

For the applicant: Mr W. G. Jonker

e respondent: Mr van As