IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Case No. C 9**66/2002**

In the matter between

JACOBUS JOHANNES PETRUS HARMSE
Applicant

and

CITY OF CAPE TOWN
Respondent

JUDGMENT

WAGLAY, J:

1. The applicant referred a dispute with his employer, the Respondent to this Court by way of a statement of claim. In his statement of claim the Applicant alleges that the decision of the Respondent not to shortlist him for any of the three posts to which he applied constituted unfair discrimination. This unfair discrimination, he says, is prohibited by section 6 of the Employment Equity Act 55 of 1998 (the "Act").

2. The grounds upon which Applicant alleges he was discriminated against are as follows:

   (i) race;

   (ii) political belief;

   (iii) lack of relevant experience; and/or

   (iv) other arbitrary grounds.

3. The Applicant goes on to allege that the Respondent furthermore unlawfully discriminated against him by failing, in considering his application for shortlisting, to apply certain subsections of section 20 of the Act.

4. The Respondent has raised an exception to the Applicant's statement of claim on a number of grounds. The grounds relied on fall into two categories:

   (i) the Statement of Claim is vague and embarrassing; and

   (ii) the Statement of Claim lacks averments that are necessary to sustain the action.

5. Rule 6 of the Rules of this Court deals with referrals of disputes by way of a statement of claim. Rule 6(1)(b) provides that "a document initiating proceedings, known as a 'statement of claim' … must have a

substantive part containing the following information:

(i) The names, description and addresses of the parties;

(ii) A clear and concise statement of the material facts, in chronological order, on which the party relies, which statement must be sufficiently particular to enable any opposing party to reply to the document;

(iii) A clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any opposing party to reply to the document; and

(iv) The relief sought".

6. The statement of claim serves a dual purpose. The one purpose is to bring a Respondent before the Court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the Respondent of the material facts and the legal issues arising from those facts upon which applicant will rely to succeed in its claims.

7. The material facts and the legal issues must be sufficiently detailed to enable the Respondent to respond, that is, that the Respondent must be informed of the nature or essence of the dispute with sufficient factual and legal particularity so that it knows what it is that the

Applicant is relying upon to succeed in its claim.

8. The Rules of this Court do not require an elaborate exposition of all facts in their full and complex detail – that ordinarily is the role of evidence, whether oral or documentary. There is a clear distinction between the role played by evidence and that played by pleadings – the pleadings simply give the architecture, the detail and the texture of the factual dispute are provided at the trial. The pre-trial conference provides an occasion for the detail or texture of the factual dispute to begin to take shape. In terms of rule 6(4)(b) the parties in the pre-trail conference must attempt to reach consensus on facts that are common cause, facts that are in dispute, the issues that the Court is required to decide and the precise relief claimed.

9. Accordingly the rules of this Court anticipate that the relief claimed might not have been precisely pleaded in the Statement of Claim filed. The Rules of this Court further anticipate that the factual matters at issue will be dealt with more fully and precisely in the pre-trail conference. The rules therefore anticipate that the parties at the pre-trial conference will have dealt in much more detail not only with the factual matters but also the legal issues. The statement of claim and response thereto foreshadows this activity but is not a substitute for it.

It is for this reason that the rule on pre-trial conferences provides for reaching consensus on the issues that the Court is required to decide.

10. When an exception is raised against a statement of claim, this Court must consider, having regard to what I have said above, whether the matter presents a question to be decided which, at this stage, will dispose of the case in whole or in part. If not, then this Court must consider whether there is any embarrassment that is real and that cannot be met by making amendments or providing of particulars at the pre-trial conference stage.

11. It is against the above background that the respondent's objections must be determined. The first objection raised by the respondent is that the applicant is not properly before this Court because the applicant did not himself refers his dispute to conciliation. This meritless objection has been withdrawn.

12. The second ground of exception relates to the issue of 'race'. The respondent argues that if an employee claims unfair discrimination on the grounds of race when applying for an advertised post, then such an employee's essential averments must include:

12.1. that the employee would have been shortlisted but for the

fact that s/he is a black person;

12.2. that other (specified) persons, who were not black, were shortlisted because they were not black;

12.3. an identification of the act of discrimination as either direct or indirect discrimination; and

12.4. material facts relied on by the applicant in support of his allegations with sufficient particularity to enable the respondent to respond.

13. The respondent alleges that the applicant has failed to make the essential averments and that for this reason the applicant‘s statement of claim fails to disclose a cause of action based on race or is vague and embarrassing. I will deal first with the allegation that the statement of claim fails to disclose a cause of action of unfair discrimination based on ‘race’.

14. In its statement of claim, the applicant has pleaded that:

14.1. he is an employee;

14.2. he is in the employ of the respondent;

14.3. he is a black person as defined in the Employment Equity Act (Act No. 55 of 1998) (“the Act”);

14.4. during August or September 2001, the respondent advertised posts of strategic executive directors;

14.5. the respondent informed all employees that the appointment process would comply with the Act;

14.6. the respondent failed to shortlist him for any of he three posts for which he applied;

14.7. he sought reasons for the respondent's failure to shorlist him;

14.8. the reasons furnished by the respondent for failing to shortlist him were not credible and that this gives rise to a necessary inference that other unstated factors must have been decisive;

14.9. the respondent appointed white males to two of the three advertised posts;

14.10. the respondent's decision not to shortlist him constitutes unfair discrimination against him on the grounds of race.

15. The applicant's claim is that he was not shortlisted because he is a black person. This conclusion appears from the language in the portions of the statement of claim referred to above. The applicant says so in respect of at least two of the three advertised posts. In fact the applicant in paragraph 29.1 of his statement of claim specifically states that the decision of the respondent not to shortlist him for any of the three posts constitutes unfair discrimination as envisaged in section 6 of the Act on the basis of race. The

applicant, contrary to the respondent's claims, does plead facts about the outcome of the shortlisting process. He pleads: that he was not shortlisted but that two white persons were. The applicant has therefore indeed alleged unfair discrimination on the grounds of race. However, the matter does not end there.

16. The respondent claims that even if it is unfair discrimination that is alleged, a party before this Court must expressly state whether they allege direct or indirect discrimination. There is no authority in our law for the proposition that if a party does not in a statement of claim expressly allege direct or indirect discrimination, then such party in non-suited. The Act does not define the concepts of 'direct' and 'indirect' discrimination. The Act also does not define (comprehensively or otherwise) the concept of discrimination. These issues have been left to the Courts to develop.

17. The epithet 'direct' or 'indirect' discrimination relates to that which must be proved at trial. If the averments made in a statement of claim, as amplified at the pre-trial conference establish a basis on which evidence may be presented, then a party should not be non-suited merely because the statement of claim has not expressly stated whether the discrimination alleged is direct or indirect. The applicant has claimed that as a black employee he has been unfairly discriminated against by the respondent

relative to the white employees appointed to the posts as advertised. In such circumstances it cannot be said that the statement of claim, on account of the absence of an express identification of the alleged discrimination as 'direct' or 'indirect' discloses no cause of action. The approach urged by the respondent has the consequence of rendering a party non-suited by the elevation of form over substance.

18. The authorities relied on by the respondent [the Final Constitution, section 6 of the Act, Harksen v Lane N.O. (1997) 11 BCLR 1489 (CC), Pretorius *et al*, Employment Equity Law, Leonard Dingler Applicant Representative Council v Leonard Dingler (Pty) Ltd & Others (1998) 19 ILJ 285 (LC) and Lagadien v University of Cape Town (2000) 21 ILJ 2469 (LC)] have contributed greatly to the debate on the definition of the concepts of 'direct' and 'indirect' discrimination. However, these authorities do not support the conclusion urged by the respondent, namely "that the distinction between direct and indirect discrimination is so fundamental to the law of discrimination that it is not possible for a respondent to reply meaningfully to a claim without knowing whether direct or indirect discrimination (or both) are being relied on." Accordingly, the respondent is neither substantially embarrassed nor seriously prejudiced by the absence of an express allegation as to the 'direct' or 'indirect' nature of the alleged unfair discrimination. The respondent's objection that the applicant has failed to disclose a cause of

action based on race discrimination therefore falls to be dismissed.

19. The respondent further exception is that the applicant's statement of claim in so far as race discrimination is concerned is vague and embarrassing. The respondent's complaint is that it cannot respond to the statement of claim without knowing whether the applicant is alleging 'direct' or 'indirect discrimination'. The difference between 'direct' and 'indirect' discrimination lies in that which must be proved at trial. A respondent's defence to an unfair direct discrimination claim is no different to an unfair indirect discrimination claim. For the reasons already set out above, the respondent's claim that the applicant's statement of claim in so far as race discrimination is concerned is vague and embarrassing also falls to be dismissed.

20. The respondent also argued that the applicant 'is obliged to plead facts which go to show how the appointment process discriminated against him on the basis of race. The applicant must, respondent states, plead facts that "might go to show that he was not shortlisted because of his 'race' and that [the applicant] fails to plead any facts about the outcome of the shortlisiting process.

21. The applicant pleads that he is a black person, that the respondent informed all its employees that the appointment process would comply with the Act, the respondent failed to shortlist him for any of he three posts for which he applied and that the respondent appointed white males to two of the three advertised posts. At paragraph 29 of the statement of claim, and under the heading "Legal Issues that arise from the above facts" the applicant states that the decision of the respondent "not to shortlist the Applicant for any of the three posts … constitutes unfair discrimination as envisaged in section 6 of the Employment Equity Act 55 of 1998 ("the EEA") on the basis of race". This express averment, in the context of the other allegations in the statement of claim provide the answer to the respondent' claim that nothing of substance is alleged to which it might respond. The allegation that the applicant's statement of claim is vague and embarrassing thus also falls to be dismissed. The statement of claim as far as the allegation of discrimination on the basis of race is concerned is sufficiently pleaded. This does not mean that the statement might not have been more detailed and better crafted. But those would be matters of detail (completeness or fullness) and elegance rather than substance (no cause of action) and embarrassment (vague and embarrassing).

22. A party cannot be non-suited on the basis of inelegantly drafted pleadings unless the inelegance results in the pleadings being unintelligible. The

statement of claim in respect of discrimination based on 'race' is not unintelligible, the necessary allegations have been made On an exception that the statement of claim is vague and embarrassing, the issue is not whether the excipient would be prejudiced but rather whether the excipient would be seriously prejudiced. In this matter the necessary allegation are sufficiently pleaded for the respondent to know, in sufficient detail (adequately), the case it is called upon to meet.

23. The respondent in its notice of exception further alleges that the applicant's statement of claim fails to disclose a cause of action based on discrimination due to political beliefs and is accordingly vague and embarrassing and bad in law. With regard to the allegation that the statement of claim fails to disclose a cause of action: In it's notice of exception the respondent alleges that the applicant when claiming discrimination on the ground of political belief must allege the following:

23.1. that he held political beliefs and the nature of the beliefs which he held;

23.2. that but for the fact the he held such specified political beliefs he would have been shortlisted;

23.3. that other persons who held different political beliefs to those of the applicant were indeed shortlisted because of their political beliefs;

23.4. whether the act of discrimination complained of constituted direct or indirect discrimination; and

23.5. the material facts relied upon by him in support of these allegations with sufficient particularity to enable the respondent to reply.

24. The respondent's notice of exception then goes on to say that the applicant altogether fails to make the necessary allegations as recorded by it. Turning to the applicant's statement of claim, the applicant makes the following allegations:

24.1. he is an employee;

24.2. he is in the employ of the respondent;

24.3. he is a black person as defined in the Employment Equity Act (Act No. 55 of 1998) ("the Act");

24.4. during August or September 2001, the respondent advertised posts of strategic executive directors

24.5. the respondent informed all its employees that the appointment process would comply with the Act

24.6. the respondent failed to shortlist him for any of he three posts for which he applied;

24.7. he sought reasons for the respondent's failure to shorlist him;

24.8. the reasons furnished by the respondent for failing to shortlist him were not credible and that this gives rise to a necessary inference that other unstated factors must have been decisive;

24.9. that the respondent appointed white males to two of the three advertised posts;

24.10. the decision by the respondent in shortlisting candidates was materially influenced by political affiliation of the applicants for the advertised post and because he was not aligned to the political party which was in control of the respondent, he was not shotrtlisted

24.11. The respondent's decision not to shortlist him constitutes unfair discrimination against him on the grounds that he was not appropriately politically aligned.

25. The applicant in his statement of claim specifically states that the decision of the respondent not to shortlist him for any of the three posts constitutes unfair discrimination as envisaged in section 6 of the Act on the basis of political belief. The applicant's claim is that those who were shorlisted and appointed were 'politically aligned' to the political party in control of the respondent and that he was not sufficiently politically aligned to that political party. It is clear from the above that the applicant claims that he was not

shortlisted because he was not regarded as being 'appropriately politically aligned'. In the circumstances the statement of claim does indeed disclose a cause of action. Accordingly the respondent's exception on that ground as all the others falls to be dismissed.

26. The next issue is whether the statement of claim in respect of discrimination on the basis of political belief is vague and embarrassing. In this regard the test has been variously formulated. In the matter of International Tobacco Co v Wolheim & Others 1953 (2) SA 603 (AD) at 613 Greenberg JA held that " if the exception is that the declaration is vague and embarrassing, then, if it be shown, at any rate for the purposes of his plea, that the defendant is substantially embarrassed by vagueness or lack of particularity, it equally should be allowed". It has also been held that "an exception that a pleading is vague and embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged" [van Winsen *et al* , *The Civil Practice of the Supreme Court of South Africa* (Fourth Edition) ed. M Dendy at p.491]. Such embarrassment as an excipient alleges must be substantial. The prejudice allegedly suffered by an excipient must be serious. Mere embarrassment and prejudice, which is not of a substantial and serious nature, is not enough to render the statement of claim vague and embarrassing.

27. LTC Harms in ***Civil Procedure in the Supreme Court*** at B-165 notes the following:

> "An exception is a valuable part of the system of procedure: its principal use is to raise and obtain a speedy and economical decision on questions of law which are apparent on the face of the pleadings. In this manner the leading of unnecessary evidence is avoided. If evidence can be led which can disclose a cause of action or defence alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action or defence."

28. While it is correct that the applicant does not spell out in detail the nature of his political beliefs he does plead that he was not regarded as appropriately politically aligned with the political party that was in control of the respondent. The applicant's statement of claim does indeed make adequate and sufficient factual allegations in order to enable to respondent to respond. The identity of the political party in control of the respondent and the nature of its political beliefs and opinion are hardly matters in respect of which the applicant can be substantially embarrassed or seriously prejudiced. The respondent is by its very nature a political animal. The respondent must surely know not only the political party referred to but also the political beliefs of such party. The specific and particular views of that

political party is a matter which, on the basis of the statement of claim as it stands, will and must be dealt with in evidence. It is not necessary (though it may be desirable) that the applicant spells out in detail the full and complete nature of his own 'political alignment'. In the context of the nature of the respondent (an overtly political animal) it is sufficient (or adequate) that the statement of claim alleges that the applicant was" not regarded as being appropriately politically aligned and for this reason, *inter alia*, was not shortlisted".

29. If the facts pleaded at this stage are correct, and indeed "[F]or the purposes of deciding an exception the court takes the facts alleged in the pleading as correct" (subject of course to avoiding stultifying itself by accepting facts which are manifestly false and so divorced from reality that they cannot possibly be proved) (see van Winsen et al at pages 492-493), then the respondent has a case to meet and sufficiently knows what that case is, in order that it may respond. The respondent's allegations concerning the necessity for the applicant to state whether it is 'direct' or 'indirect' discrimination that he relies on has been dealt with sufficiently above. In the circumstances the respondent's allegation that the portions of the applicant's statement of claim relating to discrimination on the grounds of political belief are vague and embarrassing also falls to be dismissed.

30. Respondent further argues that the applicant's claim as contained in paragraph 30.1 to 31 of his statement of claim discloses no cause of action and is vague and embarrassing and bad in law because it is inter alia, based on Chapter III of the Act.

31. In paragraphs 30 and 31 of the statement of claim the applicant pleads that:

> "30. Furthermore and in any event, the decision as aforesaid constitutes unfair discrimination in that the Respondent, in shortlisting candidates for the First Level appointment, and in particular in considering the Applicant's application:
>
> 30.1 failed to comply with its obligations in terms of section 20(4) of the [Act] to review all the factors set out in section 20(3) thereof, namely formal qualifications, prior learning, relevant experience and capacity to acquire, within a reasonable time, the ability to do the job;
>
> 30.2 contravened section 20(5) of the [Act] by unfairly discriminating against the Applicant on the grounds of the Applicant's lack of relevant experience; and
>
> 30.3 as a result, failed to meet its numerical goals to achieve the equitable representation of suitably qualified persons from designated groups.
>
> "31 the Applicant was on a proper application of sections 20(3) to 20(5) of the [Act], suitably qualified for all of the jobs for which he applied and Respondent's failure to shortlist him by relying on his alleged qualifications for the job thus constitutes unfair discrimination."

32. Chapter II of the Act deals with the prohibition of unfair discrimination in section 6.

Section 6 of the Act provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act. Section 5 of the Act (also part of Chapter II) obliges every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. This section is peremptory and applies to all employers. One of the ways in which an employer can eliminate unfair discrimination is by taking affirmative action measures consistent with the purposes of the Act. However neither section 6 nor any of the other sections of Chapter II, defines 'affirmative action measures'. It is in Chapter III of the Act and in section 15 that we find a definition of 'affirmative action measures'. Section 15 defines 'affirmative action measures' as:

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

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

> (a) measures to identify and eliminate employment barriers,

including unfair discrimination, which adversely affect people from designated groups;

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

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

33. If one were to have regard only to section 6 of the Act then one might be drawn to the conclusion that affirmative action is no more than a defence to a claim of unfair discrimination. Affirmative action is indeed a defence to be deployed by an employer against claims that it has discriminated unfairly against an employee. However, from the reading of the Act it appears that affirmative action is more than just a 'defence' in the hands of an employer and should not be confined to so limited a role in the elimination of unfair discrimination in the workplace. The definition of affirmative action in section 15 indicates a role for affirmative action that goes beyond the passivity of its status as a defence. Affirmative action measures include measures to "eliminate employment barriers", to "further diversity" in the workplace and to ensure "equitable representation". In these respects affirmative action involves more than just a defensive posture. It includes pro-activeness and self-activity on the part of the

employer. The Act obliges an employer to take measures to eliminate unfair discrimination in the workplace.

34. Section 20 of the Act provides that:

"20(3) For the purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's –

(a) formal qualifications;

(b) prior learning;
(c) relevant experience; or
(d) capacity to acquire, within a reasonable time, the ability to do the

job.

20(4) When determining whether a person is suitably qualified for a job, an employer must-

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

(b) determine whether that person has the ability to do the job in terms

of any one of, or any combination of those factors.

20(5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience."

35. Sections 20(3) – (5) deal with the concept of 'suitably qualified". Section

20(3) tells

us something of the content of this concept. Sub-section 20(4) and 20(5) contain directives on how to determine whether a person is 'suitably qualified'. Section 20(4) is the general leg of the guide in which that Act instructs that a hierarchy of the elements making up the content of the concept must be avoided. Section 20(5) singles out 'relevant experience' for special attention. It appears from the wording of section 20 that an employer may fairly discriminate solely on the grounds of a persons "lack of relevant experience". The factual circumstances in which a persons lack of relevant experience may on it's own form the basis of rendering the person unqualified or not suitably qualified are however, limited as section 20(5) provides that the employer may fairly discriminate on the combined grounds of lack of relevant experience and:

a. formal qualification; or

b. prior learning; or

c. formal qualifications and prior learning.

36. The applicant's claim simply put is that, having regard to sections 20(3)-(5) of the Act,

36.1. he was suitably qualified for the posts for which he applied (paragraph 31 of the statement of claim);

36.2. the respondent failed to comply with its obligations to review

all factors when determining whether or not he was suitably qualified (paragraph 30.1of the statement of claim);

36.3. the respondent, in contravention of section 20(5) unfairly discriminated against him on the ground of his lack of relevant experience (paragraph 30.2 of the statement of claim).

37. In terms of section 20(5) of the Act an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience. The applicant's claim is that he was unfairly discriminated on the grounds of lack of relevant experience. In this regard the applicant at paragraphs 17 to 17.4 specifically pleads that the respondent informed him that the reasons he was not shortlisted are:

> "17.2 the (sole) eligibility criterion was 'past accomplishments in similar circumstances", with more recent and more longstanding accomplishments carrying greater weight;
>
> 17.3 the panel was of the opinion that the Applicant's exposure at strategic level management, with policy and strategy as a portfolio was lacking;
> 17.4 the Applicant's "broad based management of diverse functions" was somewhat limited, both in terms of time and scope of complexity:"

38. Employment equity is partly about providing equal opportunities and indeed preferential treatment to persons falling within the designated groups.

Affirmative action measures may however only be taken in respect of 'suitably qualified' people from the designated groups. This much is apparent from the definition (description) of 'affirmative action measures in section 15 of the Act. Section 4 of the Act provides that except where Chapter III otherwise provides, Chapter III of this Act applies only to designated employers and people from designated groups."

39. Section 20(1) does indeed provide that a designated employer must prepare and implement an employment equity plan. Section 20(2) elaborates the contents of such an employment equity plan. Section 20 as a whole, however, is concerned with more than just the preparation and implementation of an employment equity plan. Section 20(3)-(5) outlines factors to be taken into account in the determination of whether a person is 'suitably qualified'. Section 20(3) begins with the phrase "For the purposes of this Act…". The concept of "suitably qualified" is not described nor defined elsewhere in the Act. Accordingly the concept of suitably qualified, as elaborated in sections 20(3) to 20(5) applies to the Act as whole and is not limited to Chapter III. The prohibition against unfair discrimination solely on the grounds of a person's lack of relevant experience, as contained in section 20(5) of the Act, applies to all employers and is not limited to designated employers. Similarly, the taking of affirmative action measures is the duty of every employer and is not limited to designated employers.

This conclusion is based on section 5 of the Act, which obliges every employer "to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice".

40. The factors taken into account by an employer when determining whether an employee is 'suitably qualified' constitutes an 'employment policy or practice'. Section 1 of the Act defines "employment policy or practice as including but not being limited to 'selection criteria' and 'performance evaluation systems'. The applicant's allegations as to the reasons why he was not selected relate to 'selection criteria'. The Act must also be interpreted so as to give effect to its purpose. Section 2 of the Act defines its purpose as follows:

"The purpose of this Act is to achieve equity in the workplace by –

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in the workforce."

41. Viewed in this manner, sections 20(3) –(5) are an integral part of steps to be taken by an employer to promote equal opportunity in the workplace by eliminating unfair discrimination. One way in which employers could unfairly

discriminate is by elevating 'lack of relevant experience' to a '*sine qua non*' for the purposes of appointment or indeed promotion. This mischief has been identified and addressed by the Act. The Act in section 6 lists a number of grounds on which an employer (whether designated or otherwise) may not discriminate. The grounds referred to in section 6 do not constitute an exhaustive list. This is illustrated by the use of the word "including" just before the listed (specified) grounds.

42. The history of deliberate discrimination in our country provides a harrowing and almost limitless range of discriminatory policies and practices in employment and other spheres of our society. If an employer's conduct falls within this category of unfair discrimination (solely on the grounds of lack of relevant experience), what may the employee do? The employee may refer the instance of unfair discrimination to this Court (whether or not one regards it as an independent prohibition). This would be consistent with one of the purposes of the Act, namely, 'promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination'. To hold otherwise would place a restriction on the jurisdiction of this Court which is warranted neither by the express language of the Act nor by its purpose. Accordingly, the respondent's exception that paragraphs 30.1 to 31 of the applicant's statement of claim do not disclose a cause of action, are vague and embarrassing and bad in law is also liable to be dismissed.

43. This of course does not resolve the question (as raised at paragraph 26 of the respondent's notice of exception) as to whether a failure by a designated employer to prepare and/or implement an employment equity plan can in law constitute unfair discrimination in terms of section 6(1) or 6(2) of the Act. If the grounds relied on and alleged by an applicant can, independently of the issue of the employment equity plan, be categorised as 'unfair discrimination' as contemplated in section 6 and sections 20(3) –(5) then the claim may properly be pursued in law. The allegations in this matter do indeed fall within the category of unfair discrimination contemplated in section 6 and sections 20(3) –(5). To this extent, it is not at this stage for this Court to determine those aspects of the notice of exception not properly raised on a fair interpretation of the applicant's statement of claim. The issue might raise itself in the further prosecution and defence of the matter by the applicant and the respondent. If so, the Court will deal with it at the appropriate time.

44. One of the ways in which this issue has been posed by the respondent is that affirmative action may only serve as a defence. In part this is correct. The real answer however lies in the determination of who is making the claim of affirmative action. It may found a cause of action in the hands of one and defence in the hands of another. If one were to have regard only to section 6 of the Act then one might be drawn to the conclusion that affirmative action is no more than a defence to a claim of unfair discrimination. Affirmative action is indeed a defence to be deployed by an employer against claims that it has discriminated unfairly against an employee. In this sense, it serves as a shield. However, having regard to the fact that the Act requires an employer to take measures to eliminate discrimination in the workplace it also serves as a sword.

45. Affirmative action has its roots embedded firmly in the Constitution of the Republic of South Africa (Act 108 of 19996) ("the Constitution"). Under the Constitution equality is a fundamental human right. Section 9(2) of the Constitution provides that "equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken." In addition to this, section 9(4) of the Constitution provides that "national legislation must be enacted to prevent or prohibit unfair

discrimination." The Employment Equity Act is borne of this constitutional imperative. The right to equality as elaborated in section 9 of the Constitution moves well beyond the mere formal equality. Our constitution embraces and promotes the more thoroughgoing and challenging concept of substantive equality. In the absence of the full development of the concept of substantive equality our society will continue to be characterised by deep-rooted inequality and injustice. (In this regard see National Coalition for Gay & Lesbian Equality & Another v Minister of Justice & Others 1999 (1) SA 6 (CC) at 38H-39D and Stofman v Minister for Safety and Security and Others (2002) ILJ 1020 at 1029-1030. See also President of the Republic of SA & Another v Hugo 1997 (4) SA 1 (CC)).

46. The protection and advancement of persons or categories of persons disadvantaged by unfair discrimination, by legislative and other measures is recognised by the Constitution as part of the right to equality. It is not fashioned as an exception to the right to equality. (In this regard see Du Toit et al in *Labour Relations Law: A Comprehensive Guide* (3rd ed) at 457) It is part of the fabric and woven into the texture of the fundamental right to equality in section 9 of the Constitution. In this sense, 'affirmative action' is more than just a defence or shield. If at all it be 'shield', it would

be inconceivable that it is available only to those in our society who have power, namely employers. If this were the case then employees would, in so far as their full and equal enjoyment of all rights and freedoms is concerned, be at the mercy of an employer with no or no real remedy should the employer fail to promote substantive equality.

47. There is no doubt that an employer may not discriminate unfairly against an employee. This right not to be unfairly discriminated against is an integral part of the right to equality and a necessary condition of the inherent right to dignity in section 10 of the Constitution. This right not to be unfairly discriminated against is a right enjoyed by all employees whether or not they fall within any of the designated groups as identified in the Act. If an employer fails to promote the achievement of equality through taking affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within one of the designated groups not to be unfairly discriminated against. Similarly, if an employer discriminates against an employee in the non-designated group by preferring an employee from the designated group who is not "suitably qualified" as contemplated in sections 20(3) to 20(5) of the Act, then the employer has violated the right of such an employee not to be discriminated against unfairly. In either case, the issue is whether the employer has violated an employee's right not to be discriminated

against. To this extent, affirmative action can found a basis for a cause of action.

48. Whether or not employees have a right to affirmative action arising out of an employment equity plan is another question altogether. A positive answer to that question does not inarguably arise from the language of sections 20(1) and 20(2) of the Act. One would have to consider the provisions of sections 20(1) and 20(2) of the Act, together with the Act as a whole and the Constitution. If however an employer adopts an employment equity plan that regulates appointments and promotions, then the employees may have a legitimate expectation that the respondent will act in accordance with the plan.

49. On an analysis of the Constitution and the Act I am satisfied that the Act and specifically sections 20(3) to (5) read with Chapter II do indeed provide for a right to affirmative action. The exact scope or boundaries of such a right is a matter that will have to be developed out of the facts of each case.

50. This then brings me to the objection dealing with applicant's allegation that he was discriminated against on unspecified "other arbitrary grounds". The applicant has in this respect conceded that he has not alleged details as to

what the other arbitrary grounds of discrimination might have been and will therefore not persue this claim.

51. Finally the Respondent objects to the first of the alternative forms of relief sought by the applicant on the grounds that it is not competent for this Court to grant the relief sought on the facts as alleged by the applicant.

52. Where the relief prayed is set out in alternative form, simply because one of the relief sought tops the list it does not constitute the “main relief”. It like all of the others constitutes various possible forms of relief set out in alternative to one another.

53. Whether or not the relief objected to is competent on the present fact is entirely irrelevant when determining an exception. At worst the relief objected to constitutes nothing more than a plus petiisse. This does not found a ground for an exception.

54. As the objections raised on exception are all ill-conceived (save for the “arbitrary ground” claim which the applicant does not intend to persue) I see no reason in law and equity why cost should not be awarded against the respondent.

55. In the result I make the following order:

The exception raised by the respondent is dismissed with costs.

_____
Waglay J

Date of Judgment: 09 May 2003
For the applicant: Adv. M.W. Janisch instructed by Laubscher & Hattingh Inc.
For the Respondent (Excipient): Adv. CS Kahanovitz instructed by Mallinicks Inc.