IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO : C828/2002

In the matter between:

LILIAN DUDLEY Applicant

and

THE CITY OF CAPE TOWN First Respondent

IVAN TOMS Second Respondent

JUDGMENT

TIP A J

INTRODUCTION

1 This is an exception brought by the first respondent against portions of the applicant's statement of case. It concerns issues of employment equity, of discrimination and of affirmative action, which have arisen in the following circumstances. In November 2001 the City of Cape Town ("the City") advertised the post of Director: City Health. Amongst those who applied for the position were the

applicant, who is a black female doctor, and the second respondent, who is a white male doctor. At the time, the applicant was the City's Interim Manager: Health. After the application and interviewing processes had been completed, they were amongst three candidates whose names were placed before the City Manager who, in consultation with the City's executive management team, was to make the final selection. The second respondent, Dr Toms, was preferred and he was appointed to the post with effect from 1 January 2002.

2 The applicant was informed of this outcome on 21 December 2001. A few days later she wrote to the City Manager requesting all information material to the decision to appoint Dr Toms and not her. The City Manager replied on 8 January 2002. This reply did not satisfy the applicant and, on 29 January 2002, she lodged a grievance concerning the City's failure to appoint her to the post. When the City Manager declined to address the merits of this grievance, it was referred to the South African Local Government Bargaining Council on 12 February 2002. The Bargaining Council took the view that it did not have jurisdiction over the dispute and it was then referred to the CCMA, on 8 March 2002. A conciliation hearing was held on 4 April 2002, at which the point was raised that Dr Toms should have been joined as a second respondent. This was done and the dispute was referred once more to the CCMA on 11 April 2002. The dispute remained unresolved and a certificate to that effect was issued by the CCMA on 7 May 2002. The dispute was described as being based on an alleged unfair labour practice and on alleged unfair discrimination.

3 Thereafter, an action was launched in this Court on 2 August 2002. The relief

sought by the applicant includes the following:

3.1 an order directing the City to set aside the appointment of Dr Toms as Director: City Health;

3.2 an order directing the City to appoint the applicant to the position *alternatively* an order directing the City to reconsider the appointment in compliance with its non-discrimination and affirmative action obligations;

3.3 an order directing the City to pay damages *alternatively* compensation to the applicant for *injuria* suffered by her;

3.4 an order directing the City to pay damages *alternatively* compensation to the applicant for loss of earnings/patrimonial loss in an amount equivalent to the difference between her salary as Interim Manager and that of Director: City Health, calculated from 1 January 2002 until such time as an order of instatement is made;

3.5 an order directing the City to take such steps as this Court may direct to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;

3.6 an order directing the City to prepare and implement an Employment Equity Plan which will achieve reasonable progress towards employment equity in the City's workforce.

4 The City opposes the action. Dr Toms has elected to abide the Court's decision. On 4 October 2002 the City filed a notice setting out various grounds of complaint and, when these remained unaddressed, it proceeded with an exception to the

applicant's statement of case, filed on 5 December 2002. The exception was enrolled for hearing on 9 May 2003. Shortly before that, an order was made admitting the Women's Legal Centre Trust to these proceedings as an *amicus curiae*. Mr Freund appeared for the *amicus.* His thoughtful submissions have been of great assistance to me.

5 To complete these introductory passages, I should mention that a second action has been instituted by the applicant in this Court under case number C987/2002, being a claim for compensation arising out of circumstances associated with the appointment of Dr Toms. These, it is alleged by the applicant, brought about an intolerable situation necessitating her 'resignation' on 10 May 2002, amounting to a constructive dismissal.

BACKGROUND FACTS

6 Although the issues that fall to be decided in these proceedings are primarily matters of legal interpretation, it will be useful for the background circumstances to be rather fully described. This being an exception, the factual allegations advanced in the applicant's statement of case must be accepted at face value, save where there might be good reason to depart from them. The relevant background facts and circumstances comprise the following.

7 In February 1998 the applicant was appointed to the position of Specialist: Health Service Support on the staff of the Cape Metropolitan Council ("CMC"). In December 1999 she was seconded to the position Acting Head: Municipal Health

Service within the CMC. Her responsibilities in that position embraced a number of policy, planning and research matters.

8 During December 2000 the CMC and a number of municipal substructures merged to become the City. As already indicated, the applicant was appointed to the post of Interim Manager: Health in February 2001. This was one of sixteen posts which together formed the City's interim executive management team. There was only one woman on this team, being the applicant; she was also one of its four black members. She was responsible *inter alia* for the overall management and strategic direction of the City's medical services, as well as budget and business planning processes.

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

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

"*1) What were the competencies for the position?*

1.1) Which of these competencies did I lack?

2) What were the required qualifications for the position?

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

3) What were my scores for the psychometric assessment?

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

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

4.1) If yes, why were these provisions not followed?

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

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

11 In his reply dated 8 January 2002, the City Manager set out the City's position in the following terms:

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

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

The City has targeted safety and health as critical deliverables; consequently the requirement for the behavioural competencies in the health portfolio demanded a level above competence. This need was further supported by the complexity of the evolving health service provided by and still to be provided by the City of Cape Town, as well as the fact that HIV/AIDS and TB is one of the key priorities of this Council.

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

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

With specific reference to your questions posed:

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

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

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

2.1) Your qualification most certainly met the required standard.

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

3.1) The above mentioned session refers.

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

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

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

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

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

Elimination of unfair discrimination

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

Affirmative Action

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

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

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

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

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

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

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

General principles governing selection:

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

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

…

4.2.7 The selection decision:

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

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

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

13.1 The City Manager and the entire 'first reporting line' of top management were appointed before the position of Director: City Health was advertised. The 'first reporting line' consists of 10 Executive Directors, also known as Strategic Executives. They are all male. The City Manager and all but two of these Strategic Executives are white. On this basis, the applicant avers that women, black persons and, in particular, black women were not equitably represented in the City's 'first reporting line'.

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

filled by men and 9 by women, of whom four were black. In all, 26 of these positions were filled by white persons.

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

THE EMPLOYMENT EQUITY ACT

14 Before outlining the particular contentions made by the applicant in her statement of case, it will be convenient to set out certain key provisions of the EEA.

15 The origin and the overall objectives of the EEA are clearly reflected in its preamble:

"*Recognising-*

that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and

that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws,

"*Therefore, in order to-*

promote the constitutional right of equality and the exercise of true democracy;

eliminate unfair discrimination in employment;

ensure the implementation of employment equity to redress the effects of discrimination;

achieve a diverse workforce broadly representative of our people;

promote economic development and efficiency in the workforce; and

give effect to the obligations of the Republic as a member of the International Labour Organisation,

"*Be it enacted … "*

16 Section 2 records the purpose of the EEA:

"*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 all occupational categories and levels in the workforce.*"**

17 Chapter II of the EEA is devoted to the 'Prohibition of Unfair Discrimination'. Section 5 deals with its 'elimination':

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

18 Section 6 proscribes unfair discrimination in these terms:

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

(2) It is not unfair discrimination to-

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

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

(3) … "

19 Chapter III of the Act concerns affirmative action measures. In terms of section 12, this chapter applies only to 'designated employers' as defined. The City is such an

employer. Section 13 stipulates a set of duties resting on a designated employer:

"***(1) Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.***

(2) A designated employer must-

(a) consult with its employees as required by section 16;

(b) conduct an analysis as required by section 19;

(c) prepare an employment equity plan as required by section 20; and

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

20 The legislature has provided guidance in respect of the content of affirmative action measures in section 15:

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

(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;

(d) subject to subsection (3), measures to-

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

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

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

(4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups."

21 Sections 16 to 19 of the EEA deal with, respectively, the obligation to consult with employees, the matters for consultation (including the preparation and implementation of an employment equity plan), the disclosure of information required for a proper consultation process and the carrying out of an analysis of the employer's "*employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.*" Section 20 deals in some detail with the required employment equity plan and, in so doing, further illustrates the goals of affirmative action measures:

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

(2) An employment equity plan prepared in terms of subsection (1) must state-

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

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

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

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

(e) the duration of the plan, which may not be shorter than one year or longer than five years;

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

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

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

(i) any other prescribed matter.

(3) For 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.

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

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

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

(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.

***(6) An employment equity plan may contain any other measures that are consistent with the purposes of this Act.*"**

THE APPLICANT'S CONTENTIONS

22 Against the factual and legislative framework described above, the applicant has mounted a case with four components: unfair discrimination, affirmative action, constitutional obligations and an alleged unfair labour practice. In order properly to situate the contentions that have been advanced in this exception, it is necessary to reproduce fairly extensively the applicant's contentions as pleaded under each of those causes of action.

Unfair Discrimination

23 The applicant contends that: "*The criteria applied by the City in selecting Toms and not the applicant for appointment to the post and the manner in which they were applied: resulted in direct discrimination against the applicant; alternatively reflected a bias in favour of white persons and/or men and against black persons and/or women*."

24 She contends further that *inter alia*:

24.1 "*But for the fact that the applicant is a black woman, she would have been*

selected for appointment to the post."

24.2 "*The applicant met all the advertised requirements for the post and was suitably qualified therefor, in terms of s20(3) of the EEA and in terms of the City's own policy*."

25 The applicant further contends that the decision by the City to appoint Dr Toms and not herself breached its obligations in terms of sections 5 and 6 of the EEA.

Affirmative Action

26 Under this heading the applicant contends that the City's decision to appoint Dr Toms and not herself breached its obligation to implement affirmative action measures in terms of chapter III of the EEA.

27 The applicant alleges further that the City's decision breached its own affirmative action policy "*in that it failed to prefer her for appointment, notwithstanding that she was suitably qualified and a black woman*."

28 She contends also that these breaches by the City amounted to discrimination "*on the basis of race and/or gender*" in breach of section 6 of the EEA.

Constitutional Obligations

29 As a third leg of her action against the City, the applicant has cast her claims in terms of the Constitution of the Republic of South Africa, 108 of 1996 ("the Constitution"), it being alleged by her that the City's failure to implement affirmative action obligations and to appoint her:

29.1 breached her right to equality as contemplated in section 9(2) of the Constitution;

29.2 constituted unfair discrimination on the ground of gender and/or race in that, in particular, "*the applicant was a better candidate than Toms*";

29.3 infringed the applicant's constitutional right to fair labour practices pursuant to section 23(1) of the Constitution;

29.4 infringed her constitutional right to dignity in terms of section 10 of the Constitution.

Unfair Labour Practice

30 The fourth basis upon which the applicant seeks to found her claim is that the City's failure to appoint her and, instead, to appoint Dr Toms constituted an unfair labour practice in terms of item 2(1)(b) of schedule 7 of the Labour Relations Act 66 of 1995 ("LRA"). She contends, as a matter of procedure, that it would be expedient for this Court to arbitrate this dispute pursuant to section 158(2)(b) of the LRA.

31 In support of this ground, the applicant alleges that the appointment process did not

comply with the City's own policy, that it was arbitrary, irrational, unprofessional and unfair to the applicant and, further, that it was discriminatory against black women and failed to give effect to the City's affirmative action obligations.

THE GROUNDS OF EXCEPTION

32 In its notice of exception, the City raised five grounds. The first of these, being *Ground A*, related to an alleged inconsistency between the relief sought in the present case and that sought by the applicant in the proceedings brought under case number C987/02 (which I have briefly outlined earlier in this judgment). This ground was not persisted with.

33 *Ground B* juxtaposes two strands of the applicant's claims:

33.1 The first is that the applicant alleges that she was a better candidate than Dr Toms; that she would have been appointed to the post but for the fact that she is a black woman; the City's selection reflected its bias in favour of whites and/or men and against blacks and/or women; and that this conduct by the City constituted direct discrimination.

33.2 The second is that the City was obliged to implement affirmative action measures; that the applicant should have been given preference over Dr Toms because she is black and a woman; that in failing to give the applicant preference the City breached its obligation to implement affirmative action; and that the City's failure to apply affirmative action in favour of the applicant amounted to discrimination on the basis of race and/or gender in breach of

section 6 of the EEA.

34 Having thus characterised the applicant's claims, the City submits: "*that an employer's failure to apply affirmative action by failing to advantage or prefer a member of a designated group who has applied for employment cannot in law constitute unfair discrimination in terms of sections 6(1) and (2) of the EEA*." On this basis, the City contends that the applicant's claim as summarised in paragraph 34.2 above discloses no cause of action.

35 *Ground C* mounts an attack on the applicant's allegations that the City has failed to prepare a proper employment equity plan and/or to adhere to employment equity principles and/or to comply with its obligations in terms of chapter III of the EEA, and her consequential prayers for, firstly, an order directing the City not to conduct the same unfair discrimination or a similar practice in respect of other employees and, secondly, to prepare and implement an employment equity plan.

36 In this regard, the City raises two contentions:

36.1 It submits firstly: "*that this Court has no jurisdiction to entertain a claim [relating to other employees] in circumstances where the complainant has failed to exhaust the monitoring, enforcement and compliance procedures set out in chapter V of the EEA*."

36.2 Secondly, the City contends that the applicant has pleaded no facts in support of her alleged entitlement to seek relief on behalf of persons other than herself. The City further denies that she has the *locus standi* to do so.

37 In *Ground D* the City points to two allegations made by the applicant, the one being that she was 'a better candidate' than Dr Toms and the other being that affirmative action should have been applied by the City in order to prefer her as a candidate over Dr Toms. Since these two allegations have not been made in the alternative, the City raises the contention that they are "*mutually inconsistent and/or contradictory claims and are accordingly vague, embarrassing and bad in law*." The basis for this contention is that if indeed the applicant was the best candidate for the position, then no need would have arisen for her to have been preferred because she was black and/or a woman.

38 *Ground E* relates to the applicant's claim based on an alleged residual unfair labour practice in terms of item 2(1)(b) of schedule 7 of the LRA. The City cites item 4(b) of schedule 7, which requires such disputes to be resolved through arbitration. The City has not consented to this Court hearing the dispute as an arbitrator, as contemplated in section 158(2)(b) of the LRA. In the alternative, in the event that this Court should hold that it does have jurisdiction to hear that claim, the City contends that the applicant has failed to plead facts which would go to show that the conduct complained of related to the '*promotion, demotion or training of an employee*' and that the necessary jurisdictional facts are accordingly absent.

THE ARGUMENTS

39 As is apparent from the above review of the grounds of exception, the City does not presently attack the applicant's case insofar as it is based on allegations of direct discrimination. Whether or not her claims in that regard are sound is a matter for

the trial court to establish once the relevant facts have been traversed. The City has also not excepted to the constitutional claim *per se*. Likewise, the question whether an applicant can seek relief on the basis of reliance on the equality provisions entrenched in section 9 of the Constitution when there are specific and immediately pertinent provisions in the EEA is one that I need not decide.

GROUNDS B & C

40 These two grounds were combined in the City's submissions and it is in my view convenient to examine them in that fashion, since the manner in which the legislature has set out procedures and remedial measures will to some extent at least inform an evaluation of related substantive issues. These grounds bring into focus the nature of affirmative action and its enforceability. The City's contentions are, at a general level, that:

40.1 the EEA seeks to promote affirmative action as 'the product of consensus' between employers and employees;

40.2 the EEA does not lend itself to 'employee driven litigation' as a means to resolve disputes about how affirmative action objectives are to be realised;

40.3 no time limit is prescribed for the completion by an employer of its employment equity plan, although a tardy employer may be disadvantaged;

40.4 disputes about a failure to prepare an employment equity plan and disputes about a failure to implement such plan are treated differently;

40.5 the EEA includes extensive provisions relating to the role of *inter alios* labour inspectors in ensuring compliance with the requirements relating to an employment equity plan;

40.6 those provisions fall short of direct access to this Court by a disgruntled employee;

40.7 affirmative action is not available to an individual employee for use as a 'sword' in the prosecution of a claim, but as a 'shield' for an employer to protect what might otherwise amount to discriminatory practices;

40.8 affirmative action is, correspondingly, not intended to be invoked for the benefit of individuals but to advance group interests.

41 Out of this set of contentions arose a good deal of debate on whether the applicant was wrongly seeking to deploy as a sword a principle that was intended as a shield, or whether she was correctly asserting affirmative action as a positive instrument which she, as a single applicant, was entitled to wield.1 More particularly, it is the City's argument that: affirmative action measures are to be formulated and implemented on a group basis; since they will inevitably involve a degree of discrimination against some persons within a previously advantaged group they require protection; to this end, affirmative action incorporates the function of shield. Mr Rose-Innes, for the City, underlined the distinctions to be drawn between the

1 For the reasons developed in this judgment, the 'sword or shield' debate can be a limiting one. Neither of those options can adequately condense the nature of affirmative action. For instance, it is not merely a protection for an employer in terms of section 6(2)(a) of the EEA; it imposes far-reaching positive obligations on, at least, designated employers. A proper understanding of rights and obligations can flow only from a thorough analysis of the language of the Act itself.

prohibition against unfair discrimination contained in Chapter II and the detailed provisions for measures to be taken to implement affirmative action set out in Chapter III.

42 A comparison of these two chapters shows that there are indeed points of distinction that are significant for this case. The prohibition against unfair discrimination is directly enforceable by a single aggrieved individual or by the members of an affected group. Whether or not there has been discrimination is a matter of law and the application of the law to the complained of facts. That is a matter for the decision of this Court or an arbitrator and the content of the prohibition is not in any way the subject of consultation between employer and employees.

43 By contrast, the structure of Chapter III is such that, by definition, it is intended to and can be brought into operation only within a collective environment. This is inherent in the nature of the duties of an employer outlined in section 13(2). Those are: consultation, analysis, preparation of an employment equity plan and reports to the Director-General on progress in the implementation of the plan. Each of those phases is given statutory content. That is important, for section 13(1) qualifies the employer's obligation as being one that is "*in terms of this Act*". In the debate before me, the applicant and the *amicus* stressed the use of the words "*must … implement affirmative action measures*" in section 13(1) without regard to this qualification. In consequence, a number of their submissions have in my view accorded inadequate weight to the structure of Chapter III and, as will be seen below, to the content of Chapter V.

44 Section 16 stipulates aspects of the consultation process. It is designed *inter alia* to ensure that a range of interests are reflected. Thus, section 16(2) provides:

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

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

(b) employees from designated groups; and

(c) employees who are not from designated groups."

45 That spread of employees and their interests must be viewed in the context of section 17, which defines the matters for consultation:

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

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

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

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

46 The analysis described in section 19 is the foundation for the construction of the employment equity plan. Its provisions are comprehensive. It warrants emphasis that employees are to be consulted about its conduct. It stipulates:

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

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

47 In short, employees are to be involved in identifying two key features: "*employment barriers*" and "*the degree of under-representation*". Those are in turn part of the remedial action plan that must be devised and carried out, namely the employment equity plan. Section 20 sets out the necessary content and, once more, the provisions are comprehensive and self-explanatory. I recite the relevant subsections in full; it is not inappropriate to echo that employees are to be consulted on all of them:

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

(2) An employment equity plan prepared in terms of subsection (1) must state-

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

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

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

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

(e) the duration of the plan, which may not be shorter than one year or longer than five years;

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

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

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

(i) any other prescribed matter."

48 So, too, the employees are to be consulted in relation to the submission of the reports to the Director-General pursuant to section 21. Those are detailed reports that traverse all material matters from the initial consultation process through to the numerical goals that have been set. Those goals require tabulation of different occupational categories against targets for African, Coloured, Indian and White males and, distinctly, females for each category. The year in which those numbers are intended to have been satisfied must be given.3 The EEA then sets out further

2 One of those requirements is the elimination of 'employment barriers': section 15(2)(a).

3 Form EEA2 promulgated as part of the General Administrative Regulations, GN R1360 of 23 November 1999.

provisions: every such report is a public document4; publication is required5; successive employment equity plans are required6; a senior manager must be appointed to take responsibility for monitoring and implementing the plan7; there are detailed provisions to ensure that employees are informed about all relevant material8; records must be maintained by the employer in respect of *inter alia* its employment equity plan9; income differentials must be reported10.

49 The above survey of the provisions of Chapter III displays very clearly that its essential nature is programmatic and systematic. Importantly, its methodology is uncompromisingly collective. This is evident from the Act. It is reflected also in the Code of Good Practice issued in terms of section 54 of the EEA11, paragraph 7.2 of which sets out several objectives and guidelines in relation to the consultation process. For instance, it is observed that: "*All employees should be made aware and informed of – the content and application of the Act as preparation for their participation and consultation; … the need for the involvement of all stakeholders in*

4 Section 21(6).

5 Section 22. In the case of the City, the report would be tabled in Parliament.

6 Section 23.

7 Section 24.

8 Section 25.

9 Section 26.

10 Section 27.

11 GN R1394 of 23 November 1999. Interpretation of the Act requires *inter alia* that any relevant code of good practice must be taken into account: section 3(c).

order to promote positive outcomes."12 See too the Code's endorsement of the need for consensus: "*In setting objectives and developing corrective measures, parties to the consultative processes should attempt to reach consensus on what would constitute reasonable progress over the duration of the plan.*"13

50 The Code also underlines the methodical nature of the process. Thus: "*The development of a plan should be undertaken as an inclusive process that will result in a documented plan.*"14 The purpose and rationale for the employment equity plan is summarised in these terms: "*The plan represents the critical link between the current workforce profile and possible barriers in employment policies and procedures, and the implementation of remedial steps to ultimately result in employment equity in the workplace*."15

51 Paragraph 8.4 of the Code deals with 'numerical goals'. Its provisions are significant for the purpose of this case and I reproduce them:

"***8.4.1 Numerical goals should be developed for the appointment and promotion of people from designated groups. The purpose of these goals would be to increase the representation of people from designated groups in each occupational category and level in the employer's workforce, where under-representation has been identified and to make the workforce reflective of the relevant demographics as provided for in form EEA 8.***

8 In developing the numerical goals, the following factors should be taken into consideration –

- *the degree of under-representation of employees from designated groups in*

12 Paragraph 7.2.1.

13 Paragraph 8.5.

14 Paragraph 6.1.

15 Paragraph 4.2.

each occupational category and level in the employer's workforce;

- *present and planned vacancies;*
- *the provincial and national economically active population as presented in form EEA 8;*
- *the pool of suitably qualified persons from designated groups, from which the employer may be reasonably expected to draw for recruitment purposes;*
- *present and anticipated economic and financial factors relevant to the industry in which the employer operates;*
- *economic and financial circumstances of the employer;*
- *the anticipated growth or reduction in the employer's workforce during the time period for the goals;*
- *the expected turnover of employees in the employer's workforce during the time period for the goals; and*
- *labour turnover trends and underlying reasons, specifically for employees from designated groups.*"

52 Plainly, the relevance of each of these considerations will vary from employer to employer and from one occupational category to another.16 What this catalogue illustrates, however, is the thoroughness of the exercise that must be performed in order to achieve a realistic and satisfactory employment equity plan. Ultimately, it is the purpose of such plan that it will compellably declare in specific and unambiguous terms how numbers will change in each category and by when. Without an analysis commensurate with the inclusive approach reflected in paragraph 8.4 of the Code, that objective is unlikely to be reached.

16 The provisions of the EEA embrace all levels of employment. See form EEA 9 which deals with 'Occupational Levels' and spans 'top management' to 'unskilled and defined decision making'; similarly form EEA 10 ranges from 'legislators, senior officials and managers' to 'elementary occupations'.

Chapter V of the EEA

53 Part A of Chapter V deals with monitoring and enforcement.17 Its provisions are relevant at two levels: they furnish additional insight into the nature of affirmative action within the meaning of the EEA and they provide an answer to the question whether, viewed holistically, the

17 Part C of Chapter V deals with legal proceedings. It traverses aspects of both Chapter II and Chapter III. That does alter the fact that Part A relates solely to affirmative action matters dealt with in Chapter III.

54 applicant is entitled to approach this Court directly with an action grounded on affirmative action.

55 Mr Rose-Innes argued that the substantive distinction between Chapter II unfair discrimination and Chapter III affirmative action is mirrored in the distinction drawn by the legislature in the EEA. Enforcement of the first is undertaken through the declaration of a dispute in terms of section 10, which posits the CCMA as the initial forum. In the event of unsuccessful conciliation, the dispute then falls to be adjudicated by this Court.18 Precisely that route has been followed by the applicant and - insofar as her claim is one based on unfair discrimination - no complaint has been raised.

56 Section 10 governs only disputes that concern Chapter II19. Conversely, it is plain that any issue arising in respect of Chapter III falls within the framework of Chapter V. Section 36 sets out the initial enforcement step. Its content spans the Chapter III process:

"*A labour inspector must request and obtain a written undertaking from a designated employer to comply with paragraphs (a) to (j) within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to-*

(a) consult with employees as required by section 16;

(b) conduct an analysis as required by section 19;

(c) prepare an employment equity plan as required by section 20;

(d) implement its employment equity plan;

(e) submit an annual report as required by section 21;

18 With the consent of all the parties to the dispute, it may also be determined through arbitration.

19 Section 10(2).

(f) publish its report as required by section 22;

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

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

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

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

57 If an employer refuses to give such undertaking or fails to comply with an undertaking that has been given, a labour inspector may issue a compliance order in terms of section 37. If the employer does not comply, the Director-General may apply to the Labour Court to have the compliance order made an order of Court.20

20 Section 37(6).

58 An employer may object to an inspector's compliance order by making written representations to the Director-General, who "*may confirm, vary or cancel all or any part of the order to which the employer objected*." 21 If part or all of a compliance order should remain in force, the employer may appeal that order to the Labour Court.22 If the employer does not appeal and also does not comply with the order of the Director-General, the latter may apply to the Labour Court for that order to be made an order of Court.23

59 The role of the Director-General in these enforcement mechanisms is a pivotal one. It comes into play before the Labour Court may be called on to deal with a compliance issue. Correspondingly, there is no express provision in the Act for direct access to the Labour Court by, for instance, an aggrieved employee who seeks relief such as that pursued by the applicant in the present case.24 Mr Whyte, for the applicant, argued that this Court's powers under section 50 were broad enough to accommodate a direct affirmative action claim. He was supported in this by Mr Freund, who submitted that the procedures set out in Chapter V provide an "administrative enforcement" route which an employee may elect to follow, but that they do not exclude direct recourse to this Court. He contended that the enforcement procedures in the EEA are similar to those in the Basic Conditions of

21 Section 39(3).

22 Section 39(5) read with section 40.

23 Section 39(6).

24 The relief at issue here is that which is based on affirmative action.

Employment Act 75 of 1997 ("BCEA")25 and that the Labour Court can hear and determine any matter concerning a contract of employment, notwithstanding those procedures.26

60 Although there are parallels in the steps set out in the relevant parts of the BCEA and the EEA, I do not agree that the analogy extends to there being an election to go directly to the Labour Court in relation to Chapters III and V of the latter Act. As its name suggests, the BCEA establishes and enforces basic conditions of employment; whilst it advances fair labour practices by doing so27, its content is straightforward. The most demanding function that the Director-General must carry out under the rubric of enforcement is to consider an employer's objection to a compliance order. In the context of the BCEA that is a relatively elementary task, reflected in the uncomplicated information that the Director-General must take into account: "*any evidence concerning the employer's compliance record; the likelihood that the employer was aware of the relevant provisions; and the steps taken by the employer to ensure compliance with the relevant provision.*"28

61 When it comes to the EEA, however, there is a qualitative difference in the functions that are performed and the objectives that are to be achieved. This is immediately evident from a comparison of the BCEA provisions cited in the previous paragraph and the level of responsibility and complexity assigned to the Director-General

25 Sections 63 to 73 of the BCEA.

26 Section 77(3) of the BCEA.

27 Section 2 of the BCEA.

28 Section 71(4) of the BCEA.

under the EEA. Section 42 deals with the assessment of compliance:

"*In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must, in addition to the factors stated in section 15, take into account all of the following:*

(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-

(i) demographic profile of the national and regional economically active population;

(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

(iii) economic and financial factors relevant to the sector in which the employer operates;

(iv) present and anticipated economic and financial circumstances of the employer; and

(v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;

(b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;

(c) reasonable efforts made by a designated employer to implement its employment equity plan;

(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and

(e) any other prescribed factor."

62 The importance of the Director-General's role *vis-à-vis* employment equity is further evident from his or her capacity to conduct a 'review'. Section 43 details this function. Section 43 sets out follow-up provisions. They are provisions that establish a role for the Director-General that is at once proactive and interactive. They can hardly be classified as reactive or 'administrative' in the way that the comparable portion of the BCEA can be. Section 43 provides:

"*(1) The Director-General may conduct a review to determine whether an employer is complying with this Act.*

(2) In order to conduct the review the Director-General may-

(a) request an employer to submit to the Director-General a copy of its current analysis or employment equity plan;

(b) request an employer to submit to the Director-General any book, record, correspondence, document or information that could reasonably be relevant to the review of the employer's compliance with this Act;

(c) request a meeting with an employer to discuss its employment equity plan, the implementation of its plan and any matters related to its compliance with this Act; or

(d) request a meeting with any-

(i) employee or trade union consulted in terms of section 16;

(ii) workplace forum; or

(iii) other person who may have information relevant to the review."**29**

Section 44 is in these terms:

"*Subsequent to a review in terms of section 43, the Director-General may-*

(a) approve a designated employer's employment equity plan; or

(b) make a recommendation to an employer, in writing, stating-

(i) steps which the employer must take in connection with its employment equity plan or the implementation of that plan, or in relation to its compliance with any other provision of this Act; and

(ii) the period within which those steps must be taken; and

(iii) any other prescribed information."

63 What of the Labour Court in this process? Again, the legislature has clearly

29 Although subsection (1) contains a reference, broadly, to '*this Act*', it is plain from the content and context of what follows that it is intended, substantively, to deal only with Chapter III.

positioned its point of entry:

"*If an employer fails to comply with a request made by the Director-General in terms of section 43 (2) or a recommendation made by the Director-General in terms of section 44 (b), the Director-General may refer the employer's non-compliance to the Labour Court.*"30

64 Consonantly with the structure of the EEA, this section in effect reiterates that, in the context of affirmative action, the Labour Court may be called on to impose its judicial authority when it becomes necessary for that to happen. However, that does not mean that issues of non-compliance can in general be brought directly to this Court. Nor does section 49,

30 Section 45 of the EEA.

65 which deals with the jurisdiction of the Court, have that result: "*The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of this Act, except where this Act provides otherwise.*" This means that this Court is properly seized with an issue such as the present one, namely whether the interpretation and application of the EEA allows, firstly, individual claims based on affirmative action and, secondly, whether there is direct access to the Court for any such claim. It does not mean that the answer to those questions must be 'yes'.

66 Similarly, had it been the intention of the legislature, notwithstanding the overall structure of the Act which I have outlined above, that individuals could bring affirmative actions directly to this Court, one would expect that to have been included in the powers set out in section 50(1). On a proper construction, no such power is there to be found:

"*Except where this Act provides otherwise, the Labour Court may make any appropriate order including-*

(a) on application by the Director-General in terms of section 37 (6) or 39 (6) making a compliance order an order of the Labour Court;

(b) subject to the provisions of this Act, condoning the late filing of any document with, or the late referral of any dispute to, the Labour Court;

(c) directing the CCMA to conduct an investigation to assist the Court and to submit a report to the Court;

(d) awarding compensation in any circumstances contemplated in this Act;

(e) awarding damages in any circumstances contemplated in this Act;

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

(g) imposing a fine in accordance with Schedule 1 for a contravention of certain provisions of this Act;

(h) reviewing the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law;

(i) in an appeal under section 40, confirming, varying or setting aside all or part of an order made by the Director-General in terms of section 39; and

***(j) dealing with any matter necessary or incidental to performing its functions in terms of this Act.*"**

67 It was argued for the applicant that the review power in section 50(1)(h) was broad enough to accommodate the applicant's claim and that there is nothing in Chapter V to oust it. I fully concur with the latter part of that submission. Indeed, Chapter V read with Chapter III will very likely be the source of most of the reviews that may be brought to this Court. However, I entirely disagree that the appointment by an employer of one employee instead of another will in general be grounds for a review, directly brought. For the purpose of this judgment, I need not consider

whether such a review might exceptionally lie, since the applicant is in any event not before this Court on review.

68 It will be sufficient to observe that provision is made in section 34 for an employee to raise an alleged contravention of the Act with a range of persons and bodies, from another employee through to the Director-General and the Commission for Employment Equity.31 One such contravention would be an employer's failure to implement an equity plan. The enforcement mechanisms in Chapter V would then come into play. If non-compliance persists, the Labour Court may be called on to adjudicate. Alternatively, if the enforcement measures themselves are not performed in accordance with the Act, a review might arise.

69 Coursing through these last considerations is a fundamental feature of the EEA, namely its underlying policy decision that affirmative action is to be collective in nature, that it is to be participative and programmatic, and that it is to be essentially self-regulatory. There are targets, there are categories, there are dates and there are numbers. That is its working vocabulary. Its antithesis is an *ad hoc* adjudication of the kind that the applicant seeks to enforce in this matter, on the basis that there is an independent and individual right to affirmative action. It is an approach that the legislature has eschewed.

70 These two routes cannot operate in tandem, at least not in respect of designated employers and those who opt in.32 *Ad hoc* appointments and promotions will inevitably run the risk of being at odds with the collectively determined equity plan. I

31 The list does not include the Labour Court.

32 In terms of section 14.

have set out earlier in this judgment the complex and interlocking nature of the analysis and projections that must be made for the purpose of an employment equity plan. The Labour Court cannot separately embark upon an equivalent exercise in order to deal with individual affirmative action claims. If it were to, it is difficult to imagine how its determination of a plan would correspond with that reached in terms of the Act. If it were to avail itself of the statutory plan, then that should take place pursuant to the procedures of Chapter V.

71 The collective nature of affirmative action and the absence of an independent individual right to claim an appointment is a well-recognised one. See for instance *Stoman v Minister of Safety and Security and*

72 *others* (2002) 23 *ILJ* 1010 (T) at 1035 H-I:

"*The emphasis is certainly on the group or category of person, of which the particular individual happens to be a member, or, more starkly put in the negative, of which a specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination. The aim is not to reward fourth respondent as an individual but to advance the category of persons to which he belongs and to achieve substantive equality in the SAPS as an important component of South African society.*"

This understanding of the purpose and operation of affirmative action was crisply formulated in *Local 28, Sheetmetal Workers' Industrial Association v EEOC* 478 US 421 (1986) at 424:

"*The purpose of affirmative action is not to make identified victims [of past discrimination] whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief, and the beneficiaries need not show that they were victims of discrimination.*"

See also *Abbott v Bargaining Council for the Motor Industry (Western Cape) (1999)* 20 *ILJ* 330 (LC) at paras [12] and [13]; M McGregor, 'Affirmative Action: An Account of the Case Law', (2002) 14 *SA Merc LJ* at 270; Thompson and Benjamin *South African Labour Law* at CC!-59.

73 The achievement of employment equity is an important component of the right to equality entrenched in the Bill of Rights. In my view, the approach adopted in the EEA gives full expression to that component. Section 9(2) of the Constitution states:

"*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.*"

74 This section identifies *inter alia* the goal of true substantive equality. In the context of the workplace, that translates into 'equality of outcome' in relation to processes of

appointment, promotion and the like. Chapter III of the EEA does precisely that. It goes beyond 'equality of opportunity' and 'formal equality'.33 The latter two remove obstacles in the form of discrimination. That objective receives distinct treatment in the Bill of Rights, in section 9(4):

"*No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*"

It likewise receives distinct treatment in Chapter II of the EEA.

75 Just as section 9(2) of the Constitution notes that the need for positive measures arises from past discrimination, so section 15(2) of Chapter III notes that barriers 'including unfair discrimination' must be identified and eliminated. Those are amongst the measures that must be consulted upon and that must find their way into the employment equity plan.34 It is of course logical that the first item to be addressed in an equity plan should be the removal of any residual systemic unfair discrimination. If that were not done, affirmative action measures would constantly be impeded. However, that logical requirement does not put in place a bridge between the provisions of Chapter II and Chapter III. Their purpose and operation remain distinct. In general, a failure to comply with the requirements of Chapter III will be a non-compliance issue and not one of unfair discrimination.35

33 See the useful summary by Christoph Garbers, 'The right of a job candidate to affirmative action selection: a landmark case?', *Contemporary Labour Law* Vol 12 No 10.

34 Section 17(b) read with section 20(2)(b).

35 An unfair discrimination claim could potentially arise in the context of an affirmative action appointment if, for instance, target criteria were taken into account in a discriminatory fashion as between the members of a group of 'designated' applicants. Facts of that kind are however quite different from the present one, where the applicant relies on a blanket failure

76 In support of the contention that the applicant has an individual right to an affirmative action, justiciable in this Court, reliance was placed on the recent judgment of Waglay J in *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC). The learned Judge reached the following conclusion:

"*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 (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.*"36

77 The learned Judge went on to summarise his conclusion on this aspect in these terms:

"*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.*"37

78 I regret that I am unable to follow this result. In my respectful view, the learned Judge has not sufficiently maintained the distinction between Chapters II and III that

to apply affirmative action.

36 Para [47].

37 Paragraph [49].

the interpretation of the Act requires. In general, for the reasons set out in this judgment, if due affirmative actions measures have not been applied by a designated employer that gives rise to an enforcement issue under Chapter III and not an unfair discrimination claim under Chapter II.

79 In particular, there is with respect no sound basis upon which sections 20(3) to (5) fall to be read together with the provisions of Chapter II and, likewise, no basis upon which that can produce a right to affirmative action.38 The prohibition in section 20(5) against unfair discrimination solely on the ground of lack of relevant experience relates only to the determination to be made in subsection (4) concerning whether a person is 'suitably qualified' for the purpose of the employment equity plan.39 If there is a contravention of subsection (5) that is a matter for the enforcement procedures prescribed in Chapter V. It does not give rise to a claim in terms of Chapter II. It also does not bring about an individual right to affirmative action.40

80 Mr Freund argued the applicant's right of direct access to this Court on an affirmative action claim on a further basis. This was that section 36, which deals with an inspector's powers to obtain an undertaking to comply, does not extend to

38 Section 20 has been cited above in paragraph 21.

39 See particularly section 20(2)(c). The phrase '*suitably qualified*' occurs only in Chapters III and V. It does not present itself in any form in Chapter II. The introductory phrase to section 20(3), '*For purposes of this Act*' must be read as '*For purposes of the relevant Chapters of this Act*'.

40 See in this context also the preservation of the distinction between Chapter II dispute proceedings and Chapter III mechanisms in section 46 of the EEA.

section 13, which sets out the duties of designated employers. As a corollary, he contended that the applicant could not have invoked section 36. This argument is unpersuasive. Although section 36 does not specifically refer to section 13, it comprehensively covers its content. It is correct that the applicant could not have invoked section 36 in order to secure *her* appointment, but that is not a deficiency in the wording of the Act; it is a consequence of the policy choices that the Act embodies. There is no default right to approach this Court for an order that the Act itself does not countenance.

Conclusion on Grounds B & C

81 Having regard to the considerations set out above, it is my conclusion that the City must succeed in its exception on Grounds B and C. It does so on both of the key contentions raised by it, namely that the EEA does not establish an independent individual right to affirmative action and also that there is no right of direct access to the Labour Court in respect of any such claim.

82 It follows also that the applicant does not have *locus standi* to approach this Court directly for an order that the City is to prepare and implement an employment equity plan. That is an enforcement issue expressly catered for in Chapter V. I may add that the position would be no different had the applicant been mandated by all the City's employees to seek that prayer. The route would still be through the compliance steps of the Act and not through direct application to Court.41

41 An order to prevent '*the same unfair discrimination or a similar practice*' would however be competent in proceedings pursuant to the applicant's unfair discrimination claim: section 50(2)(c).

83 The conclusion that the applicant has no individual right to affirmative action in terms of the EEA must apply also in relation to the City's affirmative action policy. As is apparent from the portions cited above, that policy reproduces a number of provisions of the EEA. However, it does not incorporate the essential content of an equity plan. For instance, the key element of representivity targets is specifically mentioned as still having to be determined. An individual employee cannot enforce an affirmative action claim through a policy of this sort (incomplete or otherwise) any more than can be done through an equity plan under the EEA. A designated employer's obligations are described in Chapter III. It may include in its plan other provisions not inconsistent with the Act42, but the Act does not contemplate a plan that is prepared and implemented outside the framework of Chapter III.43

Ground D

84 The particulars relating to this ground have been set out fully earlier in this judgment. In essence, the City complains that the applicant in one breath alleges that she should have been appointed because she is the better candidate (and was therefore discriminated against) and that she should have been appointed because of affirmative action. The City's contention is that these should have been pleaded in the alternative, because they are mutually inconsistent.

85 Inherent in that argument is the premise that an affirmative action appointment is by definition not the appointment of the best candidate. That may be so in a great many instances, but it is not necessarily the case. As will be apparent from the

42 Section 20(6).

43 The City's policy may nevertheless be relevant to unfair discrimination and unfair labour practice proceedings.

analysis of the EEA set out in this judgment, a key to an acceptable equity plan is that target numbers and dates must be fixed that will in time secure proper representivity. The material requirement is that persons who are thus appointed should be '*suitably qualified*'. If there is an applicant with superior qualifications that means at least that the hurdle of 'suitably qualified' will have been very comfortably cleared.

86 Nevertheless, the respondent is entitled to certainty about the nature of the claims that it must meet. Mr Whyte argued that the unfair discrimination allegations are not contradictory but cumulative. In the context of this case, 'cumulative' seems to me to be a mantle for imprecision. For instance, the applicant first pleads a case based on unfair discrimination allegations. It then follows with the heading: 'Affirmative Action', the last paragraph of which reverts to allegations about unfair discrimination. The result is that it is unclear precisely what the applicant avers that she will set out to prove under each cause of action or whether she intends to allege and prove all the 'cumulative' allegations in order to prove a single cause of action. To this extent, the exception is upheld. The applicant must set out a principal cause of action with discrete alternatives, in order that the City will be entirely sure what case it has to meet.

Ground E

87 The applicant's unfair labour practice claim is based on item 2(1)(b) of Schedule 7 of the LRA as it read before the amendments brought about by Act 12 of 2002. For the purpose of that item, an unfair labour practice meant any act or omission involving "*the unfair conduct of an employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee.*"

88 The relevant dispute procedure was governed by item 3(4)(b) which provided that any dispute arising from item 2(1)(b) should be resolved through arbitration. The City relies in this regard on the judgment of Landman J in *Marnitz v Transnet Limited t/a Portnet* (1998) 19 *ILJ* 1501 (LC), which is directly in point: "*It is perfectly clear that this court has no jurisdiction to adjudicate on a matter referred to in item 2(1)(b)…*"44 The learned Judge referred also to the limitation of this Court's jurisdiction in section 157 of the LRA45 and to the fact that the respondent had not consented to arbitration.

44 See paragraphs 14 and 15.

45 Section 157(5) provides: "*Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.*"

89 The latter aspect arises from section 158(2) of the LRA:

"*If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-*

(a) stay the proceedings and refer the dispute to arbitration; or

(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make. **"**

90 The City, it is common cause, has not given its consent to this Court sitting as arbitrator.

91 See also *Coetzer and others v Minister of Safety and Security and another* [2003] 2 BLLR 173 (LC):

"***[12] The parties were unable to agree at the pre-trial conference on the issue which this Court is required to decide. Each party recorded their views. The applicants suggested that the main issue is whether SAPS discriminated against the applicants on a racial basis by not appointing them to the remaining 20 posts. SAPS was of the view that the main issue was whether it discriminated unfairly against the applicants by not appointing them to the 20 main posts. SAPS is closer to the mark. This court's jurisdiction in terms of section 6 of the EEA is invoked only by a complaint of "unfair discrimination". Section 6 reads:***

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

***[13] I might add that the applicants' reliance, in their statement of case, on item 2(1)(b) of Schedule 7 of the Labour Relations Act 66 of 1995, ie a complaint relating to an employer's unfair conduct regarding promotion, is misconceived. This court has no jurisdiction to entertain such an application, It falls within the jurisdiction of a bargaining council or the CCMA, as the case may be….*"**

92 In answer to this, Mr Whyte relied in the first place on the decision of Waglay J in *Department of Justice v CCMA & Others* [2001] 11 BLLR 1229 (LC). That decision concerned a review of an award in the CCMA where the main issue had been characterised as an unfair labour practice involving promotions. There were also allegations concerning discrimination, which are normally the province of this Court. After considering the difficulties that arise with separated jurisdictions, the learned Judge distilled the following principles:46

"*From the above it seems to me that the following principles are applicable in situations where two possible causes of action are present, and each would lead to a different forum having jurisdiction:*

- *The applicant is the master of the dispute and has the right to choose the cause of action and grounds upon which it relies;*
- *The Commissioner must determine what the main issue to be decided is and whether the matter is one to be determined by arbitration in the CCMA. Although the ipse dixit of the applicant may be the decisive factor where the wording of the statute is clear on this point, the Commissioner may, in certain circumstances, be required to look at the objective situation to determine what the "real issue" before the CCMA is.*
- *The mere presence of issues that usually fall to be determined by the Labour Court does not automatically preclude the CCMA jurisdiction. The CCMA may be required to decide issues usually reserved for the Labour Court where it is peripheral or incidental to the main dispute before it.*
- *Where there are elements of both classes of dispute, that is those that fall to be determined by the Labour Court and those over which the CCMA has jurisdiction, jurisdiction will be determined with reference to the usual twofold test for causation (factual and legal causation).*

46 Paragraph [14].

· *In determining the extent of the CCMA's jurisdiction, the wording of the empowering statutes should be given effect to.*"

93 With reference to these principles, Mr Whyte argued that the main issue before this Court was one of discrimination and that the unfair labour practice issue similarly involved discrimination. He contended further that a finding of discrimination would logically lead to a finding that there had been an unfair labour practice. Accordingly, he argued that this matter fell analogously within the principles cited above.

94 I am unable to agree with the submission that an action based on unfair discrimination is essentially congruent with one brought on grounds of an unfair labour practice. Although each may pursue the same result, being a particular appointment, they are conceptually and procedurally distinct. Mr Whyte's argument suggests that the core of the unfair labour practice claim is unfair discrimination. If that is so, then it is a misconception to have an action styled an unfair labour practice.

95 The facts before me are not the same as those that had to be decided in the *Department of Justice* review. In that case there was certainty about the main issue. The overlapping elements were peripheral or incidental to that main issue. As Waglay J concluded:

"*From the Commissioner's reasoning it is clear that the main issue before him was that of the unfair process in relation to respondents' promotion. To the extent that matters of discrimination were raised they were clearly incidental to the main issue of promotion. The factual situation giving rise to the proceedings in the CCMA clearly did have the makings of a case of alleged unfair discrimination. Two white males were found to be the most suitable candidates for the positions advertised by the employer's own selection committee, but were rejected in favour of two black candidates, one male and one female.*

However, the respondents elected to attack the action of the employer on the basis of an unfair labour practice relating to their promotion: this was their prerogative and the CCMA was obliged to hear the matter within those parameters. On the evidence led before the CCMA the Commissioner found for the respondents not on the basis of unfair discrimination but as appears from the reasons recorded above, because the process by which the promotion had been denied was unfair and amounted to an unfair labour practice."[47]

96 The case before me is not one of overlapping elements within an identified single cause of action, but one of distinct causes of action that the legislature has definitively allocated to different *fora*. It falls within the ambit of the *Marnitz* and *Coetzer* decisions referred to above. There is in my view no good reason why those decisions should not be followed in the present case.

97 Mr Whyte argued also that it would be consistent with the object of expeditious resolution of disputes for this Court to hear the unfair labour practice case, since it formed part of a single dispute. From a practical point of view that submission has a number of attractive features. However, it is a result that requires legislative amendment. Given the present statutory framework, an outcome of that sort lies beyond the power of this Court. This follows from: the exclusive assignment of unfair labour practice disputes to the CCMA; the provisions of section 157(5) of the LRA; the prerequisite of consent in section 158(2)(b) for such dispute to be dealt with by the Labour Court; the anomalous position that would arise if this Court were at one and the same time to adjudicate an unfair discrimination action as a Court and conduct an unfair labour practice determination as an arbitrator.

98 It is hence my conclusion that this exception must succeed on the ground of want of

47 Paragraph [29].

jurisdiction.

99 In case that I am wrong in that conclusion, I will deal briefly with the second leg of this exception, namely that the statement of case does not contain essential averments, being that there are no pleaded facts to establish that the act or omission complained of related to "*the promotion, demotion or training of an employee*". It is common cause that the only one of these that could play a part in this case is '*promotion*'. It is also so that the word 'promotion' is nowhere mentioned in the statement of case.

100 Mr Whyte has sought to meet this difficulty by pointing to various other allegations in the pleadings from which, he argues, an inference is to be drawn that the complaint has to do with the failure to promote. I need not detail those allegations, for they run into the allied difficulty that the statement of case also contains the allegation that: "*The position was in all material respects the same as the position of Interim Manager:Health occupied by the applicant at that time.*" It is not for a respondent to pick its way through a variety of allegations in order to make a deduction about an essential element of an action. Such element should be unambiguously pleaded and the respondent should be in no doubt about what the applicant intends to allege and prove. This has not been done in respect of this action. Accordingly, I would have upheld the exception on this ground also and afforded the applicant an opportunity to correct the statement of case.

CONCLUSION

101 The parties were *ad idem* that in the event of one or more of the exceptions being

upheld, the applicant should have an opportunity to reconsider its approach to this litigation and to move for appropriate amendments.

102 In their argument before me, the parties were also common cause that the costs of the exceptions should stand over for determination at a later date.

103 I make the following order:

1 The exceptions taken by the first respondent under grounds B, C, D and E of its notice of exception dated 5 December 2002 are upheld.

.2 The applicant is granted one month from the date of this order to apply for leave to amend her statement of case, provided that the parties may by agreement extend such period.

3 In the event that the applicant does not seek leave to amend her statement of case within such period, the application is dismissed.

4 The costs are reserved.

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K S TIP
Acting Judge of the Labour Court

Date of hearing: **9 May 2003**

Date of judgment: **16 January 2004**

t: Adv L A Rose-Innes SC
with Adv C S Kahanovitz
instructed: Herold Gie Attorneys

For the respondent/applicant: **Mr J Whyte of**
Cheadle Thompson & Haysom

For the *amicus curiae*: **Adv A Freund**