

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J1161/2004

In the matter between:

GERT THOMAS WILLEMSE

Applicant

and

EBRAHIM PATELIA N.O.

First Respondent

GENERAL PUBLIC SERVICE Second Respondent

SECTORAL BARGAINING COUNCIL, GAUTENG

THE DIRECTOR-GENERAL: DEPARTMENT OF

Third Respondent

ENVIRONMENTAL AFFAIRS AND TOURISM

J U D G M E N T

NEL AJ:

- 1] Dr Willemse, the applicant herein, in June 2001 applied for the position of Director: Biodiversity Management in the Department of Environmental Affairs and Tourism (“the DEAT”), represented by the third respondent herein. He was recommended in February 2002 for the position by a selection committee but in May 2002, the acting Director General at the time did not accept the recommendation “due to the fact that the DEAT’s human resources component must be representative of the demographics of the country as mandated by the Employment Equity Act (“the EEA”) and the transformation process”. This decision led to an

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unfair labour practice dispute involving the unfair conduct of the DEAT in failing or refusing to promote him being declared by Dr Willemse in July 2003. This dispute was eventually referred to the General Public Service Sectoral Bargaining Council for arbitration by the first respondent ("the arbitrator"). On 9 June 2004, the arbitrator found that no unfair labour practice had been committed by the DEAT. Dr Willemse has now approached this Court for the review of this award of the arbitrator.

BACKGROUND.

- 2] Dr Willemse at all relevant times has been a Deputy Director in the DEAT. He has been appointed in an acting capacity for the post of Director: Biodiversity Management for various time periods since 1 June 1996. This post is in the directorate Biodiversity and Heritage of the DEAT. Over the period 27 July 2001 till 10 May 2002, Dr Willemse acted in this very post for which he had applied after the DEAT had advertised a vacancy both internally and externally for the position of Director: Biodiversity Management in June 2001. The advertisement stated that: "It is the intention of the Department to promote representivity through the filling of the post". On 16 July 2001, Dr Willemse applied for the vacancy on the prescribed form, together with his *curriculum vitae*.

- 3] A perusal of Dr Willemse's CV reveals impressive qualifications as well as experience. He has been employed at the Rand Water Board, the Rand Afrikaans University (as it then was), the Technikon Witwatersrand and the University of Pretoria. He served as an associate professor at the Medical University of South Africa. Prior to joining the DEAT, he was Assistant Director: Research, in the Department of Nature Conservation: Gauteng Province. He joined the DEAT in June 1996 as Deputy-

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Director: Nature Conservation (post-transformation the Sub-directorate Biodiversity Access, Management and Rehabilitation). Responsibilities of this sub-directorate related to all aspects of protected area conservation in the context of national policy-making and co-ordinative functions, including evaluation and supervision of some conservation related research projects on an *ad hoc* basis. The sub-directorate also produced and distributed informational literature on biological resources (e.g. vegetation maps and booklets) and a register of protected areas. It managed the South African Natural Heritage Programme as an incentive scheme for private landowners to conserve unique or threatened ecosystems, habitats or populations. In addition to these functions, so Dr Willemse's CV reveals, he also assumed responsibility for all obligations and activities, national and international, resulting from South Africa's ratification of the Convention on Biological Diversity in 1995. He was also involved in the development of a national policy and strategy for the conservation and sustainable use of South Africa's biodiversity through a consultative process involving all stakeholders and obtaining parliamentary approval therefor in September 1997. His duties at international level included assuming responsibility, as head of South Africa's delegation, for meetings under the auspices of the Convention on Biological Diversity and meetings of the Southern African Development Community, African Region and non-aligned Movement pertaining to diversity. He, in that capacity, attended some 31 meetings internationally since 1996. Dr Willemse authored or co-authored some 37 publications. He has done extensive research, acted in many advisory capacities and served on numerous societies and committees.

4] The application for employment, which Dr Willemse submitted, contains

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special notes indicating the relevance of certain information required. In respect of three items, namely race, gender and the question "Do you have a disability?" the application form explains that this information is required to enable the DEAT to comply with the EEA. Of relevance is that, next to the question "Do you have a disability?" Dr Willemse confirmed that he had one by marking the yes block on the application form.

- 5] On 23 January 2002, Dr Willemse was interviewed for the post advertised. The interview was conducted by a panel consisting of four persons appointed by the DEAT. The selection committee which interviewed all the candidates on 23 and 30 January 2002, consisted of Ms M Mbengashe, Senior Manager: Biodiversity and Heritage, Ms P Yako, Executive Manager: Biodiversity and Conservation, Mr H Magome, Chief Director: San Parks and Mr W Hlongwane, H R M Technical Adviser. In a letter directed to the Acting Director General of the DEAT and signed by the Chief Director: Biodiversity and Heritage on 5 February 2002, the panel recommended that the acting Director General approve the promotion of Dr Willemse to the post of Manager: Biodiversity Management. The recommendation indicated that a total number of 45 applications had been received of which 18 had been from within the Public Service and 27 from outside. A shortlist had been drawn up and approved prior to the interviews. The selection committee's proposal document set out extensively what the key performance areas were which they had regarded as crucial to the successful functioning in the post and stated that, using the stated key performance areas, the committee had concluded that Dr Willemse was the most suitable candidate for the post. The following reasons for this

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conclusion were given:

Clear understanding of Government processes e.g. planning cycles and budget.

A good understanding of Government prescripts/policies and constitution e.g. MAP.

Strategic thinker and innovative.

Good understanding of programme and project management skills, has hands-on experience.

Good leadership and management skills.

Clear understanding of information management and where to source it and how to manage it.

Exceptional technical knowledge on biodiversity management issues.

Good understanding of biodiversity and its link with sustainable development, WSSD and NEPAD.

Clear strategy on using the World Summit on Sustainable Development Conference to the benefit of the country, especially on biodiversity issues.

The selection committee's letter to the Acting Director General also stated the following:

"The promotion of Mr (sic) Willemse will enhance the skills needs in the branch Biodiversity and Conservation while opening up a position at middle management level, where representivity is lacking. The committee has also taken the government's policy on affirmative action and the work force profile of the branch into consideration before making this nomination, (see attached Annexure "A"). The rest of the candidates were not appointable. Attached as annexure "B" is Mr (sic) Willemse's promotion letter for your signature".

- 6] On 8 May 2002, Dr Willemse received a letter from the acting Director General of the DEAT, advising him that his application for the advertised post of Director: Biodiversity Management had been unsuccessful.

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7] Dr Willemse says that he was shocked and upset when he received the information that he was unsuccessful, bearing in mind that he had filled the vacancy on various occasions in an acting capacity and also in light of the fact that no negative reports pertaining to his services in the acting position had ever been brought to his attention. On 10 May 2002, Dr Willemse accordingly requested that his employer provide him with the reasons why he was not appointed and copies of his application form, the recommendation and approval of the short list of candidates for the interview and of the recommendations of the interview panel.

8] On 22 May 2002, Dr Willemse received an internal memorandum from the human resources office of the DEAT, advising him that "The reason for the decision not to appoint (him) Director: Biodiversity Management, is due to the fact that the DEAT's Human Resources component must be representative of the demographics of the country, as mandated by the EEA and transformation process". The memorandum went on to advise Dr Willemse that the information requested by him could not be given as it contained privileged information. He was, however, provided with a copy of his application form.

9] On 23 May 2002, referring them to the Promotion of Access to Information Act, Dr Willemse persisted in his request for the information the DEAT had refused to give him. On 3 June 2002, the human resources Department advised Dr Willemse in the following terms:

"Kindly be informed that this office wish to reiterate its position not to fill the post of Director: Biodiversity Management due to the fact that the Department strives to meet its Constitutional obligations of addressing of

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demographics and representivity".

The DEAT continued to refuse to divulge any further information requested on the basis of it being confidential and legally protected by legislation. It stated that it regarded the matter as closed. Dr Willemse was invited, if he remained dissatisfied, to approach the relevant institutions to address his concerns.

- 10] At this point in time, on 17 June 2002, the DEAT advertised a vacant post of "Manager: Biodiversity Management". This advertisement stated that "This post is strictly for the promotion of representivity" and that "The national Department of Environmental Affairs and Tourism is an equal opportunity, affirmative action employer. It is our intention to promote representivity (race, gender and disability) in the Department through the filling of this post and candidates whose appointment/promotion/transfer will promote representivity will receive preference".
- 11] According to Dr Willemse, he did not apply for this post for two reasons. He held the view that the post originally advertised during July 2001, and the one advertised in July 2002, did not appear to him as if they were the same in all respects. Secondly, he was still busy trying to get all relevant information from the DEAT pertaining to the decision not to appoint him to the vacant post originally advertised during July 2001.
- 12] Dr Willemse took up the invitation to take his matter further and on 11 October 2002, the Public Service Association wrote a letter on his behalf to the DEAT requesting essentially the same information which the DEAT up until then had refused to provide Dr Willemse with. A month later the

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DEAT replied, providing some information and further indicating that:

"3. Unfortunately we are unable to provide the recommendation/submissions for nomination/interview report and the score sheets to you because such documents vanished from our files without any trace....."

4. Dr Willemse was not appointed to the post of Director: Biodiversity Management due to the fact that the Department still strives to meet its constitutional obligation in addressing representivity".

13] On 25 July 2003, Dr Willemse submitted a grievance notification to the DEAT and on 31 July 2003, the DEAT advised him that it was not agreeing to his requested outcomes. This led to Dr Willemse, on 5 August 2003, referring his dispute to the second respondent herein. In his referral he summarised the facts of the dispute as being "unfair conduct of employer relating to appointment/promotion" and he indicated that the outcome he required was "appointment to post of Director: Biodiversity Conservation". When the dispute remained unresolved as at 8 September 2003, it was referred to arbitration. The arbitration before the arbitrator herein took place on 4 December 2003 and 1 March and 18 May 2004.

THE AWARD.

14] The award, which is the subject of this review application was, as stated earlier, handed down on 9 June 2004. The arbitrator indicated in his award that the issue in dispute was: "Whether the respondent had committed an unfair labour practice by not promoting the applicant to the position of Director: Biodiversity?" Having heard the evidence and argument, the arbitrator concluded that he could find no basis to satisfy the unfair labour practice claim brought forward by Dr Willemse and he dismissed his claim.

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15] The very first ground of review levelled against the arbitrator's award is that he stated in his award that: "It is clear that the applicant had initially applied for a promotion post **and was not recommended**' (my emphasis). Patently this is a misdirection by the arbitrator as the applicant was indeed recommended for appointment to the post he applied for. The arbitrator was clearly aware of the fact that Dr Willemse was indeed recommended for the position because that is exactly what the arbitrator records elsewhere in his award. This misdirection is in my opinion not material, as I do not believe it played any role in the conclusions that the arbitrator arrived at. This apparent misdirection by the arbitrator does accordingly not in and by itself justify interference with his award by this Court.

16] From the award and the record of the arbitration it appears that Dr Willemse essentially raised two issues for determination by the arbitrator. The first issue related to the re-advertising of the post, with Dr Willemse contending that such re-advertising by the DEAT of the post was unprocedural and that the post that was advertised did not exist at the time. The filling of the post, so contended the Dr Willemse further in the arbitration, constituted the filling of a non-existent post. The arbitrator concluded that these two posts were the same and rejected Dr Willemse's stated contentions. This issue was not really pursued by the applicant in the review and I do not believe that I need to consider this aspect any further.

17] The second issue raised by Dr Willemse for determination by the arbitrator related to the failure by the DEAT to promote him. Mr Ackermann, who appeared on behalf of the applicant, drew attention to the fact that the arbitrator had concluded that, as the applicant had not applied for the position when it was advertised the second time, he had no claim in respect of the

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failure or refusal by the DEAT to promote him. This conclusion of the arbitrator appears from the following extract from his award:

"The applicant had failed to apply for the re-advertised post. The applicant was not a contender in the race for the post under the new selection process. The applicant can accordingly base no claim on his non-appointment in this process. The applicant has rightly not made any comparison between himself and the successful incumbent to the position.

The applicant has based his claim on the respondent's decision not to appoint him from his application and recommendation of the selection committee from the initial position advertised. It must be borne in mind that at that stage the respondent had not concluded the process by appointing a person to that position. At the time when the dispute of the applicant is based the respondent has made no final decision to appoint a person to this position.

The respondent had decided to not appoint the applicant and rather elected to re-advertise the position as issues of affirmative action were at stake. There is no evidence before me to suggest that the respondents had placed a restriction on the applicant's ability to apply on (sic) the re-advertised position. There is also no evidence before me to suggest that had the applicant applied for the second time he would have simply not been appointed".

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Still later on in his finding the arbitrator states the following:

"The respondent had decided not to appoint the applicant to allow for the fulfilment of its legitimate affirmative action commitments. The respondent had however not excluded the applicant from the race when the post was re-advertised.

The applicant cannot now lay claim to a position where he had removed himself from the running. The applicant has no right to compare himself to the successful incumbent. The applicant's dispute is based at a point in time when the respondent has not committed itself to a final appointment in the position to the complete exclusion of the applicant.

Had the applicant elected to apply for the re-advertised post and had not been appointed he could have argued to have claim to the position. At this point the applicant's claim is empty.

The applicant attempts to argue that an affirmative candidate should not have been appointed as the Department's targets were met and that the Department did not have an employment equity plan. The applicant however could successfully make this comparison only in the instance of an affirmative action candidate being appointed to the position above him he could then compare his position to that of the position in the position".

18] The arbitrator in his findings also stated that Dr Willemse attempted to argue that an affirmative action candidate should not have been appointed, as

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the Department's targets had been met. The arbitrator went on to state that Dr Willemse could however successfully make this comparison only in the instance of an affirmative action candidate being appointed to the position ahead of him. He could then compare his position to that of the person in the position. It is apparent from this passage that the arbitrator misunderstood Dr Willemse's case and what he had to decide. The crisp question was whether the discrimination which Dr Willemse alleged was perpetrated by the DEAT in not promoting him, but instead wanting to appoint someone else with reference to gender representivity, was fair. This was the issue squarely raised at the time that the acting Director General refused to accept the selection committee's recommendation that Dr Willemse be promoted. It was this decision that formed the basis of the dispute before the arbitrator, not the eventual appointment of someone else. It was the fairness of the acting Director General's decision not to promote Dr Willemse that the arbitrator was called on to apply his mind to.

19] Mr Ackermann suggested in argument that the arbitrator confused the issue of an employer's rights and obligations to pursue employment equity and the question, in the pursuit of employment equity, whether an employer acted in a rational and fair manner. He was particularly critical of the following conclusion of the arbitrator:

"In this case the Department simply used its affirmative action commitments, which even the applicant accepts as valid, to create the opportunity to acquire better candidates. The applicant, again, could have applied for the new position. Firstly such a decision is reasonable and cannot be regarded to be unfair and secondly this in itself cannot grant the applicant an entitlement to a permanent promotion position".

20] It is apparent that the arbitrator was influenced largely, if not exclusively, by the decision of DEPARTMENT OF JUSTICE v CCMA AND OTHERS [2004] 4 BLLR 297 LAC. In being so influenced, I believe the arbitrator

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misconstrued the applicable principles herein. The Department of Justice case (supra) is in my view clearly distinguishable in a number of respects from the one under consideration. The most relevant being that, in the Department of Justice case, the selection committee had not recommended appointment and a decision had not been taken at all by the appointing authority not to appoint a party. Such appointment to the exclusion of the complaining employee was eventually made. Of relevance hereto are perhaps the following comments of Zondo JP, at page 321 B-C of the Department of Justice case:

“An employee who complains that the employer’s decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such a decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the inquiry into whether the conduct was unfair can then follow. This is not one of those cases such as disputes relating to unfair discrimination and disputes relating to freedom of association where, if the employee proves the conduct complained of, the legislation then requires the employer to prove that such conduct was fair or lawful and, if he cannot prove that, unfairness is established.....”

- 21] I am of the view that the present case involves exactly this inquiry. Dr Willemse in my view established that he applied for a position and, having been recommended for the position, that the DEAT decided not to appoint him in order to address its representivity. The fact that the DEAT then advertised the same or a slightly different position does not detract from the fact that it had made a conclusive decision not to appoint Dr

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Willemse in order to appoint someone from a different gender and race group. On the facts, with which I shall in due course deal with, patently the reason for not appointing Dr Willemse amounted to discrimination based on both race and gender. It clearly required the employer to justify such discrimination by showing that it was fair. The failure by the arbitrator to realise the distinction had the result that he did not apply his mind at all to this most crucial question whether the DEAT acted fairly in refusing to promote Dr Willemse, which question I am satisfied was indeed before him and did not fall away because Dr Willemse did not later apply for the same or a similar position. This in my view in and by itself renders the whole of the arbitrator's award reviewable and requires that it be set aside.

22] Mr Ackermann submitted that the arbitrator:

in the first instance, in determining the rationality of the acting Director General's decision (not to accept the recommendation to promote Dr Willemse), ought to have had regard to the fact that the DEAT did not have an employment equity plan;

secondly should have had regard to the evidence put before him by Dr Willemse that, at the time that the acting Director General refused to accept the recommendation that Dr Willemse be promoted, by reason of the fact that representivity had to be promoted, representivity targets set in the DEAT had already been met;

thirdly, should have applied his mind to the question that was raised before him by the applicant whether the yardstick in respect of representivity was the Department as a whole or each level (or

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component/directorate) in the Department.

23] It was argued that the arbitrator failed to apply his mind to any of these three issues in particular and that, in so doing, he committed a reviewable irregularity or misconducted himself in the conduct of the arbitration proceedings. A perusal of the record of the arbitration discloses that the applicant in the arbitration squarely raised each one of these issues.

24] As I have indicated above, it is apparent that the arbitrator's conclusion, that there was no unfair labour practice committed relating to the failure to promote Dr Willemse, was arrived at as a result of his reasoning that, as the applicant had failed to apply for the position when it was advertised the second time, that effectively put an end to any claim he may have had. That, in my view, had the result that the arbitrator in fact failed to apply his mind properly, if at all, to all the relevant material before him and in particular the three issues I referred to above. In particular, the question whether representivity levels within the DEAT had been reached at the time the decision not to promote Dr Willemse by reason of representivity was taken, is in my view of cardinal relevance herein. The fact that the arbitrator did not apply his mind properly to the proposition placed before him by Dr Willemse that representivity levels in the DEAT had already been met at the time that the Acting Director General refused to accept the recommendation that he be promoted and did so for reasons to advance representivity in the Department, in my view also renders the arbitrator's award reviewable. I will revert to this issue in more detail in a moment.

25] I am of the view that, the further failure by the arbitrator to apply his mind

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to the question equally squarely raised before him whether the yardstick to determine representivity was the whole Department or that of each level in the Department, viewed cumulatively with his other failures to apply his mind, constitutes sufficiently serious irregularities which drive me to conclude that the applicant did not have a fair hearing at all. I believe that the arbitrator misconstrued the real issue before him. He had to determine the question whether the failure or refusal by the DEAT to promote Dr Willemse, following the June 2001 advertisement of the post, his application therefore and his subsequent recommendation for the promotion, was an unfair labour practice. Dr Willemse's case was not that he ought to have been promoted instead of the person who was later appointed, following the July 2002 advertising of a similar post. Dr Willemse not applying when a position was advertised later, even if it was the same position, had no substantive bearing on the question whether the DEAT's failure or refusal to promote Dr Willemse the first time around constituted an unfair labour practice. As a result of the arbitrator having so misdirected himself in respect of the issues he had to determine, his conclusion that no unfair labour practice was perpetrated by the DEAT is neither justified, nor rational, having regard to the reasons therefore and the evidence and material before the arbitrator. I am satisfied that his award stands to be reviewed and set aside. I am further satisfied that I am able to determine all these issues raised on the evidence and material before me in order to substitute, if necessary, the arbitrator's award with that of this court.

I proceed to do so.

THE DEAT'S REASONS FOR NOT PROMOTING DR WILLEMSE

26] The acting Director-General of the DEAT at the time was Dr Patrick Matlou. He testified that in this capacity he, at the time of Dr Willemse's application for promotion, was the person who had to consider recommendations for promotion from the selection committee. As such, according to Dr Matlou, he had the power to accept, amend or reject recommendations for appointment. In this capacity he considered the selection committee's recommendation that Dr Willemse be appointed to the position of Director: Biodiversity Management in the DEAT. His evidence was that, on receiving the recommendation from the selection committee, he looked at the employment equity situation in the DEAT not only in terms of a branch of the Department where the recommendation

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was being made. He looked at the senior management services (“SMS”) profile in the Department as a whole and said that, on that basis, it was a situation where, if Dr Willemse were appointed at that particular time into the SMS, it would not have promoted employment equity. The basis for this conclusion of Dr Matlou was that he said the records of the Department reflected that there were around 52% representivity by black employees. He further stated that as far as whites were concerned, there were 22 employees at the SMS level of the DEAT, both male and female, and black employees were 23 in number, both male and female. What he had considered was that there were 19 black male, 4 black female, 18 white male and 4 white female employees at the SMS level in the Department as a whole. Looking at males at SMS level, both black and white, he said that it represented 82% male employees at the SMS level. There being 8 female employees, 4 black and 4 white, Dr Matlou testified that looking at transformation, they looked at the demographics of the country and he said that, in terms of the demographics of the country, there was a total disproportionate situation in terms of white males at the SMS level of the DEAT as a whole. White males made up about half of the DEAT at SMS level and to appoint another white male to this level would have made it 19 white males and 19 black males at the SMS level of the DEAT. He said there was a dearth of female employees in the SMS level of the DEAT as a whole, whilst males made up 82% at that level. He went on to testify that looking at the profile of the Department in general, there was a preponderance of white males. This was another factor he took into consideration, looking as he said at it “globally”. I assume by this he meant considering the whole Department. Dr Matlou said that a number of variables were looked at such as the demographics of the country and the gender issues. He regarded the

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SMS profile of the DEAT as being preponderantly male. The number of white males was over and above the demographic representation of whites in the country according to Dr Matlou. This according to him lead thereto that, even amongst the male employees employed in the DEAT, there was an over representation of white males based on employment equity of white males.

27] Under cross examination of Dr Matlou, Dr Willemse wanted to know from him, with the selection committee and Dr Matlou both having considered representivity levels and the Department's affirmative action programmes, why did he come to a different conclusion to that of the selection committee namely that Dr Willemse should not be promoted. The reason for this, according to Dr Matlou, was that the selection committee looked at representivity in that branch (of the Department) and that they, according to Dr Matlou, had not looked at the profile of the Department as a whole. He, in arriving at his different conclusion looked at the profile of the Department as a whole. He contextualised his decision within the scope of the Department as a whole and particularly the SMS level thereof.

28] When Dr Matlou was asked what the representivity targets were that he operated on at the time of his decision not to promote Dr Willemse, he could not provide a clear answer. He went on to say, with reference to the documents before the arbitrator, what was being used as a guide at the time was that 50% representivity, of which a third had to be women, was the target. With this in mind, Dr Matlou again stated that, with the male employees in the SMS level being 37, it amounted to 82% and did not meet the requirements of representivity. Appointing another male would have pushed this number even higher to 38 being males. Dr Willemse's appointment, according to Dr Matlou, would not have enhanced representivity on the basis of gender, neither would it have assisted in terms of representivity on the basis of the demographics of South Africa. Dr Matlou appears to have held the view that the representivity targets of the DEAT did in any event not matter.

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29] Dr Matlou said that his decision not to promote Dr Willemse was taken around representivity and the employment equity was the major deciding factor. The gender issue was the most important one when making his decision and the statistics available indicated that the DEAT was not doing well in respect of female employee numbers, said Dr Matlou. Dr Willemse's qualifications to do the job were not questioned at all.

30] This, in very brief I believe gives the complete reasons for the decision of the DEAT not to promote Dr Willemse. The only reason given by the acting Director-General at the time for refusing to accept the recommendation that Dr Willemse be promoted was that he had stated "not approved due to representivity". I mention at this stage already that it does appear as if Dr Matlou's reasoning was influenced by what he regarded as a disproportionate situation in the SMS level of the Department in terms of white males. Having regard to the fact that it is apparent that the DEAT's targets of representivity had at the time been met, it is possible, in fact I believe it most likely, that Dr Matlou only had regard to the four black females holding positions at the SMS level when he determined that gender representivity had to be improved. Only if he did so could he possibly have thought that the number of female employees at SMS level required to be increased. What is apparent is that he failed to consider, with regard to gender representation, that the target set that one third of the 50% employees at SMS level should be women, had already been met. I will revert to this aspect again.

THE ABSENCE OF AN EMPLOYMENT EQUITY PLAN.

31] Much was made by Dr Willemse, both in the arbitration and on his behalf before me, of the absence of an employment equity plan on the part of the DEAT. He strenuously argued before the arbitrator that the absence on the part of the DEAT of a formal employment equity plan, in and by itself justified the conclusion that he had been unfairly discriminated against. It was argued by Mr Ackermann that, for an employer to apply a form of discrimination in pursuit of its employment equity goals, it has to be done on a rational and fair basis. It was suggested that, to ensure that such discrimination as may take place in pursuit of employment equity is fair, there should be an employment equity plan in place. As the DEAT did not have an employment equity plan, so continued the

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argument, a rational basis was absent when the acting Director General refused to accept the recommendation by the selection committee to promote the applicant. Accordingly it was submitted that, in the absence of an employment equity plan, the DEAT had acted unfairly in refusing to promote Dr Willemse by reason of its affirmative action programmes and in order to promote representivity in the absence of an employment equity plan.

I do not agree with this proposition.

32] Although the DEAT, through its human resources manager, was reluctant to admit that it did not have an employment equity plan at the time relevant hereto, having regard to the documents placed before the arbitrator, it is apparent that, at the time Dr Willemse's promotion was refused, the DEAT indeed had no employment equity plan.

33] In terms of section 20 of the EEA, a designated employer, which the DEAT is, must prepare and implement an employment equity plan. Section 20 of the EEA requires that such a plan must state:

the objectives to be achieved for each year of the plan;

the affirmative action measures to be implemented as required by the Act;

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;

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

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

the procedures that will be used to monitor and evaluate the

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implementation of the plan and whether reasonable progress is being made towards implementing employment equity;

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

the persons in the workplace, including senior managers, responsible for monitoring and implementing the plan; and

any other prescribed matter.

34] Obviously, an employment equity plan is helpful as a framework within which to determine the fairness of an employer's discriminatory decisions when it purports to make appointments, or refuse to make them, in furtherance of the employer's employment equity objectives. In view of the potential discriminatory nature of affirmative action measures, it is of course important, when one has to assess whether such discrimination as may have been perpetrated by an employer in pursuit of affirmative action goals, was fair or not, for a reviewing court to see exactly how and in terms of what the employer exercised its discretion. In this process one of the issues to be determined will be whether the employer had interpreted its own employment equity policies and plans properly. Affirmative action measures should not be applied in an arbitrary or unfair manner. Where an employer, like in the present instance, fails and or refuses to promote an employee by reason of promoting representivity levels from designated groups, then, if that employer had no employment equity plan whatsoever, it may be very difficult to determine whether such discrimination as it may have perpetrated in its refusal to promote an employee constituted unfair discrimination or not. Whilst the DEAT did not have a formal employment equity plan at the time the acting Director General refused the recommendation to promote Dr Willemse, the evidence before the arbitrator did disclose that the DEAT was operating within a framework of policy statements as well as targets with reference to its employment equity goals and objectives. The DEAT had

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an employment equity policy statement and race, gender and disability profiles for the Department. It also had compiled a progress report in respect of the transformation process and it had been submitting annual report data to the Department of Labour as required by law. There accordingly was a determined or determinable framework within which the DEAT was to operate, and against which one can assess whether the conduct of the DEAT herein was fair and whether it constituted an unfair labour practice or not. It is apparent from both the recommendations of the selection committee and the evidence of the acting Director General that these parties all had regard, to some degree or other, to these policy statements and employee profiles when they acted in respect of Dr Willemse's application. I am therefore satisfied that the fact that the DEAT did not have an employment equity plan as required by the EEA, does not in and by itself render the refusal to promote Dr Willemse unfair. I also do not believe that the absence of an employment equity plan is in and by itself a cause of action when dealing with the question whether the employer committed an unfair labour practice relating to its failure or refusal to appoint or promote an employee. I do not, however, need to decide this issue for purposes of arriving at a decision herein.

THE REPRESENTIVITY LEVELS AND TARGETS OF THE DEAT AT THE TIME IT REFUSED TO PROMOTE DR WILLEMSE.

- 35] In a DEAT document called "***Departmental Policy/Agreement on the Promotion of Representivity***", representivity is defined as being "broadly representative of the South African community with reference to targets set out in the policy document". The targets set for the DEAT

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were that the top management level should have 50% representivity, of which a third had to be women. The policy dictated that the objective in respect of disabilities set for the DEAT was that employees with disabilities should make up 2% of the Department's personnel. Having had regard to the documents and evidence before me, I concluded that the applicable representivity target which the DEAT had to apply, when considering Dr Willemse's application for promotion, was 50% for black employees, of which one third had to be women. The target was that 2% of the DEAT's employees should be made up of disabled persons.

36] Dr Willemse expressly alleged in the arbitration that, at the time that the acting Director General did not approve his promotion, the Department as a whole had set the representivity level to be at 50% for blacks, of which one third should have been women. He testified that the Department as a whole had achieved those representivity levels in January 2002, having attained 56,6% of employees being blacks and with 35,3% thereof being women. From documents placed before the arbitrator, it appears that these figures changed in four months to 58,5% blacks being employed in the DEAT, of which 37,3% were women. Dr Willemse testified that, in the directorate or component where he was employed, namely Biodiversity and Heritage, the situation was even better. There, according to Dr Willemse, the representivity level achieved in January 2002, against the target of 50% for blacks and one third thereof for women respectively, was 62,9% for blacks, 59% thereof being women. The documents again reflect that in May 2002, these figures had improved to 64,5% black employees, and had reduced to 54,8% thereof being female employees in this directorate. Dr Willemse alleged this was way above what the Department had set as its targets. Referring to documentation which the DEAT had provided to him, specifically the progress report on the transformation process in the Chief Directorate: Biodiversity and Heritage, Dr Willemse pointed out that this report stated that management consisted of only black females, which created an imbalance in both race and gender. This would, I assume, be a reference to the requirement that 50% employees should be blacks, of whom one third should be female. This report breaks down the levels into senior management, middle management and support staff and shows that the senior management level in this directorate only consisted of black females, which, as I stated a moment ago, was regarded as having created an imbalance in both race and gender. The report further stated that, at middle management level, prospective black female employees should definitely get preference. It stated that at support staff level it would be preferable to target males in that category.

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37] Dr Willemse also testified that, having regard to this transformation report, the selection committee, in their recommendation to the acting Director General, specifically argued that an opening in the middle management level would be created by his promotion which would then have enabled the DEAT to address the problem of representivity (apparently particularly of female employees at the middle management level). In addition, so it appears from the documents, Dr Willemse's promotion would have addressed the gender imbalance in this directorate by introducing a single male to the ranks of the three females employed at the senior management level.

38] In the face of these very specific allegations of Dr Willemse that the DEAT had achieved its representivity targets, a perusal of the evidence adduced on behalf of the DEAT does not disclose any evidence conclusively rebutting these very specific allegations of Dr Willemse.

39] When Dr Willemse confronted DEAT witnesses about the absence of an employment equity plan, reference was made to the fact that there was a Departmental policy on affirmative action which, in the absence of an employment equity plan, was applicable at the time. A perusal of this document indicates that the Department stated therein that it would endeavour to accomplish the targets set therein by December 1999. The levels set in this document are 50% representivity, of which a third must be women, for junior, middle and top management. Middle management, incidentally, is defined therein as being Assistant Directors, Deputy Directors and equivalent gradings and top management are Directors and above. Dr Willemse, at the time of his

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application for promotion, was a Deputy Director and accordingly part of middle management. He was applying for a position of Director, which would have moved him out of middle management into top management. Top management is at times also referred to as the Senior Management Services (“SMS”) level. Dr Willemse put to witnesses that, according to the documentation provided to him by the DEAT, it had not only met its targets, but had exceeded them. One document which a DEAT witness attempted to use in support of her denial that this was so, was totally irrelevant to the issue as that reflected people who had received training in occupational categories. That was the high-water mark of the DEAT's effort to rebut this particular allegation by Dr Willemse that the DEAT, at the time of him seeking to be promoted, had already achieved its representivity levels or targets.

40] It is apparent from the figures provided by Dr Matlou in his evidence before the arbitrator that they are contained in a document, which was used in the arbitration. It contains the DEAT employee profile as at December 2001. According thereto, there were 46 positions at SMS level (the level to which Dr Willemse applied to be promoted). In fact, 24 of these positions were held by black employees, making up 52% of the total component. 8 of the 46 employees at SMS level were females (as Dr Matlou testified, 4 white and 4 black employees).

41] In terms of the evidence before the arbitrator, the target was, as I have indicated earlier herein, that 50% of employees at SMS level should have been black, of which one third should have been women. The policy does not dictate that the one third of the 50% having to be women should also be black. Dr Willemse's evidence is accordingly supported through this DEAT employee profile as at December 2001. Representivity targets set for the DEAT at SMS level had in fact been met. 50% out of 46 employees required that at least 23 should be black - 24 employees at this SMS level were black. Requiring that a third of the 50% target should

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be females, it meant that at least 7 women should have been contained in the 50% target- there were 8 women appointed at the SMS level when Dr Willemse's application was being considered. Dr Willemse was accordingly correct in his proposition that, at the time of his application to be promoted to the SMS level, the representivity targets set by the Department had been met.

- 42] The DEAT did not in my view present any, or sufficient factual evidence in rebuttal of Dr Willemse's evidence that representivity levels targeted by the DEAT had been achieved by it. I am accordingly satisfied that, as a matter of fact, such targets for representivity as were set by the DEAT for black and female employees had been met, and in fact exceeded at the time Dr Willemse's appointment was refused by the DEAT.

CONSIDERATION OF DR WILLEMSE'S DISABILITY.

- 43] The DEAT argued before the arbitrator that Dr Willemse raised his disability too late and only during cross-examination of the DEAT's witnesses and that, accordingly, it had no opportunity to lead evidence to rebut this allegation. This complaint is in my view without any foundation and not justified as Dr Willemse had clearly already indicated this on his application form. He also raised it at a time in cross examination of the DEAT's witnesses when, if the DEAT wanted to take issue with this particular contention of Dr Willemse's, it had every opportunity to do so by the calling of further witnesses or even to request that Dr Willemse himself be recalled to be further cross-examined on this issue. The DEAT elected not to do any of these. This complaint of the DEAT is a red herring and stands to be rejected.

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44] The acting Director General's approach to the issue of representivity levels with regard to disability should be seen against the background of the evidence adduced on behalf of the DEAT by its human resources manager. This witness was the appointed official accountable for the purposes of the EEA. She testified that representivity levels in the disability group reflected the greatest need for action in the DEAT.

45] As stated, Dr Willemse had indicated on his application for the position that he had a disability. It will be remembered that the application for employment specifically indicated that certain information (race, gender and disability status) was relevant to enable the Department to comply with the EEA. As far as Dr Matlou was concerned, the gender issue was the most important one. He testified that he did not consider Dr Willemse's disability to be relevant. It can also nowhere be seen whether the selection committee considered this factor at all. When Dr Willemse cross-examined Dr Matlou in respect of representivity levels, he put it to him that the Department's human resource manager had testified that the biggest problem with regards to representivity was in the area of disability. Dr Matlou confirmed that to be the case. Asked whether the target of representivity in respect of disabled employees had been reached at senior management level, Dr Matlou responded that there were two disabled employees, both being white males. He specifically indicated that he regarded it as important to state those employees' racial background and their gender. He stressed the fact that there were two white males who were disabled in a group of 45 employees. Asked whether he did as a matter of fact consider Dr Willemse's disability status, Dr Matlou responded that the disability of an employee must be of such a nature that it impaired his ability to do his work. He testified that it was nowhere suggested to him that Dr Willemse's disability was one that impaired him from doing his work. Thereupon Dr Willemse pointed out to

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Dr Matlou that the definition of "people with disabilities" in section 1 of the EEA was to the effect that it included "people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment". Dr Willemse then put it to Dr Matlou that, in 1967, he was refused entry into the Government services because of his disability. Dr Matlou's response was that Dr Willemse was speaking of issues of which he had no knowledge. When Dr Matlou was pointedly asked whether he, as a matter of fact, had considered Dr Willemse's disability as reflected on the application form, Dr Matlou indicated that he had noted it, but that his decision was not to be changed because of the definition of disability. He did not think that Dr Willemse's disability had a bearing on the particular case. Dr Matlou argued that, whilst disability was one factor to look at, other issues like representivity should also be considered.

46] From Dr Matlou's evidence it is apparent that, to the extent, if at all, that he had regard to the fact that Dr Willemse had a disability, he disregarded it because, as he testified, he was of the view that a disability had to be such that it impaired Dr Willemse from doing his work. In this proposition of his he was patently wrong. I also believe, having regard to Dr Matlou's evidence, this was an afterthought on his part. He in any event felt that it had no bearing on the particular case. In this he was also wrong in my view. Clearly he was obliged to take all relevant factors into consideration in deciding whether to accept or reject the selection committee's recommendation. It is further apparent that, to the extent that Dr Matlou did consider Dr Willemse's disability, if he did so at all, the acting Director General was influenced by the fact that the employees in the senior management services who were disabled were white males. It is apparent that he tried to reason in the arbitration that, within the disabled group itself, as there were no black disabled employees, it neutralised Dr Willemse's disability as a factor that he ought to have considered.

47] It would also appear as if the acting Director-General applied preferential treatment within designated groups, with specific reference to gender. In doing so, it is apparent that he either totally disregarded Dr Willemse's

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disability status or he certainly did not have regard to the fact that representivity in the ranks of the disabled required the greatest need for action in the pursuit of representivity in the DEAT.

48] It is further apparent that Dr Matlou over-emphasised the presence of white males, both generally, as well as specifically with reference to the fact that two white disabled males were already employed in this component of the DEAT. Dr Willemse's stated disability was nevertheless a relevant factor which ought to have been properly considered by Dr Matlou, particularly having regard to the fact that disability representivity was the one area where the DEAT had experienced problems. I do not believe that there was any justification for the acting Director-General, in considering whether to accept or reject the recommendation that Dr Willemse be promoted, to disregard, in its totality, Dr Willemse's undisputed disability status and only to consider gender representivity. This is in my opinion a particularly serious oversight, having regard to the fact that, at the level to which Dr Willemse applied to be promoted, gender representivity targets had been met, yet disability representivity targets had not been met, either at the SMS level, or in the DEAT as a whole. These were most relevant factors, which ought to have been given proper consideration. This failure by the DEAT to properly consider and weigh up all the relevant facts applicable to Dr Willemse's application, including his stated disability, contributed to the final conclusion that I have been driven to herein.

MERITAS ONLY CONSIDERATION

49] It is also relevant to bear in mind that the applicable policy at the time of Dr Willemse's application was that, once representivity targets had been reached, merit would become the only consideration and all applicants will compete equally. This principle is expressly contained in the "**Departmental Policy/Agreement on the Promotion of Representivity**" policy document. Dr Matlou made it patently clear that it was only the issue around representivity and employment equity, which was the major deciding factor. He did not question Dr Willemse's qualifications in respect of the job at all. Dr Matlou clearly disregarded the policy directive that merit had to be the only consideration. Had he

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applied it, I am of the view that DR Willemse ought to have been promoted at the time on this basis alone.

CONSIDERATION OF THE DEAT AS A WHOLE VERSUS THE DIRECTORATE OR COMPONENT WHERE DR WILLEMSE WAS TO BE APPOINTED.

50] It would appear from Dr Matlou's answers in cross-examination that one of the reasons why he did not accept the recommendation of the selection committee that Dr Willemse be promoted, was that the selection committee did not look at the profile of the DEAT as a whole but only at representivity in the particular branch (directorate or component) of the Department. In this regard it is perhaps relevant to be reminded exactly what it is that the selection committee stated in its recommendation, namely:

"The promotion of Mr (sic) Willemse will enhance the skills in the branch Biodiversity and Conservation while opening up a position at middle management level, where representivity is lacking.

The committee has also taken the Government's policy on affirmative action and the workforce profile of the branch into consideration before making this nomination, (see attached annexure "A"). The rest of the candidates were not appointable. Attached as annexure "B" is Mr (sic) Willemse's promotion letter for your signature".

Dr Matlou said that he contextualised this decision within the scope of the Department as a whole and particularly the SMS part thereof.

51] On this issue whether the whole Department, or only the relevant component thereof had to be considered in respect, *inter alia*, of representivity, Dr Matlou was questioned by Dr Willemse about the

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contents of an employment equity policy statement applicable to the DEAT at the time. More particularly he was asked to comment on a directive contained therein stipulating what a selection committee should consider when making recommendations on the suitability of a candidate. It is necessary to quote the specific part of the policy document, which was put to Dr Matlou. It reads as follows:

- "(h) The selection committee shall make recommendations on the suitability of a candidate after considering only:
- (i) ...
 - (ii) ...
 - (iii) ...
 - (iv) The representativeness of **the component where the post is located** (my emphasis) in accordance with employment equity targets. Targets, set in the employment equity plan, will take into account the representativeness of the component, the Directorate, the Chief Directorate and then the Department as a whole.
 - (v) The Department's affirmative action program and approved numerical targets".

These policy directions appear to correspond largely with those contained in the relevant Public Service Regulations ("the PSR") stipulating what appointment procedures were to be followed in the Public Service.

- 52] As I have said earlier herein, Dr Matlou gave as the reason why he rejected the recommendation of the selection committee that the selection committee had only looked at the branch, and not the Department as a whole. From the aforesaid policy document applicable to the DEAT, it is, however, clear that the selection committee

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was compelled to make its recommendations “after considering **only** the representativeness of **the component where the post is located in accordance with employment equity targets**” (my emphasis). It follows rather logically that, if you get representivity levels right at the level of the component, you will get it right in the Department as a whole. The opposite is, however, not true. By getting representivity levels right by looking at the Department as whole, you may, exactly as happened herein in the Directorate: Biodiversity and Heritage, have gender and race imbalances by having 3 females at the SMS level out of a total of 4 posts. It is accordingly quite apparent why both the policy directive of the DEAT itself and that contained in the PSR dictated that representivity should only be looked at at the level of the component.

53] It is apparent, further, from this policy directive that such targets as had been set in the employment equity plan, took into account the representativeness of the component, the Directorate, the Chief Directorate and then the Department as a whole. So, as I understand this policy directive, when a selection committee made its recommendations, it was compelled, as it would appear the selection committee did, to have specific regard to the representativeness of the component where the post was located. That is obviously why the selection committee referred only to the branch.

54] The evidence before the arbitrator was that the applicable Public Service Regulations, 2001 at the time that the decision herein was made by the acting Director General not to accept the recommendation from the selection committee, was Part VII D5 of the PSR which directed that:

“D.5 The selection committee shall make a recommendation on the suitability

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of a candidate after considering only-

- (a).....;
- (b) the training, skills, competence and knowledge necessary to meet the inherent requirements of the post;
- (c) the needs of the Department for developing human resources;
- (d) **the representativeness of a component where the post is located**(my emphasis); and
- (e) the Department's affirmative action program.”

These regulations also direct that the selection committee must record the reasons for its decisions and that, when the executing authority does not approve a recommendation of a selection committee, it is also compelled to record the reasons for this decision in writing. These are the written records which the DEAT initially refused to provide Dr Willemse with, and when they later on changed their attitude, they reported that these documents had gone missing.

55] Dr Matlou could not indicate what specific document or documents, if any, he had in mind when he considered the recommendation from the selection committee. The DEAT initially refused to provide Dr Willemse with certain of the information he requested. When the DEAT later on decided to provide Dr Willemse with the information, certain very important documents “had vanished from the files without trace”. These documents, I believe, would have further assisted the arbitrator, and this Court, in determining whether the relevant parties herein had properly Applied their minds in the exercise of their discretion that had to be exercised. As it turns out, it is apparent that policy directives were not followed by Dr Matlou when he exercised the discretion vested in him to accept or reject Dr Willemse’s recommended appointment. It is to be regretted that the DEAT did not, from the outset, act openly and transparently in respect of the reasonable requests for information received from Dr Willemse. It is most probable that the delays in providing Dr Willemse with the requested information contributed in the end to such information inexplicably having been lost by the DEAT. As an aside, I wish to indicate that I believe Dr Willemse was entitled to receive the information requested with particular reference to the annexures to the selection committee's recommendation as well as the written recordal of the reasons for the acting

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Director General's decision. Dr Matlou was in any event required by PSR to record his reasons for his decision in writing.

CONCLUSIONS

56] It is apparent from a perusal of Dr Matlou's evidence that what weighed heavily, when applying his mind to the selection committee's recommendation, was the fact that there were 37 males in total in the DEAT's SMS level. The DEAT employee profile in fact indicates that there were in fact 38 SMS level employees in the DEAT at the relevant time. Nothing turns on this minor discrepancy. Dr Matlou stated expressly in his evidence that he had regard to the requirement that, what was required was 50% representivity, of which a third should be women. It is further very apparent that Dr Matlou reasoned or interpreted that the one-third representivity who should be women was to be one third of the whole DEAT. This reasoning of Dr Matlou, in my view, was erroneous. It is quite apparent that, in the first instance, the representivity target set was that, as far as the SMS level of the DEAT was concerned, 50% of the employees at this level had to be from the designated categories. Designated groups, in terms of the EEA, means black people as defined, women and people with disabilities. Clearly, what the targets set further required was that, of the 50% representivity target, a third should be women. This being the case, it is clear that the acting Director-General, Dr Matlou, was over-emphasising the fact that, in the SMS level of the DEAT, there were 37 males. He clearly failed to give any consideration to the fact that, in the component in question (Directorate: Biodiversity and Heritage) there was only women at SMS level. In addition, in my view that, having regard to the policy documents which had application at the time, the acting Director General appears to have erred in respect of

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his analysis of what representivity levels the DEAT had to achieve. If he had applied his mind properly, he ought to have realised that the targets set for the DEAT (50% representivity, of which a third should be women) had already been met, particularly in respect of the SMS level.

57] A further factor, which the selection committee clearly had in mind, namely the under-representation of women in the middle management level, was not at all considered by the acting Director-General at the time. He made it clear in his evidence that he only considered the gender representivity in the DEAT as a whole at the SMS level.

58] On the objective facts before me, what ought to have been properly considered by the acting Director-General when he arrived at his decision not to accept the selection committee's recommendation, were at least the following relevant facts and factors:

The DEAT had at the time not only achieved its set target of 50% representivity at the SMS level of the DEAT as a whole, it had in fact exceeded it;

Likewise, of the gender target set, namely that of the 50% representivity level, one third should be women, this target had also been met;

The selection committee had correctly only considered the representativeness of the component where the post was located.

At SMS level of the component where Dr Willemse was recommended to be promoted to, only black females were employed, creating an imbalance in both race and gender representivity.

Promoting Dr Willemse to the SMS level of the component would have enhanced the skills needs in that component, whilst at the same time opening up a position at middle management level where representivity was lacking.

Representivity in respect of disability represented the one area where the DEAT had problems. Dr Willemse had indicated that he had a disability;

The policy applicable at the time in respect of employment equity dictated that, as soon as representivity targets had been met, only merit would be considered in making further appointments. There was no question about the

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merit of Dr Willemse's appointment and that, on merit alone, he ought to have been promoted.

59] In addition to these facts and factors which ought to have been considered, I am further of the view that, both in respect of policies applicable to the DEAT, as well as in terms of the PSR, the selection committee was compelled to consider representivity but only of the component where the post was located. This the selection committee did and in so doing it rationally concluded that, in the event of Dr Willemse being promoted, it would open up a position at middle management level, where representivity was lacking. It is apparent from all the documentation and the evidence adduced before the arbitrator that the selection committee members most probably at least properly applied their minds to exactly what it stated, namely that the representivity levels were lacking in middle management of the component in question. It would appear, on the probabilities, that the selection committee had also properly assessed the fact that, at the SMS level, both the DEAT as a whole and the component in question had also already achieved the targets set. In rejecting this well considered and reasoned recommendation of the selection committee, the acting Director General did so single-mindedly on the grounds of enhancing gender representivity in the DEAT as a whole, ignoring, I believe in their entirety, all the factors which I referred to above which ought to have been considered.

60] I am in the result of the view that the acting Director General failed to apply his mind to all the relevant facts and factors which I have referred to above. To the extent that the acting Director General did apply his mind, single-mindedly so it would appear to gender representivity, he

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erred in respect of the facts and the policy directives applicable at the time. I have already referred to the fact that he clearly did not consider the fact that the DEAT had already achieved its target in respect of gender representivity, in addition to having achieved it in respect of black employees generally.

- 61] In light of the acting Director General's clear resistance to the appointment of any further white males to the senior management services level he was cross-examined about a number of white males who, within a year of Dr Willemse's promotion being refused, had been appointed to senior management services level. Dr Matlou's answer to this was that he was only dealing with the decision that he had taken in respect of Dr Willemse. In response to the proposition put to him that, as early as 1 October 2002, a white male had been appointed to the senior management services level, Dr Matlou suggested that his refusal to agree to Dr Willemse's promotion did not mean that white males should not be appointed. He suggested the change could have occurred subsequent to his decision. It is however apparent from the propositions put to Dr Matlou, and not disputed by the DEAT, that relatively shortly after Dr Willemse's promotion was refused solely by reason of the fact that such promotion would have distorted the level of representivity in the DEAT of white males at the senior management services level, white males were indeed appointed to those positions. Clear evidence that demographics did indeed change, allowing for this, was not presented by the DEAT to rebut the suggestion by Dr Willemse that this, in and by itself, constituted unfair discrimination relating to him. Dr Willemse contended that, the fact that a number of appointments of persons from non-designated groups were made within a year of the refusal to promote him into the position in question, established the existence of

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unfair discriminatory practices by the respondent in promotions and appointments. The DEAT had an *onus* to disprove this proposition by Dr Willemse. I could find no evidence in the record which successfully rebutted the suggestion by Dr Willemse, save for the broad proposition by the acting Director-General that change could have occurred later on. On this basis as well, I therefore believe the DEAT acted unfairly in refusing to promote Dr Willemse.

62] As I have indicated earlier herein, in the senior management services level, the area of gender representivity which appears to be the only one which Dr Matlou really applied his mind to, as a matter of fact, did not represent problems for the DEAT. In fact, as I also have indicated earlier herein, the statistics which Dr Matlou appears to have applied his mind to at the time reflect that the DEAT had achieved its objective of having females employed in excess of the one third of the 50% representivity. Dr Matlou expressly testified that the gender issue was the most important issue to him when he considered the various representivity levels.

63] I am of the view that, in the exercise of the discretion vested in him, the Acting Director General either failed to apply his mind properly thereto, or he misdirected himself in regarding the gender issue as the most important, at the time when representivity levels, both in respect of gender and race, had been reached. At the same time he appears to have disregarded Dr Willemse's disability in the first place because of him misconstruing the definition of "disability". He also appears to have been of the view that within the disability category he had to apply race as a factor.

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64] Before looking at the legislative framework within which I have been assessing Dr Willemse's complaint herein, I mention that Dr Willemse did not deny that the DEAT, as his employer, had every right to implement affirmative action. His case was simply, as stated, that because the targets set by the DEAT in respect of representivity had been met, merit only should have applied. He accordingly suggested that, by considering only gender representivity at a time that the Department had reached both its set representivity targets for designated groups and gender representivity, the DEAT unfairly discriminated against him by refusing his promotion solely on the grounds of gender representivity. Dr Willemse also argued that, as disability representivity was the one area in which the DEAT had not met its targets, and where action was required, the DEAT further unfairly discriminated against him by not having given proper consideration to this aspect of his application.

65] Section 6 of the EEA reads as follows:

"6. Prohibition of Unfair Discrimination.-

(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) ..."

66] Section 11 of the EEA reads as follows:

"11. Burden of Proof - whenever unfair discrimination is alleged in terms of

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this Act, the employer against whom the allegation is made must establish that it is fair".

67] The DEAT confirmed that Dr Willemse's promotion was not turned down by the acting Director-General for any reason related to his ability to do the job, or on merit. The DEAT stated that, in pursuit of its employment equity targets, it was fair for it to take affirmative action measures consistent with the purpose of the EEA. In effect, the DEAT admitted that it had discriminated against Dr Willemse by reason of taking affirmative action measures, but it contended that it was fair to do so in pursuit of achieving gender representivity.

68] As I have stated repeatedly, one of Dr Willemse's reasons for alleging that he had been discriminated against by the DEAT was that it still used representivity in respect of gender as a criterion at a time when the numerical goal set for this (50% representivity of which one third should be women) had been achieved. I have already indicated that I am of the view that this particular complaint of Dr Willemse (that representivity levels had been achieved) was not refuted by the DEAT. In the pleadings before me, Dr Willemse squarely and expressly stated this complaint of his. He did this in the following terms in his founding affidavit:

"I also submit that the numerical targets for affirmative action in my Department had already been complied with and met before the interview date of 23 January 2002 was conducted. The said arbitrator Ebrahim Patelia was aware of this".

69] The relevant portion of the Department's answering affidavit reads as

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follows:

"If he (Dr Willemse) could prove at this stage that, the Department's employment equity targets were met, and that he was the best candidate for the post, it would have been unfair for the third respondent not to appoint him merely because he is a white male. But this was not the issue that needed to be decided as the applicant elected not to apply for the re-advertised post".

70] I am of the view that it was not for Dr Willemse to prove that the Department's employment equity targets had been met. He clearly made that allegation during the arbitration and alleged that the DEAT's further reliance on representivity targets as reason for not promoting him, was unfair. The DEAT bore the onus to prove that such discrimination as it perpetrated in pursuit of affirmative action, was fair.

71] Having regard to the evidence adduced, and particularly the documents on which the acting Director-General in particular apparently relied when he refused to promote Dr Willemse, I am of the view that the numerical target set (of 50% representivity, of which one third should be women) had indeed been met by the Department. Further support for this conclusion is to be found in the fact that, amongst the papers submitted to the arbitrator, one finds the second and third equity reports which the DEAT had submitted to the Department of Labour. The third report covered the period May 2001 to April 2002 - the period relevant to Dr Willemse's application. Whilst the response to the question "Did you achieve the numerical goals as set out in your employment equity plan for this period?" was answered in the negative by the DEAT, a summary of the DEAT's employment equity targets, as of 1 April 2003, disclosed that, at the entry level, the target was that 60% of employees should have been black. The status on 1 April 2003 was that 76% of employees at this level were black. One third of the 60% having to be women, it required at this level that 20% thereof should be female employees. The status on 1 April 2003 was that the DEAT had achieved 62% (of the 60% representivity level). For junior management level the results were that, against a target of 50% blacks, 48% had been achieved. This is the only area of under-representivity, as will be seen from the further statistics. In respect of women, the one third of 50% requirement at this junior level was that 17% (of the 50%) of employees in this category should have been women. 61% (of the 50% requirement) of employees at the junior

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levels are reflected as in fact having been women on 1 April 2003. At middle management level, against a target of 50%, a 60% representivity level for blacks had been achieved. Against the 17% of the 60% level for women, 32% of the 60% overall representivity by women had been achieved at middle management level of the DEAT. In the SMS level of the DEAT, against a target of 50%, 61% black representivity had been achieved. In respect of women, against a target of 17% of the 60%, a representivity of 30% women of the overall black representivity level had been achieved at SMS level. The DEAT's average total was given as at that time being a requirement of 53% blacks at all levels. The report claimed that the DEAT had achieved 61% by 1 April 2003. The average target across all the levels for women was 18%. The DEAT, according to this summary of its equity target as on 1 April 2003, had achieved 46% representivity for women.

72] In addition, as I have right at the outset indicated, the statistics, which the acting Director General was referring to, were also contained in a document placed before the arbitrator. This document is headed "**DEAT Profile as at December 2001**". This document confirmed exactly what the selection committee had recommended to the acting Director General namely that, if Dr Willemse was promoted, it would have opened up a position at the so-called middle management level where representivity in respect of blacks generally, but not particularly in respect of women needed attention. These statistics are in respect of the Department as a whole. Having regard to the representivity status in January and May 2002 for the whole Department, as well as for the Biodiversity and Heritage ("B&H") section thereof, (which is the applicable section where Dr Willemse was) it reflects that, from January to May 2002, against a national minimum target of 50% for blacks, in the DEAT it had achieved a level of representivity of 56.6%. In the B&H section thereof it had achieved a level of black representivity of 62.0%. In respect of the one third representivity for women, the DEAT had achieved a 35,3% level of representivity for women. In respect of the B&H section of the Department, it had achieved a level of 59% representivity for women out of the overall representivity target. In

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respect of disability, against a target of 2%, the DEAT had achieved a level of 1.57% and the B&H Department was at 3.7%. Four months later, in May 2002, representivity for blacks had increased from 56.6% to 58.5% for the DEAT and had increased for the B&H section of the Department from 62.9% to 64.5%. In respect of women, in May 2002, the level of representivity for women had increased from 35.3% to 37.3% in the DEAT and in the B&H section of the Department it had decreased from 59% to 54.8%. Representivity for employees with disabilities had dropped from 1.57% to 1.37% for the DEAT and had also dropped in the B&H section of the Department from 3.7 to 3.2%. The only area that was reflected as having a gap (between the national minimum target set and that achieved) was that in the DEAT, in respect of its target of 2% representivity for employees with disabilities, it had fallen short of this target by 0,73%.

73] I am accordingly satisfied that the DEAT had as a matter of fact, at the time it refused to promote Dr Willemse in order to achieve affirmative action goals, reached the representivity targets it had set for itself. I am further of the view that the Department's concession contained in its pleadings referred to earlier, is in fact applicable. As the Department's employment equity targets had been met, and as I am satisfied that Dr Willemse was the best candidate for the post, it was unfair for the third respondent not to appoint him merely because he is a white male. The DEAT's consideration of gender representivity was premised on wrong facts and misconceived. The DEAT was compelled by its own policy directives as well as those of the Public Service, to consider only the directorate to which Dr Willemse applied to be promoted to. It was also compelled to only apply merit in deciding whether to promote Dr Willemse or not. Its failure or refusal to act in terms of all these prescripts, objectively viewed, renders its conduct in refusing to promote Dr Willemse as unfair.

74] I am fortified in my conclusion that Dr Willemse was unfairly refused promotion, as he was clearly regarded as the best candidate for the post by a very senior selection committee who applied their minds meticulously to quite a number of facts and factors. This committee,

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which exclusively consisted of designated employees more senior than Dr Willemse, after a proper application of their minds, recommended Dr Willemse's appointment, with full reasons having been given for such recommendation. The selection committee also considered the government's policy of affirmative action. On the acting Director General's own evidence, the only reason why he did not accept the selection committee's recommendation was merely because Dr Willemse is a white male and the acting Director General held the view that gender representivity at the SMS level had to be addressed. As I have indicated, this was not a justified factor and/or conclusion on the part of the acting Director General, having regard to the facts relevant herein.

75] This failure by the acting Director General to apply his mind to all the relevant facts and factors herein is further exacerbated by the fact that he either did not apply his mind sufficiently, or at all, to the fact that Dr Willemse was himself a designated employee falling within the category of disabled people in respect of which category the DEAT on its own admission needed to take action. If the acting Director General were to be consistent, and considered that the DEAT as a whole had not met its representivity levels in respect of disabled employees, this certainly was a factor he ought to have considered.

76] A further factor which the selection committee justifiably took into consideration, having regard to the facts relevant herein, was that Dr Willemse's promotion to senior management services level would enable the DEAT to address particularly gender representivity which was in fact needing action and attention in the middle management level, which Dr Willemse would have vacated, had he been promoted. Clearly this did

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not get any consideration from the acting Director General.

77] Having considered all these factors which had to be considered to arrive at a fair decision whether Dr Willemse's promotion may be refused in order to promote affirmative action, which is what the DEAT had done, I am of the view that the DEAT did not succeed in establishing that the discrimination perpetrated against Dr Willemse was fair when it purported to apply employment equity objectives relating to gender representivity and when it, based on that, refused his recommended promotion.

78] Seady AJ had the following to say in Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & Others [1998] 19 ILJ 285 (LC) where she stated at 295E:

"The justification requirement lies at the heart of the enquiry into unfair discrimination and involves a careful consideration of the context in which the dispute arises. There is no fixed formula to be applied mechanically".

79] Obviously, preceding this enquiry is the question whether there had been discrimination against Dr Willemse when he applied for the relevant post. I have had regard to what Swart J had to say in respect of what discrimination means in Public Servants Association of South Africa v Minister of Justice 1997(3) SA 925. At 976F he stated the following:

"Although bearing in mind that section 15 of the Canadian Charter of Rights differs in wording from our section 8 (of the Constitution) it does refer to the question of discrimination and in stating his views as to what 'discrimination' means, Hogg refers at 52-17 to certain rules derived by him from the cases. Discrimination must be on listed or analogous grounds. Discrimination may be justified only under section 1 of the Charter. Discrimination need not be

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invidious. Analogous grounds involve immutable personal characteristics. Particular disadvantage is required. General disadvantage is not required. Discrimination may be unintended. It may be systemic. It may require reasonable accommodation. It need not appear on the face of the law. Regarding particular disadvantage, the following is stated at 52-25:

‘In order to establish discrimination under section 15, it is obvious that an individual must show that he or she has suffered a disadvantage by reason of his or her possession of one of the characteristics named in section 15 or an analogous characteristic. In *Andrews* ([1989] 1 SCR 143, 174) McIntyre J said that, in order for a legislative distinction to amount to a discrimination against an individual or group, the distinction must be one ‘which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society’. It is the requirement of disadvantage that involves a comparison with others - others who are similarly situated to the complainant except for the presence of an immutable characteristic’.

The fact that discrimination did not appear on the face of a law is explained by him at 53-33 on the basis that a law may be discriminatory in its effect or in its application. Without having to consider the various origins at this stage, I think that the facts fully justify the conclusion that the white, male applicants for the State Attorney posts have been discriminated against on those very bases - they are white and male.

But that is not the end of the matter. For section 8(2) of the Constitution to apply it must also be established that the aforesaid discrimination was unfair. The applicants are, however, assisted by the presumption

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contained in section 8(4) (of the Constitution) which now comes into operation because of the finding of discrimination and the dispute now turns on the question whether it has been established that the discrimination was not unfair".

80] Applying these helpful principles to the matter under consideration, apart from the fact that I do not think that the DEAT disputed that it had discriminated against Dr Willemse, it is clear that Dr Willemse was in fact discriminated against on the basis that he is white and male.

81] Mlambo J stated in Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council [2000] 21 ILJ 1119 (LC), at 1125B, that affirmative action should not be applied in an arbitrary and unfair manner. He goes on to state the following, at 1125G:

"[19] There appears to be no doubt therefore that for affirmative action to survive judicial scrutiny the following is relevant:

19.1 There must be a policy or programme through which affirmative action is to be effected;

19.2 the policy or programme must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination.

[20] In the Court's view there are good reasons for these requirements. These requirements ensure that there is

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accountability and transparency. They ensure that there is a measure or standard against which the implementation of affirmative action is measured or tested. They ensure that no arbitrary or unfair practices occur under the guise of affirmative action. They also ensure full knowledge and participation in establishment and implementation of the programme".

82] In the Leonard Dingler Employee Representative Council matter, *supra*, Seady AJ, at paragraph 28 of the judgment, said:

"Given that considerations of legitimacy and rationality must be measured in testing fairness, it is the employer or some other respondent who can and should provide this explanation. The employer must show that the object of the practice or policy is legitimate and that the means used to achieve it are rational and proportional".

83] Having regard to the fact that representivity levels in respect of both blacks and females had been achieved at the SMS level of both the DEAT and the component, and further that, as recommended by the selection committee, by promoting Dr Willemse, it would enhance the skills needs in the branch Biodiversity and Conservation and open up a position in the middle management level in that component of the DEAT, where representivity levels required action, I believe the acting Director General's stated object, namely to achieve gender representivity was, under the circumstances, neither rational nor proportional.

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- 84] Having further regard to the fact that the one area of representivity where, on the DEAT's own admission action was required, namely in respect of disabled employees, there further appears no justification for the acting Director General either to disregard, or to not regard Dr Willemse's disability status as of sufficient importance to give it any, or proper attention.
- 85] I am accordingly of the view that the DEAT applied affirmative action herein in an arbitrary and unfair manner.
- 86] The only reason provided by the acting Director General for refusing to accept the recommendation of the selection committee was that as the selection committee had looked at the matter from a branch perspective he had done so Departmentally. In doing so, so contended the acting Director General, he was of the view that gender representivity had to be advanced, which would not have happened had he approved Dr Willemse's recommended promotion. Having regard to those reasons, the acting Director General's decision was not justifiable or rational in light of the facts and material to which he ought to have applied his mind, and having regard to the facts as contained and stated elsewhere herein, particularly having regard to the fact that the DEAT had already achieved its set targets of representivity, both in respect of blacks and women. At the same time, the DEAT had not achieved its set targets in respect of representivity levels of disabled employees, a designated group to which it could not be contested Dr Willemse belonged.
- 87] When applying affirmative action, employers should consider a variety of factors, of which past disadvantage is only one. Retention of skill and the

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efficient operation, particularly of State organs, clearly also require consideration. According to the evidence in the present case, the acting Director General confined himself to gender representivity only when deciding not to promote Dr Willemse. Against this single-minded factor which the acting Director General considered, one sees that the key performance areas which were regarded as crucial to the successful functioning in the post which were identified and listed by the selection committee were:

- Strategic capability and leadership
- Programme and project management
- Financial management
- Change management
- Information management
- Knowledge of biodiversity-related legislation and policy development
- Problem solving and analysis
- People management and empowerment
- Co-ordination and stakeholder involvement skills
- Communication skills

88] Using the aforementioned key performance areas the selection committee concluded that Dr Willemse was the most suitable candidate for reasons as stated earlier herein.

89] As already stated the selection committee also considered the fact that Dr Willemse's promotion would enhance the skills needs in the branch biodiversity and conservation whilst opening up a position at middle management level, where representivity was lacking. The Committee also took the Government's policy on affirmative action and the workforce profile of the branch into consideration before making its nomination. In contrast to these well-considered reasons of the selection committee for recommending Dr Willemse's promotion, the acting Director General, on

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his own admission, used one yardstick and that was gender representivity. As already stated, apart from his apparent failure to apply his mind to all the relevant factors, the one factor he did apply his mind to he did so erroneously against the background of the fact that the Department had already achieved both its black representivity as well as gender representivity targets. It has not, however, achieved its disability representivity level.

90] I have accordingly conclusively been persuaded that Dr Willemse was unfairly discriminated against when the DEAT refused to promote him on grounds of gender and race. He ought to have been promoted and I am particularly fortified in my conclusion by the well-reasoned and properly considered recommendation from the selection committee, who in terms of the prescriptions contained in the PSR, also consisted apparently of only historically disadvantaged persons.

91] I am accordingly of the view that DEAT through the acting Director General committed an unfair labour practice when it refused to promote Dr Willemse in or about May 2002. I am equally satisfied that the DEAT failed to satisfy me that such discrimination as it perpetrated against Dr Willemse in a purported effort to advance gender representivity, its consequent discrimination against Dr Willemse was not fair. Had the acting Director General applied his mind properly to all the facts relevant at the time he would have accepted the well-reasoned and rational recommendation of the selection committee which had, contrary to the conduct of the acting Director General, clearly considered all the relevant factors before making the recommendation that Dr Willemse was to be promoted. Although the acting Director General has the final prerogative

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to accept or refuse to accept the recommendation, when he in fact did refuse to accept the recommendation, such refusal ought to have been reasoned and rational having regard to all the facts and circumstances applicable at the time. He failed, or refused, to do so and as I have said, in doing so, Dr Willemse was unfairly discriminated against resulting in him unfairly having been refused promotion in May 2002. That having been the case, and against the background that nobody took issue with the merit of Dr Willemse's appointment, I am of the view that the DEAT committed an unfair labour practice relating to its failure to promote Dr Willemse to the position of Director: Biodiversity Management. The recommendation that Dr Willemse be appointed was made on 5 February 2002. He was advised of being unsuccessful on 8 May 2002.

92] In an amendment to the relief sought, Dr Willemse seeks an order that the DEAT is to ensure that as from 1 March 2002 Dr Willemse receives the same salary and benefits he would have received had he been promoted to the post of Director: Biodiversity Management with effect from the stated date. In support of this relief sought I was referred to the relevant portion of the PSR, which direct that "a promotion may not take effect before the first day of the month following the month during which the executing authority approved it". In this particular case the acting Director General's decision not to accept the recommendation that Dr Willemse be promoted was conveyed to Dr Willemse on 5 May 2002. It is reasonable to assume, had the acting Director General decided to approve the recommendation, that Dr Willemse would likewise have been advised that the recommendation had been accepted and that he accordingly would be promoted, and that such notification would have taken place on 5 May 2002. It would follow that in terms of the PSR Dr Willemse's promotion, had it been approved, as it ought to have been, it would have taken effect on 1 June 2002.

93] In the result I make the following order:

- (a) The third respondent's refusal to promote the applicant is held to be an unfair labour practice.
- (b) The third respondent is ordered to ensure that, as from 1 June 2002 the

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applicant, with retrospective effect, receives the same salary and benefits he would have received had he been promoted to the post of Director: Biodiversity Management with effect from 1 June 2002.

- (c) The third respondent will be entitled (but not obliged) to give effect to this order by granting the applicant protective promotion in terms of the Public Service Code.
- (d) The third respondent is ordered to pay the applicant's costs of suit herein.

DEON NEL

Acting Judge of the Labour Court

DATE OF HEARING: 11 JULY 2006.

DATE OF JUDGMENT: 19 October 2006

APPEARANCES:

ON BEHALF OF THE APPLICANT: ADV M F ACKERMANN
INSTRUCTED BY LEN DEKKER ATTORNEYS.

ON BEHALF OF THE THIRD RESPONDENT: MS L PILLAY OF THE
STATE ATTORNEY.