"REPORTABLE"

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN **CASE NO: C.475/99**

In the matter between:

CHRISTO GERMISHUYS Applicant

and

UPINGTON MUNICIPALITY Respondent

JUDGMENT

GAMBLE, AJ

Introduction:

1. Although the pleadings, evidence and relevant documents in this matter are in Afrikaans, I have decided to write this judgment in English. In doing so, I mean no disrespect to either of the parties, both of whom are fully conversant with the language. My choice of language is influenced by the wider interest which the issues discussed herein may elicit should the judgment be reported. I should mention, too, that since the case concerns alleged racial discrimination, it is

necessary to utilise race-based terminology which would otherwise not be necessary.

2. In June 1998 the position of Assistant Town Treasurer at the Upington Municipality ("the Municipality") became vacant with the promotion of the incumbent, Mr Nico van Niekerk ("Van Niekerk"), to the position of Town Treasurer. Van Niekerk is a white male.

3. The position of Assistant Town Treasurer remained vacant for more than a year until Mr Tekoethata Mohutsiwa ("Mohutsiwa") was appointed to the position with effect from 1 August 1999. Mohutsiwa is an African male.

4. The appointment of Mohutsiwa followed a thorough, detailed and transparent procedure:

   4.1 The position was advertised in the printed media;

   4.2 A committee of the Municipality met to consider the various applicants;

   4.3 A short list of four applicants (all males) was drawn up;

   4.4 The short-listed applicants (two Africans and two whites) were interviewed by a selection committee appointed by the Municipality after they had been required to undergo a written proficiency test;

4.5 After conducting the interviews, the Municipality's Executive Committee ("Exco") (the body formerly designated to deal with the appointment) deliberated over the applications;

4.6 The decision of Exco was noted by the full Council of the Municipality and Mohutsiwa was appointed subject to certain conditions.

5. The Applicant was one of the four short-listed candidates. His application was unsuccessful. He is a white male and alleges that the Municipality has discriminated against him unfairly on the basis of race. His case is that he was the most suitable candidate for the post and that he was not appointed because he is a white male.

6. On 8 November 1999 the Applicant launched an application in terms of the Labour Relations Act of 1995 ("the LRA") as well as the Equal Employment Act of 1998 ("the EEA") in which he claimed:

6.1 appointment to the position of Assistant Town Clerk or a similar position;

6.2 maximum compensation permissible at law;

6.3 costs of suit.

7. The Applicant's statement of claim makes no mention of the specific provisions

of the LRA and/or EEA upon which he relies. At the commencement of the hearing I requested clarification and was informed by Ms de Wet, who appeared on behalf of the Applicant, that the claim was brought in terms of item 2 of Part B of Schedule 7 to the LRA, the so-called residual unfair labour practice provision. I should point out that the provisions of the said item 2 were repealed by Schedule 2 to the EEA with effect from 9 August 1999. However, since the alleged unfair discrimination occurred before that date, the residual unfair labour practice determination falls to be made under the relevant provisions of the LRA. This much was common cause between the parties.

8. For the sake of convenience I set out the relevant portion of the said item 2:

> **"2. Residual Unfair Labour Practices**
>
> **(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving –**
>
> **(a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;**
>
> **…**
>
> **(2) For the purposes of sub-item (1)(a) –**
>
> **(a) 'employee' includes an applicant for employment;**

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

(c) any discrimination based on an inherent requirement of the particular job does not constitute unfair discrimination."

9. At the conclusion of the matter, Ms de Wet indicated that the Applicant no longer sought an appointment with the Municipality. The Applicant contents himself with a claim for compensation calculated as being the difference between the amount which he presently earns and the amount which he would have earned had he been successful in his application with the Municipality. This is said to be an amount of R6000,00 per month calculated over an 11 month period.

Recruitment Process:

10. It is common cause between the parties that the Respondent is bound by an agreement concluded in August 1994 at the National Labour Relations Forum for Local Government relating to equal employment practice and affirmative action. (For the sake of convenience I will hereinafter refer to this document as the "National Agreement".) I pause to point out that the National Agreement was concluded by various Municipal employers' organisations on the one hand, and trade unions and employees' representatives on the other hand.

11. In the preamble to the National Agreement the parties acknowledged the need to, *inter alia*:

11.1 "ensure equal employment opportunity practises in Local Government";

11.2 **"enforce the right of fundamental equality and opportunity between men and women in employment"**;

11.3 "the right of every person to be protected against employment discrimination on the grounds of race …;

11.4 "transform Local Government to a non-racial, non-sexist institution and provide redress to disadvantaged people."

12. The objective of the National Agreement includes transformation of local authorities into non-racial and non-sexist institutions, the elimination of discrimination in the employment situation, the development of equal opportunity programmes to promote equality in the employment relationship and the advancement of affirmative action programmes. The National Agreement distinguishes, too, between equal employment practices and affirmative action procedures.

12.1 The former are aimed at –

> **"ensuring that anyone regardless of race, ethnic and social origin, colour, culture, gender, religious or political persuasion, disability, age or sexual orientation has an equal chance for appointment to a post on merit or potential ability"**;

12.2 The latter includes –

12.2.1 "implementing positive remedial action, programmes and procedures to address historic and existing inequalities, imbalances, prejudices and injustices in the workplace;"

12.2.2 "actively pursuing an on-going strategy to redress imbalances in the workplace to reflect the relevant labour market."

13. In the section dealing with strategies and procedures for the implementation of the terms of the National Agreement, the following approach is stipulated in respect of **"New Appointments"**:

> **"6.2.1.1 Special attempts will be made to appoint applicants from disadvantaged groups to vacant posts while maintaining the merit principle, as outlined in 6.2.1.5 below and the provisions of education, training and development referred to in paragraph 5.8 above.**
>
> **6.2.1.2 Affirmative Action appointments will only apply in those job categories where disadvantaged people are not fairly represented.**
>
> **6.2.1.3 Members of disadvantaged groups will receive preference above others, other things being equal, in those job categories where Affirmative Action applies.**
>
> **6.2.1.4 That all vacancies shall be advertised internally and may be advertised externally with requirements that do not demand qualifications or competencies unrelated to the post.**
>
> **6.2.1.5 The merit principle will be adhered to. Merit is defined as the capacity to do the job, judged on qualifications, experience, knowledge, potential and/or demonstrated ability. Emphasis would be on meeting minimum requirements for the job and not necessarily appointing the ideal candidate or highest qualified candidate.**
>
> **6.2.1.6 Relevant experience and length of service shall be taken into account where formal qualifications are absent."**

14. After the promotion of Van Niekerk to the position of Town Treasurer, the position of Assistant Town Treasurer was initially advertised towards the beginning of 1999. There was great interest in the position, including that of several black candidates. However, there were no suitable applicants and the post was not filled.

15. The position was advertised again in mid-1999. A copy of the English advertisement was placed before me with the following relevant detail:

15.1 **"Upington, situated on the banks of the Orange River, is a fast-growing and progressive town in the Northern Cape. The Local Transitional Council is a** [*sic*] **equal opportunity employers** [*sic*] **and requires the services of a:**

Assistant Town Treasurer."

15.2 "Requirements:

- **applicable B Degree with nine years' applicable experience**
- **excellent managerial ability**
- **thorough knowledge of complete financial administration and processing of accounts including balance sheets**
- **report writing and notification skills**
- **computer competency and knowledge of integrated computer systems."**

15.3 "Duties:

oversee the control of the income division, namely: Housing Debtors; Electricity/Water Debtors; Tax/Sewerage/Refuse; Diverse Debtors; Investments

responsible for the administration of G-Kolf accounts and other special funds

stand-in for Town Treasurer if necessary

help with compilation of trade budget (tariff denomination).”

16. The Applicant, together with a number of others submitted his application to the Municipality.

17. In terms of a decision taken by the Municipality on 22 February 1999 relating generally to the appointment of personnel, all appointments at grades 2 and 3 (under which the post in question fell) are to be handled at the level of Exco. An *ad hoc* committee made up of the chairperson of Exco together with a number of other senior municipal officials is responsible for assessing the initial applications and the short-listing of candidates who are then interviewed further by a selection committee formally convened by Exco.

18. In regard to the position which was the subject of the present application, four persons were short-listed by the *ad hoc* committee referred to in paragraph 17 above. Besides the Applicant and Mohutsiwa, two other males (one white, one black) were short-listed.

19. The four short-listed candidates all travelled to Upington (at the Municipality's expense) for an interview on 23 July 1999. The Applicant was accommodated by the Municipality at a local guest house on the evening before the interview. As it happened, both Mohutsiwa and the other black candidate also stayed over at the same guest house and the Applicant met them the following morning at the breakfast table. I pause to mention that in his evidence, the Applicant was so bold as to state that he immediately formed the impression that neither of the black candidates had the requisite experience for the job (the implication being that the Applicant considered himself a better candidate for the job). Applicant subsequently met the other white candidate at the Municipality's offices prior to the interview and remained firm in his assessment of his own ability.

20. On the morning of 23 July 1999 the four candidates were required to undergo a written test at the Municipality's offices, which was aimed at assessing the candidates' ability to do the job (the questions being largely of a financial/accountancy nature).

21. The Applicant made much play of the fact that he was the first to complete the test paper. However, it transpired during evidence that the two black candidates requested that the question paper be translated from Afrikaans to English and this appears to account for the fact that they took a little longer to complete the test. In any event, the Municipality placed no time limit on the written test.

22. Thereafter the candidates were individually interviewed by the members of the selection committee which was made up of Exco members (or their appointees), senior Municipal officials and trade union representatives. To this end, a list of some 15 *pro forma* questions was drawn up and circulated amongst the members of Exco on the understanding that the questions would be used during the interview process.

23. Mohutsiwa was interviewed first, followed by the Applicant and the other two candidates referred to above.

24. After the interviews, Exco deliberated on the candidates in the absence of the Municipal employees and trade union representatives who had been excused.

25. The Applicant testified that upon completion of his visit to Upington, he felt that he had done very well during the interview. He thought that he had answered the questions put to him during the interview correctly and that the members of Exco had liked what they had heard from him. As far as he was concerned, the job was his.

26. The Applicant drove back to Stellenbosch from Upington and stopped at Calvinia (about 4 hours drive from Upington) to telephone the Municipality. He was very eager to know whether he had been appointed to the position. He contacted a certain Betty van der Westhuizen (who is employed in the Municipality's personnel department) and was told that he had not been appointed to the position. The Applicant said that Van der Westhuizen was very unhappy with the fact that he had not been appointed and told him that the person who had been interviewed first had got the job. (Throughout the proceedings the Applicant never referred to this person by name, but preferred to call him **"the successful candidate"**.)

27. Needless to say, the Applicant was most dissatisfied with the fact that he had not been appointed and immediately took steps to address the situation. After taking legal advice he faxed a letter to the Municipality on 28 July 1999 in the following terse terms:

> ***"Met die oog op 'n moontlike verwysing van hierdie saak na die CCMA soek ek die redes hoekom ek onsuksesvol was. Ek is meer bevoeg as al die ander kandidate om hierdie pos te vul.***
>
> ***Ek hoop dit sal vir u moontlik wees om voor 3 Augustus 1999 my skriftelik te antwoord."***

28. I pause to point out that, at this stage, the Applicant had had no insight into the qualifications, competencies or experience of any of the other candidates. Furthermore, he had not been a party to their interviews with the Municipality. It is difficult to understand, therefore, on what objective basis the Applicant could assert at such an early stage that he was more **"competent"** than all the other candidates.

29. On 5 August 1999 a certain Ms Gilbert, in a letter on behalf of the Town Clerk of the Municipality, replied to the Applicant's fax. In that letter (hereinafter referred to as "the Gilbert letter") the following material points were raised:

29.1 The Municipality is an equal opportunity employer;

29.2 The four short-listed candidates all met the minimum requirements for the post;

29.3 The Municipality was bound by the National Agreement;

29.4 Specific reference was made to paragraphs 6.2.1.2 and 6.2.1.3 of the National Agreement, i.e. to affirmative action appointments;

29.5 There was under-representation of disadvantaged people in the Department of the Town Treasurer;

29.6 Further reference was made to section 2(b) of the EEA which reads as follows:

> **"The purpose of this Act is to achieve equity in the workplace by –**
>
> **…**
>
> **b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the work force."**

30. The Gilbert letter concludes with the following somewhat cryptic statement:

> ***"Met inagneming van bogenoemde feite het die Raad 'n aanstelling gemaak."***

I say cryptic because it does not appear precisely which **"facts"** were those relied upon. Be that as it may, I think that upon a proper reading of the Municipality's letter of 5 August 1999, it would be fair to conclude that it was the Municipality's case that Mohutsiwa was appointed on an affirmative action basis, as defined in the National Agreement.

<u>The Applicant's cause of action:</u>

31. The Applicant lost little time in taking the matter further. The day after receipt of the Gilbert letter he filed his referral to the CCMA in terms of section 135 of the LRA. In the prescribed Form 7.11 he stated, *inter alia*, the following:

31.1 "Ek meen ek was die geskikte** [sic] **vir die pos. Iemand anders is aangestel."

31.2 "Ek het navraag gedoen en op 5 Aug 99 ingelig** [sic] **hoekom ek nie die pos/werk gekry het nie."

31.3 "In die advertensie is nie gestel dat dit 'n 'affirmative action'-pos is nie."

31.4 "Ek glo hulle het die 'affirmative action"-beleid diskriminerend toegepas."

31.5 "Ek glo en weet 'other things being equal' was nie toegepas nie."

32. While the abovementioned reasons were probably cryptically stated because of a lack of space in the document, the Applicant offered the following narrative as additional commentary under the section in the form headed **"nature of the dispute"**:

> **"1.** ***Sien brief van Munisipaliteit gedateer 5 Augustus 99 nadat ek navraag gedoen het oor die kriteria vir die aanstelling van 'n ander werknemer (bo my).***
>
> ***2. Sien advertensie wat in koerant was. Ek glo nie die suksesvolle applikant voldoen nie daaraan nie.***

3. My volle CV is aan die Munispaliteit gegee en die onderhoud het baie goed verloop.

4. Veral van belang is die feit dat ek deeglike en indiepte kennis en ervaring het van boekhouding en oudit vir Munisipaliteite. Dié werk verskil van gewone oudit werk. Ek klassifiseer my as 'n spesialis in die gebied.

5. Ek het die ondervinding om met R130 miljoen bedryfsbegroting te werk, asook kwalifikasies.

6. By onderhoude het al vier applikante toetse geskryf. Ek was vinnig klaar met elke toets, terwyl die suksesvolle applikant die volle tyd gebruik het en gelyk het of hy sukkel om klaar te maak. Dit het my laat twyfel oor sy vermoë."

33. In his statement of case filed in this matter, the Applicant made allegations similar to those set out in paragraph 32 above. However, the following additional allegations emerge:

33.1 Certain of the topics which were discussed during the interview are amplified upon in an attempt to portray the Applicant's suitability for the job;

33.2 The fact that the selection committee which interviewed him comprised Van Niekerk and Ms van der Westhuizen as well as trade union members and Councillors. The Applicant added: ***"die Vakbond lede en Raadslede was almal swart en is deel van die agter-geblewenes in die Suid-Afrikaanse politieke konteks."*** (During argument Ms de Wet was at pains to point out that the majority of the Councillors who sat in on the interview were not only black, but were also members of the ANC, a fact which was incidentally not in dispute);

33.3 The Municipality failed to inform the applicants that the appointment would be in terms of an affirmative action programme;

33.4 The Applicant stated that he had 3½ years experience in dealing with financial statements and budgets of municipalities and suggested that this differed materially from the financial statements of an ordinary business. He went on to allege that he has in-depth knowledge and experience of bookkeeping and auditing in respect of municipalities, thereby asserting a measure of specialisation.

34. With reference to the Gilbert letter, the following is alleged:

> ***"Applikant voer aan dat Respondent in die lig van bogenoemde nie die ooreenkoms waarna verwys word deur Respondent, billik en regverdig vertolk en uitgevoer het nie. Gevolglik is daar onbillik teenoor Applikant gediskrimineer."***

35. Read in conjunction with the other allegations made in his statement of claim, the following paragraph neatly summarises the Applicant's case:

> ***"Applikant voer aan dat hy na aanleiding van kontak met die ander drie kandidate, indrukke wat gelaat is, toetsuitslae, werksondervinding, kwalifikasies en spesialiteitskennis, die mees gepaste kandidaat was vir die pos soos geadverteer."***

The Municipality's response:

36. The Municipality took strong exception to the suggestion that the Councillors and trade union members of the interviewing panel were to be regarded as **"*agtergeblewenes*"** in the South African political context.

37. The term **"*agtergeblewenes*"** (probably better translated as "**backward**" or "**underdeveloped**") differs from "***histories benadeelde***" ("**historically disadvantaged**") and is suggestive of an attitude of covert condescension on the part of the Applicant. At the very least, I would regard the use of the phrase as inappropriate in the context of the case and the current political milieu.

38. The Municipality contended that its policy in regard to the appointment of individuals from historically disadvantaged communities had been made known.

39. The Municipality denied in terms that it was its intention to appoint a candidate drawn exclusively from the historically disadvantaged community to the relevant post.

40. The Municipality placed in issue the fact that the Applicant had any special knowledge or experience which uniquely qualified him for the post and, in particular, put him to the proof of each of the allegations summarised in paragraph 35 above.

41. While admitting that the Gilbert letter had been written by the Municipality's chief executive officer, it was denied that the National Agreement had been incorrectly interpreted or implemented.

42. Finally, the Municipality disputed that it was guilty of any unfair discrimination in respect of the Applicant.

The Evidence

43. Much of the evidence before me was not disputed. Accordingly, I propose dealing only with those facts and/or conclusions which appear to be in issue.

44. The Applicant's perception was that the Municipality had applied an affirmative action approach to the appointment of the position of Assistant Town Treasurer. He relied in this regard on the Gilbert letter. He proceeded to argue that the Municipality had erred in its application of clause 6.2.1.3 of the National Agreement (see paragraph 13 above) because this was not a situation where **"other things** (were) **equal".** Had that been the case, the Applicant said he would have accepted the appointment of Mohutsiwa. However, the Applicant was of the opinion that he was, on all accounts, the best candidate and that in such circumstances the affirmative action employment principle as set out in the National Agreement had been violated. This, he argued, constituted unfair racial discrimination.

45. In advancing this line of argument, the Applicant attempted to establish that he was not Mohutsiwa's **"equal"**, but his **"superior"**. I have already alluded above to the Applicant's initial assessment of his superiority after he met Mohutsiwa at the breakfast table. This attitude of superiority was confirmed when the Applicant saw that he was the first person to finish the written test. (Of course, he did not know at that time that it was necessary for the question paper to be translated into English and that that would, *per se*, have caused a delay in the answers given by the two black candidates.)

46. The Applicant's presumptuous attitude led him to believe at the conclusion of the interview that he was **the** person for the job. In the absence of any consideration of the other candidates' CV's, their test results or how they had fared during the interviews, it is most difficult to understand how the Applicant could have held the belief that he was **"*meer bevoeg*"** (probably better defined as "**more competent**", but once again a phrase suggesting a measure of self-importance) than the other candidates even before he had received the Municipality's reply set out in the Gilbert letter.

47. In evidence, the Applicant testified that he had had telephonic contact with Van der Westhuizen prior to travelling to Upington for the interview. During that conversation Van der Westhuizen informed him that she considered him to be the best qualified person for the job, with the best experience. Van der Westhuizen holds an administrative position in the Municipality's personnel department. No evidence was led by the Municipality to contradict this statement which is, of course, admissible against the Municipality.

48. It seems as if the Applicant's presumptuous attitude originates from that discussion. Of course, the simple answer is that Van der Westhuizen would have expressed a view to the Applicant prior to the conducting of the tests and the interviews and her assessment (for whatever it may be worth) can never be anything more than a *prima facie* view. It was, after all, the prerogative of Exco to evaluate the candidates on everything that was before them, including the test results. One does not know either whether Van der Westhuizen held any personal preference as regards race or language.

49. At the time that he applied for the position, the Applicant was 27 years of age, had taken 5 years to qualify for a Bachelor's degree in accountancy and was busy with an Honours degree in that field. He had been employed by a firm of auditors, commencing as a clerk in 1995. It was common cause that he had approximately 2 ½ years experience in the handling of audit procedures, financial statements and the like, including those of various small and medium sized municipalities in the Western Cape.

50. Prior to applying for the job, the Applicant never attempted to establish from the Municipality what was meant in the advertisement by:

50.1 an **applicable** Bachelor's degree;

50.2 9 years' **applicable** experience.

51. Indeed, the Applicant's presumptuousness in applying for a position in respect whereof he only held a third of the requisite experience is tempered only by the fact that the Municipality considered that he was worthy of being interviewed (two of the other candidates had well in excess of 9 years work experience and the third 8 years).

52. The Applicant unilaterally assumed that **"applicable"** referred to experience in the financial department of a municipality (as opposed to any other large corporate entity). He suggested that the only **applicable** experience would be found in a person who had experience in the financial administration, auditing and processing of the books of account of a municipality. The obvious error in this assumption is demonstrated by the fact that Van Niekerk, when previously appointed to the position of Assistant Town Treasurer, had come from a private sector position with no direct experience in the municipal setting.

53. The Applicant's confidence in applying for a position which required experience of 9 years when he himself had a maximum of 3 to 4 years' experience, demonstrates the high regard which he had for his own competence. Mohutsiwa, for example, had 15 years' experience with, *inter alia*, the University of Bophuthatswana, had a B.Com degree and was 47 years old at the time he applied for the position. All his experience was in the financial/accounting field.

54. It seems to me, at the end of the day, that the Applicant simply over-estimated his experience and his suitability for the job. His self-confidence was demonstrated, for example, by his own assessment in the witness box of his university qualification. He said that he thought he had **"excellent"** results, whereas in fact his grades, with the exception of one subject in the final year, proved to be no more than average.

55. Under cross-examination the Applicant conceded that all four candidates were similarly qualified from an academic point of view. However, the critical factor which made him the preferable choice was his alleged **appropriate** experience. To my mind the Applicant adopted far too narrow an approach to the interpretation of this concept. Clearly, the Municipality was looking for was a person with general experience in accounting functions, the management of financial reporting and the drafting of financial statements. Upon the evidence before me, there does not, moreover, appear to be any special experience required for the job which cannot be learned in a relatively short period of time.

56. I should add that I was not particularly impressed by the Applicant as a witness. He was dogmatic in his responses to various questions, contradicted himself on a number of material points and appears to have held himself in far higher regard than the circumstances warrant. He seems to have been unable to move away from his initial perception of relevant competencies gleaned at the breakfast table on the morning before the interviews. His presumptuous attitude, which was detected during the interview with the Municipality, was apparent, too, in the witness box.

57. At the end of the day, the Applicant did nothing to establish that he was in any way a more superior or competent candidate for the job than Mohutsiwa.

58. I might add that I do not think that the Applicant has in any event correctly interpreted clause 6.2.1.3 of the National Agreement. Where a job prescribes minimum requirements, then **"all other things being equal"** suggests that provided all candidates meet that threshold, it matters not that one is better than the other. Compliance with the stipulated entry level requirement by all candidates would entitle the local authority to prefer the black candidate over the white candidate if it was applying an affirmative action procedure.

59. Van Niekerk gave evidence on behalf of the Municipality and confirmed that the contentious term **"applicable"** related to a qualification in commerce and general experience in accounting. He cited his own experience and qualifications as an appropriate example. Van Niekerk also testified that he had been responsible for testing the candidates prior to the interviews and stated that, as far as he was concerned, they were all on a par as far as competence was concerned. He was happy to recommend to the interviewing committee that all the candidates enjoyed a similar level of competence to perform the work. Significant in this regard is the fact that Van Niekerk did not consider that the Applicant stood out above the rest. (Van Niekerk conveyed the test results to the selection committee and also sat in on the interviews with the individual candidates.)

60. After the interviews had been conducted, Exco sat in deliberation, the remaining members of the selection committee having been excused. Van Niekerk was thereafter called in by Exco and informed that two of the four candidates had been short-listed (the Applicant and Mohutsiwa). He was asked whether he had any preference for either of these candidates and said no. In evidence was asked what his choice would have been if he had had to decide for himself. He stated that he preferred Mohutsiwa.

61. Van Niekerk testified further that he and Mohutsiwa had worked together for the past year and that Mohutsiwa had proved to be the correct choice. He was hardworking, had good inter-personal relationships with other members of staff and his management capabilities were also good.

62. The thrust of the cross-examination of Van Niekerk was that Mohutsiwa was not the best candidate. The Applicant's suggestion on this score was that the compilation of the annual financial statements in respect of a municipality differed in certain respects from the statements compiled in respect of other corporate entities. For this reason, and by virtue of his **"specialist"** experience referred to in paragraph 49 above, the Applicant contended that he should have been the preferred candidate. Van Niekerk accepted the difference in financial reporting, but stated that it was in respect of a limited area only and was not of such a fundamental difference that it could not be learned by someone who did not have precisely that experience.

63. A further point of criticism raised by the Applicant was the fact that the annual financial statements for the 1999 tax year had not been completed by Mohutsiwa, but by Van Niekerk himself, the clear suggestion being that Mohutsiwa was incapable of doing the work. Van Niekerk's reply was that because Mohutsiwa's appointment had overlapped with the date of submission of the 1999 financial statements, he (Van Niekerk) had simply finished off the task which he had commenced doing in the absence of an appointed Assistant Town Treasurer. His explanation was entirely rational and acceptable.

64. It further emerged from the evidence of Van Niekerk that the appointment of Mohutsiwa had been made purely on merit, he having been regarded as the most outstanding candidate. It was, therefore, not necessary for the Municipality to apply any affirmative action procedure. In regard to the Gilbert letter, Van Niekerk stated that the letter was wrong in that it conveyed the incorrect reasoning behind Mohutsiwa's appointment. It appears as if Gilbert did not consult the correct individuals prior to the drafting of that document. According to Van Niekerk the letter is to be regarded, in essence, as *pro non scripto*.

65. In conclusion, it emerged from Van Niekerk's evidence that Mohutsiwa had successfully fulfilled the position of Town Treasurer in Van Niekerk's absence on leave and that everyone at the Municipality appeared to be happy with his appointment. Of course, the adage that the proof of the pudding is in the eating does not really assist the Municipality in this case because one does not know how the Applicant would have performed had he been appointed. He may have been equally competent or possibly even better than Mohutsiwa. Nevertheless, Mohutsiwa's success in the position is an indication that the Municipality's choice was not so skewed as to be indicative of obvious bias in favour of one individual over another.

66. The Municipality further presented the evidence of Ms E Munnik who was appointed chairperson of Exco in April 2000. At the time of the interview of the Applicant, Mr B Freeman was the chairperson of Exco and Munnik a regular member of that committee.

67. I should state at the outset that Munnik was a most impressive witness. She gave evidence in a forthright and frank manner and was not embarrassed to say, for example, that she had permitted her political allegiances to play a strong roll in her early days as a Town Councillor. She was elected to the Municipality's Council in 1995, having been very active in the ANC Women's League in Upington prior to that. She said that in her early days as a Councillor she had followed her heart in making decisions. She suggested that she had learned over the years to follow her head, rather than her heart, when dealing with Council issues. There can be no doubt that she approached her position with the necessary civic responsibility and that she at all times endeavoured to do only the best for the community of Upington. She is a person steeped in procedural regularity and appears to have carefully adhered to that approach in this case.

68. Munnik was a member of the original *ad hoc* committee which short-listed the four candidates and, as previously stated, was an active participant in the interview process of the Applicant. Munnik went to great lengths to impress upon the Court that the appointment of Assistant Town Treasurer was not an affirmative action appointment, but that Exco was looking for the best person for the job. Advancing this argument, she said purely and simply that Mohutsiwa was the better candidate. The committee was particularly impressed by his maturity (he was some 18 years older than the Applicant). The fact that Mohutsiwa was black and Setswana-speaking were additional positive factors in his favour. However, they were not the main or conclusive factors.

69. Munnik confirmed that Van Niekerk had been called in to the deliberations of Exco and asked regarding the suitability of the Applicant and Mohutsiwa. This of course demonstrates that Exco approached the appointment from the point of view of a non-racial bias. It would have been quite simple to have short-listed only black candidates. Alternatively, it could have created some form of charade by short-listing white candidates as well and paid lip service to an objective assessment of such candidates. There can be no doubt but that Exco took its function seriously, applied its mind to the task at hand and made a choice which it considered the correct one in the circumstances.

70. There is very little in the evidence of Munnik which can be faulted as far as the interview process and deliberations of Exco are concerned. Indeed, it may be said that the whole procedure was conducted in an exemplary fashion.

71. Of course, the Gilbert letter flies in the face of Munnik's evidence that Mohutsiwa's appointment was not in accordance with an affirmative action policy. She was called upon to explain this obvious discrepancy in the Municipality's approach to the appointment.

72. Munnik testified that she saw the letter for the first time on 20 June 2000 during the course of a pre-trial consultation. She said that Gilbert was a senior personnel officer who dealt with industrial relations matters. A letter of the sort emanating from the Applicant and threatening litigation at the CCMA, would have been directed for Gilbert's attention as a matter of course. Gilbert was not part of the appointment process and would not have had first-hand knowledge of the basis of Mohutsiwa's appointment. In addition, it transpired that Gilbert had not consulted any of the members of the selection committee or Exco for input regarding the basis of their decision. It would appear, therefore, that Gilbert drafted the letter on the basis of certain assumptions made by her which did not accord with the correct facts. Those assumptions appear to have been based on the automatic applicability of the National Agreement. It may be said, therefore, that euphemistically speaking, the left hand did not know what the right was doing.

73. It was never seriously suggested to Munnik that her evidence was false or that her explanation regarding the Gilbert letter was contrived or untruthful. During argument Ms de Wet accepted that if the Gilbert letter were found to constitute the correct basis for the Applicant's appointment, the evidence of Van Niekerk and Munnik to the contrary would have been based upon a shrewdly devised ploy. Not only was this not put to either Van Niekerk or Munnik as an explanation for the correctness of the Gilbert letter, but I consider it most improbable in the circumstances. If Mohutsiwa was the best candidate regardless of race, then the **"affirmative action defence"** could quite readily have been advanced by Munnik and Van Niekerk. However, they did not adopt this line as an easy option out of the dilemma and sought to explain the correct status of the Gilbert letter. I am unable to reject their version on this score and it would seem to me that their explanation regarding the Gilbert letter is the most probable one in the circumstances.

74. In arriving at its decision on the appointment of the position of Assistant Town Treasurer, the Municipality was bound by the terms of the National Agreement. I have referred to the relevant sections of the National Agreement above from which it will be noted that an affirmative action approach could have been adopted based on under-representation in the particular department. In addition, if all the applicants were regarded as **"equal"** (all other things being equal), the Municipality would have been justified in appointing Mohutsiwa. However, as I understand its argument, it was not necessary for the Municipality to consider the applicability of clauses 6.2.1.2 and 6.2.1.3 because Mohutsiwa was simply the better candidate, thereby placing himself ahead of the rest. Of course, as Munnik correctly pointed out, his appointment served a dual purpose in that it enabled the Municipality to strengthen the representation of historically disadvantaged people in its workforce.

75. The Applicant bore the onus of establishing that the Municipality had unfairly discriminated against him on the basis of race. This he attempted to do with reference to some facts and a number of inferences:

75.1 The Applicant said that Van der Westhuizen had told him that he was the best qualified candidate. As pointed out above, although Van der Westhuizen formed part of the selection committee and sat in on the interviews, she was not party to the final decision. Her opinion on the strength of the CV's placed before her can be no more than just that – an opinion.

75.2 The Applicant placed his own subjective interpretation on the term **"relevant experience"** and sought to elevate his own work experience into a specialist category which would make him the only person with such relevant experience. I am afraid that he did not succeed in his endeavours in this regard. I prefer the evidence of Van Niekerk (whose task it was to have the advertisement drawn up) over the highly subjective and self-adulatory opinion of the Applicant.

75.3 The Applicant's suggestion that he was able to evaluate the relevant pro's and con's of the abilities of the two black candidates after a breakfast table discussion is hardly worthy of serious consideration. On the contrary, not only does it demonstrate a lack of humility, but it smacks of self-importance and arrogance.

75.4 The Applicant sought to rely heavily upon the explanation offered in the Gilbert letter. As demonstrated above, that letter does not accurately reflect the attitude of the Municipality. In any event, the Applicant's self-adulation predates this explanation as appears from paragraph 27 above.

75.5 The suggestion that the majority of the members of the selection committee, including the Exco members, were black, **"*agtergeblewenes*"** and members of the ruling party, demonstrates not only the Applicant's arrogance and racial prejudice, but also implies that these individuals were unable to free themselves of their party political affiliations, their historical past or their own race in coming to a reasonable conclusion. Indeed, the Applicant's remarks in this regard say far more about himself than they do about the Municipality's employees. In her evidence Munnik was most indignant about the Applicant's suggestions on this score. Her reaction was indicative of the effect of the Applicant's condescension and corroborated the evidence regarding the impression which Munnik and her colleagues on Exco formed about the Applicant during the interview.

76. The Applicant's inability to accept that he was not the most suitable candidate for the job appears to lie at the root of this matter. He has attempted to advance an argument of racial discrimination on the basis of speculation, unjustified inferential reasoning and an inability to accept his lack of suitability.

77. It is the Applicant who bears the onus of establishing that the Municipality has discriminated against him.

> Leonard Dingler Employee Representative Council and Others v Leonard Dingler (Pty) Ltd and Others [1997] 11 BLLR 1438 (LC) at 1449.I – 1452.G;
>
> Abbott v Bargaining Council for the Motor Industry (Western Cape) (1999) 20 ILJ 330 (LC) at 333F-G;
>
> Louw v Golden Arrow Bus Services (Pty) Ltd [2000] 3 BLLR 311 (LC) at p.322.C – 325.G.

78. Once an applicant has established an act of discrimination, the burden shifts to the respondent to avail itself of one of the acceptable grounds of justification or to demonstrate that such discrimination was not unfair.

79. In the Leonard Dingler case, *supra*, discrimination was defined as follows by Seady AJ at p.442H-J:

> **"Direct race discrimination occurs where a person is treated differently because of their race or on the basis of some characteristic specific to members of that race. It is incorrect to equate discrimination with actual prejudice. Discrimination occurs when people are not treated as individuals. To discriminate is to assign to them characteristics which are generalised assumptions about groups of people (*R v Birmingham City Council Ex Parte Equal Opportunities Commission* 1 All ER 769 (HL) and *James v Eastleigh Borrough Council* ICR 554 (HL)).**
>
> **It is not necessary to show any intention to discriminate for direct discrimination to be established. Intention or motive of the respondent may however be relevant to what remedy the court should impose. If a black employee receives less favourable treatment than a white employee, the black employee has been discriminated against on grounds of race. Whether the discrimination is unfair is a separate enquiry (see below)."**

80. In the present case the Municipality denies an act of discrimination and alleges that it exercised its choice in favour of the better candidate.

81. Strictly speaking, any employer which chooses one candidate amongst a group of several for a position of employment, of necessity **"discriminates"** against the unsuccessful candidates. Discrimination in that context implies the preferring of one party above another. More properly, it would be correct to say that the employer **"differentiated**" rather than **"discriminated"**. But even if the choice is to be regarded as discrimination *per se*, it would be necessary for the Applicant to demonstrate that such discrimination was **"unfair"**.

Kadiaka v Amalgamated Beverage Industries (1999) 20 ILJ 373 (LC) at 380-381.

And then, once unfair discrimination is established, it must be shown to have been exercised on arbitrary grounds.

See: Kadiaka's case, *supra*, at p.383.

82. On the facts of the present case I am satisfied that the Applicant has failed to establish any act of discrimination of the part of the Municipality which would afford him relief under the residual unfair labour practice provision.

83. Assuming, however, that I am wrong on this score, I am of the opinion that it has in any event not been shown that any act of discrimination (as the term is used in the broader context referred to in paragraph 81 above) was exercised on arbitrary grounds. Whether one follows the Applicant's approach of reliance on the Gilbert letter or the evidence of Munnik regarding an appointment solely on merit, it cannot be said that the choice of Mohutsiwa:

83.1 **"demonstrates that** [the Applicant] **was treated as belonging to a class and not on his merits"**; or

83.2 was **"for no reason or** [was] **purposeless".**

(See: Kadiaka's case, *supra*, at p.384A-D.)

Either way, the Municipality has provided an adequate and morally defensible reason for the appointment.

84. The Applicant's position is not dissimilar to that of the Applicant in –

> Swanepoel v Western Region District Council and Another [1998] 9 BLLR 987 (SE) at 990H-I and 992G-H:
>
> **"There is not a shred of evidence to support the subjective contentions of Applicant. Indeed, Applicant's complaints, the very pegs upon which she hangs her submissions of unfair discrimination are, in my view, nothing short of disingenuous conjecture and, perhaps, a reflection of Applicant's bruised ego and injured feelings.**
>
> **Furthermore the attitude and approach of First Respondent towards Applicant exposes her fallacious reasoning. She, a Caucasian female of unknown political affiliation was short-listed as a prospective candidate for the post in question and given an interview about which she did not and, it is suggested, is unable to complain in the context of the fair and impartial manner in which it was conducted.**
>
> **…**

In the race for employment there must indeed be few job seekers who do not in their own minds, either with or without the encouragement of others, form expectations as to their suitability. These expectations are, however, not 'legitimate expectations' upon which Applicant could conceivably rely for relief and indeed, such legitimate expectations as Applicant may have had, were adequately met, as I have said, by giving Applicant access to procedurally fair administrative procedures, i.e. the selection process, untainted by discrimination or bias of any description and regular and proper in all respects."

Costs:

85. Ms de Wet asked that the Applicant's costs be paid on the attorney and client scale because, she said, the Respondent only gave its reasons for the Applicant's failed appointment on 15 May 2000. On that day, the Applicant was informed, in terms, that Mohutsiwa was not appointed in terms of an affirmative action procedure. This was pursuant to an additional minute filed on behalf of the Municipality supplementary to the pre-trial minute filed on 7 February 2000.

86. Whatever the Applicant's position may have been arising out of his interpretation of the Gilbert letter, it would have been abundantly clear to him from the supplementary minute that the Municipality's case was Mohutsiwa was appointed on merit and merit alone. Notwithstanding this communication from the Municipality, the Applicant persisted in his application.

87. The erroneous and misleading allegations made in the Gilbert letter were only pertinently brought to the Applicant's attention on 28 June 2000 after the evidence of Van Niekerk and Munnik.

88. It is argued that the Municipality never played open cards with the Applicant and, whatever the decision of the Court may be, the Municipality should be ordered to pay the Applicant's costs on an attorney and own client scale. I consider that such a request is not worthy of serious consideration and merely serves to demonstrate the unwarranted demands which generally pervade the Applicant's case. After the Municipality had given fuller reasons for its decision (i.e. over and above those set out in its response), the Applicant would have known what the case was. If the Applicant was unable to reconcile the Gilbert letter with the alleged basis for the Municipality's decision, he could have called for a further pre-trial meeting to establish the basis and the import of the Gilbert letter. He did not do so and has only himself to blame for the delay in discovering the correct position.

89. On the other hand, the Respondent's employees issued a document in response to a legitimate (albeit impertinent) request by an unsuccessful job-seeker. It took no steps to rectify the situation until 15 May 2000 and even then, it failed to adequately distance itself from the clear impression created in the letter.

90. Until the evidence of Van Niekerk and Munnik was heard in Court, the Municipality contented itself with an explanation for a decision which it knew was not correct. Given the Applicant's dogmatic and self-centred approach to the matter, it is of course open to doubt as to whether he would have adopted any other route had he been informed earlier about the status of the Gilbert letter. Moreover, as I have suggested above, the Gilbert letter would not have assisted the Applicant in proving an act of unfair discrimination. Indeed, the Gilbert letter would have provided a complete defence under the provisions of Item 2(2) of Part B of Schedule 7 to the LRA (see paragraph 8 above).

91. After the filing of the supplementary reasons in terms of the pre-trial procedure, the Municipality made an open offer to the Applicant that he could withdraw his claim with each party bearing its own costs. I was informed that this offer was open for acceptance until Sunday, 18 June 2000, i.e. before Applicant briefed Counsel. Notwithstanding this offer, the Applicant persisted in the matter and the Municipality was obliged to transport its witnesses to Cape Town for the purposes of the hearing.

92. I am of the opinion, therefore, that the Respondent is not blameless in regard to the unnecessary escalation of costs. It could and should have informed the Applicant at an earlier stage of the correct position and, in particular, of the correct status of the Gilbert letter. However, I do not regard this transgression as sufficiently serious to deprive the successful party of its costs.

93. The Applicant, on the other hand, has advanced a case which, at best for him, could be described as **"weak".** It could well be argued that the Applicant's proceedings were vexatious in the sense in which that term was defined by Gardiner JP in -

> In Re Alluvial Creek Ltd 1929 CPD 532 at 535:
>
> **"There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."**

Such a finding would warrant costs on the attorney and client scale.

94. In the circumstances I consider that fairness requires that the Applicant be ordered to pay the Respondent's costs on the ordinary scale. For the direction of the Taxing Master, I record that Van Niekerk and Munnik are to be regarded as necessary witnesses for the purposes of the calculation of any travelling and accommodation expenses. I do not regard it appropriate to grant the Respondent the costs of two legal representatives for the purposes of attending Court. However, the Respondent was fully entitled, indeed obliged, to make use of correspondent attorneys to conduct the matter effectively.

Conclusion:

95. In the light of the aforegoing, I make the following order:

95.1 The application is dismissed;

95.2 The Applicant is ordered to pay the Respondent's party and party costs;

95.3 Mr N. van Niekerk and Ms E. Munnik are declared to have been necessary witnesses.

GAMBLE, AJ

For Applicant:: **Adv A. de Wet**
instructed by De Lange Attorneys
and Conveyancers, Durbanville

For Respondent: **Mr C. Laubscher of Marais Muller Inc**
Bellville

Dates of hearing: **26-28 June 2000; 11 July 2000**

Date of judgment: **August 2000**