IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO 603/98

In the matter between:

THOMAS AUF DER HEYDE Applicant

and

UNIVERSITY OF CAPE TOWN Respondent

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JUDGMENT

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JAMMY AJ

INTRODUCTION

1. The University of Cape Town was, throughout the apartheid era and the many years of legislated racial discrimination which characterised it, widely and justifiably regarded as a bastion of liberality and a vigorous proponent of racial equality.

2. That ethos has, to all intents and purposes, been perpetuated since the establishment of the "new" South African democracy, bolstered and endorsed by the constitutional imperatives which now require it.

3. Inherent in this practice is the concept of affirmative action and, in that context, the University's Equal Opportunity Employment Policy, of which the following extracts are of material relevance to the issues to be decided in this matter.

"1.1 An institution such as the University of Cape Town which has been established for some considerable time and which strives to be a university of the first rank in an international as well as an African context (Mission Statement, 1985) needs to ensure that it appoints to its

staff only the best persons available. To appoint the best staff requires appointing those individuals, who, over a period of time and in the context of their particular posts, will make the greatest contribution to the work and the reputation of the University.

1.2 The University recognises that the notions of merit and of appointing the best person for the job are not independent of context. The University has frequently based its appointments on contextual considerations that have inter alia included negative or positive resource implications tied to certain candidates, questions of departmental or faculty balance, "fresh winds from outside", known versus unknown, definite commitments to the University or South Africa versus vague commitments, special teaching needs, etc. To such considerations must be added the importance of role modelling for students and the notion of University departments acting as transient but crucially important training grounds for persons who may ultimately be valuable staff members of other universities in the region.

1.3 The need to ensure that adequate and acceptable role models are available for a changing student body implies that the University will seek to appoint as many South Africans as possible to its academic and administrative staff. But the justifiable claim that South African citizens have on the University's posts must be balanced by the need to seek freely good applicants and to appoint the best of them to each particular vacancy. It is only by being appointed in the face of international competition that South African academics can keep the University "in the front rank"; (and yet a part of Africa, and especially South Africa).

1.4 The University accepts that it cannot be sure that it is appointing the best staff available if the pool of available South African talent continues to be limited chiefly to white males. The University must make every effort to develop the careers of blacks and women both within the institution and, when this is possible, at a distance, in order to increase the number of candidates able to compete for appointment on equal terms. Furthermore, through its search and selection procedures, the University must make substantial efforts to seek potential candidates amongst already well-qualified blacks and women and to encourage them to apply for posts available at the University. The University believes that the teaching, learning and research environment of a South African university which is staffed by able men and women and by able whites and blacks will be considerably richer than that of a university whose staff is seen as white male dominated.

1.5 Women and black persons have not had opportunities equal to those of white males. For a variety of social, political and economic reasons, they have generally not been able to achieve the same levels of formal qualification and of teaching and research experience as white males. For this reason, the University accepts that it has a commitment to help overcome imbalances created by this country's legacy of discriminatory practices, and will make conscious efforts to equalise the access which women and black persons have to posts on its staff establishments, such access to be based on merit.

1.6 The University dedicates itself to the task of ensuring that every post is filled by the person able to make the greatest overall contribution to its mission. The University is confident that it best serves the country and all of its people by adopting an equal opportunity employment policy.

2. Policy

2.1 The University will adhere without exception to a policy of searching thoroughly for good applicants in respect of all its vacancies and of appointing, in every case in the context of a particular post, only the person who can be expected to make the greatest contribution to the work and reputation of the University.

2.2 The University will carry out affirmative action in the specific sense of doing everything in its power to help prepare black persons and women to become equal competitors for every post on its establishment.

3.2 Identification of the best person for the job

3.2.1 Selection committees will try to identify all candidates who may be worthy of appointment, and ultimately will determine, in the light of the qualifications of each applicant in relation to the needs as stated in the advertisement and in the statement of further particulars sent to candidates, the person who represents their best choice.

3.2.2 If a black person or a woman is judged fully appointment-worthy by a selection committee but is not recommended for the particular vacant post under consideration, attention will be given to the possibility of making a recommendation for the recruitment of the candidate. Alternatively, arrangements may be proposed or explored whereby the career of the candidate can be developed at this University in one or the other way. The candidate may also be referred to other universities known to be in search of staff.

3.3 Career preparation

The University will enhance the career preparation of worthy blacks and women in every way possible.

3.5.1 The chairpersons of selection committees for academic as well as administrative posts will be responsible for ensuring that their committees consider with care the implications of an equal opportunity employment policy. They will in addition ensure that the search procedures of their committees are such that as many candidates as possible are identified who are worthy of appointment."

4. THE BACKGROUND

In or about November 1994, the Respondent advertised for applications for the appointment of a Lecturer/Senior Lecturer in its Department of Chemistry. The opening paragraph of that advertisement was in the following terms:

"We invite applications for a lecturer/senior lecturer in Chemistry. This is a contract post initially for three years with a possible extension to five years. The successful candidate will hold a PhD degree, have demonstrated research excellence with a significant publication record and a proven ability in lecturing undergraduate classes. An interest in Applied Chemistry would be an advantage."

There followed details of the salary range and contact particulars and the advertisement concluded as follows:

"The University of Cape Town is committed to policies of equal opportunity and affirmative action which are essential to its mission of promoting critical inquiry and scholarship."

5. On 15 December 1994, the Applicant wrote to the Respondent applying for a -

Temporary Senior Lectureship in Chemistry.

He had, he stated in evidence, "understood the duration of the position to be initially for three years, just as it says here, with a possible extension to five years" and that, "..... if I were to be offered the position, it would be secure for three years and that there was a very good chance that it would be extended to five years."

6. A series of meetings were then held by the Respondent's Selection Committee, at which applications for the position advertised were reviewed and in due course, on 24 April 1995, the Applicant received a letter from the Respondent's acting Registrar, the following extracts of which are material:

"I have pleasure in offering you a three-year contract appointment as Senior Lecturer in the Department of Chemistry with earliest possible effect.
.....
.....
This appointment is for the period specified and does not carry any commitment to a permanent appointment on the University staff. Within this period the appointment is subject to three months' notice of termination from either side."

7. The three-year period for which the Applicant was thus appointed commenced on 8 May 1995 and terminated on 7 May 1998 and during this period the Applicant was one of three such appointments made in the Department of Chemistry. Neither of the other two appointees is white.

8. On 11 August 1997, the Respondent advertised for applications for the position of **Lecturer:Department of Chemistry**. The appointment was to be from 1 January 1998 and required a candidate "with experience in any recognised area of Chemistry." Details of the necessary qualifications and experience, as well as the remuneration package and contact addresses were stated.

9. On 29 September 1997, the Applicant applied for the advertised post setting out what he referred to as his attributes and strengths. On 7 November 1997 a letter from the Registrar was addressed to him advising him that, "after careful consideration by the Selection Committee" his application had not been successful.

10. Drs K Chibale and K J Naidoo, the two black appointees, together with the Applicant, to the initial three-year contract posts earlier referred to, were respectively appointed to permanent positions as Lecturers in the Department of Chemistry with effect from 1 September 1997 and 21 January 1998.

11. **THE APPLICANT'S CLAIMS**

The Applicant contends that the Respondent's failure, in the face of a reasonable expectation on his part that it would do so, to appoint him in a permanent position in its Chemistry Department, alternatively to renew his fixed-term contract after it expired on 8 May 1998, constitutes an automatically unfair dismissal in that its failure or refusal to do so is a consequence of the unfair application of its Equal Opportunity Employment Policy, alternatively of direct or indirect discrimination by the Respondent against him on the grounds of his race and gender. Alternatively, his dismissal is a consequence of the Respondent's failure to follow due procedure in terminating his employment on operational grounds.

12. **THE ALLEGED UNFAIR APPLICATION OF THE RESPONDENT'S EQUAL OPPORTUNITY EMPLOYMENT POLICY**

The appointment of two of the Applicant's black colleagues in the Department of Chemistry to permanent positions, in alleged disregard of the Applicant's indication of his wish similarly to be appointed, and notwithstanding that the Applicant is, it is alleged, as well, if not better, qualified than the other two, constitutes, the Applicant contends, the unfair application by the Respondent of its Equal Opportunity Employment Policy, pursuant to which his two black colleagues were appointed. One of them, moreover, Dr Chibale, is not a South African citizen and the Respondent's employment equity policy, it is submitted, is not applicable to non-South African citizens. That policy should apply only to previously disadvantaged South African citizens in accordance with the Constitution and the Labour Relations Act 1995. ("the Act")

13. In that context, it is argued, the Respondent's policy, *per se*, constitutes an unfair labour practice, as does its implementation and application. Alternatively, it is applied by the Respondent in an unfair and discriminatory manner in its application to a non-South African citizen who was appointed to a position which

the Applicant is qualified to occupy and which he in fact did occupy during the three-year period of his contractual appointment.

14. The Respondent's conduct in that regard, constitutes an automatically unfair dismissal as contemplated by Section 187(1)(f) of the Act; alternatively, it amounts to an unfair labour practice as contemplated by Item 2(1)(a) of Schedule 7 of the Act; alternatively, it amounts to unfair conduct in its failure to comply with the provisions of Section 189 of the Act.

15. **THE RESPONDENT'S CASE**

It did not dismiss the Applicant, the Respondent submits, but if it is found that it did indeed do so, then such dismissal was not automatically, or on any other substantive basis, unfair. It could, in the circumstances in which it occurred, have been only on the grounds of operational requirements and, if that is in fact found to have been the case, it is conceded by Mr H C Nieuwoudt, who appeared for the Respondent, that it was procedurally unfair.

16. **THE RESPONDENT'S REPLY**

To the extent to which the Applicant relies on the provisions of Section 186(b) of the Act for its contention that he was dismissed by the Respondent, he is required, the Respondent submits, to satisfy two elements of the definition of **dismissal** which it incorporates. In terms of the section -

"Dismissal" means that -

(b) an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it."

What must therefore be established is, in the first instance, a reasonable expectation of renewal and secondly that such renewal did not occur or was not on the same or similar terms.

17. It is common cause that the Applicant was employed as a Senior Lecturer, for a

period of three years at a specified salary with incremental provisions. The only expectation which, if indeed it could be established, he was entitled to hold would therefore have been one of renewal of the fixed-term contract on the same or similar terms and not one of permanent employment, a failure by the Respondent to satisfy which would accordingly not constitute dismissal as envisaged by Section 186(b).

Dierks v University of South Africa (1999) 20 ILJ 1227 AT 1247.

18. The reference in the initial advertisement to which the Applicant successfully responded was to an appointment for a fixed period of three years. The further reference therein to a possible extension of that fixed-term contract to five years did not, the Respondent says, in the face of pertinent advice to the Applicant to the contrary, justify a reasonable expectation on the part of the Applicant that the contract would be so extended.

19. With regard to the appointment of Dr Chibale to the permanent position of Lecturer in the Department of Chemistry, whilst that appointment was pursuant to the Respondent's Employment Equity Policy, it was also on merit. Dr Chibale, the Respondent contends, was better qualified for that particular post than was the Applicant. Dr Naidoo's permanent appointment as a Lecturer in the Department was four-square pursuant to the Employment Equity Policy, the terms and provisions of which do not qualify the Applicant for such appointment.

20. Neither Dr Chibale nor Dr Naidoo was appointed to the vacant post of Lecturer in the Chemistry Department for which the Applicant applied in September 1997. The Applicant however was not considered to be a suitable candidate for this appointment.

21. Finally and significantly, the Respondent contends, the Applicant's main area of activity, namely the setting up of a science advice unit, did not materially contribute to the mission of the Chemistry Department to contribute to the world-

class status of the Respondent and did not justify the application of the funds available to the Chemistry Department towards the funding of the Applicant's employment costs.

22. **WAS THE APPLICANT DISMISSED?**

Section 186(b) of the Act is explicitly narrow in its terms. An employee will be deemed to have been dismissed if an employer, in the face of a reasonable expectation on the part of the employee that it would do so, fails to ***renew*** (emphasis added) a fixed-term contract of employment on the same or similar terms, or offers to renew it on less favourable terms. In essence therefore, the section contemplates the renewal, which in my view would include the extension, of what will continue to subsist as a contract post for a fixed and limited period, upon terms broadly equating those initially applicable, where the prevailing circumstances justify the employee's expectation that this will occur.

23. The contract post to which the Applicant was appointed was unequivocally stated to be for an initial period of three years, which might possibly be extended for a further two years. Any possible hope or expectation on his part that the appointment might presage a permanent employment relationship with the University was to all intents and purposes expressly negated by its stated disclaimer "of any commitment to a permanent appointment on the University staff."

24. This notwithstanding, Mr P Janisch for the Applicant, submits that the employer's conduct contemplated by the section includes, by inference or import, not only a refusal to renew or extend the initial contract, but to make it permanent.

25. That issue was the subject of critical examination in a published article by Prof Marius Olivier.

"Legal constraints on the termination of fixed-term contracts of employment: An enquiry into recent developments": (1996) 17 ILJ 1001.

"What is required in order to activate the provisions of s186(b) is an expectation that the fixed-term contract in question would be renewed on the same or similar terms. It is evident that the Act does not require that or regulate the position where the expectation implies a permanent or indefinite relationship on an ongoing basis..... The reference to *renewal* on the *same* or *similar terms* supports that this is the inference to be drawn from the wording of the subsection. What s186(b) apparently envisages is that an employer should not be allowed not to continue with fixed-term employment in circumstances where an expectation of renewal is justified."

The remedy available to the employee if that occurs unfairly, Olivier says, is that of reinstatement or re-employment on the same or similar terms, but not appointment as a permanent employee or on an indefinite basis.

"This would consequently leave the possibility open that the employer could after the expiry of the period of the subsequent fixed-term contract terminate the services of the employee concerned, as long as the termination is not otherwise prohibited - such as where the employee had once again a reasonable expectation that the contract would be renewed."

26. The gravamen of s186(b) in the context of what an employee would be entitled, all other things being equal, reasonably to expect at the conclusion of the specified period of a fixed-term contract, was examined by this court in -

Dierks v University of South Africa (*supra*)

The issue for determination in that matter bore a basic similarity, insofar as the interpretation and applicability of s186(b) of the Act was concerned, to that in this case. The Applicant was employed by the University on successive fixed-term contracts, at the eventual conclusion of which he was not given a permanent post in the face of what the court determined was in fact a reasonable expectation on his part that this would be the case. Citing Olivier (***supra***) with apparent approval, the court (Oosthuizen AJ), noting that the concept of "reasonable expectation" as expressed in s186(b) has no statutory definition, characterised it as including, essentially,

"..... an equity criterion, ensuring relief to a party on the basis of fairness in circumstances where the strict principles of the law would not foresee a remedy."

Whether or not the employee's expectation was reasonable, the court commented, must be deduced on the basis that **"apart from subjective say-so or perception there is an objective basis for the creation of his**

expectation." This must needs be assessed on an analysis of the facts and relevant circumstances bearing upon it **(at page 1246).**

27. The Applicant's claims in **Dierks** were premised on a submission that s186(b) could not realistically be interpreted, notwithstanding its wording, as being limited to reasonable expectations of renewals of fixed-term contracts, with no expectation of permanent employment. That submission was examined by the court at page 1247.

"Prima facie, it does seem logical that if a reasonable expectation can lead to a renewal of a fixed-term contract, the same expectation should lead to appropriate relief for permanent employment by implication particularly if there is no provision in the Act to address the apparent lacuna."

There were however, said Oosthuizen AJ, **"other considerations which tend to support the respondent's reliance on the wording of s186(b)",** which made no provision for the situation where an employee has an expectation of permanent employment. The reason for that wording, in the court's view, **"is founded to a large extent on the patent unfairness of the indefinite renewals of fixed-term contracts"** and the further factor that Schedule 7(B) to the Act provides in Item 2 a remedy to an employee claiming permanent employment in the context of the residual unfair labour practices there defined.

28. An entitlement to permanent employment, the court concluded,

"..... cannot be based simply on the reasonable expectation of s186(b), i e an applicant cannot rely on an interpretation by implication or 'common sense'".

It would require a specific statutory provision to that effect, particularly against the background outlined above. It was held that the court "does not have the jurisdiction to decide the crisp issue insofar as it concerns the reasonable expectation of permanent employment."

29. The correctness of that decision was vigorously, albeit respectfully, challenged by

Mr Janisch. Citing with approval -

Wood v Nestle (SA) (Pty) Ltd: (1996) 17 ILJ 184 (IC)

and other authorities, he sought to extract therefrom what he referred to as a "common denominator", namely "the refusal to allow an employer to rely upon the effluxion of a fixed-term contract as a basis for parting company with an employee, whilst fairness would demand, in the circumstances, that the employee be treated as if he or she were employed on a longer-term or indefinite basis." In the context of the unfair labour practice jurisprudence and the objective of labour legislation in that regard, an employee should, he contended, be protected not only against the failure to renew, but also the failure to extend or make the contract permanent.

30. I have considerable difficulty with that submission. The wording of s186(b), incorporated in an Act which is acknowledged to have been the product of intensive consultation and debate directed, inter alia, towards the creation of a broad legislated employment equity environment, is unequivocal and unambiguous. It contemplates a reasonable expectation of renewal of *a fixed-term contract of employment* and if, as the Applicant contends, that concept must be broadened in the context of the application of equity principles, the question must be asked why the simple expedient of including a reference to expectation of permanent employment, was not followed.

31. It does not seem to me that that omission can be explained as an oversight. The sub-section is one expressly dealing with fixed-term, limited-period contracts. Nothing could be clearer and the suggestion that the reasonable expectation which it contemplates, can relate to anything other than the benefit for which it expressly provides, cannot, to my mind, be sustained.

32. On that specific aspect of this matter therefore, the Applicant could not legitimately, within the context of s186(b) of the Act, have formed a reasonable expectation of permanent employment and accordingly, if he was unfairly

dismissed, what must be established by him is that that dismissal was either automatic in terms of s187 of the Act, or was constituted by the Respondent's failure or refusal to renew (or extend) his fixed-term contract following expiration on 8 May 1998, when he reasonably expected it to do so.

33. Only two provisions of s187 can realistically have any possible application in this dispute. They are: **Sub-section (1)(f)**, which provides that a dismissal is automatically unfair if its reason is -
"(f) that the employer unfairly discriminated against an employee, directly or indirectly, 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;"
and sub-section 2(a) -
"(2) Despite sub-section (1)(f) - (a) A dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job."

34. The applicability of s187(1)(f), the Applicant submits, arises from the Respondent's unfair application of its Equal Opportunity Employment Policy, alternatively, as a consequence of direct or indirect discrimination by the Respondent against the Applicant on the grounds of race and gender. Significant in that regard, is the further alternative claim, introduced by way of amendment at the trial, that the Respondent's conduct constituted an alleged unfair labour practice in terms of Item 2(1) of Schedule 7 of the Act. That provision has the effect of constituting what would be an automatic dismissal in terms of s187, an unfair labour practice in terms of the schedule, assessed on virtually identical criteria.

35. The Applicant's allegations of automatic unfair dismissal, alternatively of an unfair labour practice by the Respondent, will therefore fall to be assessed on the same facts and circumstances. That assessment, moreover, will apply equally to the

Applicant's allegation of the Respondent's unfair failure or refusal to renew or extend his fixed-term contract essentially for the same discriminatory reasons.

36. The issue of unfair discrimination in the context of Item 2(1)(a), was addressed in the recently reported judgment of Landman J, in **Louw v Golden Arrow Bus Services (Pty) Ltd (2000) 21 ILJ 188 (LC).** The Applicant, **Louw,** contending that a white male employee, purportedly of equal status, was earning a monthly salary substantially in excess of that paid to him, instituted proceedings in the Labour Court claiming that the company was discriminating against him, and others in his position, on the basis of their race as contemplated by the definition of a residual unfair labour practice in Item 2(1)(a) of Schedule 7 to the Act.

37. It was held that neither *dolus* nor *culpa* need be proved to establish the existence of unfair discrimination and that the statute created "a form of strict liability", whether or not the conduct in question was "accompanied by intention, negligence and motive."

38. Citing the Constitutional Court decision in -
Harksen v Lane NO 1998 (1SA) 300 (CC) at 325A - D,
the Court referred to the initial question to be determined, namely whether the Act or omission constituted differentiation between people or categories of people.
"If the answer is positive, the court then embarks on a two-stage analysis:-

(i) Firstly does the differentiation amount to 'discrimination'? If it is on a specified ground, then the discrimination will have been established. If not on a specified ground then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation."

39. The question whether or not the Applicant was unfairly discriminated against in the context of that analysis, clearly necessitates a prior assessment of whether or not he held a reasonable expectation of the renewal or extension of his fixed-term contract, as opposed to one of permanent appointment. I am satisfied, on the *conspectus* of the evidence in that regard, that such an expectation on his part was both reasonable and justified. A number of factors bear on that conclusion.

40. The first is the wording of the advertisement to which the Applicant initially responded - one inviting applications for a contract post for three years with a possible extension to five years. It seems to me that the criteria governing that possible extension, in the absence of any wording to the contrary, might reasonably be inferred to be the standard of the incumbent's performance during the initial three-year period, the need for the rendition of his academic services for the extended period and the logistical ability of the institution to maintain the post in question.

41. The second factor is the wording of the Applicant's letter of appointment. The disclaimer, as I have stated, is one of "any commitment to a permanent appointment on the University staff." The appointment is stated to be "for the period specified" and that period is unconditionally stated to be three, and possibly five, years. The Applicant believed that he would continue in the employ of the University beyond the expiry date of his initial term, whether his continued service was to be in the form of an extended fixed-term contract or of a permanent appointment, an issue regarding which he acknowledges himself to

have been uncertain.

42. Such extension or renewal, the Applicant conceded however, could not "simply happen." Something, he said, "would have to be done, a process would have to be initiated by the Department in order to formalise that extension at least."

43. In the logistical context, he assumed that if the initial advertisement contemplated a possible five-year fixed-term appointment, sufficient funds would be committed for that purpose.

44. The Department's conduct towards him supported the existence of an expectation of extension or renewal of his initial appointment. His work, in the position held by him, was of the highest standard and acknowledged as such.

45. His colleague, Dr Naidoo, had held a similar expectation based, to all intents and purposes, on discussions which he had had with the previous Head of Department, Prof Bull, notwithstanding the Professor's denial, in the course of his evidence, that he had given any indication to justify an expectation that a contract appointment "had the characteristics of permanence."

46. He had been assimilated into the departmental and faculty structures in which he played an integral role.

47. Prof K R Koch, an Associate Professor in the Department of Chemistry, held the view that, if the incumbent in a contract post performed well, "there is the possibility of confirmation of that period of (extended) time, although, presumably, it was clearly understood that they are contract persons."

48. The issue of the possible conversion of the Applicant's contract lecturer post to one of permanence had at least been mooted by a body known as the "Advisory

Working Group", albeit not pursued.

49. In short, Mr Janisch submitted, processes were in place to consider the Applicant's claim to stay on after the three-year period. Finance was in principle available, he was a valued member of staff whose standard of performance had never been open to question, and in the result, other, extraneous reasons must have motivated the decision to terminate his employment upon the expiry of the initial three-year term. Those reasons, it was submitted, constituted unfair discrimination against the Applicant in the context of that concept as reviewed earlier in this judgment.

50. The evidence, Mr Janisch contended, clearly supports that contention. Three employees, the Applicant, Dr Chibale and Dr Naidoo were initially appointed on three-year fixed-term contracts. Each of them, at one time or another, conveyed to the Respondent their wish for greater certainty regarding their employment future at the University.

51. A recommendation was made in August 1997 for Dr Chibale to be interviewed for a permanent post without advertisement.

52. In the face of an objection to that process by Dr Naidoo and concerns in that regard on the part of the Applicant, the Respondent's Selection Committee resolved that all three should have an equal opportunity to apply for the post in question, which was accordingly advertised. This notwithstanding, the process to appoint Drs Chibale and Naidoo without advertisement was pursued and completed, the Applicant to all intents and purposes, being excluded therefrom.

53. The only reason to be deduced from the differential treatment of Drs Naidoo and Chibale on the one hand and of the Applicant on the other, it was submitted, was accordingly a racial one, the others having been appointed because they were black and the Applicant having been excluded because he was not. Indeed, the

Applicant contends, the Respondent concedes on the pleadings that Drs Chibale and Naidoo were appointed "pursuant to" the Respondent's Employment Equity Policy, whereas the Applicant did not qualify for such an appointment. The Respondent's submission that Dr Chibale's appointment was one on merit is incidental to the issue in the face of its acknowledgment that it was also an Employment Equity decision and irrespective of his academic capabilities, his race was the defining criterion.

54. Dr Naidoo's final appointment to the University's permanent staff without advertisement was conceded by the Respondent to have been similarly motivated, and vis-a-vis the Applicant therefore, the tests defined in Harksen & Lane NO (*supra*), to establish a presumption of unfair discrimination, are satisfied.

55. **THE RESPONDENT'S REPLY ON THE ISSUE OF DISCRIMINATION**

There was no vacancy, the Respondent states, for a Senior Lecturer following the expiration of the Applicant's initial three-year term of contract employment. The reason for the Applicant's failure to be appointed to the more junior position of Lecturer for which he applied in September 1997 was unrelated to any aspect of or factor in the appointments of Drs Chibale and Naidoo to the permanent staff. He simply did not qualify for that appointment in the context that he had not made himself indispensable to the Department. The Faculty Selection Committee in considering the Applicant's qualifications for appointment to that position, considered him unsuitable for reasons entirely unrelated to his race or gender. Finally, if this Court were to find that discriminatory factors were applied in the respective treatment of Drs Chibale and Naidoo on the one hand and of the Applicant on the other, that discrimination, in the context of the University's Equal Opportunity Policy, was not unfair.

56. I am left in little doubt, in the circumstances prevailing at the time, that the Applicant's treatment, with its adverse consequences, was significantly different from that to which his two black colleagues were subjected and I turn now to the

question of whether that discrimination was unfair, either in the context of the allegation of automatically unfair dismissal in terms of s187 of the Act or of an unfair labour practice as defined in Item 2(1)(a) of Schedule 7.

57. The Respondent is committed, it submits, to policies of equal opportunity and affirmative action which are essential to its mission of promoting critical enquiry and scholarship. Inherent in, and not independent of that policy is the need to appoint the best persons available to the positions concerned, persons who, "over a period of time and in the context of their particular posts, will make the greatest contribution to the work and the reputation of the University." Merit, as a factor in that assessment, is not independent of the context and, as stated in the Policy, acknowledging the importance of role-modelling in a changing student body, the University "will seek to appoint as many South Africans as possible to its academic and administrative staff." In the context however of its further commitment to "help overcome imbalances created by this country's legacy of discriminatory practices," the University "will make conscious efforts to equalise the access which women and black persons have to posts on its staff establishments, such access to be based on merit."

58. **THE APPLICANT'S SUBMISSIONS ON THE ISSUE OF UNFAIR DISCRIMINATION**

The Applicant alleges or infers that the appointment of Drs Chibale and Naidoo to permanent positions when he was not so appointed, constitutes unfair discrimination against him. This contention cannot be sustained to support an allegation of automatically unfair dismissal where no reasonable expectation of such permanent appointment existed and if, as I have found to be the case, the Applicant could not legitimately have held such an expectation, what happened to his colleagues is of no relevance to this issue. A finding of automatically unfair dismissal can only be based therefore on the Respondent's failure, in the face of what I have found to be the Applicant's reasonable expectation that it would do

so, to renew or extend his fixed-term contract for one or more of the reasons defined in s187(1)(f) of the Act. The reason in his case, the Applicant contends, was his race. Discrimination against him on the basis of his race however, can only be established where other persons of a different race are differently treated in comparison. It is not disputed by the Applicant that the positions to which each of Drs Naidoo and Chibale were respectively appointed, were not the lectureship position advertised by the Respondent in August 1997 and unsuccessfully applied for by the Applicant in September of that year. It is however apparent from the Selection Committee minute of the meeting at which applications for that position were considered, that none of the criteria detailed in s187 in any way influenced the decision of the Committee that the Applicant was not appointable to the position in question.

59. In the context that the fixed-term contracts of neither Dr Chibale nor Dr Naidoo were renewed or extended but that, whether or not they were entitled to hold reasonable expectations of permanent appointment (which, had it been relevant, I would similarly have held not to have been the case), they were so appointed, there exists once again no basis to justify a finding by this Court that the Respondent's failure to renew or extend the Applicant's contract constituted unfair discrimination on any of the grounds defined in s187(1)(f) or an unfair labour practice involving unfair discrimination as set out in Item 2(1)(a) of Schedule 7 to the Act.

60. Whilst the Respondent's Equal Opportunity Employment Policy may to a greater or lesser degree have been a factor in the appointment of Drs Naidoo and Chibale therefore, it was not, in my view, a factor in the non-appointment of the Applicant to a permanent position nor in the failure of the Respondent to renew or extend his fixed-term contract.

61. Notwithstanding Dr Chibale's chagrin at the suggestion that this was in fact the case, the application by the Respondent of its Equal Opportunity Employment

Policy as a factor in his permanent appointment and that of Dr Naidoo, is acknowledged by the Respondent. In the context of its stated principles and objectives, that Policy, the Respondent contends, is not applicable to the Applicant and the manner and circumstances of its application in the appointments of his two black colleagues, did not, the Respondent submits, constitute unfair discrimination against the Applicant, whether direct or indirect. Whilst their race was admittedly a factor in the permanent appointments of Drs Chibale and Naidoo, the fact that the Applicant is white, and would not in those circumstances "qualify" for special consideration in terms of the Policy, played no part in the decision not to extend his contract or appoint him permanently.

62. The concept of reasonable expectation is of course unrelated to any determination of unfair labour practice as defined in Item 2(1)(a) of Schedule 7 to the Act and the question which remains for determination in that context is whether, as alleged by the Applicant in his amended Statement of Claim and as defined for decision in the minute of their pre-trial conference tabled by the parties, the Respondent's conduct in its selective application of the Policy amounted to an unfair labour practice as contemplated in the Schedule.

63. Mr Janisch. in developing this argument, embarked upon an exhaustive dissection of the Respondent's Equity Policy, emphasising the contention that the discrimination provided for in Item 2(2)(b) of Schedule 7 to the Act, namely that constituted by -

".....policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination ....."

will be unfair if the affirmative action which implements it is applied "randomly, arbitrarily, haphazardly and on an *ad hoc* basis. A degree of certainty, objectivity and transparency, he submitted, must exist to justify discrimination on that basis. The manner in which the Policy was applied in the appointments of Drs Naidoo and Chibale, a process in the course of which prescribed requirements and

recognised procedures were either by-passed or disregarded, did not meet those criteria.

64. The Policy, in its preamble, is unequivocal in its main purpose which is expressed as -

"..... a commitment to help overcome imbalances created by this country's legacy of discriminatory practices, and (to) make conscious efforts to equalise the access which women and black persons have to posts on its staff establishments, such access to be based on merit."

65. Appointments in that context, will be, in every case, of the person "who can be expected to make the greatest contribution to the work and reputation of the University" and in essence, selections of persons to be appointed on merit to academic and administrative posts will be made with careful consideration of "the implications of an Equal Opportunity Employment Policy."

66. I am left in no doubt, from the evidence and documentation presented in this matter that, irrespective of their race, neither Dr Naidoo nor Dr Chibale would have been appointed to the permanent positions which they now occupy, had they not been considered academically competent, qualified and suitable to fill them. I am not persuaded, on the basis of that evidence, that the Applicant was better qualified than either of them. On the contrary, the minutes of the various meetings of the Selection Committee and other relevant groups involved in the process, clearly indicate that his qualifications in that context were responsibly weighed and found wanting.

67. As far as the Respondent was concerned therefore, the basic requirements and objectives of the Policy, as it interpreted them, were therefore satisfied in both material respects. Two persons were appointed who, historically, would in the Respondent's perception, have been disqualified by the "country's legacy of discriminatory practices" and who, objectively, were moreover considered to be

"the best persons for the job." Those appointments, and the application of the Policy in terms of which they were made, cannot therefore be said to have been made randomly, arbitrarily, or haphazardly, as the Applicant infers and I can find no basis in fact or in law to support the contention that they constituted unfair discrimination against him in the context of the statutory provision upon which he relies in that regard.

68. The Applicant makes two further submissions. In the first instance, he contends, Dr Chibale is a non-South African and the application by the Respondent of its Equal Opportunity Employment Policy to persons who are not South African citizens is unfair. The unfair labour practice directly affecting him in that context, he submits, is constituted by the appointment by the Respondent of a non-South African citizen to a position which the Applicant is qualified to occupy and had occupied during the subsistence of his fixed-term contract.

69. This argument is premised on the submission that the Policy, by its own definition, should apply only to previously disadvantaged South African citizens as so characterised by the Constitution and the Act. The "legacy of discriminatory practices" which it is designed to address are those of "this country" and the Policy is directed towards the development of the careers of blacks and women and "the pool of available South African talent." The imbalances which it seeks to address are, the Applicant states, South African imbalances and the concept of affirmative action envisaged by the Constitution and the Act is one developed against the background of South Africa's discriminatory history. The only persons to whom it should legitimately and fairly be directed therefore, are persons previously and directly disadvantaged by unfair discrimination in the South African context. Such persons will constitute the group of "target beneficiaries" to whom the concept is directed and if it is to be fairly applied and implemented, will be confined to South African blacks and South African women. Nationality is therefore an essential and legitimate limiting criterion.

70. I have been unable, as appears to have been the case with Counsel, to find any

authority or pronouncement on this issue in South African employment law jurisprudence. The contention however would seem, to my mind, to have merit. The "legitimate beneficiaries of affirmative action are ..... those who have been disadvantaged by measures which impair their fundamental human dignity or adversely affect them in a comparably serious way."

Kentridge J in Chaskalson (ed): Constitutional Law of South Africa at 14 - 38.

71. Whilst there is case authority to the effect that, in labour-related cases, such beneficiaries must be able to show that they had been actually disadvantaged, academic opinion is that the term "disadvantaged" must not be so narrowly interpreted as to require that each potential beneficiary must show that he or she was actually disadvantaged. What is necessary however, is that they should be members of groups that "have been disadvantaged by general societal discrimination, whether direct or indirect."

Kentridge (*supra*): 14 to 39.

72. There is no basis upon which Dr Chibale can qualify as a member of such a group or, in that context, upon which, directly or indirectly he can be deemed, actually or potentially, to have been disadvantaged by general societal discrimination. He cannot therefore in my opinion, legitimately be said to fall within the category of persons to whom the Policy in question is directed and in that context, the affirmative action which the Policy embraces is inapplicable to him. The fact that, in that context the University incorrectly, but patently in good faith, so applied it, cannot in my view, constitute what is in all respects a commendable statement of principle and intent, **per se** an unfair labour practice as the Applicant contends. Indeed, no submissions of material relevance were directed to me to support that contention.

73. The unfair discrimination of which the Applicant complains in that regard however, is constituted by the appointment of a non-South African citizen to a

position which he, the Applicant, is qualified to occupy. The only inference validly to be drawn from that submission is that if Dr Chibale had not been so appointed for the reason that he is not a South African citizen and was therefore not entitled to benefit in terms of the Policy, the Applicant, a South African citizen and allegedly qualified in every other respect, would have been so appointed. That assumption is however without foundation. Whilst the Respondent, clearly perceiving it legitimate to do so, makes reference to the Policy as a factor in Dr Chibale's appointment, it was clearly not the overriding consideration motivating it. I have already made reference to Dr Chibale's angry repudiation of that suggested criterion and there can be little doubt that both in his own perception and that of the Selection Committee, he was the person who, in the words of the Policy, could be expected to make the greatest contribution to the work and reputation of the University in the position to which he was appointed.

74. For these reasons, I find that the allegation by the Applicant of unfair discrimination against him in this specific context is unfounded.

75. The Respondent's contention that the Applicant was not dismissed cannot, as I have indicated, be sustained in the light of my finding that the Applicant had a reasonable expectation of the renewal or extension of his fixed-term contract as opposed to any expectation of permanent appointment. As a final alternative to his earlier alternative claims of automatically unfair dismissal or unfair labour practice as a consequence of direct or indirect racial discrimination, the Applicant pleads that his employment was terminated for operational reasons with regard to which the Respondent failed to follow due prescribed procedures. Significantly, in that regard, the Applicant does not allege that his dismissal in those circumstances was substantively unfair.

76. In his closing submissions to me, Mr Nieuwoudt submits that if the finding of this Court is that the Applicant was in fact dismissed, that dismissal can only have been on the grounds of operational requirements and the Respondent concedes,

he stated, that if that is indeed found to have been the case, the dismissal was procedurally unfair for the reasons alleged by the Applicant.

77. It does not seem to me that this aspect of the matter needs, in these circumstances, to be taken further. I have, for the reasons which I have stated, concluded that the Applicant was in fact dismissed. In the absence, as I have found to be the case, of any material aspect of the unfairness alleged by the Applicant to have primarily characterised that dismissal, the Applicant submits, and the Respondent acknowledges, that it can only have been on operational grounds. Its substantive justification in that regard is not challenged by the Applicant and the Respondent's failure to follow due procedure is conceded by the Respondent.

78. The Applicant's entitlement to compensation in these circumstances was comprehensively examined and reviewed by the Labour Appeal Court in -

Johnson & Johnson (Pty) Ltd v CWIU (1999) 20 ILJ 89.

Dealing with the provisions of s193 and s194 of the Act, the Court, at page 99, said this:

"If a dismissal is found to be unfair solely for want of compliance with the proper procedure the Labour Court, or an arbitrator appointed under the LRA, thus has a discretion whether to award compensation or not. If compensation is awarded it must be in accordance with the formula set out in s194(1); nothing more, nothing less. The discretion *not* to award compensation in particular cases must, of course, be exercised judicially."

The judgment, at page 100, continues:

"The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right, and is punitive to the extent that an employer (who breached that right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another..... The nature of an employee's right to compensation under s194(1) also implies that the discretion *not* to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of s194(1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee."

79. In -

Whall v Brandadd Marketing (Pty) Ltd (1999) 20 ILJ 1314 (LC) at 1323
Grogan AJ commenting on that *dictum* said the following:

"I do not understand the Labour Appeal Court to have intended to suggest that the two examples it provides of cases in which compensation may be refused are exhaustive. To refuse compensation on the ground, for example, that the employee immediately obtained alternative employment at a salary higher than he was previously earning would, in my view, be consistent with the examples provided by Froneman DJP."

80. I am respectfully unable to agree with that view which appears to me to be in direct contradiction of the Labour Appeal Court's determination that patrimonial or actual loss is not a factor to be taken into account in the exercise of the Court's discretion whether or not to award compensation where a fair procedure has not been followed. Whilst, as Grogan AJ states, the examples given in **Johnson** may not be exhaustive, the example which he himself propounds as being consistent with the circumstances contemplated by the Labour Appeal Court, is in fact one based on the absence of patrimonial loss and is in fact expressly excluded from the criteria which the Court, in the exercise of its discretion, may validly take into account.

81. The Respondent's contention, which the Applicant acknowledges, that he did not suffer patrimonial loss is therefore irrelevant as is, in my opinion, the further submission that the Respondent acted at all times in a *bona fide* manner. The absence of *mala fides* on the part of an employer who disregards fair and prescribed procedures will not absolve him from the compensatory consequences of his conduct.

82. There is a plethora of authority to the effect that the limitation to the equivalent of 12 months remuneration prescribed in s194(2), relating to substantively unfair

dismissal, is equally applicable to that which will be payable in terms of s194(1), where the period between the date of the employee's dismissal and the last day of the hearing of the arbitration or adjudication, exceeds that period. That is the position in this matter and the compensation to which I hold that the Applicant is entitled must therefore be calculated on that basis.

83. The issue of costs in this matter must, in my view, have appropriate regard to the extent to which the Applicant has succeeded in his claims. His primary contentions in that regard related to an allegation of unfair dismissal and unfair labour practice. It was the development of those contentions and the Respondent's challenge thereto which absorbed by far the greater portion of the evidence and argument presented in the course of this trial. The issue of operational necessity, substantively uncontested in the end result, was dealt with in a relatively minor context.

84. For that reason, it does not seem to me to be equitable that the Respondent be required to bear any portion of the Applicant's costs and I accordingly make the following order:

84.1. The dismissal of the Applicant was unfair for want of compliance with a fair procedure.

The Respondent is to pay to the Applicant within fourteen (14) days of the date of this judgment, compensation equivalent to 12 months remuneration calculated at the Applicant's rate of remuneration on the date of the termination of his employment.

There is no order as to costs.

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B M JAMMY
ACTING JUDGE OF THE LABOUR COURT

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