



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: C1001/18

In the matter between:

SOLIDARITY OBO AP ERASMUS
and
ESKOM HOLDINGS SOC LTD

Applicant

Respondent

Heard: 17 – 20 October 2023; Heads of argument delivered by 8 January 2024 and transcript of the proceedings made available to the Court on 26 January 2024 whereupon judgment was reserved.

Delivered: By means of email on the 24 May 2024; deemed received at 10.00hr on the 27 May 2024.

JUDGMENT

RABKIN-NAICKER J

[1] In this referral, Solidarity on behalf of its member (Erasmus) seeks¹ the following order:

¹ In clause 97 of the Statement of Claim

- “1.1 that the Respondent unfairly discriminated against the Applicant on the grounds of race;
- 1.2 that the decision not to appoint the Applicant amounted to an absolute barrier and therefor constituted a quota system;
- 1.3 that the Applicant be promoted to the position, vacant position, or similar position to that which he applied for and be compensated the amount of the difference in salary and benefits from 01 November 2017 up and until now, as if he was appointed;
- 1.4 that the respondent compensate the Applicant in the maximum amount which the Court deems just and equitable;
- 1.5 directing the Respondent to take steps, to prevent same unfair discrimination, or a similar practice occurring in the future in respect of other employees (i.e. to deliberately exclude candidates from the shortlisting process based on considerations of race),
- 1.6 alternatively, granting relief that the Court deems equitable in the circumstances;
- 1.7 for costs of suit.”

[2] In the pre-trial minute signed by the parties, the following facts were agreed as common cause:

“3. The common cause facts between the parties are those facts that have been admitted in the Respondents’ Statement of Defence. These admitted facts are:

- 3.1. The Applicant has been employed by Eskom since 01 August 1988.
- 3.2. He was appointed as a Project Manager on “Managerial level M15” by Eskom Enterprises in September 2004 (Transmission Telecommunication Division).
- 3.3. The Applicant was transferred to his current position of Senior Advisor Outage Coordinator on or about 1 January 2017.

- 3.4. Eskom is a designated employer in terms of the Employment Equity Act 55 of 1997 (“**the EEA**”) and is required to prepare and implement an employment equity plan that will achieve reasonable progress towards employment equity in the workplace.
- 3.5. On 1 April 2017, Eskom implemented employment equity plans for each of its divisions including its Group Technology Division. These plans were for a 3 (three) year period. The Plan for its Group Technology Division commenced from 1 April 2017 and will run until 31 March 2020 (“**the EE Plan**”).
- 3.6. The EE Plan seeks to achieve reasonable progress towards employment equity within Eskom’s Technology Division. To achieve this, the EE Plan includes affirmative action measures consistent with the purpose of the EEA. A key objective of the EE Plan is continuing to apply affirmative action measures to progressively eliminate barriers to employment equity within the timeframes that the EE Plan covers.
- 3.7. On 3 April 2017, a Staff Requisition Form (“**GA13**”) was completed by Sabastian Pasquallie, a Middle Manager: Site Outage. The GA13 was initiated, authorised and supported by Hennie Van Staden (“**Mr Van Staden**”), Senior Manager: Outage Support and Execution (Peaking) for the recruitment of a Manager: Site Outage Execution at Peaking Power Station for the Group Technology Division (“**the Post**”). Mr Van Staden was, in terms of the GA13, authorised to sign a letter of appointment offered to the successful candidate.
- 3.8. The individual appointed to the Post was required to manage the Outage Execution section to meet Eskom’s business objectives in that section. The Post was graded on Eskom’s M16 Grade.
- 3.9. A suitable candidate was to be appointed to the Post.
- 3.10. In terms of the GA13 completed by Mr Pasquallie and authorised by Mr Van Staden, a white male was to be appointed to the position. The Employment Equity Assigned Manager, Cynthia

Khumalo (“**Ms Khumalo**”) indicated on the form that African males or females of all races should be preferred for the Post. The GA13 was approved in line with the conditions imposed by Ms Khumalo.

- 3.11. During July 2017, the Post was advertised internally. In terms of the advertisement, the individual to be appointed to the Post had to have the following minimum requirements:

“Qualification(s):

B Tech (Mechanical/ Electrical/ Project Management/Technical) or National Higher Diploma (Mechanical/ Electrical/ Project Management/ Technical)

Experience

5 years minimum related experience in either Outage/ Maintenance or Project Management”

- 3.12. The advertisement also provided that:

“If you have not been contacted within 28 days after the closing date of this advertisement, please accept that your application was unsuccessful.

Eskom is committed to equality, employment equity and diversity. In accordance with the employment equity plan of Eskom and its employment equity goals and targets, preference may be given, but is not limited, to candidates from under-represented designated groups. Eskom reserves the right not to make an appointment to the posts as advertised. Candidates with disabilities are encouraged to apply for positions”.

- 3.13. A number of employees, including the Applicant, applied for the Post. Eskom then followed its recruitment process to appoint a suitable candidate.

- 3.14. Candidates who met the minimum requirements were shortlisted and interviews were conducted.

- 3.15. Mr Van Staden wanted to appoint the Applicant to the Post. However, the Applicant was not appointed because it was preferred that the person appointed to the Post was an African male or female of any race.
- 3.16. The Applicant sent an email to his Senior Manager, Mr Van Staden in which he raised several issues regarding his not being appointed to the Post.
- 3.17. In Mr Van Staden's view:
- 3.17.1. the Applicant was the preferred candidate and was nominated by him for the Post; and
 - 3.17.2. The appointment of the Applicant would not have influenced Equity KPI's and subsequently would not have impacted numerical targets set out in the Respondent's EE Plan
- 3.18. On or about February 2018 the Applicant lodged a formal grievance. The Respondent indicated that no suitable candidates from designated groups could be identified for the Post.
- 3.19. The Applicant requested information in terms of Section 18(1) of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**"), the Respondent did not comply with the request.
- 3.20. On 12 July 2018, Solidarity filed a 7.11 referral to the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**") on behalf of the Applicant.
- 3.21. On 6 August 2018, the Commissioner of the CCMA after concluding the conciliation proceedings issued a certificate of outcome indicating that the matter remained unresolved."

Evidence at trial

- [3] The first witness for the respondent was Valerie Eileen Dibela (Dibela). She testified that she is currently employed at Eskom Transmission, a division of Eskom, as an HR Business partner. In April 2020 she worked in Recruitment in Shared Services which did administration for the various divisions. She was concerned with recruitment and was involved in the recruitment process in which Erasmus was involved.
- [4] Dibela clarified that they advertised for internal candidates for the position. She confirmed that the GA13 document is the start of the paperwork for the recruitment process. The GA13 document would be completed to request the service of procuring a person for a particular department. The recruiting manager, in conjunction with the HR business partner completes the GA13 and then signs it to say they are in agreement. The post in question was for internal advertising according to the GA13. She was asked to explain the form and clarified that the form reflected that the position had just been created in the department and they were not replacing anyone who had left. As to the question on the form 'Was internal pipeline considered' the answer on it was 'yes'.
- [5] Dibela explained that recruitment is not the only option to fill positions in Eskom. They also use 'talent boards' to find candidates. The GA13 indicated that they did not find a person from this method. She stated that she was not involved in the filling of the form but was involved after the GA13 was completed, and the advert approved. She was then responsible for advertising it and running the process.
- [6] Dibela confirmed that the box on the form marked 'employment equity' was filled in by the late Dr Cynthia Khumalo who was the Employment Equity Manager at the time. The form was filled in by Mr van Staden. and he had marked the requisite boxes of the form indicating that a white male was required. He also indicated in an additional comment section of the form "internal promotion from G15 will not have any effect on employment equity." Dr Khumalo had handwritten the following on the form "preferably MALE-AFRICAN; FEMALE ALL RACES".

[7] Dibela was questioned about the content of the advertisement. She said she had not drafted it but there was nothing untoward in its contents. It stated that candidates should apply by clicking the link below. She explained that Eskom job applications are done online. Potential applicants would create a profile on the system by putting their name, surname, gender, and nationality. She confirmed that the advert stated that: "Eskom is committed to equality, employment equity and diversity in accordance with the employment equity policy of Eskom and its employment equity goals and targets. Preference may be given but is not limited to candidates from under-represented designated groups". She further confirmed that it stated that: "Eskom reserves the right not to make an appointment to the post as advertised." She was asked what she understood by the equity declaration. She stated that:

"Our positions are such that in certain areas you would have certain nationalities under-represented. I don't want to get into trouble but as an example if you are in Durban then you would have the Indian community over-represented in the space, if you come to us in the location would have the black over-represented so when we talk about under-represented we're talking about other designations that must come up also to make it on par."

[8] She explained that on the closing date of an advertisement the Recruitment department downloads a spreadsheet. From that they refer to the GA13 to confirm what the employment equity requirements for the post are. Then she stated that based on those requirements a preliminary short list is drawn up. This short list is then sent to the line manager telling him or her that these are the people who qualify for the position. The line manager is asked to prepare the final short list. Once the final short list comes back from the manager, CVs are requested from the candidates and their qualifications are confirmed on the basis of these. She testified that for a managerial position they usually interview the first three recommended candidates and after interviews, the first two are taken for

psychometric assessment. When that assessment comes back verification of qualifications is done, and fingerprints are checked for a criminal record. After this the file is finalised and the offer letter is sent to the line manager for signature.

- [9] Dibela testified that given Dr Khumalo's comments on the GA13: "We would have African males and females of all races." She confirmed that they would not have included white males for this post. Asked how Erasmus was shortlisted she testified with reference to the download that Erasmus had described himself as "African". She stated that she did not know any of the about 100 applicants and relied on the posted profiles on the portal. If Erasmus had marked that he was a white male, he would not have been shortlisted she said. Asked whether this was an absolute barrier to white males getting into higher positions, she had the following answer:

"No it's not. Because in terms of the shareholder's scorecard as I indicated before, we have EE requirements and EE plans. Where we are over-represented we don't shortlist but if you look at what Dr Cynthia said, she said preferably African. Meaning if we went through a round and we couldn't find a suitable African male and there were no females of any races then, we could go to the second round and re-advertise and then request an EE exemption to say, we could not find the candidate we were looking for. Let's look at all the people who applied for the position, so we don't have an absolute barrier in all the positions that we advertise."

- [10] Dibela testified that the interviews were held in Cape Town and an HR colleague stood in for her. She confirmed there were two recommended candidates. One of them was Erasmus and the other an African male. After the verification process was finalised regarding qualifications, (the MIE process), Dibela said the form came back stating that Erasmus is white and she then requested Mr Van Staden to ask Dr Khumalo for an exemption and make a motivation for that. He replied by saying that: "Hi Valerie, the GA 13 that we signed specifically indicated that we might

appoint Male White. Please get the signed GA13 from Nkensani.” She said that she understood that it was clear that he had a candidate in mind who he wanted to appoint. There was nothing amiss with that and all he had to do was motivate for an exemption she stated.

- [11] Dibela was referred to an email written to her by Van Staden after her query about EE exemption in which he wrote: “Hi Valerie, you will notice on the GA13 was approved with the possible appointment of a white male because this is all we can get at this point. The complete and fair recruitment process was followed and this person was the only recommended candidate”. Dibela testified that she did not agree that Erasmus was the only recommended candidate as two were recommended to go to the next process.
- [12] Dibela explained that she was taking leave at the point of this email exchange and told Van Staden that he should now deal with HR Partner, Nkensani Leuw. She was referred to an email addressed to herself and one Dumisani Mdlala and copied in were Van Staden and Dr Khumalo among others. It was dated 3 October 2017 and sent by Nkensani Leuw. It read: “Hi Valerie, the aim to create pipeline for Senior management, we are currently not reaching the targets in terms of race and gender as per our shareholder compact therefore we cannot appoint a white male.”
- [13] She was asked what she understood by the above and she stated that it meant that they cannot appoint a white male based on their pipelining on the senior management profile of the position. She explained the concept of a pipeline as follows:

“When positions get to supervisory and managerial status you look at your scorecard that is where I was saying to you, you have where we have under-represented and over-represented racial groups. Now in terms of pipelining you are saying, in order to get a balance at the top, how do we start building up to that. So the pipelining would be to promote the African males in this instance or to promote females of all races, so that they get

to the score and reached the compact, the shareholders compact in terms of what is required.”

- [14] She stated that at that time senior management in Group Technology comprised of white males. She was referred to an email from Van Staden in reply to that of Leuw’s in which he stated: “I’m sorry but that is not Nkensani’s decision.” Asked whose decision it was, Dibela stated that it was Dr Khumalo who was the decision maker. Dibela clarified that Mr Dumisani Mdlala (Mdlala) was HR manager for Group Technology at the time. His comment on Nkensani’s Leuw’s email was copied to Dibela and he had commented as follows: “Hi all, there is no way we will deviate from the targeted direction. HR will not support that.” Dibela stated that she understood this email to mean that Van Staden should now do a motivation; and it would go to Dr Khumalo without HR support.
- [15] Dibela stated that Van Staden did not motivate for an exemption and the post was not filled. Questioned about the content of the interview report for the position in question Dibela confirmed that the consensus scored for one Mr Mjongi Mdeka (Mdeka) who was recommended was 44/60 and that of Erasmus was 46.5/60.

Cross-examination

- [16] It was put to Dibela that the decision not to appoint Erasmus had nothing to do with him saying on the application that he is an African. It had to do with the fact that the employer said we cannot appoint you because you are a white man. Dibela agreed. It was further put to her that the Statement of Response did not plead that Erasmus had incorrectly referred to himself as an African. She said she did not know the answer to this. She confirmed her evidence in chief that only specific race and gender groups as identified in the GA13 are shortlisted. She agreed that if Erasmus had identified himself as a white male he would not have been shortlisted “in that round”.

- [17] It was put to Dibela that white males were totally excluded when they were over-represented. She said “excluded but not totally.” She stated that there might be a second round of advertisements if from the selection criteria no suitable candidate is found which is the norm or as she had suggested to Van Staden, put a motivation to the EE Manager “to say a whole number of reasons. This is a critical position that I need like urgently and we are not finding a suitable candidate. Can we look at appointing from this group that we have not here. That is also a process that we do. Hence I was saying to Mr Van Staden send a motivation to Dr Cynthia for that.”
- [18] It was put to Dibela that the nowhere in the Recruitment and Selection policy manual is provision made for the exclusion of any over-represented race group, in a shortlisting process. She replied: “Not in so many words, sir. It says to you, the recruiting manager in conjunction with the EE Manager. So whatever position they do in the recruiting that should have put their scorecards out there and looked at candidates in line with EE”. She conceded that the policy did not contain a provision dealing with deviations for over-represented candidates. She stated that in practice it is done.
- [19] Dibela conceded that if a white male applies for a post and a designated candidate is found, the white male is denied the opportunity to contest that position together with the individual from the designated group. On the question of the content of the GA13, Dibela insisted that Dr Khumalo was the ultimate decision-maker in terms of EE requirements: “As a requester you put in your wish list and she would then look at the scorecard and then say, no not in this instance you can’t employ X-race or Y-gender. Whatever the line manager and the HR business partner had done, they need to go to Ms Khumalo to rubber stamp to say, yes you can go ahead in this fashion Becauseif you look at the GA13,...the signatures Ms Khumalo’s one would come at the end when these people have done their wish list.”

[20] She conceded that the GA13 was filled in by Mr Pasquallie and Ms Leuw. But insisted that before it went to Dr Khumalo it was signed by Van Staden. She would not agree to the proposition that Ms Leuw, being the responsible HR business person in terms of the Recruitment and Selection policy, agreed with the gender and race appointments in respect of male and white.

[21] Dibela was referred to an email exchange between Van Staden and Mr Marcus Nemadodsi (Nemadodsi), the acting GM of technology. Van Staden had headed his email 'motivation for a promotion appointment' and asked for any feedback on the issue. The reply from Nemadodsi was as follows:

"Hi Hennie,

You are absolutely spot on, this appointment will not impact EE any further than they already are.

In trying to query with few stakeholders on this matter, I learnt that Technology has the worst EE numbers in the organization. With that background, opportunities like this cannot be missed. While we may not change the picture overnight, we should feel we are doing enough from our different sections to improve on them.

In that, I cannot support this appointment. Please go out again and I have cleared this with HR, they will allow another round which will be trying address this unfavourable EE position.

Good luck."

[22] It was put to Dibela a number of times that Erasmus was the recommended candidate as inter alia reflected in the above email. It was put to her specifically that Mjongi Mdeka was not recommended because he was not found suitable. Dibela insisted this was incorrect and stated that her assumption was that Van Staden would not have considered any other person because even on the GA13 he said he was promoting a G15 to an M16. She stated that it was already clear from that that this "was a given position."

Evidence of Mr Dumisani Mdladla (Mdladla)

[23] The second witness for the respondent, Mdladla, testified that he is currently HR Operations Manager in Generation. In 2014 he started as the HR Operations Manager for the Technology Division. When it was combined with the Generation Division in 2016, he got his current title. He confirmed that he was very involved in the recruitment and filling of positions in Technology as his department gave support to the recruitment manager. Then at the approval stage, he got involved to ensure that all the paperwork required for the recruitment was finalised. He stated that Nkensani Leuw was one of his senior advisors providing support to line managers and reported to him. She was stationed at head office in Johannesburg,

[24] Mdladla confirmed that the Recruitment and Selection Policy document signed in July 2015 applied at the start of the recruitment process in which Erasmus was an applicant. He testified that having considered all selection criteria for a post, equity plan requirements of the division and of Eskom had to be considered. He testified that on the GA13 the block headed “employment equity” had to be filled in by the Equity Manager for Eskom when the post was a managerial, one like the one in question. His role was to check and verify the GA13. He confirmed that Dr Khumalo had filled in the wording “preferably male African, female all races”. Referred to the typed portion of the form and the phrase “internal promotion from G15 – will not have any effect on EE” he was asked if he knew who typed that and stated:

“ ...I do not want to think that was completed by Dr. Khumalo because it contradicts her handwriting but explaining that typed phrase there it cannot be correct that it will have no impact when you appoint, you promoting to that one. It depends who you are promoting. If you were gonna promote a race group that is not going to assist the business in creating a pipeline for the next level, it was gonna be having an impact.”

- [25] Mdladla testified that the person doing the preliminary shortlisting should have concentrated on African males and females of all races. If the process ran without white males and no successful appointment was made, he stated that the manager had two options. One was to motivate to the powers that be to request a relook at shortlisting and add other race groups who might have been included without starting the process afresh. The second would be to go to round 2 of the recruitment whereby the requirements in terms of employment equity are being relaxed to include other races that were initially excluded. He stated that while option one was not mentioned in the recruitment policy, it had been a practice at Eskom for a long time.
- [26] Mdladla was referred to a document headed 'Talent Discovery Procedure' with an effective date of 10th August 2017. He explained that this was the revised version of the Recruitment and Selection Procedure Policy. It was explicit in setting out the role of the Employment Equity Manager in all managerial appointments, whereas the former policy did not spell that out, although the practice existed. He confirmed his email stating that they could not deviate from employment equity requirements for the post. He stated that interviewing outside of the directive of the EE Manager was not procedural and therefore HR could not support it.
- [27] Mdladla testified that Eskom's national EE plan was informed by the divisional plans. The position that Erasmus applied for was in a category names "Professionally Qualified" below senior managers. Looking at the Employment Equity targets for March 2018 for Senior Management African Male, he confirmed that Technology had a target of 25.2 but were sitting at 16.96 per cent. He stated that it was in line with the targets in senior management to appoint African males so that they could be part of the pipeline for senior management. Referred to Talent Board Profiles including one of Erasmus, Mdladla stated that this did not play a role in recruitment processes at the time he applied. Eskom was now fine tuning

this process which included the need for retention of employees in its recruitment procedure.

Cross-examination

[28] Mdladla confirmed that a person who is in an over-represented group will not be shortlisted and cannot compete for a post if Eskom finds a suitable candidate from a designated group. It was put to him that the Recruitment and Selection Policy only refers to the business unit and division and states inter alia that “The minimum inherent requirement of the job will be considered in conjunction with the employment equity plan of the business unit and division”. Mdladla conceded that the national plan of Eskom is not referred to. He said that Eskom adopted the process of having this confirmed by EE Managers and hence for this position Dr Khumalo confirmed. He would not concede that Eskom did not comply with its own policies.

[29] Mdladla was questioned on his evidence that divisional plans inform the national equity plan. He conceded that divisions have to align to the national targets that “nationally by looking at the manpower numbers of each division do provide guidance in terms of how that division should be targeted”. He agreed that technology division’s employment equity plan was never signed off but stated that technology was being monitored and targets were given to technology.

[30] With respect to the GA13 he conceded that the form was compliant and he signed it off. He stated it complied because the assigned EE Manager stipulated the requirement. He conceded he did not see the Divisional EE profile when he signed it off, and it was not attached to the form but he relied on Dr Khumalo who was using the targets that are allocated to technology division although there was not a divisional approved plan at the time. He only took account of what Dr Khumalo had indicated in handwriting and did not feel the need to consult with her. It was put to him that although the handwritten comment said ‘preferably’ which cannot

mean 'exclusively', only African males and females of all race groups would be shortlisted. He agreed.

[31] It was put to Mdladla that Erasmus was not appointed due to the equity profile above that of the position he applied to and not because of the equity profile on the level G16. Mdladla agreed but stated that Eskom needed to ensure that the pipeline to the next level (level 18) was corrected.

[32] It was put to Mdladla: "Is it your evidence here today under oath that Mr Erasmus should in any event not have been shortlisted because he is a White male?" He replied: "He should not have been shortlisted if he did the right thing but if in that round we did not find a suitable candidate, in the next round or through motivation for review he might have been considered."

Evidence for the Applicant

[33] Erasmus testified that he was appointed as a Project Manager at Level 15 in 2004, having been an Eskom employee since 1988. He was transferred/seconded to another division in the position of Senior Advisor Outage Co-Ordinator on 1 January 2017. He had heard about the possibilities within Peaking Generation that was stationed at the head office in Cape Town. He said they had a specific need with regards to project management and contact management. He then engaged with the Senior Manager of the division, Van Staden, who confirmed he can do with a secondment for six months to assist with the projects that were at hand at the time.

[34] He was given a multi-million project to run during the six months at a power station close to Mossel Bay and at the same time he was introduced to the outage cluster, or the group of power stations within Peaking that was planning for a major outage project. As he came to the end of the six months the Peaking senior manager indicated to his line

manager in telecommunications that they requested an additional three months on his secondment so that they had time to fill that position, of that he was at that time acting as - Site Execution Manager for Peaking. The secondment was extended again twice to end in February 2017.

[35] At the beginning of December 2016, he testified that he was requested by the senior manager in Peaking to consider a full transfer. He said that in his old job as the only contact and project manager for telecommunications in the Western Cape, he was very comfortable but it did not take him anywhere. He testified that his reaction to the request to consider a full transfer was to say that he would only consider this on specific conditions. At the time he had 12 years to go within his career. The first condition was that if he was transferred the vacant post in question needed to be filled. The second condition was that he will get a fair opportunity when he applied for that post. And the third condition was that he would be getting an acting allowance for the time he was acting at that stage. He confirmed the position in which he had been acting was a level 16 as was the one he applied for. He testified that "I was positioning myself based on the discussions that I had with the senior manager and the negotiations we had in good faith". He said when it got to January 2017 and the transfer was offered officially, he discovered that none of the pre-requirements for him to take the transfer were met. He referred to a letter dated 27 January 2017 from Van Staden to Mr Dima (Dima) who was the acting General Manager for Technology at the time. He read the letter out:

"Hi Dhiraj, I'm really sitting in a predicament here and need your help
Altus rejected the transfer letter due to the following:

- A. When we negotiated with Althus to be transferred to Outage management one of the commitments was that we will recruit for the Manager Site Outage vacant position on my proposed structure. I need permission for the following to make this happen else I'm really running the risk to losing him, putting not only the upcoming outages

at Palmiet at risk but also the outage planning process for Gariep and VanderKloof, which he is busy with as well.

- a. Approval of my changed structure (there is absolutely no impact on any of the current employees).
 - b. Approval to interview selected people for the manager site outage position with the aim to promote.
- B. The other commitment was that we will pay him acting allowance as he has been acting in that position now already for more than 5 months. HR cannot tell me why I cannot pay him acting allowance and the issue keeps on dragging I need approval to do that.
- C. If I can do one of the above I can probably get away with the 3rd request from him and that is to review his current salary in line with other Snr Adv Outage Coordinators. If we can't do any of the two above soon than I urgently need to do this.

I know it looks like a gun to the head but these are the type of things that we have to do with the current embargo on external recruitment and fixing of numbers. We have to wheel and deal, manage the situation and get the job done and this is the only way I can do it at the moment.

I cannot afford to lose him at this late stage. He understands that he might not be successful with the recruitment but he was willing to take that risk.”

[36] Erasmus testified that the first request was adhered to and that is that the post was advertised. He stated that as an employee of Eskom he was not aware of the practice of not shortlisting a member of an over-represented group. He said he learnt that white males could not be shortlisted in the court proceedings. He was asked why he had indicated that he was an African when applying for the post and stated as follows:

“M'lady, I am thankful for the opportunity to actually explain it and also to clear my name in this regard, listening to the respondent's statements

about this. Maybe just for painting the bigger picture. At the time I was leading a multi-racial group and I really found that I've got a passion in that regard. If you would ask any of my friends or any of my colleagues, who am I? One of the things that will come out is that I am a bridge-builder between the cultures. So, at this point in time, it was my understanding, and it may have been naïve, I am not sure, if my memory serves me well, where I actually saw that HR, this was my perception, where HR gave me the opportunity to indicate whether I am white, whether I am coloured, or whether I am black, whether I am Indian or whether I am African I have never seen in the past any opportunity where I could state that I am a white African because you could only select one of the two. So it was my intention, intentionally I selected African. It was not to mislead at all, and I would really like to use this opportunity to clear that. So, it was in line with what I was doing, it was in line with my stance, and it was in line with what I was promoting within the business.”

- [37] Erasmus emphasised that the issue of him being white and having described himself as African, was not raised in the interviews where HR was present. It only became an issue at trial. He testified that he was not involved in drawing up the GA 13 at all. He confirmed that he went to the psychometric test and the other candidate who was recommended was there. There was no feedback on these and no appointment. He engaged with Eskom again because it was a key critical post to be filled and nothing was done about it. He was still acting at that time but in another position. He stated that when he discovered that the post was not filled, and there is a possibility because of my race, he knew that “just because of who I am, that I am a principle person, I cannot just leave it at that. Not just for myself but for people to follow me.” He said he therefore wanted to find out about the process and be systematic and make sure he had it on paper so he lined Van Staden up. He read the following from an email dated January 11 2018, that he wrote to Van Staden:

“...I would like to get clarity on the outcome of the Outage Execution Manager post for Palmiet/Gariep/Vanderkloof stations.

Firstly I would like to thank you for the opportunities I had within your team – I trust that to date I did not disappoint the group with regards to my outputs where specific tasks were given. Acting as Palmiet Execution Manager was a privilege which I thoroughly enjoyed (sic) – this was a new start for me in Eskom. The position I enjoyed at Palmiet fitted me like a glove and therefore the opportunity to apply for the post directly afterwards, came at a great time.

After a six month’s waiting period, the budget was finally released to appoint a forth (sic) Execution Manager in your team. As you know, I applied, got shortlisted and did the Psychometric Tests afterwards – being invited for the test normally means you are one of the preferred candidates. With the well-executed Palmiet Outage behind me and the application process finalised, I was very positive that the appointment will be coming my way. An appointment will also be 100% in line with the proposed developed action as per my Talent Management profile.

Today, 4 months after the tests were done but with no further action taken, it is clear that the process was not completed. This came as a surprise since quite a bit of money and time was spent by Eskom already to roll out and complete the full process. To understand the current situation, my position within it as well as my future within the team, I will appreciate it if you can answer the following questions:

- 1) Is the Outage Execution Manager post for Palmiet/Gariep/Vanderkloof cluster identified as a core position which implies that it should be filled as soon as possible?
- 2) What was the core reason for not finalising the process via an appointment?
- 3) Was there a suitable candidate by the end of the process?
- 4) If so, was I the preferred candidate?
- 5) In terms of succession management planning and in line with my Talent Management profile, was I nominated for this position?

- 6) We lost another Outage Execution Manager which means you now effectively have two gaps; will the preferred candidate for the Palmiet/Gariep/Vanderkloof process be appointed before a new recruitment process is started?..."

[38] Erasmus then indicated what answers were given by Van Staden to the above questions. Van Staden had written back to say that yes, the position was a core position. The core reason for not finalising the process was "The appointment we wanted to make was not in support of Eskom's Employment equity strategy." There was suitable candidate and Erasmus was the preferred candidate. He was nominated for the position in line with succession planning and his Talent Management profile and nominated for the position. As to the further open position, question 6 above, Van Staden had replied that "This has not been decided yet and is subject to a possible review of the structure."

[39] Erasmus testified that having received these answers he knew he was the successful candidate and the sole reason for not appointing him was because he was white. He was referred to the grievance he laid and explained to the Court: "My grievance was that the negotiations that led to my transfer which then led to also the vacancy that was advertised and filled was not available for me at all, and I was throughout the process not informed that I cannot be on the shortlist if I indicated, well I didn't know it at the time. Let me just state. My grievance was against the fact that I was not appointed because of the colour of my skin." He stated that it was not really in his profile to lodge grievances. It was a second time in 30 years. The first time was also a race issue.

[40] Erasmus was referred to the summarised response of the Chair of the Grievance process which read as follows:

"From my review of the GA-13, the recruitment process appears initially to have been aimed at trying to appoint a known candidate as it targets a

white male (and did not indicate females or other races) I could not confirm with this with the HR EE Manager who was not contactable.

The preference for targeted EE groups is normal practice and was appropriate under the circumstances as EE representivity in this area is below the planned levels at this level. Feedback from HR Corporate indicates that for White Males at this level are overrepresented by 16%. It is true that appointing Mr Erasmus would not have caused a decline in EE for the Division, however there would be a missed opportunity to promote a candidate from the designated groups to improve the GT EE. Where suitable candidates cannot be found in the 1st round of advertising, where preferred EE targets are not identified, it is common practice to broaden the advert to all areas where suitable candidates to ensure that every opportunity is made to find a suitable candidate, which may include to re-advertise the position. This will be up to the management to decide, based on the criticality of the job.”

[41] Erasmus testified that he was not presented with the employment equity plan of the Respondent, specifically technology. He also stated that a ‘pipeline’ was not mentioned during the grievance process. He believed that if he was promoted from a 15 to a 16 level, his current position which is also a managerial level 15 will become vacant and therefore a previously disadvantaged person can still move into that post.

[42] He was referred to the recommendation of the Chairperson of the Grievance which read:

“There was no obligation to appoint Mr Erasmus, when no other suitable candidates could be found following the initial advertisement and interview process.

- If the position is critical to fill, the manager can motivate for a round 2 campaign, looking broader to try and identify a suitable candidate from the designated groups. If a suitable candidate can again not be found, Mr Erasmus can again be considered for appointment.

- Eskom has the right to stop any campaign for valid operational reasons (this includes EE or financial reasons) If the campaign continues however and a suitable candidate from designated groups is not identified after a second round, a white male who is the preferred candidate and who meets all the requirements (e.g. Mr Erasmus) can be considered for appointment.
- The Request for salary increase cannot be supported as, for financial reasons, currently Eskom is not giving salary increases, other than in terms of the national income differential exercise process.”

[43] Erasmus testified that he had no knowledge of a policy dealing with a manager motivating for an appointment. However, it may have been the practice. He was asked how the whole process had made him feel. He stated that he felt cheated, in that he was taken through the whole process where the outcome was pre-determined. It was not easy for him. He also felt very frustrated as to how long the grievance process took. He also felt humiliated a couple of times especially when it was known he had not been promoted, and felt he was being treated as nothing just a number, after 29 or 30 years' service to the company.

[44] Erasmus confirmed the relief he was seeking in the statement of claim. He stated that if he considers the process from the beginning it was driven by HR people without speaking to technical people, and that is part of the reason “we are sitting where we are at the moment”.

Cross-examination

[45] Questioned about what he meant about having a fair opportunity to be appointed to the job when he negotiated with Van Staden, Erasmus stated that in the past he had missed two opportunities for promotion that went nowhere and said “he wanted to make sure that there is nothing behind the scenes that I do not know of that will take away a fair opportunity.” He confirmed in relation to one opportunity that the person

who became head of department in 2004 when he had applied was an Indian person.

- [46] Erasmus did not concede that he was being misleading when he described himself as African. He stated that he intentionally decided to select African because at that time he saw himself as an African white. He was asked what the purpose was of HR putting the question on the application portal. He did not agree that the purpose was to determine the race of the applicant. He said it was the first time he had seen 'African' as an extra choice other than black, white or coloured. He was glad to have the opportunity to describe himself as African because for him that was working away from racism.
- [47] The proposition was put to him that if Dr Khumalo 'did not write what she wrote' on the GA13, do you accept that white males would have been shortlisted. He answered that if the evidence was as the Respondent states, yes I do. He accepted that Eskom does not have to appoint the best candidate for a post.
- [48] It was put to Erasmus that the advertisement for the post stated that "Eskom is committed to equality, employment equity, and diversity. In accordance with the employment equity plan of Eskom and its employment equity goals and targets, preference may be given, but is not limited to, to candidates from under-represented designated groups Eskom reserves the right not to make an appointment to the posts as advertised. Candidates with disabilities are encouraged to apply for positions." Erasmus said he had absolutely no problem with that statement, but "we now talking about a fact that we talk about a gate keeper. We talk about being able to contest.....I just needed a fair opportunity."
- [49] Erasmus did accept that there was an over-representation of white males on senior management level in Technology. But he totally disagreed with the Chair of his grievance process that "..it is true that appointing Mr

Erasmus would not have caused a decline in employment equity for the division, however, there would be a missed opportunity to promote a candidate from a designated group.” He stated that he did not accept this notion of a ‘pipeline’. He stated that one of his colleagues had been appointed from level 12 straight to a 16 level. He stated as follows:

“If I was given the promotion, my 15 post would have been vacant and I would have taken a 16 post with the broad band, so KPI’s or the figures would not have changed at all,.....but there is no missed opportunity because the focus stays on senior management which is three levels higher than even the post where I was heading to, plus it cannot be a missed opportunity if promotions can be done over various levels”.

- [50] Erasmus accepted that no motivation for an exception in his case was made to the Employment Equity Manager. He accepted that he did write to Van Staden and his line manager which suggested that they could use evaluations of his work given by colleagues and managers to motivate for the decision not to appoint him to be reassessed.

Evidence of Mr Van Staden

- [51] Van Staden testified that he left Eskom at the end of May 2018. At that time he was a senior manager of Outage and Project Execution. He said that the position in question was advertised because it was very critical for him as manager to have the huge outage at Palmiet Power to be a success. Erasmus was seconded to the section from telecommunications for further development, and in his experience he might have been the right candidate or person for the position. He said Erasmus was already busy with some outage execution work which was executed successfully. He wanted to retain him and the only way to do it was to maybe appoint Erasmus upon a successful recruitment process. He said there was definitely no predetermined idea that he would be appointed and Erasmus knew he would have to go through a fair recruitment process.

- [52] Van Staden confirmed that he was part of the interviewing panel. The other members were an HR person and Mr Pasquallie his line manager. He said he was not aware that Erasmus had indicated he was African in his application. Nobody made him aware of it throughout the process. He confirmed that the GA13 was filled in by Mr Pasquallie and Ms Leeuw of HR and authorised by him.
- [53] He was asked what he meant by stating that on the Form that a promotion from G15 would not have any effect on EE. He explained that by that he meant that the employment equity target which was the level that the person will be appointed to is in the same band level. So the position was measured as the same level so would not have any effect on the targets or measured targets. Van Staden said he was aware of the practice of not shortlisting over-represented categories such as white males.
- [54] He testified that the outcome of the interviews was that there were two candidates identified as possible appointments, being Erasmus “and one Mr MJ, I can’t remember his surname.” He confirmed the next step was the psychometric testing and then they evaluate and make the final decision. He stated that after the testing they evaluated it and his final decision was clearly that the appointment should be Erasmus and that request was made. He had the authority to make the appointment and decision and HR developed the offer letter.
- [55] He testified that he was amazed to get an email from Ms Dibela to seek approval from Dr Khumalo because they had gone through the whole process that was clear to everybody, and then it looked like HR had a turn around. When he had a look at the GA13, after Dr Khumalo had written on it, he said it was clear in his mind that they did not take out the possible appointment of a white male. It was just said or mentioned as a footnote “to say that if you do have a black male, that they would prefer that we rather appoint that person. So preferably means, if you got a

choice between a white male and a black male, they would prefer to appoint a black male.”

- [56] He testified that nobody had responded to his contention that the appointment would not have an impact on equity figures. He confirmed to Ms Dibela that everybody approved the GA13 with a possible or preferable appointment of, or possible appointment of a white male, and he also confirmed that they had gone through a fair recruitment process as per HR, and that they came to a recommended candidate, which was the white male.
- [57] He was referred to the email from Nkesani Leuw which said “...the aim is to create pipeline for senior management. We are currently not meeting the targets in terms of race and gender as per our shareholder’s contract, therefore we cannot appoint a white male”. He said that in his view the objection to the appointment then changed because they then suddenly said that we should not appoint because it will have a future impact on the higher levels. So the idea is to appoint at the lower levels so that in future we can appoint from this pipeline to higher levels affecting employment equity.
- [58] He testified that he was not aware of any specific policy to motivate for an exception. The only motivation he made is the GA13 and the specific motivations to his general manager in terms of the filling of the position. He stated he did motivate from the beginning to say that he needed to fill the position and then secondly there is a possible candidate he would like to include in the recruitment process, hence his specific note in the GA13 of a possible white male. His first motivation was to Bima to start the recruitment process. Mr Nemadotsi (Nemadotsi) who became acting general manager in Bima’s place informed him that he could not appoint Erasmus because of employment equity. Nemadotsi had informed him by email that there was an option of doing another round of recruitment process to get a favourable equity appointment.

- [59] Van Staden was referred to Mdladla's email that HR would not support Erasmus' appointment and that he had interviewed contrary to the GA13. Van Staden denied this stating that the GA 13 specifically mentioned a white male, so it was in line with that. It was clear he said that the appointment was not supported by HR so there was no point in re-asking Dr Khumalo to consider it.
- [60] Van Staden was asked why he replied to the question that Erasmus asked him "Is Eskom's current policy that no white candidate should be allowed a promotion?" by stating "No it is not". He testified that in his experience it is not a firm and fixed policy that no white will be promoted and he is an example of that. He was asked for the specific position for which Erasmus applied, could a white man be appointed. He stated that eventually no, it was stopped from all sides and they could not appoint a white male. At the time he left Eskom the position was not filled.
- [61] Van Staden was asked why he did not appoint Mdeka, the other recommended candidate. He stated that after the psychometric testing that HR was running, it was then finally decided that the better candidate was Erasmus. HR did not at any point require or indicate to him that why not appoint Mdeka.

Cross-examination of Van Staden

- [62] Van Staden stated under cross examination that he needed to fill the position in question to have successful completion of the outage project and because Erasmus was a good performer to retain him. He agreed that there had been negotiations with Erasmus. He conceded that that he had agreed with Erasmus the position in question would be filled. He confirmed that his evidence was that he had emailed Bima to get permission to advertise the position and hopefully appoint Altus Erasmus. He conceded that Erasmus was his preferred person to fill the position, he had told Bima this. The subject line in the email to Bima was not the vacant position but was Altus Erasmus, he agreed. He stated that

it was 100% correct that he was telling Bima that he needed to get Erasmus into this position and asking if he could go ahead and start the process. He agreed he would do anything he could lawfully do to appoint Erasmus.

[63] Van Staden stated that he thought it was Pasquallie who filled out the GA13. He agreed he had had discussions with Pasquallie around filling in a cross for male and white and the phrase that the promotion from G15 would not have any effect on EE. He conceded he knew that he needed to motivate as to why a white male should be appointed which is why the GA 13 was filled in as it was. He could not recall if he specifically got Dr Khumalo's support as EE Manager. He had some idea about how the shortlisting process was done. He accepted it was as described by Dibela. However he disagreed that Dibela should have ignored white males.

[64] Van Staden stated that he couldn't comment on Dibela's evidence that the reason Erasmus got short listed was that he described himself as African. He did understand that if Erasmus had described himself as white on the application he would not have been shortlisted. He confirmed that the interviewing panel was himself, Pasquallie and an HR Person. Van Staden confirmed he assessed the psychometric tests and he chose who should be offered the post. Erasmus scored better in the psychometric tests. He stated that if two candidates are basically on the same level he would have then certainly preferred to appoint the black candidate but this was not the case. He explained:

"...in my mind preferably means all things being equal, if you then had a choice between the two, you would then prefer the black person. In my mind subsequent to the psychometric testing, it was not equal anymore, and the preferably would then fall away So, we had the only choice is then to appoint the best candidate which was Mr Erasmus because it's atotal picture to do the appointment, it's not only the interviews, the psychometrics was included."

[65] It was put to him that the reason and probability he did not accede to the request from Dibela to 'request approval from Cynthia to appoint Alvin' was that he knew that Khumalo would not give the required approval. He replied 'that is possible'. He conceded he chose not to go to Khumalo but stated that the reason he did not was because it was approved on the GA13 that "I can appoint male White, preferable a Black male." He agreed with the comment by Nemadotsi that technology had the worse EE numbers in the organisation. Van Staden insisted that the 'sign off' by Khumalo on the GA13 form was getting her approval. He conceded that the ability to motivate for the appointment of a white male was certainly known by himself and Pasquallie by the 20th November. Under re-examination van Staden clarified that it could have been that there was an over-representation of white males in Technology. It depends which section you were talking about.

Evaluation

[66] In submission before me, and based on the transcribed record of the proceedings, there is no dispute that the practice at Eskom during the period in question was to shortlist only under-represented candidates in terms of the organisation's employment equity requirements. In respect of this post, those requirements, according to the respondent, meant that African men and women of all races could be shortlisted. Erasmus was only shortlisted because he stated that he was African on his application. I must consider whether the shortlisting decision not to appoint Erasmus amounted to unfair discrimination and whether it created an absolute barrier to non-designated groups in terms of the EEA.

[67] The following provisions of the EEA are apposite to revisit:

Definitions

"*employment policy or practice*' includes, but is not limited to-

- (a) recruitment procedures, advertising and selection criteria;
- (b) appointments and the appointment process;
- (c) job classification and grading;
- (d) remuneration, employment benefits and terms and conditions of employment;
- (e) job assignments;
- (f) the working environment and facilities;
- (g) training and development;
- (h) performance evaluation systems;
- (i) promotion;
- (j) transfer;
- (k) demotion;
- (l) disciplinary measures other than dismissal; and
- (m) dismissal.

6 Prohibition of unfair discrimination

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

(2) It is not unfair discrimination to-

- (a) take affirmative action measures consistent with the purpose of this Act; or**
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.....

“15 Affirmative action measures

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

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

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

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

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

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

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

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

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

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

[68] In *SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)*² Moseneke ACJ (as he then was) had this to say about affirmative action measures:

“[36] The test whether a restitution measure falls within the ambit of s 9(2) is threefold. The measure must —

² (2014) 35 ILJ 2981 (CC) 2981

- (a) target a particular class of people who have been susceptible to unfair discrimination;
- (b) be designed to protect or advance those classes of persons; and
- (c) promote the achievement of equality.

[37] Once the measure in question passes the test, it is neither unfair nor presumed to be unfair. This is so because the Constitution says so. It says measures of this order may be taken. Section 6(2) of the Act, whose object is to echo s 9(2) of the Constitution, is quite explicit that affirmative action measures are not unfair. This however, does not oust the court's power to interrogate whether the measure is a legitimate restitution measure within the scope of the empowering s 9(2).

[38] The next question beckoning is whether the manner in which a properly adopted restitution measure was applied may be challenged. The answer must be, yes. There is no valid reason why courts are precluded from deciding whether a valid employment equity plan has been put into practice lawfully. This is plainly so because a validly adopted employment equity plan must be put to use lawfully. It may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose.

[39] As a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational. Although these are the minimum requirements, it is not necessary to define the standard finally.

Employment Equity Act

[40] The mission of the Act is diverse. For now, its important objects are to give effect to the constitutional guarantees of equality; to eliminate unfair discrimination at the workplace; and to ensure implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce representative of our people. The Act expressly prohibits unfair discrimination. It obliges a designated

employer to take affirmative action measures. Designated employers must ensure that suitably qualified employees from designated groups are equally represented in each working category of the designated employer. The Act requires that an employment equity plan must be devised and approved. Affirmative action measures must be taken in accordance with an approved employment equity plan.

[41] Section 15 describes the permissible character of affirmative action measures. They must be designed to ensure that 'suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupation categories and levels'. I pause to underline the requirement that beneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment. The Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core object of equity at the workplace is to employ and retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public.

[42] A designated employer is required to implement several measures in pursuit of affirmative action. They must identify and eliminate employment barriers, further diversify the workforce 'based on equal dignity and respect of all people' and 'retain and develop people' as well as 'implement appropriate training measures'. Section 15(3) contains a vital proviso that the measures directed at affirmative action may include preferential treatment and numerical goals but must exclude 'quotas'. Curiously, the statute does not furnish a definition of 'quotas'. This not being an appropriate case, it would be unwise to give meaning to the term. Let it suffice to observe *that s 15(4) sets the tone for the flexibility and inclusiveness required to advance employment equity. It makes it quite clear that a designated employer may not adopt an employment equity policy or practice that would establish an absolute barrier to the future or continued employment or promotion of people who are not from designated groups.*" (emphasis mine)

[69] There was no dispute that a white male, in terms of the respondent's practice of implementing its affirmative action measures, had no possibility of being shortlisted for the post in question. The respondent insisted that the practice did not amount to an 'absolute barrier' because provided a suitable candidate was not found from an under-represented group, there was the possibility for a wider second round of applications and/or a motivation being made for a particular white male to fill the post. It appears to the Court that the inflexible and blunt instrument practiced at the shortlisting stage must be recognised as an absolute barrier to the ability of members non-designated groups to compete with employment equity candidates from the inception of a recruitment process. No nuance in the practice is observable. As Moseneke ACJ stated in *Barnard*:

'Let it suffice to observe that the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by s 15(3) of the Act.'

[70] The guidelines given by Dr Khumalo for the post i.e. "preferably African male and females of all races" could not be honoured by the existence of an absolute barrier to shortlisting white male candidates. *In casu*, the decision not to appoint Erasmus was based on a section 6 listed ground, that of race, and amounted to unfair discrimination. The respondent was unable to establish that section 6(2) applied, given its reliance on an employment practice that in fact amounted to an absolute barrier and was not consistent with the purpose of the EEA.

[71] Much was made in submission and at trial by the applicant regarding the EE plans and policy of the respondent. The divisional EE plan was not signed off; the recruitment and selection policy did not mention the shortlisting barrier, there was no mention of the 'pipe-line' in the national EE plan. In the pre-trial minute there was *disagreement* as to the issues the Court is required to decide. In the Court's view the evidence placed before me at trial went to the question of whether Erasmus was unfairly discriminated against and whether an 'absolute barrier' was created by

the practice of only shortlisting a category of under-represented candidates. This is evidenced by the transcript of the testimony at trial which did not engage in the type of scrutiny and challenge to the national EE plan to lay any basis for declaring it not compliant with the EEA, or unconstitutional if so compliant. What the evidence showed was that the plan was applied in an impermissible fashion.

[72] The applicant has submitted that because respondent only brought up the issue of Erasmus identifying himself as African in the application for the post at trial, and did not plead same, such evidence should not influence the Court in its determination of the relief to be granted. The respondent disputes this relying on the architecture of the pleadings which included the statement in response to the claim, that the applicant 'did not comply with the requirements to be appointed'. The evidence that he referred to himself as African in his application should be seen as the 'detail and texture' to the framework of the pleadings, it was submitted.

[73] The fact that Erasmus did apply as an 'African' and not a white male was undisputed at trial. He readily acknowledged that he did so under evidence in chief. He said it was done not to mislead but in line with his 'stance'. He had not pleaded that he had done so in his statement of claim and the issue was not specifically raised in the statement of defence. In *Matla Coal Ltd v Commissioner for Conciliation, Mediation & Arbitration & others case no JA33/04* Nicholson JA said:

'Where a defence is not pleaded and not articulated in evidence it is not a defence and a court errs when that "defence" is made a reason for its conclusion. The essence of our procedure is to give each party to a dispute a fair opportunity to put his or her case and meet the allegation made by the other party. To this end there are pleadings which define and therefore give fair warning of the issues in dispute.'

[74] The issue was articulated in evidence by both sides. The evidence by the respondent that there had been such a self-description/deception in the application on its portal in fact fortified the applicant's case. This was

because it was respondent's evidence that finding out about the self-description in the post interview stage, was the reason that his promotion was blocked. In other words, the blocking of the promotion was on respondent's own version a consequence of the realisation that the successful candidate was a white man. In my view, what the applicant seeks to do by emphasising that the issue was not raised in the statement of defence, is to prevent the Court from taking the issue into account when deciding on a remedy. The respondent has submitted that the 'clean hands doctrine' should preclude Erasmus from being awarded compensation. I deal with the appropriate remedy herein below.

[75] The testimony of witnesses on both sides of this dispute was on the whole candid. Erasmus presented as both confident and committed to his convictions. His explanation as to why he referred to himself as a member of a designated group reflected this, as much as did his explanation for lodging a grievance when he said he felt that: "I cannot just leave it at that. Not just for myself but for people to follow me". He self-described as an African not to mislead he claimed, but as a matter of principle. Given his convictions, it seems to the Court that it is highly improbable that Erasmus was unaware of the practice of shortlisting only underrepresented persons, or that his self-identifying as African would assist in overcoming this hurdle in the process. That he only discovered this in Court is improbable.

[76] The principle that an applicant must approach court with clean hands would disentitle an applicant to relief only if his conduct can be regarded as fraudulent or dishonest.³ Erasmus was most probably disingenuous in his explanation of his decision to describe himself as African. However, I cannot on the evidence of this case find that he had an intention to deceive or defraud Eskom. He is thus entitled to be compensated on the

³ Van Rensburg NO and Another v Naidoo NO & Others (2732/11) ZAECPEHC (940 at paragraph 18

evidence before me. In addition, I accept that Van Staden had no knowledge of the fact that Erasmus had described himself as African on the portal. I also accept as Dibela testified that his description of himself as African was not what halted the process of offering him the post.

[77] I feel constrained to comment that Van Staden was unabashed at the efforts he made to appoint his favoured candidate. The fact that there was an African male who scored highly and was also sent to have further psychometric testing did not dent his view that Erasmus was best suited for the post, and that his appointment would not have an impact on employment equity figures. He expressed the view that when “all things being equal” an African candidate should be appointed, reflecting a questionable understanding of affirmative action measures.

[78] The applicant’s case laid emphasis on the fact that that the ‘pipeline’ concept was not part of the recruitment and selection policy. From the evidence at trial, it appears to me to be a rationale career pathing initiative to develop persons from designated groups towards taking up positions at senior management level. But it is not necessary for the Court to make findings in relation thereto. The evidence before me has established that an employment practice of the respondent amounted to an absolute barrier to non-designated groups and cannot be regarded as an affirmative action measure in terms of the Act. There are myriad ways to take equity targets into account during interviews of suitable candidates for a position, without blocking categories of persons from proving their worth to an employer in a recruitment practice and in the process infringing on their rights to dignity and equality.⁴

[79] Revisiting the relief sought by the applicant, this Court will not usurp the role of the employer and promote Erasmus. Given that I have found that

⁴ As stated in Barnard supra “[32] Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society.”

Erasmus was unfairly discriminated against, I will however grant him compensation in an amount that I find to be just and equitable on the evidence before me. In all the circumstances, I make the following order, taking into account the *Zungu* principles on costs and the ongoing relationship between the parties:

Order

1. The respondent unfairly discriminated against Erasmus.
2. Eskom's practice of not shortlisting members of non-designated groups for advertised posts amounts to an absolute barrier and is not an affirmative action measure as contemplated by the EEA.
3. Eskom must take remedial steps to ensure that the said practice ceases.
4. Eskom is to pay compensation to Erasmus in an amount equal to 18 months of his salary at the time that he applied for the post in question.
5. There is no order as to costs.

H.Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: Dirk Groenewald instructed by Serfontein, Viljoen & Swart Attorneys.

Respondent: ENS Africa (Dion Masher)

LABOUR COURT

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