

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case No. CA 11/00

UNIVERSITY OF CAPE TOWN

Appellant

and

THOMAS AUF DER HEYDE

Respondent

JUDGMENT

DU PLESSIS AJA

1]In 1995 the appellant appointed the respondent as a senior lecturer for a period of three years. When the contract expired in 1998, the appellant did not renew it. The respondent alleges that the appellant thereby dismissed him. He also alleges that the dismissal was unfair. In the alternative the respondent alleges that the appellant's actions pertinent to the renewal of the contract constituted an unfair labour practice. The respondent instituted action in the Labour Court for orders aimed at declaring that he was unfairly dismissed, that the appellant's actions constituted an unfair labour practice, at his reinstatement and, as an alternative to the latter, at the payment by the appellant of compensation.

2]The Labour Court held that the respondent had been dismissed and that the dismissal was only procedurally unfair. It ordered the appellant to pay to the respondent compensation equivalent to 12 months' remuneration.

3]The appellant now appeals against the finding that the respondent had been dismissed. The respondent, supporting the finding that he had been dismissed, cross-appeals against the finding that the dismissal was only procedurally unfair. The respondent still maintains that the dismissal was substantively unfair and that the appellant's actions constituted an unfair labour practice.

4]The appellant's "Equal Opportunity Employment Policy" (the Policy) is central to the issues. The Policy is generally aimed at appointing to its staff, in context, the best persons available. The Policy also identifies a need to develop the careers of black persons and women in order to enlarge the traditional pool of available candidates. In terms of the Policy the appellant commits itself to affirmative action in the sense of doing everything in its power to help prepare black persons and women to become equal competitors for every post. While not stated in so many words, the Policy is also aimed at seeking a more balanced staff component consisting of the best available white and black women and men.

5]Mr DF Molteno, the appellant's Equal Opportunity Officer, testified that the appellant has an equal opportunity fund. There are essentially two categories of equal opportunity posts. The first is that of contract development posts. Persons who have potential but are not yet developed are appointed in such posts, generally for a period of three years. During the first year these persons' salaries are paid out of the equal opportunity fund. The further years are paid out of the budget of the relevant faculty. Mr Molteno explained that those charged with

the implementation of the Policy try to ensure that the faculties do not abuse these posts by using the individual for the contract period, having the advantage of payment from the fund, and by then simply not renewing the relevant contract. The appellant wants faculties to make every effort to ensure that such persons are appointed, if possible, for further periods or permanently. Strategic appointments comprise the second category. This applies to fully qualified persons for whom there are at a specific point in time no posts available. Such a person may then be appointed against a future vacancy. The latter procedure is also followed where the candidate is not an affirmative action candidate, but one whose services the appellant considers in context to be important to it. I now turn to the facts.

6]In the course of 1994 a senior lectureship in the appellant's department of chemistry became vacant. Due to financial constraints, such a vacancy was not filled automatically. However, in the course of 1994 the chemistry department had succeeded in obtaining from SASOL Ltd the promise of funds which would pay, over a five year period, part of the salary for a senior lecturer. The department received the necessary approval to fill the vacant post for three years. After that, the situation was to be reviewed. At the time Ms Lahusen-Thompson was the appellant's staffing committee officer. She testified that the post was "released" only for three years because financial requirements, and many other factors, could change in the three year period. As it turned out, the funds from SASOL were not paid over to the appellant.

7]In November 1994 the post was advertised in the following terms:

"This is a contract post, initially for three years, with a possible extension to five years".

The respondent submitted what he termed an "application for temporary senior

lectureship”. Dr K Naidoo, a black person, also applied.

8]The selection committee sat on 8 February 1995. Both Naidoo and the respondent were rated “appointable”. The committee resolved to interview the respondent for possible appointment as a senior lecturer and Naidoo for possible appointment as a lecturer. After the interviews, the committee resolved to appeal to Prof Martin, the deputy vice chancellor responsible for the implementation of the Policy, for “an additional supernumerary post in terms” of the Policy. The committee resolved that, if such a post were approved for Dr Naidoo, they would recommend the appointment of the respondent to the post as advertised. It further resolved that, should a post in terms of the Policy not be approved for Dr Naidoo, they would meet again “in order to decide whether to offer the advertised post to Auf der Heyde or to Naidoo”. The desired approval for a supernumerary post was not obtained. The committee resolved to offer the respondent “a three year contract appointment”. It further recommended that a further post that was to become vacant, that of a Dr Marais, be advertised. They resolved not to appoint Dr Naidoo to that post in terms of the Policy. This recommendation was later reviewed, and on 26 April 1995 the committee resolved to offer to Dr Naidoo a three year contract post against the one to be vacated by Marais. This was a contract development post in terms of the Policy.

9]Two days earlier, on 24 April 1995, the appellant had offered to the respondent “a three year contract appointment”. It was pointed out to the respondent that he was to become a member of the Temporary Employees’ Pension Fund. It was also pointed out to him that the appointment “is for the period specified and does not carry any commitment to a permanent appointment ...”.

10]In September 1995 another post in the chemistry department was advertised. One of the applicants was Dr K Chibale, a black person but not a South African. Interviews were held and certain candidates were asked to present seminars, including Dr Chibale. On 8 February 1996 the selection committee recommended that a Dr Egan be appointed to the post. The committee also recommended that every effort be made to offer an additional post to Dr Chibale. Following the committee's recommendation, the head of the chemistry department wrote to the dean of the science faculty seeking his support for a request that Dr Chibale be appointed on a three year contract on the understanding that the appointment would be against the first appropriate post to be vacated in the department. The letter identifies the post as that of one Dr Torrington who was to retire on 31 December 1996. Dr Chibale was appointed in October 1996 on a three year contract. For the first three months his salary was, as a bridging measure, paid out of the equal opportunity fund. The appellant's witnesses who testified about Dr Chibale's appointment were unanimous in their view that his was not truly an affirmative action appointment. The fact that he is a black person played a role to the extent that he was regarded as a positive role model for black students, but the witnesses were equally unanimous in their view that Dr Chibale is an outstanding academic.

11]The narrative now moves on to the middle of 1997. The respondent, who by then had been in the appellant's employ for more than two of the three year contract period, learnt that a Dr Campbell was to vacate his post in the chemistry department. On 18 June 1997 he (respondent) wrote to Prof Moss, then the head of chemistry, and enquired about the "status of the post" to be vacated. Moss replied that the post had been unfrozen and was to be advertised soon. The post, that of lecturer, was advertised on 21 July 1997. The respondent, Naidoo and Chibale, and also other candidates applied.

12]On 4 August 1997, before he applied for the post, the respondent wrote to the dean of science. The exact purpose of the letter is unclear. However, having made reference to certain relatively long term projects in which he was involved, the respondent wrote that Prof Moss had suggested that “I continue pursuing funds for the M-projects I envisaged - notwithstanding the university’s view of contract posts. I must say I also believe I should continue, since the alternative is to sit back, do nothing and wait until the contract ends. This would do my soul little good”. The dean advised the respondent to discuss the matter of contract appointments with Prof Moss as he (respondent) needed “to be appraised of developments so that (he could) ... plan accordingly”. The respondent testified that he spoke to Moss who told him that the appellant could not commit itself either way: to renew or not to renew the respondent’s contract.

13]In the meantime Dr Chibale had also made enquiries about his future with the appellant. He implied that he would seek other employment, should his position at the university not be made more secure. Prof Moss, who regarded Chibale as an asset to the appellant, requested the dean, Prof Moran, to set up a selection committee to consider the appointment of Dr Chibale without an advertisement. Prof Moran agreed as did Prof Martin. It must be pointed out that the witnesses were agreed that filling posts without advertisement was a procedure used in exceptional circumstances and after strong motivation. On 23 September 1997 a selection committee met to consider the appointment of Dr Chibale without advertisement. During the discussions, it was pointed out to the committee that there were three persons in contract posts who were desirous of being appointed permanently: Chibale, Naidoo and the respondent. Persuaded by an argument that the process was flawed, the committee did not make the

appointment but resolved to “motivate to advertise the post”.

14]The motivation did not carry the day. Two days later, on 25 September 1997, the acting dean of sciences (Prof Thomson), Prof Martin, Prof Moss and Molteno, the Equal Opportunity Officer, met. The four of them decided that both Drs Chibale and Naidoo should be appointed without advertisement. Prof Moss explained in evidence that this decision was taken after discussion with the members of the selection committee, and that they were persuaded of the need to follow such a course. He testified that particularly Prof Aschman, one of the selection committee members, was strongly opposed to appointments without advertisement. Strong motivation was necessary to persuade him otherwise. A request by the chemistry department to fill the respondent’s post permanently was to be discussed at the following meeting of the dean’s advisory committee.

15]On 29 October 1997 the selection committee met. Drs Chibale and Naidoo were interviewed. As regards Dr Chibale, the committee was very positive. They unanimously resolved that he be offered a permanent appointment. The committee’s evaluation of Dr Naidoo was not so positive. The committee resolved to offer him a two year extension of his contract, and that he could at any time during that period submit a motivation for a permanent appointment. On 2 and 6 November Dr Naidoo wrote letters to Prof Moran and to Prof Martin. In the letters he complained about the fact that he had been offered an extension of his contract and not a permanent post.

16]The selection committee met again on 10 November 1997 to discuss the candidates for the advertised post (Dr Campbell’s post). I have pointed out that Drs Chibale, Naidoo and the

respondent had applied. As it had by then been decided to offer to Dr Chibale a permanent post, his application was not considered. The committee's evaluation of the respondent was not positive. It was resolved not to appoint or even interview him. As for Dr Naidoo, the committee members were not unanimous in their evaluation of him: Some felt that his research output was insufficient. Others felt that he had potential. The committee resolved not to invite him for an interview as he had been interviewed recently. The post was ultimately offered to another candidate, but it must be taken into account that, as will appear later, Dr Naidoo had by then been appointed permanently.

17]On 17 November 1997 the respondent wrote to Prof Martin. He referred to earlier communications when he had been informed that the appellant was not willing to commit itself to converting his post or extending his contract. "Since then", he wrote, "two further contract positions in this department - those of Drs Chibale and Naidoo - have been reviewed with the result that one has been made permanent, the other extended by two years. ... From the above it would therefore appear that the circumstances surrounding contract appointments in this department had changed since I initially made my inquiry, and that the university is now in a position to reach a decision on whether to make such appointments permanent or not". In the letter the respondent proceeds to request that his "contract be reviewed in the same way as those of Drs Chibale and Naidoo were". Prof Martin advised the respondent to discuss the matter with the dean. He, somewhat obliquely, explained that Chibale and Naidoo were appointed in terms of the Policy. The respondent took the matter up with Prof Moran. Moran's reply was unequivocal: Due to financial constraints the respondent's contract could not be renewed. In cross-examination prof Moran said that, after the appointment of Chibale and Naidoo, there were no funds for further appointments.

18]In the meantime Dr Naidoo had appealed against the decision not to appoint him permanently. The appeal was heard on 17 December 1997 by a selection committee under the chairmanship of Prof Martin. Naidoo was offered a permanent appointment.

19]The first issue to be decided is whether the respondent had been dismissed. Section 186(b) of the Labour Relations Act, 66 of 1995 (the Act) provides

“‘Dismissal’ means that -

(a)...

(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.”

20]For the respondent, Mr Janisch submitted that the respondent reasonably expected the appellant to renew his fixed term contract either by extending it to five years or by appointing him permanently. In **Dierks v University of South Africa [1999] 20 ILJ 1277 (LC)** it was held that an expectation of renewal in terms of section 186(b) does not include an expectation to be appointed permanently. In **McInnes v Technicon Natal [2000] 21 ILJ 1138 (LC)** it was held that section 186(b) covers a reasonable expectation of a permanent appointment (1143B to F). It is not for present purposes necessary to resolve this difference of opinion. I shall assume, without finding, that a reasonable expectation of a permanent appointment falls within the ambit of section 186(b).

21]In order to determine whether the respondent had a reasonable expectation, it is first

necessary to determine whether he in fact expected his contract to be renewed or converted into a permanent appointment. If he did have such an expectation, the next question is whether, taking into account all the facts, the expectation was reasonable.

22]The respondent testified that, when he saw the advertisement, he understood it to mean that, if his application was successful, his position would be secure for three years with a “very good chance” that the contract would be extended to five years. He rationalised this understanding as follows: He knew that funding was a problem. The appellant would therefore not have expressed the possibility of an extension to five years if it did not already have the funds for such an extension. That meant, he further rationalised, that an extension was dependent on his own performance. He performed well, and therefore he expected the contract to be renewed. The respondent’s assertion that a “possible extension” to him meant “a very good chance” does not bear any scrutiny. The words of the advertisement were clear, and there is no basis to read them as the respondent says he did. That is clear from the respondent’s own terminology that the post is a temporary one. In any event, the facts belie the respondent’s rationalisation. Ms Lahusen-Thompson’s evidence, which was not contradicted, shows that funding for five years was in itself not more than a possibility. As it turned out, the SASOL grant did not eventuate.

23]Mr Janisch submitted that, in view of the appellant’s flexible staffing policy, it (appellant) did not send out a strong enough message that the contract would not be extended or converted into a permanent appointment. The appellant unequivocally stated in the letter of appointment that the appointment “does not carry any commitment to permanent appointment”. It is difficult to think of a stronger message. To counter this letter, Mr Janisch argued that the words implicitly convey a commitment to extend the contract to five years. The letter must be read in

the context of the advertisement. I have dealt with the wording of the advertisement. The “possibility” was dependent on many factors, and the respondent knew it.

24]The respondent set up a Science Advice Unit. This was a relatively long term project with the object of creating an interface between the university’s resources and historically marginalised communities. Some of the appellant’s senior personnel encouraged this work. Mr Janisch submitted that this is a further indication that the respondent had the expectation and that it was reasonable. The mere fact that the respondent embarked on a project which could extend beyond the three years is evidence of no more than that he did his work. The encouragement in itself indicates no more than that the relevant people also thought so. Had the evidence been that the project had at all costs to continue beyond the three years and that only the respondent, and nobody else, was able to continue it, the submission may have carried more weight. Those are not the facts.

25]The respondent testified that on two occasions Prof Bull, at the time head of chemistry, said that there was no difference between contract appointees and permanent staff. That, the respondent testified, contributed to what he alleges was his reasonable expectation. In his evidence the respondent was vague as to exactly when and how this was said. He reconstructed that it was said during departmental staff meetings. In his evidence, Prof Bull denied having said what was alleged. At best, he said, the respondent misunderstood him. I shall proceed on the assumption that words to the effect testified to by the respondent were said during departmental staff meetings. The respondent clearly could not reasonably have understood the words to mean that, in terms of permanency, there was no difference. To the respondent’s knowledge, Prof Bull had no authority to extend fixed term contracts. The respondent could therefore not have understood the words to imply a promise of permanent

employment. In any event, the more probable and reasonable interpretation of such words would have been that, in terms of what was expected of them and of how they are treated while in the appellant's employ, no distinction is made between the two categories.

26]In summary, the facts show that, from the outset, the appellant made it clear that the contract was for three years, and that extension to five was only a possibility. In no manner did the appellant hold out even the possibility of a permanent appointment. When, in the middle of 1997, the respondent, as he put it, "gently prodded" the authorities by inquiring about Campbell's post, the reaction made it clear that he could expect nothing other than to be considered for the post if he applied for it. The terms of the respondent's inquiries during September 1997 leave little doubt that he had no expectation. The reply unequivocally informed him that his contract would not be renewed.

27]It was not the respondent's case, and it was not argued, that the treatment of Drs Chibale and Naidoo created a reasonable expectation on his part.

28]I am not convinced that the respondent has proved that he had an expectation that his contract would be renewed. It is unnecessary to decide this question because, even if he had such an expectation, it was, for the reasons set out above, not a reasonable expectation. In my view, the respondent did not reasonably expect the appellant to renew his fixed term contract. It follows that the respondent was not dismissed. Therefore, the question of unfair dismissal does not arise.

29]That brings me to the respondent's reliance on an alleged unfair labour practice. At the

relevant time item 2(1)(a) of Schedule 7 to the Act defined, relevant to the present case, an unfair labour practice as “any unfair act or omission that arises between an employer and an employee, involving ... the unfair discrimination, either directly or indirectly, against an employee on 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”.

30]Mr Janisch submitted that the following act on the part of the appellant constituted unfair discrimination based on race: “The granting to Chibale and Naidoo of access to a process that would eventually (and inevitably) lead to their appointment to permanent positions, while the respondent’s position was relegated to be considered in accordance with the ordinary staffing policy, a process which was destined to be unsuccessful at least for financial reasons”.

31]In essence the appellant’s defence to the contention that the appointments constituted racial discriminations is to contend that they were affirmative action appointments made pursuant to the Policy for which appointments the respondent did not qualify. Mr Janisch did not argue that, by allowing for affirmative action appointments, the Policy was unfair. His argument was first, that Dr Chibale is not a South African citizen. As such he cannot in law benefit from affirmative action. In the second place he argued that, if the Policy allows for a non-South African to benefit from affirmative action, then the Policy is, to that extent, unfair. In the third place Mr Janisch argued that the Policy, in its own terms, does not allow for permanent affirmative action appointments to be made in terms thereof.

32]I shall assume that, for the reasons contended for, the appointments did not qualify as affirmative action appointments in terms of the Policy. Does it follow that the appointments

constituted an unfair labour practice? The facts pertaining respectively to Drs Chibale and Naidoo differ, and I shall consider each appointment separately.

33]In the case of Dr Chibale the evidence shows that he is a person of conspicuous merit. He was regarded as an asset to the appellant. The fact that he is black and was to serve as a positive role model for black students was a factor in the overall evaluation of Dr Chibale. That is part of Dr Chibale's merit in context. By reason of his merit, it was decided to consider his appointment without advertisement. The evaluation committee, taking into account the positions of both Dr Naidoo and the respondent, first decided to recommend that Dr Chibale should not be appointed without advertisement, but that a post should be advertised. Later, the committee was persuaded that there was sufficient motivation for Dr Chibale's appointment without advertisement to be considered. Among those persuaded was Prof Aschman who, according to the evidence, was in principle strongly opposed to appointments without advertisement. A conspectus of the evidence thus shows that Dr Chibale was ultimately appointed without advertisement not simply because he is black, but because of his merit. There is no evidence that the respondent was held in similar esteem by his colleagues or by those responsible for appointing the appellant's staff. The evidence shows that he was not rated as highly. The appointment of Dr Chibale and the fact that the respondent was not appointed did not result from discrimination on an arbitrary ground. It resulted from the fact that Dr Chibale was regarded as having more merit than the respondent. It follows that the appointment of Dr Chibale and the failure to appoint the respondent did not constitute an unfair labour practice.

34]As regards Dr Naidoo, the evidence is not that he was of exceptional merit. His

appointment has to be considered as an affirmative action one, albeit not made regularly in accordance with the Policy. The question is whether his appointment without advertisement constituted an unfair labour practice between the appellant and the respondent.

35]As a legal concept unfairness cannot exist in abstraction . A person's act or omission is unfair if it unfairly affects the rights or expectations (reasonable or legitimate) of another. There must be a causal connection between the act or omission complained of and an adverse effect on the rights or expectations of the person complaining of the unfair labour practice. (**Woolworths (Pty) Ltd v Whitehead 2000(3) SA 529 (LAC)** per Zondo AJP at p 540, para [24]).

36]I have already concluded that the respondent had no reasonable expectation to be appointed by the appellant. He clearly had no right to such an appointment. The fact that Dr Naidoo (on the assumption made in paragraph [32] above) was appointed as a result of an irregular application of the Policy, could not have caused the respondent to expect that he would similarly be appointed. Moreover, Dr Naidoo was appointed to a supernumerary post specially created for him. There is no evidence that, had Dr Naidoo not been appointed, a post would have been advertised for which the respondent could have applied. Absent Dr Naidoo's appointment, there is still no post to which the respondent could have been appointed. Mr Janisch submitted that the evidence of Prof Moran showed that, after the appointments of Drs Chibale and Naidoo, there were no funds left to appoint the respondent. Prof Moran testified that, having taken Drs Chibale and Naidoo "on board" there were no funds left for further posts. The evidence does not mean that, had there been funds, the respondent would have been appointed. Had there been funds, it may well have been used for other purposes. Even if one

assumes that such funds would have been used to release a post in the chemistry department, there is no evidence that the respondent would have been appointed to such a post.

37]Mr Janisch submitted that the differentiation between Drs Chibale and Naidoo on the one hand and the respondent on the other, impaired the respondent's dignity and his good name, and thus constituted an *iniuria*. As regards Dr Chibale, the differentiation was on the grounds of justifiably perceived merit and cannot be an actionable wrong. As regards Dr Naidoo, his appointment, on the assumption made earlier, resulted from an irregular application of the Policy. The respondent is and has always been aware thereof. He certainly did not expect to be similarly appointed by an irregular application of the Policy. That being so, his dignity could not have been affected by the appointment. A reasonable member of society will not think less of the respondent because he was not also appointed irregularly. (As to the appropriate test, see **Mohamed and Another v Jassiem 1996(1) SA 673 (AD)** at 706H to I; **Neethling et al: Deliktereg (3rd ed)** at 331 to 332).

38]To sum up: The respondent had no right or legitimate or reasonable expectation to be appointed. He certainly had no such right or expectation to be appointed by an irregular application of the Policy. The appointments of Drs Chibale and Naidoo did not have any effect on the appointment or otherwise of the respondent. The respondent did not prove that he was dismissed nor that he was affected by an unfair labour practice.

The following order is made:

1 The appeal is allowed.

- 2 The cross appeal is dismissed.
- 3 The order of the Labour Court is set aside and the following order is made in its stead.
“The claim is dismissed with costs”.
- 4 The respondent is ordered to pay the costs of the appeal.

DU PLESSIS AJA

I agree

ZONDO JP

I agree

DAVIS AJA.

Date of hearing: 14 March 2001

Date of judgement:

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