

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

CASE NO: P185/99

In the matter between:

Applicant

and

THE TRANSITIONAL LOCAL COUNCIL

First Respondent

Second Respondent

JUDGMENT

LANDMAN J:

1. Sojen Walters, a white female, is employed by the Transitional Local Council of Port Elizabeth (the Council) as a senior personnel officer. She has experience in the job evaluation system used by the Council. When the vacant post for a principal personnel officer (job evaluation) was readvertised she decided to apply for the position which would entail a promotion for her. She was short-listed together with a number of other applicants including a Mr Sohena, a black (African) male.
2. On 20 July 1998 the applicants were interviewed by a selection panel consisting of three councilors who were entitled to make the decision and who were advised by the Mr Shand, the personnel manager and by Mr Le Roux, the previous incumbent of the vacant post. A union representative from SAMWU and IMATU were in attendance as observers, Mr Niehaus of IMATU subsequently represented Ms Walters in this matter as her attorney. Ms Walters is a member of IMATU by virtue of the closed shop agreement operating in the council. A questionnaire, to which there was a model answer, was used at the interviews in an attempt to keep the questioning consistent. After the interview the union observers withdrew. The council officials in attendance made their recommendations and the two councilors, who were left, decided that Mr Sohena was the most suitable candidate. He has subsequently offered and later appointed to the post.
3. Ms Walter's complains that her non-appointment entitles her to relief. She bases this on two grounds. I cite paragraphs 3.2, 3.3. and 3.4 of her statement of claim (with a modification regarding the citation of the parties):
 - “3.2 Ms Walters furthermore contends that the Council unfairly discriminated against her in the following respects:-
 - 3.2.1 the Council committed an unjustified act of favouritism towards Mr Sohena in a manner that impaired the

dignity of Ms Walters and which favouritism affects her in a seriously adverse manner.

3.2.2 alternatively, the Council discriminated against the Ms Walters on grounds relating to race and/or political opinion.

3.2.3 to the extent that the Council may intend to rely on employment equity or affirmative action as justification for its discriminatory action, Ms Walters denies that the Council is entitled in law to invoke such a defence in that the Council did not have any affirmative action programme or plan in place (as required by the content of a collective agreement and law) at the time of appointing the Mr Soheni. In addition, Ms Walters in any event submits that had the Council properly applied employment equity/affirmative action considerations, the Council would have been obliged to have appointed her.

3.3 Mrs Walters contends that the Council has had no justification in law or equity for having preferred the Mr Soheni to her, or alternatively that the Council acted in an unfair manner towards her in respect of her promotional opportunities and/or provision of benefits.

3.4 In the circumstances Ms Walters respectfully submits that the Council's action in having appointed Mr Soheni has no rational relationship with any legitimate purpose associated with the appointment of personnel to its staff establishment. In addition the Ms Walters submits that the Council committed an unfair labour practice against her."

Causes of action

4. At the trial Ms Walters relied on two causes of action. I found it necessary to request additional heads. In the additional heads filed on her behalf it is stated that she also relies on a delictual claim which is tied to an alleged infringement of a fundamental right provided for in the Constitution of the Republic of South Africa

of 1996 (the 1996 Constitution). I shall deal separately with each cause of action. She relies on them in the alternative.

5. Her first cause of action rests on an alleged infringement of her constitutional right to equality. It is based on s 157(2) of the Labour Relations Act 66 of 1995 (the LRA) read with the 1996 Constitution. Her second cause of action rests on an alleged unfair labour practice as contemplated by item 2(1)(a) of the 7th Schedule to the LRA. Both these claims rest on the fundamental rights enshrined in the 1996 Constitution. In one instance she relies directly on the Bill of Rights (what I would term a civil rights or constitutional claim) as her primary cause of action. In the second instance her cause of action is a statutory one, but one enshrined in an statute which seeks to give expression to some of the fundamental rights ensconced in the 1996 Constitution. Nicholson JA in **Business South Africa v Congress of South Africa Trade Unions and another** (1997) 18 ILJ 474 (LAC) at 493 A-E explained the purpose of the LRA this way:

“The primary objects of the Act include giving effect to and regulating the fundamental rights conferred by s 27 of the Constitution and giving effect to obligations incurred by the Republic as a member state of the International Labour Organization.

Section 27 of the interim Constitution (Act 200 of 1993) entrenched constitutional rights in respect of labour relations and provide in ss (4) that workers shall have the right to strike for the purpose of collective bargaining. The new Constitution entrenched similar provisions concerning labour relations in s 23 save that the worker is given the right to strike simpliciter with no reference to the purpose of collective bargaining. section 23 of the Interpretation Act 33 of 1957 requires that whenever a statute repeals and re-enacts, with or without modifications, any provision of a former statute, any reference to the provisions of that statute in any other law must be construed as a reference to the re-enacted provision. Section 23 of the new Constitution is therefore applicable in preference to s 27 of the interim Constitution.”

6. I should add that the LRA gives effect not only to labour rights but also to various other rights such as the right to freedom of association, the right to equality and many others.

7.I propose dealing first with her civil rights claim, then her unfair labour practice claim and finally her delictual claim.

Civil rights claim

8.In order to litigate a civil rights claim in the Labour Court, a litigant is obliged to show that the Labour Court has jurisdiction to entertain the claim. The Labour Court is given concurrent jurisdiction with the High Court to hear such cases by virtue of section 157(2) of the LRA read with ss 169 (b), 170 and 172 of the 1996 Constitution. Section 157(2) reads:

“The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-

- (a) employment and from labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible.”

9.The first inquiry relates to whether an allegation is made that a fundamental right has been infringed or whether a threat to violate such a right has been made. Section 157(2) refers to a “fundamental right”. Although the LRA came into operation during the lifetime of the Constitution of the Republic of South Africa of 1993 (the 1993 Constitution), it is clear that it must now be read as referring to a “fundamental right” in the 1996 Constitution. Chapter 3 of the 1993 Constitution was headed “Fundamental Rights” the corresponding chapter, Chapter 2 in the 1996 Constitution, is headed “Bill of Rights”. I believe that a “fundamental right” includes those rights set out in the “Bill of Rights”.

10. It does, however, appear that there may be additional fundamental rights not specifically provided for in Chapter

2. See for instance the remarks by Chaskelson P in **Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others** 1996 (1) SA 984 (CC). At para 184 it is stated that, though s 11(1) of the 1993 Constitution was primarily concerned with the protection of physical integrity, if a freedom of a fundamental nature which calls for protection is identified, and if it cannot find adequate protection under any of the other provisions in the Bill of Rights, there may be reason to look to the right to freedom to protect such a right. J De Waal “Revitalising the Freedom Right?” (1999) SAJHR 217 suggests that the freedom to choose to die is perhaps an example of a fundamental freedom not protected elsewhere in the Bill of Rights. See also s 39(3) of the 1996 Constitution. It is not necessary to investigate this aspect for the purposes of this case. Ms Walters alleges that her right to equality was infringed. This is a fundamental right. See s 9 of the 1996 Constitution.

11. The next inquiry depends on the meaning to be given to paragraphs (a), (b) and (c) , contained in the same sentence, in s 157(2). Must each paragraph be read disjunctively or must the jurisdictional facts mentioned in all three paragraphs be in existence to found this court’s jurisdiction? M S M Brassey in **Employment and Labour Law** Vol 3 at A7:97 remarks:

“The conditions, it seems, are initially cumulative then separate. The concurrent jurisdiction, in other words, is exercisable when there is a violation of the designated constitutional rights that occurs in one or other of the circumstances referred to in paras (a)-(c).”

12. I am of the view that this reflects the correct position. It would narrow the ambit of the section considerably if the facts in each paragraph were to be present. There would also be a measure of tautology. I do not believe that the legislature intended this.

13. Mr Niehaus submits that Ms Walters relies merely on the existence of an “employment relationship”. He submits that the amendment of s 157 by s 14 of Act 127 of 1998, was specifically with a view to giving effect (in the context of labour relations) to the horizontal application of the Bill of Rights in the 1996 Constitution, unlike the 1993 Constitution as interpreted in **Du Plessis and others v De Klerk and another** 1996 (3) SA 850 (CC). He submits that it is generally accepted that the Bill of Rights contained in Chapter 2 of the 1996 Constitution has application in the private sphere. See Cheadle and Davis, “The Application of the 1996 Constitution in the Private Sphere” 1997 SAJHR 44. But see the contrary view of Chris Springman and Michael Osborne, “Du Plessis is Not Dead: South Africa’s 1996 Constitution and the Application of the Bill of Rights to Private Disputes” 1999 SAJHR 25. I do not find it necessary to rely on paragraph (a) as, for the reasons outlined below, I am able to found jurisdiction on the basis of paragraph (b).

14. I turn to deal with jurisdiction in terms of paragraph (b). Ms Walters contends that the Council as a local authority forms part of “the State” as envisaged in s 157(2)(b) and as such this jurisdictional requirement is present.

15. It has been held by this court that a transitional local authority is an organ of State. See **Langeveldt v Vryburg Transitional Local Council** (1999) 20 ILJ 2892 (LC). A contrary view has been expressed by the High Court in **Mcosini v Mancotywa and another** (1998) 19 ILJ 1413 (Tk). In determining the concept “the State” as it is used in the LRA and in particular s 157(2) it is, in my view, permissible to look to the 1996 Constitution for guidance. See **SA Agricultural Plantation and Allied Workers Union and others v Premier of the Eastern Cape and others** (1997) 18 ILJ 1317 (LC) at 1323G-1324A. According to s 40 of the 1996 Constitution government in the Republic of South Africa is constituted as national, provincial and local spheres of government. See also s 41 and chapter 7. I do not believe that because a transitional local council or a municipality has its own legal identity, as suggested in the **Mcosini** case, is any reason for

holding that a council is not part of the State. Nor am I persuaded by the fact that the Public Service Coordinating Bargaining Council does not have local councils represented on it, indicates that a local authority is not part of the State. See the **Mcosini** case at 1416J-1417A. In my view the **Mconisi** case was wrongly decided and I decline to follow it.

16.I am satisfied that the court has jurisdiction to adjudicate on a civil rights claim in terms of s 157(2) of the LRA read with the 1996 Constitution.

17.I, however, need to consider whether it was intended by the 1996 Constitution read with the LRA that a person could institute a civil rights claim by directly relying on the Constitution even where another statute eg the LRA, which complies with the Constitution, provides similar and adequate relief. Marius Pieterse “Discrimination through the Eye of the Beholder” 2000 SAJHR 121 at 125 makes the comment, with reference to the promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the LRA and the Employment Equity Act 55 of 1998, that:

“Direct reliance on s 9 of the Constitution will thus not be necessary where this legislation applies, and s 9 will probably only come into play as primary cause of action in matters involving legal provisions, state conduct, or ‘private’ discrimination outside the scope of relevant anti-discrimination legislation.”

18.Pieterse does not say that a litigant will not be entitled to rely on the Bill of Rights as the primary cause of action. He merely says it will not be necessary to do so. I believe that I must investigate whether a litigant, such as Ms Walters, is entitled to rely on the primary cause of action. It would seem to accord with the Constitution. good order and logic that a party who has a right at common law or in statutory law, which complies with the Bill of Rights, should pursue relief in terms of that law. For instance where a litigant complains of an infringement of a right to equality the litigant ought to be confined to the LRA or the Employment Equity Act if those Acts found a cause of action.

19. Professors Cheadle and Davis “The application of the 1996 Constitution in the private sector” 1997 SAJHR 44 at 61 suggests that in the private sector:

“Once the s 8(2) analysis is complete and a court has satisfied itself that the provision of the Bill of Rights applies to a natural or juristic person, it must engage in a four stage analysis in terms of s 8(3) namely:

1. It must satisfy itself that there is no legislation that gives effect to the right as between private persons.
2. It must then determine whether there is not already a common law rule that gives effect to the right as between private person, if there is it must apply that common law rule.
3. If there is no legislation or common law rule giving effect to the right, the court must develop rules of the common law to give effect to that right.
4. In applying or developing a common law rule, the court may limit the right provided that the limitation is in accordance with s 36(1).”

20. The learned writers were, of course, dealing with the private sector. But, in principle, there is no reason why a public sector employee, who is entitled to bring a cause of action under a statute such as the LRA, should also not be confined to that statute. See s 2 for those state employees who have been excluded from the LRA.

21. However s 38 of the 1996 Constitution provides that anyone listed in that section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened. The list includes anyone acting in their own name.

22. The decision in **Hoffmann v South African Airways** (CCT 17/00) makes no reference to Hoffmann’s right to have litigated his rights in terms of the Labour Relations Act 28 of 1956 which was applicable. But the court was alive to the issue because it declined to grant a declaration regarding pre-employment testing on the ground, inter alia, that :

“The question of testing in order to determine suitability for employment is a matter that is now governed by section 7(2), read with section 50(4), of the Employment Equity Act. In my view, there is much to be said for the view that where a matter is required by statute to be dealt with by a specialist tribunal, it is that tribunal that must deal with such a matter in the first instance. The Labour Court is a specialist tribunal that has a statutory duty to deal with labour and employment issues. Because of this expertise, the legislature has considered it appropriate to give it jurisdiction to deal with testing in order to determine suitability for employment. It is therefore that court which, in the first instance, should deal with issues relating to testing in context of employment.”

23. Kentridge AJ in **S v Mhlungu and others** 1995 (3) SA 867 (CC) has stated, in a different context, that:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

See also **Zanti v Council of State, Ciskei and others** 1995 (4) SA 615 (CC) at 617-619.

24. A possible reason for permitting a party to proceed with a civil rights claim, might be that the statute is too narrow. Clearly it is possible for instance, that, the definition of unfair labour practice may be too restrictive. See Cheadle and Davis at 62 who say:

“The first phase of the s 8(3) analysis involves determining the existence of legislation. But this inevitably involves the determination of the extent of the right. For example, the Labour Relations Act 1995 purports to give effect to the right to fair labour practices in s 23(1) of the Constitution. But the definition of an unfair labour practice in item 2(1) of Schedule 7 of the Labour Relations Act is not as extensive as the definition of the 1956 Act.”

See also **Manns v Mondi Kraft Ltd** (2000) 21 ILJ 213 (LC) where it is said at 217E-F:

“There is the possibility that the stretch of the residual unfair labour practice jurisdiction does not go as far as may be permitted by s 23 of the Constitution. This may require a constitutional challenge to the LRA.

This court would be entitled to entertain the challenge in terms of s 172 of the Constitution.”

25. It is possible that instead of, or at the same time, as challenging the constitutionality of the statute, a party may process a civil rights claim and rely directly on the fundamental rights in the Constitution.

26. Another analogous situation, which may possibly entitle a litigant to sue on the primacy cause of action for a civil rights claim is where the remedies provided for in the ordinary statute are inadequate. As this may possibly apply in the case of Ms Walters. I intend to investigate it briefly.

27. In terms of s 38 of the 1996 Constitution, read with s 157 of the LRA, the Labour Court may grant appropriate relief for an infringement of a fundamental right. Section 38 provides that:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights^{1/4}”

28. Mr Niehaus submits that the relief claimed by Ms Walters clearly falls within the ambit of “appropriate” relief in that it constitutes the only viable means of giving effect to the protection of her fundamental right to equality. He also submits that by virtue of s 2 of the 1996 Constitution, a constitutional challenge, if successful, has the effect that the relevant court of law has to confirm the invalidity of the action complained of. See also **S v Manamela and others** 2000 (1) SACR 414 (CC) where the following is stated at 436B – 437B:

“The 1996 Constitution is different. It also makes provision for a competent court to 'grant appropriate relief, including a declaration of rights' to anyone whose rights under the Bill of Rights have been infringed or threatened. It does not, however, contain specific provisions equivalent to ss 98(5), (6) and (7) which dealt with the Court's powers in cases where laws or executive or administrative acts or conduct were found

to be inconsistent with the interim Constitution. Nor are there provisions in the 1996 Constitution similar to ss 35(2) and 235(3) of the interim Constitution. Instead s 172(1) of the 1996 Constitution now affords the courts greater flexibility. It empowers and obliges a court in broad terms to make any order that is 'just and equitable' if any law or conduct is declared inconsistent with the Constitution. The section provides:

“Powers of courts in constitutional matters

When deciding a constitutional matter within its power, a court -

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including -
 - i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.' “

29. The result, Mr Niehaus contends, is that a finding in favour of Ms Walters, to the effect that the Council has infringed upon her fundamental right to equality, will have the result of its conduct (the selection and appointment of Mr Sohena) being invalid.

30. Mr Niehaus’s submissions are sound in law. Mr Sohena has been joined in the proceedings. But the relief which is sought vis-a-vis him and the Council does not make it clear that Ms Walters seeks to set aside his appointment. I should also point out that it has been held that this relief can be granted in unfair labour practice proceedings. In **Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council** (2000) 21 ILJ 1119 (LC) my brother, Mlambo J, set aside an appointment of a town treasurer. It is however unnecessary for me to decide whether the order was a component one. I have indicated that Mr Sohena has not been placed on terms that his appointment be declared invalid and it would be unjust to make such an order without such notice. In any event I do not believe that in the case of a generic type post as in this case that Ms Walters requires such an order.

31. There may well be other situations where a litigant may rely on a primary cause of action founded on an infringement of a constitutional right. It is unnecessary to explore these possibilities.

32. I am of the opinion, that Ms Walters is not entitled to pursue her action in terms of s 157(2) read with the Bill of Rights when she has an adequate claim in terms of the unfair labour practice jurisdiction of the court.

Unfair labour practice

33. The second basis on which Ms Walters relies is that of discrimination on the grounds of political opinion, race and favouritism. I assume that favouritism is linked with political opinion as no other motive for favouritism was suggested.

34. A residual unfair labour practice is defined in item 2(1)(a) of the 7th Schedule to the LRA. A residual unfair labour practice, for purposes of this case, means: “an unfair act or omission that arises between an employer and an employee involving -

(a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including but not limited to race, political opinion”.

Political opinion

35. Mrs Walters alleges inter alia that the Council discriminated against her on grounds relating to political opinion. This complaint can be disposed of on the facts. No evidence was led regarding the political opinion of Mrs Walters, Counsellor Mdaka and Counsellor Meke. No direct evidence was led about the political opinion or affliction of Mr Sohena save for the admission of his CV. He has recorded under the heading: “Leadership Qualities”: “In 1982 one was a president of the interim SRC at Mmpombani in Alice. At Fort Hare one was an executive member of the then AZAPO now called SASCO”. I may take judicial knowledge that there is

a political movement known as AZAPO. But I have no evidence about whether AZAPO is the organisation “now called SASCO.” I am therefore of the opinion that I cannot find that Mrs Walters has proved what the political opinion is of Mr Sohen. Furthermore, save for the fact that at some time before the interview Councilor Mdaka read his CV, I am unable to draw a conclusion that Councilor Mdaka was influenced by this passage even assuming that it has relevance. Something was made of the fact that on a prior occasion as regard another appointment Councilor Mdaka had a list of names with the anagram “ANC” marked against a name. I am not able to evaluate the significance of this. If this fact is admissible it does not assist in proving Ms Walters’ contentions.

36. Mr Shand testified that during the closed deliberations of the selection panel, which he and Mr Le Roux attended, Councillor Mdaka said, at one stage, that the appointment of Mr Sohen was a “political appointment” and that he wanted to appoint not the feet but the head. The words “political appointment” can have various shades of meaning. They must be interpreted in their context. They could mean that Mr Sohen was being appointed on account of his political opinion (with the implication that Ms Walters was not being so appointed) because his opinions coincided with those of a councilor or both councilors. Another possibility is that the appointment of Mr Sohen was one to be made by the council and not by the officials.

37. Councillor Mdaka denies that he made the remark. However the councillor was not a satisfactory witness as compared to Mr Shand. I am mindful that Mr Shand has an interest, albeit a legitimate one, in the appointment of council officials for whom he is administratively responsible. I find that the statement was uttered. However the statement, was made, in the context of what appears to be an “unfriendly” relationship between the councillor and Mr Shand. The tension undoubtedly arises from the competing interests as seen from the perspective of the officials and the councillors on staffing. I am not convinced, on the evidence, that the statement bears a sinister or improper implication.

38.It was contended on behalf of Ms Walters that this remark about making a political appointment takes on an sinister shade when it is considered together with an alleged remark by the SAMWU representative who attended as an observer. Mr Niehaus testified that the SAMWU representative said to him, prior to the announcement of the formal selection, that he knew who the councillors would select or had selected. This is clearly hearsay evidence, although it could be admitted in proper circumstances. However, Mr Niehaus, after the last postponement, re-entered the witness stand and testified that in the meantime the SAMWU representative had told him that he would not testify in this court and that if compelled to do so he would deny making the statement. I do not think that this evidence can be admitted without calling the representative. Even if I were to accept it, it is not indicative of much more than that the SAMWU representative knew that Mr Soheni was the councillors' favourite but not that they had closed their minds.

39.I therefore conclude that Mrs Walters has not shown that the council discriminated against her on the grounds of political opinion or favouritism.

Racial discrimination

40.The complaint that Ms Walters was discriminated against by reason of her race requires careful investigation. Her reliance on this ground is complicated by a number of factors. In the first instance Ms Walters relies on affirmative action to support her contention that she was entitled to preference above Mr Soheni and at the same time that the council's alleged reliance on affirmative action in appointing Mr Soheni unfairly discriminated against her. Clearly she cannot as Mr Wade, who appeared for the Council, put it "run with the hares and hunt with the hounds". This is especially so where she alleges that as the council is not entitled to rely on affirmative action in the absence of an affirmative action plan. It is conceded, without conceding the merits, that the council did not have an affirmative action plan as contemplated in para 5.3 of the National Labour Relations Forum for the Local Government's agreement on equal employment practice and affirmative action. This admission complements an admission that at all relevant times and in respect of the

department or division in question the council did not have an affirmative action plan within the meaning of the judgments or awards in:

Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council (2000) 21 ILJ 1119 (LC);

Public Servants Association of SA & Others v Minister of Justice & Others (1997) 18 ILJ 241 (T);

MWU obo Van Coller/ESKOM [1999] 9 BLLR 1089 (IMSSA); and

ESKOM v Hiemstra N.O. & Others (1999) 20 ILJ 2362 (LC).

41.The second complication regarding affirmative action stems from the way the statement of case has been framed. Reliance on affirmative action may be a good defence to a claim of a breach of the principle of equality. If it is raised the party raising it attracts an onus to prove it. In this case Ms Walters set up affirmative action as a sort of weapons platform to launch a challenge for relief as she alleges that it favours her on account of her gender. She also anticipates in her statement of case that the council might plead affirmative action and she seeks to demolish it in so far as it favours the appointment of Mr Sohena.

42.The case for the council, gleaned from the statement of response, is that:

1.Ms Walters and all the short-listed candidates were “disadvantaged persons”;

2.Mr Sohena “given his qualifications and experience and race (together), was reasonably deemed” by the council to be the best candidate for the position;

3.The council legitimately took account of the race of Mr Sohena in terms of its prevailing policies as a factor for preferring Mr Sohena to Ms Walters;

4.Customs regarding preferential treatment of internal candidates does not trump the council's obligation to create a representative workplace by preferring affirmative action candidates.

43.I have set out the Council's position as it is pleaded regarding its appointment of Mr Sohena to the post and its treatment of Ms Walters in the course of that process. I now propose detailing the case for the Council as it emerged from the evidence of its witness, Counsellor Mdaka. The counsellors in making the position considered the demographic state of the department. By demographics is meant the racial and gender make up of the department. This reflected that while males were in the higher ranks and in the ranks below that together with white females and that blacks occupied the lowest ranks. The counsellor took into account the answers to the questionnaires. It was however conceded by the Council at the trial that Ms Walter's answers were the best. It was my impression of the evidence and cross-examination that counsellor Mdaka did not understand fully the discipline of job evaluation and that Mr Sohena's answers also displayed a lack of understanding of basic concepts. This aside, the counsellor believed that Mr Sohena rated the best on his responses to the questionnaire. The counsellor felt that Mr Sohena was the best qualified. The counsellors were concerned with the need to affirm black persons in the department. At the short-listing stage the councilors were of the opinion that there was no need to call Ms Walters as she was a white person. But as she was an internal candidate she was included as it could have been a question of promotion.

44.The counsellor's position, as demonstrated under cross-examination is that they relied on affirmative action together with their perception of the expertise of Mr Sohena in appointing him, even though a distinction was drawn between being racist ie appointing a person of their own race only, and giving expression to the need to take account of the demographic face of the city.

45. On the counsellor's own evidence I am obliged to come to the conclusion that the predominant reason for not appointing Ms Walters was because of her race. Prima facie she was discriminated against on the grounds of her race.

46. However, item 2(2)(b) provides that for the purposes of item 2(1)(a) "an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms".

47. The primary question for this court to decide is whether the Council may rely on this policy and practice. In **Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council** (2000) 21 ILJ 1119 (LC) my brother Mlambo J considered item 2(2)(b) and the very document which forms the basis of the policy or practice on which the Council seeks to rely. He concluded:

"[24] It is clear therefore that the Agreement on Equal Employment and Affirmative Action envisages further steps by individual local authorities such as the respondent. The most important of these is the formulation of an affirmative action programme. There is no dispute that the respondent adopted this agreement during a meeting on 8 October 1996. There is further no dispute that the further action plans envisaged in this agreement have not been carried out or implemented by the respondent. In a nutshell the respondent has done nothing envisaged by the agreement. In my view therefore the respondent cannot even begin to consider affirmative action in appointments before it has complied with the agreement.

[25] In the absence of an affirmative action programme specifically designed in terms of the collective agreement any appointment of purported affirmative action grounds is illegitimate. It is illegitimate because it is not in terms of any formulated policy against which it can be tested. In a nutshell the appointment of

Masengana cannot be justified on affirmative action grounds. Simply put the respondent cannot find refuge in item 2(2)(b) of schedule 7 of the Act.”

48. I am satisfied that Ms Walters has shown that the Council discriminated against her race, that the Council cannot justify its conduct and has therefore committed an unfair labour practice.

49. Ms Walters seeks a declaration to the effect that the Council infringed her right to equality and that the Council discriminated against her, alternatively that it acted unfairly towards her in relation to her promotion or benefits. She seeks an order that the Council be directed to promote her to the position of Principal Personnel Officer (Job evaluation) retrospectively as from 20 July 1998. In the alternative she seeks an order that the Council remunerate her and provide her with benefits of a Principal Personnel Officer (Job evaluation) retrospectively. Ms Walters does not seek an order setting aside the appointment of Mr Soheni. At the stage the application was launched Mr Soheni had not taken up the post but was being carried in a contract post. The Council decided to install him in the post even though litigation was pending. The actions of Council are, I believe, irrelevant to the relief which the applicant claims. It made a decision and it must have foreseen that there was a possibility that Ms Walters could be instated.

50. In **Hoffmann’s** case at paragraph 50 Ngcobo J expressed the view, albeit in the context of a civil rights claim, that:

“An order of instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as is possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that

objective rests not only upon the elimination of the discriminatory employment practice, but also requires that the person who has suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.”

51.I am of the opinion that these remarks apply with equal force to proceedings in terms of the unfair labour practise jurisdiction of the court. I propose making such an order.

Delictual claim

52.Mr Niehaus submits that purely on the basis of the existence of an employment relationship as envisaged in section 157(2)(a) of the LRA, the horizontal application of the Bill of Rights to the present matter is sound in law. He points out that Davis and Cheadle at 58 (arguing in favour of an interpretation of the Bill of Rights to support its horizontal application between private persons), submit that the Law of Delict is an adequate and appropriate vehicle for purposes of giving effect to a constitutional remedy. The learned writers submit, that even though the Bill of Rights has horizontal application, it still does not create a direct, separate constitutional cause of action. The newly created constitutional action must be mediated through our common law. Mr Niehaus submits that if this construction is accepted, then, for purposes of the present matter, and on the basis of contending that Ms Walters is entitled to rely on a constitutional cause of action, an extended application of the Law of Delict (as proposed by Davis and Cheadle) is appropriate and capable of providing a remedy to her.

53.It is further contended that the Council infringed upon her fundamental right to equality in an unlawful manner, either intentionally (*male fides*) or negligently (which it is said appeared to have been advanced by the Council with reference to its submissions during cross-examination of Ms Walters and her witnesses that Council could have had made a *bona fide* mistake in the selection of Mr Sohena), as a result of which she suffered damages (both monetary and in respect of non-monetary considerations, such as status, career

development, etc.). The amount of any financial prejudice suffered was not in dispute. In the circumstances it is submitted that the evidence dealt with all the various elements required for purposes of a delictual claim and as such the infringement of Ms Walters' fundamental right to equality can be effectively remedied by way of a delictual remedy.

54. Although delictual remedies are primarily focussed on compensation, Mr Niehaus submitted that the granting of an interdict is also one of the remedies available to a litigant in a delictual action. See Neethling et al **Deliktereg** 2nd ed Butterworths 1992 at 260. The granting of such relief may take the form of a *mandamus*, which is consistent with the relief sought by the Ms Walters in respect of her being appointed to the position in question.

55. Although he has argued cogently, Mr Niehaus, is aware that his argument is contentious. He has referred me to Du Toit *et al* **Labour Relations Law** 3rd ed at 614 who state that the Labour Court has no jurisdiction to determine delictual claims. I am inclined to think that Du Toit et al are correct. But it is not necessary to decide this for it was not Ms Walter's case that she suffered a delict. The Council would suffer prejudice if this claim were to be considered at this late stage.

56. I would like to record my appreciation to Mr Niehaus and Mr Wade for the way in which this trial was conducted and for their incisive heads of argument.

57. In the premises I make the following order:

1. It is declared that the Transitional Local Council of Port Elizabeth has committed an unfair labour practice in respect of the applicant in that it unfairly discriminated against her;

2. The Council is directed to promote her to the position of Principal Personnel Officer (Job evaluation)

retrospectively as from 20 July 1998 with all benefits;

3. There will be no order as to costs.

SIGNED AND DATED AT JOHANNESBURG ON THIS 23TH DAY OF OCTOBER 2000.

Landman J

20, 21 & 22 September 2000.

23 October 2000.

Mr Niehaus of Minnaar Niehaus Attorneys.

Adv R Wade instructed by Chris Baker & Associates.