REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J 4476/99

In the matter between:

DANIEL NTAI & 2 OTHERS Applicants

and

SOUTH AFRICAN BREWERIES LIMITED Respondent

JUDGMENT

BASSON, J

[1] The applicants, Messrs D Ntai (ANtai≅), V Radebe (ARadebe≅) and Z Boekhouer (ABoekhouer≅), referred a dispute to the Labour Court in terms of the provisions of item 2(1)(a) read together with item 3(4)(a) of schedule 7 to the Labour Relations Act, 66 of 1995 (Athe LRA≅).

[2] The applicants who are black persons, alleged that the practice of their employer, the respondent (South African Breweries Limited), of paying them lower salaries compared to their white counterparts, constituted unfair racial discrimination and therefore a residual unfair labour practice in terms of the provisions of item 2(1)(a) of schedule 7 to the LRA.

[3] The applicants sought an order declaring that the respondent=s conduct of paying the applicants a lower salary compared to their white counterparts, constituted discrimination on the basis of race, alternatively Aarbitrary≅ discrimination, and therefore an unfair labour practice. The applicants sought relief in the form of an order that the respondent is to pay the applicants a salary equal to that of their white counterparts, retrospective to a date to be determined by the Court.

[4] Item 2(1)(a) of schedule 7 to the LRA reads as follows:

A2. Residual unfair labour practices

1)For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-

(a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility≅.

[5] In essence, the applicants contended that discrimination on the grounds of race can be found in the fact that they are black but earn less than white employees who perform the same work. In this regard, the three applicants identified two white colleagues who were also working as training officers in the Training Institute of the respondent (consisting of the said five training officers). The applicants identified these Acomparators≅ as Messrs T Wyer (AWyer≅) and R Tellis (ATellis≅). Put somewhat differently, it was the case of the applicants that these two white comparators were paid substantially more than them, even though they all do the same work or work of equal value. It was this practice that allegedly constituted unfair racial discrimination, alternatively, Aarbitrary≅ discrimination.

[6] It is also important to note from the outset that, although it is clear that item 2(1)(a) of schedule 7 to the LRA (quoted *supra* at paragraph [4]) makes provision for reliance on both direct and indirect discrimination, the applicants alleged only direct discrimination and expressly indicated that they were not relying on indirect discrimination (in terms of paragraph 2 of the so-called second pre-trial minute).

[7] The respondent admitted that there was a difference in salary between the applicants and the identified comparators but denied that this difference was based on or caused by race.

[8] In my view, the *onus* lies on the applicants to prove the discrimination they allege. I am, however, mindful of the fact that this amounts to a onerous burden of proof. In **Louw v Golden Arrow Bus Services (Pty) Ltd** (2000) 21 **ILJ** 188 (LC) at 197B Landman J held:

AIt is necessary to distinguish clearly between discrimination on permissible grounds and impermissible grounds. An unfair labour practice is only committed (even by omission) if the impermissible grounds are the cause of the discrimination. Discrimination on a particular Aground≅ means that the ground is the *reason* for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different race is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less than Mr Beneke=s *because* of his race≅ (emphasis in the original).

[9] This principle appears to be well-established. See, *inter alia*, **Harksen v Lane NO and Others** 1998 (1) SA 300 (CC) at para 48; **Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others** (1998) 19 **ILJ** 285 (LC) at 299; and **TGWU and Another v Bayete Security Holdings** (1999) 4 **BLLR** 401 (LC) at 402D-G.

[10] It must further be noted that, once an applicant proves discrimination, the *onus* shifts to the employer to prove that such discrimination (on one of the identified grounds such as race) is, nevertheless, fair. See in this regard section 9(5) of the Republic of South Africa Constitution Act, 108 of 1996 (Athe Constitution≅) as well as section 11 of the Employment Equity Act, 58 of 1998 (Athe EEA≅). In my view, the fact that item 2(1)(a) of schedule 7 of the LRA (the applicable anti-discrimination provisions *in casu* which applied before the introduction of the EEA) did not specify such shift in the *onus* expressly, there is no reason to believe that, given the value placed on equality by the South African Constitution (see also the discussion *infra* at paragraph [14]), the same principle should not apply. In **Harksen v Lane NO and Others** (*supra* at paragraph [9] at 325A-D) the following was said in regard to the so-called second stage of the analysis to establish Aunfair≅ discrimination:

AIf the differentiation amounts to Adiscrimination≅, does it amount to Aunfair discrimination≅? If it has been found to have been on a specified ground, then unfairness will be presumed ... ≅.

[11] Further, accepting that the overall *onus* lies on the alleged victim of discrimination to prove that he or she has been directly discriminated against on a balance of probabilities, it would appear to me, taking into account the fundamental value of equality espoused by the Constitution (see, *inter alia*, **President of the Republic of South Africa and Another v Hugo** [1997] 6 **BCLR** 708 (CC) at 728G to 729F) that a court would not be remiss if it exercises its discretion in favour of the ease with which such alleged victim establishes a *prima facie* case, calling upon the alleged perpetrator of racial discrimination to justify its actions. This appears to be a common sense approach as espoused in, *inter alia*, the judgment of **King v Great Britain-China Centre** [1991] **IRLR** 513 at 518.

[12] This also means that, once such *prima facie* case is made out, a negative inference can be drawn from the silence of the alleged perpetrator. In **Ex parte minister of Justice : In re R v Jacobson and Levy** 1931 AD 466 at 478 Stratford JA held:

A*Prima facie* evidence in its usual sense is used to mean *prima facie* proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his onus≅.

[13] It does, however, appear that a mere allegation of discrimination will not suffice to establish such *prima facie* case (see **Transport and General Workers Union and Another v Bayete Security Holdings** (1999) 20 **ILJ** 1117 (LC)).

[14] The premium placed on the **achievement** of equality is evident where this ideal is identified as a value on which the democratic South African state is founded (in terms of section 1(a) of the Constitution). In other words, not mere formal equality but substantive equality is the constitutional goal in the sense of outcome of results and not merely equality of treatment (see, *inter alia*, **President of the Republic of South Africa and Another v Hugo** (cited above at paragraph [11]). In this regard section 9(2) of the Constitution also specifically endorses the use of affirmative action in that Ato promote the achievement of equality≅, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.

[15] This does not mean, of course, that an Aanti-discrimination≅ clause such as item 2(1)(a) of schedule 7 of the LRA (which contains the applicable legal provisions *in casu*) can be interpreted as awarding a victim of discrimination the right to affirmative action. On the contrary, a legislative measure such as chapter 2 of the EEA (*supra* at paragraph [10]) is needed to provide possible remedies in this regard. Affirmative action in terms of the applicable provisions of the LRA *in casu* remains but a shield or defence in the hands of an employer that wishes to legitimately and lawfully apply such Areverse discrimination≅ on the basis of, for instance, race (see the provisions of item 2(2)(b) of schedule 7 to the LRA). I will come back to this issue below (at paragraph [85]).

[16] Further in regard to discrimination, the following *dictum* appears to be particularly apposite. In **Prinsloo v Van der Linde and Another** 1997 (3) SA 1012 (CC) at paragraph 31 the Constitutional Court explained the meaning of the term Adiscrimination≅ as follows:

AGiven the history of this country we are of the view that >discrimination= has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes or characteristics attaching to them≅.

[17] In other words, if an employer pays employees unequally on the basis of their race, this would clearly constitute Adiscrimination≅ on the grounds of race. However, it also means that a mere differentiation in pay between employees who do similar work or work of equal value does not mean, in itself, that an act of discrimination is being perpetrated. It is only when such differentiation is based on or linked to an unacceptable ground that it becomes discrimination within its pejorative meaning.

[18] It is also clear that the causation test would apply in terms whereof the applicants are required to prove that they are paid less than their comparators because of their race. See, *inter alia*, **Harksen v Lane NO and Others** (*supra* at paragraph [9]); **James v Eastleigh Borough Council** [1990] **IRLR** 288 (HL) at 294 (*per* Lord Goff); and **Louw v Golden Arrow Bus Services (Pty) Ltd** (*supra* at paragraph [8]).

[19] As happens more frequently than not in discrimination cases, the applicants *in casu* had to base their case wholly on inference in order to prove on a balance of probabilities that they were paid less than the white comparators because of their race.

[20] The similarity of the jobs (as training officers); the difference in race between the applicants and the two comparators; and the fact that the applicants were paid less than their comparators raised a very strong inference that race could very well be a probable explanation for the difference in remuneration. All of these facts were common cause *in casu*.

[21] I am prepared to assume, in favour of the applicants, that they established, on the basis of these common cause facts, a *prima facie* case of racial discrimination based upon unequal pay for similar work or work of equal value. In other words, on the basis of these common cause facts, it may well be that the applicants were discriminated against on the basis of their race. An explanation by the respondent was accordingly called for. After all, although intention is not required for proof of discrimination, only the employer really knows the real reason for its actions.

[22] However, ever mindful of the burden of proof, and thereby accepting that the eventual *onus* still lies on the applicants, the applicants can only succeed if they show that the inference of discrimination on the basis of

race sought to be drawn is consistent with all the proven facts and that such inference is the most probable (in the sense of most plausible, acceptable, suitable or credible) inference to be drawn. See, *inter alia*, **Ocean Accident Guarantee Corporation Ltd v Koch** 1963 (4) SA 147 (A) at 159B-D where Holmes JA held:

AAs to the balancing of probabilities, I agree with the remarks of Selke J., in **Govan v Skidmore** 1952 (1) SA 732 (N) at p. 734 namely-

A... in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence*, 3rd ed, para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion is not the only reasonable one≅.

[23] See also in this regard: Hoffmann and Zeffert AThe South African Law of Evidence≅ (4th ed) at pp 589 to 591.

[24] The applicants led the evidence of Ntai and Radebe before closing their case. After an application for absolution from the instance was refused, the respondent led the evidence of Mr V Ratshefola (ARatshefola≅); Mr R van der Schyff (AVan der Schyff≅); Mr M Norton (ANorton≅); and Mr V Milford (AMilford≅).

[25] The respondent admitted that the discrepancy or differential in pay between the applicants and the two comparators was too big. However, denying that such anomalous gap in pay was caused by race, the respondent relied upon essentially three factors to explain the difference: a series of performance based pay increments; the greater experience of the comparators; and their greater length of service (seniority).

[26] Ratshefola, the respondent=s personnel manager, stated that the main determinants of pay, in terms of the respondent=s pay policy, were job size or rating; market movement; and performance. He explained that the respondent aimed to pay good performers at the 75th percentile of what was being paid in the market. The 75th percentile is generally taken as the respondent=s midpoint for that particular grade or job size, that is, a so-called comporatio of 1.00. He added that salaries varied consistently around the mid-point or comporatio to 20% above and below the midpoint. He also stated that, in order to be paid above a 1.00 comporatio, an employee should be an Aexcellent≅ performer.

[27] Ratshefola testified that a fully-qualified new appointee would normally start at approximately a 0.94

comporatio but that this could be more or less, depending on the circumstances. For example, a high salary before appointment might justify a higher starting comporatio and a low prior salary could lead to a relatively lower starting comporatio. The need to pay a premium for scarce skills or experience to attract a person particularly wanted by the respondent might also result in a relatively high starting comporatio.

[28] Ratshefola added that experience and performance played a big role in the determination of salary increases. In terms of the respondent=s six-point performance evaluation procedure, those who score one or two points were categorised as Anon-performers≅, those scoring three or four points as Anormal performers≅ and those scoring five or six points as Asuperior achievers≅.

[29] Ratshefola testified that a normal performer should receive an average to slightly above-average increase and should remain at or slightly above the assumed starting comporatio of approximately 0.95. A regular Afour≅ performer should stabilise at around a comporatio of 1.00 and should not go higher. A consistent Afive to six≅ performer should rise above a 1.00 comporatio.

[30] Ratshefola=s evidence went largely unchallenged. In fact, the applicants did not attack the pay policy of the respondent as being unfair (or even discriminatory) *per se*. The unfairness that they complained about appeared to be exclusively related to the differential between their remuneration and that of the two white comparators. I reiterate that, in order to show racial discrimination, it was incumbent upon the applicants to show (on a balance of probabilities) that the differential was caused by race.

[31] In assessing whether this was the case, the position in regard to the pay of the three applicants bears closer scrutiny.

[32] It appeared that Radebe was promoted with effect 1 April 1996 to a training officer and received an annual package of R 111 500 which computed to a 1.00 comporatio. At the time Wyer was at a 1.17 comporatio and Tellis was at a 1.16 comporatio. In the result, a 17% differential existed between Radebe and the two white comparators as at this moment. This evidence was evident from a schedule contained in the bundle of documents (hereinafter referred to as exhibit A) at pp 1D to 1F.

[33] The said schedule also showed that Radebe remained at approximately a 1.00 comporatio from that date until today, when his comporatio is slightly lower at 0.99.

[34] The next applicant to be employed as a training officer, that is, at grade G, was Boekhouer as from 1

September 1996 on a comporatio of 0.89. Boekhouer=s comporatio rose swiftly with the result that it slightly exceeds that of Radebe today at a comporatio of 1.00.

[35] Ntai was employed as a training officer with effect 1 July 1998 on a comporatio of 0.95. His comporatio remained at approximately this level and is at 0.95 today.

[36] It is important to note that the comporatios of the applicants had changed somewhat *inter se* (Boekhouer had, for instance caught up with Radebe - *supra*). This was largely due to performance related increases.

[37] Further, a later comparison with the two white comparators showed that Tellis=s comporatio had declined (he had since resigned) and that the comporatio of Wyer today is only 1.13 compared with 1.17 in 1996 (*supra*). In the result, the differential between Wyer and the highest paid applicant (Boekhouer) today is approximately 13% compared to the 17% in 1996 (*supra*). The evidence was that this differential (the comporatios of the two comparators) was whittled down deliberately because the respondent realised that the difference or gap in salaries was too big. I will return to this issue below.

[38] The respondent argued that the difference (in May 1999) was only 15%. The applicants maintained that the operative difference was 17%. Nothing much turns on the exact percentile. The main complaint of the applicants was that the difference between the applicants *inter se*, that is, between the most experienced applicant (Radebe) and the least experienced applicant (Ntai) was only about 4% with a difference in experience of four years (six years versus two years). However, on the other hand, the difference between the most experienced applicant (Radebe) and the relevant white comparator (Wyer) was approximately 17% (on the respondent=s version, 15%) whilst the difference in experience was only five years (Wyer having worked in this capacity for eleven years compared to Radebe=s six years).

[39] It is this high comporatio of the white comparators (which the respondent admitted to be disproportionally high) that the respondent sought to explain on the basis that there were other factors or reasons, and not the race of the comparators, which resulted in this anomalously high comporatios and, hence, that the difference in pay did not constitute racial discrimination.

[40] Van der Schyff, presently the human resources development manager and from 1996 until recently the training and development manager at the Training Institute to whom the applicants reported, explained how the unacceptably high comporatios of Tellis and Wyer came about with reference to their employment history.

[41] Van der Schyff testified that he was made aware of the Asurprisingly high≅ comporatios of Wyer and Tellis when the applicants raised their grievance in May 1999. Although he was of the opinion that the two comparators should earn Asignificantly higher≅ salaries than the applicants (who had only more recently been appointed as training officers, at grade G), he was of the view that the comparators should not be earning as much as what they were being paid. He therefore decided to manage their comporatios down over a period, giving them smaller salary increases than they would otherwise have received. He stated that he believed their comporatios should have been in the region of 1.08. Notwithstanding their relatively high remuneration, he believed it appropriate to still give the comparators annual increases because Athey did bring skills and intellectual capital to the job and I would have risked losing their skills≅. He also pointed out that the situation was not of their making.

[42] At the same time it was decided not to pay the applicants more in order to close the gap. Van der Schyff explained this by referring to the appointment of Boekhouer (*supra* at paragraph [34]). He stated that he was of the opinion that Boekhouer=s (lower) salary was appropriate. This appeared to have been common cause as the applicants did not complain about their starting salaries *per se* nor did they allege that the respondent=s salary policy (explained in detail above) was *per se* unfair.

[43] I reiterate that the respondent=s pay policy sought to pay employees at a rate of about 20% above or below the midpoint or comporatio of 1.00 for a specific job size or grade. The applicants did not allege that the comporatio for training officers (a grade G job size) did not comply with the market related guidelines. The applicants also did not challenge Ratshefalo=s evidence to the effect that a starting comporatio at more or less 0.94 was fair (*supra*).

[44] In essence, Van der Schyff contended that the comporatios of the applicants were at the correct level according to the pay policies of the respondent with Radebe at a comporatio of about 1.00 and Boekhouer, in performing well, also advancing to the level of a 1.00 comporatio. Van der Schyff also stated that Ntai started at an acceptable comporatio of 0.95.

[45] Van der Schyff, referring to the employment history of the two white comparators before the applicants were appointed as training officers (as from 1996 - *supra*), stated that, when Tellis and Wyer were appointed at the Training Institute, they were appointed as Atraining instructors≅ at grade F and paid on the higher FF scale. The evidence that this was a rational decision at the time was not challenged. Tellis was appointed on 1 September 1987 and Wyer on 1 November 1989. Both had already worked for the

respondent in different capacities at the time of their respective appointments and also received increases at the time.

[46] By April 1990 Tellis was at a comporatio of 0.93 (for this grade and scale) and Wyer was at a comporatio of 0.93 (see the relevant schedule - exhibit A1D).

[47] In October 1990 the Training Institute was relocated and Tellis and Wyer received an additional monthly increment of R 200 each to compensate them for travelling expenses. They had two colleagues at the time, a certain Du Plessis who also received R 200 and a black training instructor, Mr J Mashazi (AMashazi≅), who likewise received a R 300 increase. This increase took Tellis to a comporatio of 0.97 and Wyer to a comporatio of 0.95.

[48] An event which appeared to have been of fundamental importance in influencing the salaries of Tellis and Wyer occurred on 1 February 1992. Their jobs (together with that of the other Atraining instructors≅ at the time, that is, Du Plessis and Mashazi) were re-graded to the higher grade G and were renamed to that of Atraining officers≅.

[49] Van der Schyff explained the rationale for the upgrading. The respondent also employed regional training officers who were at the time graded at G. It appeared that the job sizes of the regional training officers and the Atraining instructors≅ at the Training Institute were the same or comparable. At the time, grade G employees also started receiving a car allowance of R 500 a month and the training instructors complained about the discrepancy in grade, they being at a grade F which did not include a car allowance, despite them being paid at a premium of an FF scale (*supra*). In the result, it was decided to regrade the said employees upwards and to rename their jobs to that of Atraining officers≅.

[50] It was decided to also grant the said employees a monthly increase of R 200 in salary. Van der Schyff explained that it was not an unreasonable expectation for employees who were being upgraded to also receive a take-home salary increase over and above the fact that they were now receiving a car allowance into the bargain. Ntai agreed that such a salary increase would be a normal expectation in circumstances where an employee was upgraded. The reason why a salary increase became necessary was also because the premium which their F grade jobs attracted, that is, payment at a higher FF scale, and which premium was being paid because of scarcity of such employees in the market place, resulted in payment on an FF scale with an even higher midpoint than the (new) grade G (see exhibit A623).

[51] The result of the upgrading was that Tellis moved up to a comporatio of 1.17 and Wyer moved up to a comporatio of 1.16 (relative to the grade G midpoint). These comporatios remained as high because two months later the said employees received a substantial performance related increase (see exhibits A203 and A310). The end result was a increase in remuneration of about 30%.

[52] In the light of the aforegoing, I am satisfied that race was not the reason why Tellis and Wyer were at such high comporatios as from 1992. There were namely other factors which caused the abnormally high increase. This must be so, also taking into account the very important fact that their black colleague at the time, Mashazi (*supra*), moved up from a 0.92 to a 1.12 comporatio as a result of the same regrading. Had he stayed at the Training Institute, it is probable that the large gap in comporatios between white and black training officers would have been much smaller today.

[53] In the event, even if it can be said that these comporatios were too high, there is no evidence to show (directly or by way of inference) that the high comporatios of the two white comparators were caused by or based on race. Further, as was pointed out above, the applicants (who were appointed as training officers at a later date) did not believe that the respondent=s pay policy was objectively unfair or that their pay was not market related (and high at the 75th percentile).

[54] In this regard Milford, a compensation consultant at the respondent, also testified with the assistance of graphs (see exhibits A111 and A129 and also exhibit A128) to the effect that some of the lowest paid grade G employees were white. In fact, in the case of the regional training officers who appeared to be appropriate comparators *vis-à-vis* the training officers at the Training Institute (*supra* at paragraph [49]), it was striking that the three lowest paid employees were white. Further, the graphs showed that a substantial number of employees in this grade were remunerated below the relevant midpoint, as Ratshefola also testified (*supra* at paragraph [26]). In essence, this evidence supported the respondent=s case that its remuneration policy, in general, did not discriminate on the basis of race.

[55] It therefore appears that, although the size of the gap between the comporatios of the three applicants and their two white comparators was larger than it should have been, in the sense that it constituted an anomaly resulting from the manner in which the pay policy of the respondent had been applied in the case of the two comparators, the difference was not caused by or based on race.

[56] The size of the gap can be attributed to the remuneration history of the comparators where the regrading of their jobs in 1992 and factors such as their experience (seniority) and accumulative performance related

increases appear to have played an important part.

[57] In the event, the applicants have, despite the fact that a *prima facie* case had originally been made out (see paragraph [21] above), failed to show that the abnormally large gap between these comporatios constituted racial discrimination. There is accordingly no merit in the contention of the applicants that the size of the gap indicated that at least a part of the gap was caused by race.

[58] The applicants further contended that the failure of the respondent to address the admitted anomaly in comporatios constituted racial discrimination.

[59] As it was also pointed out above, the respondent explained its decision not to increase the applicants= remuneration to the level of that of their comparators but to rather manage down the comporatios of Wyer and Tellis by giving them smaller performance related increases over time.

[60] First, the respondent indicated that the applicants were being paid in accordance with the market related pay policies of the respondent on the high end of the scale (at the 75th percentile). In the result, to have paid them more, would have inflated and distorted the entire pay line of the business. Second, the respondent did not want to risk losing the services of Tellis and Wyer as they constituted important Aintellectual capital≅ and their skills were needed. Their salaries could therefore not suddenly be reduced, thereby causing them great unhappiness and giving them reason to resign.

[61] It is of the utmost importance to note that the respondent did not proffer these grounds of justification in order to justify a practice of racial discrimination. Operational requirements of this kind can namely never justify racial discrimination. The fact remains that, for the reasons fully discussed above, the differential in pay was not caused by race. In other words, the Apractice≅ of paying the comparators more and the anomalous size of the salary gap did not constitute racial discrimination.

[62] In the event, the justification for not paying the applicants the same as their comparators with immediate effect but to rather manage down the comporatios of the comparators and to do so only over a period of time, was not put forward as justification for a discriminatory practice but merely as justification for addressing an anomaly in pay in a certain manner. As such, there appeared to be no basis for not accepting the respondent=s reasoning. Moreover, I can see no basis whereupon the Labour Court could legitimately interfere with such decision of an employer, especially as the applicants have clearly failed to show that the alleged unwillingness of the respondent to close the gap or diminish the size thereof was in any way related

to or based upon race.

[63] For the sake of completeness, I intend to deal with some of the criticisms of the applicants against the respondent=s case. Note that, for the most part, the respondent=s evidence went unchallenged.

[64] The applicants= contention that the salary gap between Radebe and Wyer was 17% and their difference in experience about five years whilst between the applicants *inter se* the gap was only 3% to 4% with roughly the same difference in experience must be seen in context. Length of service alone namely did not explain the differences. Relative performance (with performance related increases) also explained the differences in salaries. For instance, Boekhouer started at a lower comporatio than Radebe but caught up and eventually overtook Radebe (see the evidence discussed above at paragraph [34]).

[65] Further, the applicants argued that Radebe was not paid at an FF scale when he was working as a Atraining instructor≅ at the F grade in the Training Institute in 1996, whereas the comparators (when they were Atraining instructors≅ before 1992) were paid at this scale. I am not satisfied that an inference of racial discrimination can be drawn from this fact. First, the comparisons which the applicants sought to make was only from the stage when the applicants were appointed as training officers. Second, it was conceded by Radebe that he was merely being trained as a trainer at this stage, a fact which could, of course, also have justified his lower salary. It must further be noted that Radebe was appointed at a generous 1.00 comporatio when he was upgraded to a G grade as a training officer in 1996, fully in keeping with the respondent=s pay policy as it was explained.

[66] The complaint that Radebe was given a smaller increase than Tellis and Wyer on 1 July 1996 was also answered by the respondent. This complaint overlooked the fact that Radebe was given a substantial increase two months earlier. In any event, Radebe=s subsequent increases brought him to an apparently objectively reasonable 1.00 comporatio.

[67] Ntai=s complaints that he should have been given a higher starting salary as training officer and that Wyer should have been paid less than him also appeared to have been without much substance. First, Ntai started at a 0.95 comporatio, that is, consistent with and well within the acceptable norm in terms of the respondent=s pay policy (see the discussion at paragraph [27] above). Van der Schyff=s evidence that race played no role in the starting salaries or the unwillingness to increase the applicants= salaries to the level of that of the white counterparts also went largely unchallenged in cross-examination. Second, Van der Schyff rejected the suggestion that Wyer performed a mere support function and Ntai conceded that they had worked under Wyer at a certain point and this was also confirmed by Radebe.

[68] Revealingly, Radebe also conceded that, even if the comparators were of the same race, he would have alleged discrimination (the rejection of any notion of Aarbitrary discrimination≅ is dealt with below at paragraphs [70] to [74]]). It is therefore clear that the case of the applicants itself, based as it was on racial discrimination, can be criticised on a number of grounds. In this regard, the apparent failure of the applicants to originally allege Aracial≅ discrimination, that is, in their grievance form (exhibit A24A to A24B) as well as at the grievance hearing on 7 May 1999 (exhibit A25 to A28 is the respondent=s minute of this hearing), also cast a shadow over their later case based on this very contention. It appears that the evidence of Norton in regard to what had happened at the said hearing must be preferred, especially in the light of Radebe=s concession (*supra*).

[69] In the event, even taking into account possible criticisms against the respondent=s case, the fact remains that, upon a consideration of all the evidence (fully discussed above), the applicants have failed to show, in terms of their *onus* in this regard, that the more probable inference to be drawn was that they were being paid less than their white comparators because of race.

[70] The applicants further contended that they were discriminated against upon Aarbitrary≅ grounds. The applicants relied in this regard on the description of the residual unfair labour practice in item 2(1)(a) of schedule 7 to the LRA (quoted above at paragraph [4]) as Athe (unfair) discrimination ... against an employee **on any arbitrary ground, including but not limited to** ...≅ (emphasis supplied).

[71] The applicable legal principles in this regard are well-established. See, *inter alia*, **Harksen v Lane NO and Others** (*supra* at paragraph [9]) at paragraph 53 where the so-called first enquiry in discrimination litigation was formulated as follows:

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

[72] The applicants, in alleging Aarbitrary≅ discrimination, failed to identify the specific (unlisted) ground upon which they alleged that they have been discriminated against. In the event, the applicants failed to cross the very first hurdle to establish discrimination on an unlisted ground. In other words, in the absence of an

identified unlisted ground it is impossible to determine whether the ground that is relied upon is comparable to the listed grounds (such as race) in that it is based upon Aattributes and characteristics which have the potential to impair the fundamental human dignity of the applicants as human beings≅. In the result, the applicants have also failed to show (in terms of their burden of proof) that the differentiation in pay *in casu* amounted to Adiscrimination≅ in terms of the provisions of item 2(1)(a) of schedule 7 to the LRA on an unlisted ground.

[73] Litigants who bring discrimination cases to the Labour Court and simply allege that there was Adiscrimination≅ on some or other Aarbitrary≅ ground, without identifying such ground, would be well advised to take note that the mere Aarbitrary≅ actions of an employer do not, as such, amount to Adiscrimination≅ within the accepted legal definition of the concept. Whilst it was possible in terms of the previous Labour Relations Act, 28 of 1956, under the wide and virtually open-ended definition of Aunfair labour practice≅, to base a case on the Aunfairness≅ of an employer=s conduct, this is no longer possible because the 1995 LRA clearly identifies specific Aresidual≅ unfair labour practices, including an unfair labour practice based upon unfair discrimination in terms of item 2(1)(a) of schedule 7 to the LRA. (Note: Item 2(1)(a) of schedule 7 to the LRA which contains the relevant Aanti-discrimination≅ clause that is applicable *in casu*, has subsequently been repealed and replaced by the relevant provisions contained in chapter 1 of the EEA. As these provisions, for the most part, mirror the provisions which they replaced, I am of the view that the same principles enunciated in this paragraph will also apply in terms of the Aanti-discrimination≅ clause contained in the EEA).

[74] It also needs to be pointed out that, in any event, on the facts which presented themselves *in casu* (discussed fully above), it can, in all probability, be accepted that the respondent, in paying the comparators more than the applicants, did not act in an arbitrary fashion, that is to say, the evidence did not show that the respondent acted in a capricious manner or proceeded merely from will, not based upon reason or principle. On the contrary (for the reasons explained above), the respondent appeared to have acted in a *bona fide* and rational manner.

[75] The applicants expressly did not rely on indirect discrimination. This was not pleaded and was not relied upon in terms of the second pre-trial minute (at paragraph 2 thereof). This was done despite the fact that the provisions of item 2(1)(a) of schedule 7 to the LRA (quoted above at paragraph [4]) expressly allow for indirect discrimination as a cause of action in discrimination litigation.

[76] The matter of indirect discrimination was, however, touched upon in the cross-examination of one of the respondent=s witnesses and in the heads of argument of the applicants.

[77] Ratshefola, testifying that a Apremium≅ historically had to be paid for employees such as artisans due to the scarcity of such employees in the labour market, admitted that such scarcity could have been Aartificially≅ caused by race because of the existence of the system of racial segregation or Ajob reservation≅ in South Africa at the time which excluded blacks from certain jobs. This was especially so in the case of artisans (the training officers concerned were all previously artisans). He added that, although the system of job reservation was abolished (around 1981), it appeared that some premium was paid to white artisans in the past because of their historical scarcity which resulted in a small Apool≅ of artisans.

[78] However, Ratshefola clearly raised this only as a possibility and stressed in re-examination that he was not an expert in the field. Milford also appeared to support such contention only as a possibility in his evidence in chief. Such scarcity (for which a premium was paid) could therefore, only possibly, have been related to the fact that there were fewer black artisans because of the said historical distortion of the labour market.

[79] Indirect discrimination comes about when an ostensibly neutral requirement adversely affects a disproportionate number of people from a protected group such as blacks. It is clear that indirect discrimination may also arise where the issue in dispute is equal pay for work of equal value.

[80] It would therefore appear that, where an employer applies an ostensibly neutral requirement such as experience or seniority to establish pay, this practice could have an adverse impact on black employees if it can be shown that such requirement or factor (seniority) affects black employees as a group disproportionately when compared to white employees who perform the same job.

[81] This will especially be so if it can be shown that the seniority factor perpetuates the effects of past discrimination against black employees. It may even be that the application of the seniority factor is, in itself, *prima facie* discriminatory in the given circumstances. See in this regard the discussion above (at paragraphs [11] to [12]) regarding the ease with which an alleged victim of discrimination should be able to establish a *prima facie* case. The employer will, of course, be able to contend that the use of such factor (seniority) is justified for reasons other than race. It is doubtful, however, if a mere commercial rationale will trump the fundamental value of substantive equality and a test more akin to necessity will in all probability have to be adopted.

[82] Again, it must be stated that the overall *onus* to prove indirect discrimination will lie on the employees

concerned and reiterated that it is not an burden of proof that is easily complied with because evidence, usually of a statistical nature, is required to show the disproportionate impact. However, such impact may be more self-evident in a country whose past was riddled by discriminatory practices and measures and this may assist the alleged victims of indirect discrimination to establish at least a *prima facie* case.

[83] All of the aforegoing do not, however, assist the applicants *in casu*. I reiterate that the applicants explicitly chose not to rely on indirect discrimination as a possible or alternative cause of action. In the result, this was simply not a case that the respondent had to meet.

[84] In the event, even if it can be said that the evidence established a *prima facie* case of indirect racial discrimination (and this is open to at least some doubt), there was no need for the respondent to offer any explanation or justification. Furthermore, it cannot be said by any stretch of the imagination that the issue of indirect discrimination was exhaustively dealt with (for the very reason that the applicants sought not to rely thereon). In fact, it is important to remember that the applicants= witnesses (both Ntai and Radebe) conceded that it was Afair≅ to apply Aexperience≅ as a criterion in determining pay (see also the discussion above at paragraph [30]). This, in itself, appears to take the sting out of the possibility of indirect racial discrimination on the basis of seniority or experience. Radebe went so far as to concede that he would have complained even if the comparators were not of a different race (see the discussion at paragraph [68] above). In the event, I cannot and do not make a finding in this regard.

[85] Lastly, and for the sake of completeness, I wish to point out that the respondent had no legal duty or obligation to apply the principle of affirmative action and thereby somehow increase the salary of the applicants as black employees.

[86] In terms of the provisions of the LRA (on which the applicants relied for their cause of action) the application of an affirmative action policy constitutes merely a shield or defence. An employer may rely upon such defence should the employer be challenged on the basis of Areverse discrimination≅ when the employer implements an affirmative action policy to advance and protect employees or groups or categories of employees who were disadvantaged by unfair discrimination in the past, in order to enable their full and equal enjoyment of all rights and freedoms (in terms of item 2(2)(b) of schedule 7 to the LRA). However, there is no legal obligation or duty on an employer to implement affirmative action and therefore, by the same token, such employees simply acquire no right to affirmative action in terms of the provisions of the LRA. It may be noted in passing that the EEA (chapter 2) assists employees in this regard but its provisions have no bearing on the case *in casu*, not least of all because the applicants= case was based solely on the

provisions of the LRA.

[87] The application for absolution of the instance was refused. It was conceded during argument by the respondent=s representative, *Mr Freund*, that, with hindsight, this was the correct decision, especially when taking into account the fact that the size of the differential or gap in salary between the applicants and their white comparators was anomalously big.

[88] Accordingly, I will not deal with this matter in any detail. Suffice to say that, for the reasons fully discussed above (at paragraphs [19] to [21]), the applicants had made out a *prima facie* case for direct racial discrimination that called for an explanation by the respondent. In coming to this conclusion, I rejected the argument that the applicants, in order to succeed, had to show (albeit on a *prima facie* basis) the exact size or percentage of the gap allegedly caused by (direct) discrimination. This contention was clearly wrong as it was sufficient for the applicants to show, in keeping with the overall ease with which a *prima facie* case is to be established in discrimination cases (see the discussion at paragraphs [11] to [12] above), that some (unidentified) part of the differential was caused by racial discrimination to establish a *prima facie* case of racial discrimination. The exact percentage of the discrepancy caused by direct racial discrimination can only become relevant when a suitable remedy for addressing the result of such racial discrimination (the discrepancy in pay) has to be determined.

[89] Discrimination litigation in the workplace is relatively new. The EEA has only recently been promulgated and is in the process of being implemented. Discrimination litigation is also very complex, placing obstacles in the way of litigants, especially in regard to the burden of proof. At the same time the Constitution seeks to advance substantive equality in a society that has, in the past, been riddled with discrimination. In view of these constitutional imperatives and of the relative newness and complexity of discrimination litigation, and in order not to unnecessarily discourage litigants from seeking redress in matters of public importance, I regard it as fair not to award costs against the applicants. In this regard I also take into account the fact that the applicants stand in a continuing relationship with the respondent.

[90] I make the following order:

1. The application based on direct unfair discrimination is dismissed.
2. There is no order as to costs.

BASSON, J

On behalf of the applicants:	Mr MP Khumalo of Maserumule Inc.
On behalf of respondent:	Adv AJ Freund instructed by Bowman Gilfillan Inc.
Dates of proceedings:	11 to 14 September 2000; 11 November 2000.
Date of judgment:	16 November 2000.