IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

1. Reportable: Yes
2. Of interest to other Judges: Yes

26/05/26

Signature Date

Case Number: DA 18/2023

In the matter between:

MOSES KOTANE INSTITUTE Appellant

and

ZENZELE MZIMELE First Respondent

THANDEKA ELLENSON Second Respondent

Heard: **24 March 2026**

Delivered: **26 May 2026**

Coram: Molahlehi JP, Mahalelo ADJP, Tokota AJA

Summary: Appeal -order and judgment of the Labour Court.

Discrimination: A male applicant for the post of Chief Financial Officer was excluded based on gender. The appellant introduced the requirements for a female candidate and a geographic limitation after the interview. The successful candidate does not satisfy the qualifications set out in the advert. The appellant contends that the introduction of affirmative action was intended to meet the requirements of the EEA. Discrimination: representivity was introduced only after the interview.

Onus: The onus is on the employer to show discrimination was rational, not unfair or justified under section 11(1) (b) of the EEA.

Evidence: Tax returns issued by SARS are admissible as evidence of historical income, but are not sufficient on their own to prove damages.

Quantum of damages: The salary of the successful candidate as a comparator alone is not sufficient to prove the quantum of patrimonial loss.

JUDGMENT

MOLAHLEHI JP,

Introduction

[1] This is an appeal from the Labour Court, with the necessary leave, in which it was found that the appellant, Moses Kotane Institute (Institute), had unfairly discriminated against the first respondent, Mr Mzimele,[1] in a recruitment process for a five-year Chief Financial Officer (CFO) position based on his gender. The appeal is also against the order consequent upon that finding, which required the appellant to pay damages of R4,523,921. Accordingly, the appellant seeks an order that the appeal be upheld with costs and that the order of the Labour Court be set aside and replaced with an order dismissing the first respondent's claim.

[2] The appeal lapsed when the record was filed 52 days late. Accordingly, the appellant also seeks reinstatement of the appeal, together with applications for condonation for both the late filing of the notice of appeal and the late delivery of the record. The respondent opposes the appeal and all related applications.

[3] The appellant, Moses Kotane Institute, is a non-profit company registered in terms of the Companies Act,[2] and a provincial public entity in KwaZulu-Natal Province, as scheduled by the Minister of Finance, and conducts its business as an educational Institute.

[4] The first and second respondents, Mr Mzimele and Ms Ellenson, were candidates for the Chief Financial Officer position, which the Institute advertised in

[1] In some documents on the record the surname is spelt "Mzimela."
[2] Act 71 of 2008.

June 2014. Mr Mzimele is a chartered accountant, a registered auditor, and a certified fraud examiner. At some stage, he was employed on a fixed-term contract by the Institute.

Background

[5] The dispute arises from the Institute's recruitment process for a five-year Chief Financial Officer position, which required a postgraduate accounting degree, specifically a BCompt Honours; completion of articles of clerkship towards Chartered Accountant registration; and eight years' accounting or financial management experience, including five years at a senior management level. Both parties agree that Mr Mzimele who applied for the post, met all the stipulated educational and experience requirements, scored the highest in the interview process, and was ranked first by the selection panel. They also agree that the second-ranked candidate, a woman from Limpopo, met the educational requirements, and that the eventual appointee, the second respondent, Ms Thandeka Ellenson, ranked third and did not meet any of the educational requirements set out in the advertisement, as she lacked a postgraduate accounting qualification, had not completed articles, and was not a chartered accountant.

[6] It is common cause that at the time of the appointment, the Institute had no employment equity plan or policy in place. According to the Institute, the selection panel and its executives were under pressure from the provincial government (its shareholder) to improve gender representativity on its all-male three-person executive, and for that reason, they decided to appoint a woman to the CFO position. Mr Mzimele confirms this pressure and the existence of a deliberate decision to appoint a woman, but emphasises that this led to his exclusion solely because he is male, and that the requirement of appointing a woman, later narrowed to a woman from KwaZulu-Natal, was introduced only after the interviews and thus excluded the third candidate, who was apparently from Limpopo.

[7] The Institute admits, through its pre-trial admissions, that the first respondent was not appointed because he is a male. Both parties, therefore, converge on the central factual premise that the respondent was the top-scoring, fully qualified candidate, but was not considered for appointment because the Institute opted to

appoint a woman to address gender imbalance on its executive. It is this decision, and the manner in which it was implemented, that gave rise to the first respondent's claim of unfair discrimination and the ensuing litigation.

Condonation

[8] The Institute delivered both its Notice of Appeal and the record of appeal out of time, necessitating separate applications for condonation and reinstatement. It explains that the Notice of Appeal was filed 10 days late solely because its attorney of record failed to give the matter proper attention due to workload pressures. The attorney apologises, contends that the delay was short, non-prejudicial, and submits that condonation should therefore be granted.

[9] The Institute argues that the brief delay, together with its alleged strong prospects of success, justifies condonation. While Mr Mzimele criticises the attorney's conduct in his answering affidavit, the Institute maintains that the interests of justice favour having the appeal heard on the merits.

[10] Regarding the late record, the Institute concedes that it was filed 52 days late, again due to the attorney's workload and oversight. The record was due on 8 January 2024 but was only served on 20 March and filed on 22 March 2024. The Institute's attorney states that he became aware of the delay only when the first respondent's attorneys indicated that the appeal was deemed withdrawn. He then sought an extension of time from the first respondent, which was refused, and thereafter worked urgently to compile the record.

[11] He explains that he cleared his diary and completed the record by 20 March 2024. The Institute submits that, although criticism of its attorney's conduct is justified, the explanation is adequate and the prejudice of refusing condonation outweighs any inconvenience to the first respondent. Despite the first respondent's continued challenge to the explanation, the Institute argues that the interests of justice support granting condonation.

[12] On reinstatement, the Institute states that once informed by the Registrar that reinstatement was required, its attorney promptly brought the application on 9 April 2024, mistakenly believing earlier that condonation alone was sufficient. The

reinstatement application relies on the same affidavit explaining the delays. The Institute further contends that the appeal has strong prospects of success, concerns a substantial damages award, and raises issues of importance that warrant both condonation and reinstatement.

[13] Mr Mzimele opposed the condonation application and contended that the appellant failed to provide a compelling, convincing, and comprehensive explanation covering the entire period of delay. He also relies on the authority of *Saloojee v Minister of Community Development*,[3] and contends that the appellant could not escape the consequences of their attorneys' negligence and failure to comply with the rules. He also argued that the application for condonation should fail on the grounds of lack of prospects of success.

[14] The approach to condonation is settled. An applicant must provide a full and satisfactory explanation for the delay for the entire period thereof[4] and demonstrate reasonable prospects of success. These factors are not to be considered in isolation but together, weighed against the overall interests of justice.[5] The interests of justice ordinarily favour the determination of disputes on their merits, particularly where substantive rights are implicated, and the delay is not excessive.[6] In appropriate circumstances, strong prospects of success may outweigh deficiencies in the explanation, especially where no material prejudice is demonstrated.

[15] The caution sounded in *Saloojee* remains relevant. A litigant cannot automatically escape the consequences of a legal representative's neglect. However, as this Court has repeatedly observed, *Saloojee* does not establish an inflexible rule. Where the delay is adequately explained, the attorney's error is candidly acknowledged, and corrective steps are taken, the question remains whether the interests of justice favour the grant of condonation. In the present matter, the delay has been explained in chronological order. The explanation discloses no wilful disregard of the rules. The appeal raises issues of legality and

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[3] *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A).
[4] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) (2017 (1) BCLR 1; [2016] ZACC 39) para 153; *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae*) 2008 (2) SA 472 (CC) (2008 (4) BCLR 442; [2007] ZACC 24) para 22.
[5] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).; *Turnbull-Jackson v Hibiscus Coast Municipality* 2014(6) SA 592 (CC) para.23
[6] See *Grootboom v National Prosecuting Authority and Another* (2014) 35 ILJ 121 (CC) at paras 50 – 51. 35; and *Brummer v Gorfil Brothers Investment (Pty) Ltd* 2000 (5) BCLR 465 (CC) at para 3..

equality, which, as the Constitutional Court has recognised, ordinarily warrant adjudication on the merits.[7]

[16] Having regard to the explanation, the prospects of success, and the absence of prejudice sufficient to outweigh the appellant's right to a proper determination of the dispute, the interests of justice favour the granting of condonation. As the appeal lapsed by operation of the rules due to the late filing of the record, the granting of condonation results in the reinstatement of the appeal.

Issues for determination

[17] The issues for determination in this matter concern the following:

a. Whether the appellant discriminated against Mr Mzimele when it failed to appoint him as a CFO on the grounds of being a male.

b. Whether the Labour Court was correct in awarding Mr Mzimele damages for the discrimination.

The decision of the Labour Court

[18] The Labour Court rejected the Institute's affirmative action defence. It held that affirmative action was not pleaded as a statutory justification under section 6(2) of the Employment Equity Act,[8] (EEA) but emerged only belatedly, after it was conceded that Mr Mzimele was not appointed because he is male. Reliance on the Broad-Based Black Economic Empowerment Act was found to be misplaced.

[19] The Court further held that affirmative action under the EEA may be invoked only to advance "suitably qualified" candidates. The appointee did not meet the minimum educational requirements for the CFO position, and her experience was unsubstantiated. This rendered the affirmative-action justification untenable.

[20] In addition, the Labour Court found that the Institute had no written affirmative action plan at the time of the appointment and that, in the absence of a structured,

[7] See *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) para 24; and *Solidarity Trade Union and Others v Minister of Health and Others* [2026] ZACC 19 at para 40.
[8] Act 55 of 1998.

pre-existing policy, the decision was ad hoc and irrational, and therefore could not constitute lawful affirmative action, in accordance with the principles in *Gordon v Department of Health, KwaZulu-Natal*.[9] Accordingly, the Institute ought to have applied the ordinary criteria for appointment.

[21] In determining the relief, the Labour Court found that Mzimele was entitled to what he sought. The Labour Court accordingly awarded damages under section 50(2) of the EEA and ordered costs, including the costs of Senior Counsel.

The case of the appellant

[22] The Institute concedes that it is a designated employer under the EEA, and that Mr Mzimele applied for the CFO post for which he was unsuccessful because Ms Ellenson was recommended for appointment as a woman. Concerning the relief sought by Mr Mzimele, the Institute contends that under section 50 of the EEA, damages are available only to actual employees, not applicants, and thus Mr Mzimele, as an applicant, did not qualify to claim damages. It adds that, absent the second respondent's appointment, the next-ranked woman would have been selected to achieve gender balance, and the first respondent was not considered because he is male. The Institute frames the core dispute as whether selecting Ms Ellenson constituted unfair discrimination, and denies that, but for gender, Mr Mzimele would have been appointed.

[23] The Institute argued that, as an applicant rather than an incumbent, Mr Mzimele's claim falls under section 9 of the Constitution,[10] read with section 6(1), of the EEA[11]. The pleaded case alleges unfair discrimination in recruitment and

[9] (2004) 25 ILJ 1431 (LC).

[10] **Section 9 of the Constitution provides as follows:**
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[11] Section 6(1) of the Employment Equity Act 55 of 1998 (as amended) provides as follows:

selection criteria expressly covered by "employment policy or practice." It further submitted that its gender-balance decision was taken under pressure from its "shareholder," the provincial government, which was an "employment practice" within section 6(1), and that the discrimination enquiry must be conducted within that framework. This is because addressing a gender imbalance in an all-male executive entails appointing a woman, and male candidates are necessarily excluded on gender grounds. The Institute accepts the onus of showing that the discrimination was rational, not unfair, or otherwise justifiable under section 11(1)(b),[12] with reference to sections 15(2)(d) and 15(3) of the EEA,[13] which permit preferential treatment and numerical goals for suitably qualified women.

[24] The Institute emphasises that improving women's representation is a constitutional and societal imperative, widely accepted across sectors. Implementing this may legitimately make gender decisive; panels must weigh constitutional imperatives, organisational needs, and candidates' rights. It adds that organisations may define needs beyond "highest score." Given a three-person, all-male executive team, appointing a woman was a reasonable way to correct the imbalance and meet shareholder expectations.

[25] As the shareholder is a provincial department acting via the MEC, the Institute says the pressure to secure gender balance was legitimate and aligned with constitutional norms. In a small executive, a single female appointment materially advances representivity and public confidence. For a senior post with automatic board membership, the Institute submits that it was rational to treat gender

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

[12] **Section 11(1)(b) of the Employment Equity Act 55 of 1998 (as amended)** provides as follows:
"(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination — **(a)** did not take place as alleged; **or (b) is rational and not unfair, or is otherwise justifiable.**"

[13] **Section 15(2)(d)** and **section 15(3)** of the **Employment Equity Act 55 of 1998 (as amended)** provide as follows:
"15. Affirmative action measures
(2) Affirmative action measures implemented by a designated employer must include **(d)** *subject to subsection (3), measures to* **(i)** *ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and* **(ii)** *retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.*
(3) *The measures referred to in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas."*

representivity as central, even dominant, given zero female representation. It argues that gender balance was a key factor. Thus, although Mr Mzimele scored higher on technical grounds, appointing him would undermine representivity, whereas appointing a woman would advance it. Any adverse effect on him was incidental to organisational needs.

[26] The Institute further emphasise that the aim was not to favour a specific woman over the first respondent, but to achieve gender balance. It contends that gender -based selection to meet a legitimate organisational purpose is rational and objectively justifiable. This is because gender representivity is constitutionally aligned, and gender-based decisions are not inherently unfair, and fairness depends on context. The enquiry requires a balance between equity goals and the rights of unsuccessful candidates.

[27] The Institute concedes that choosing a woman triggers a presumption of unfair discrimination under section 6(1) but submits that the presumption is rebutted because the decision advances a legitimate societal and organisational goal rather than discrimination for its own sake. It argues that, when the context is considered, namely the constitutional interest in correcting imbalance and the absence of any legitimate expectation of appointment for applicants, the presumption is rebutted. Therefore, properly weighed, the decision was not unfair.

[28] The Institute disputes the Labour Court's view that, without a written equity plan, any gender-based preference is inherently irrational and unfair. It argues that the absence of a plan is not automatically fatal; each case must be assessed on its facts. It stresses that it is a small, recently established body with a three-person executive. According to it, imposing large-department formality is disproportionate. It denies unfair discrimination and maintains that the appointment was rational, not unfair, and otherwise justifiable. It challenges the finding that the decision was "ad hoc and random," asserting that the second respondent was suitably qualified and that the gender choice was rationally tied to the board's transformation.

[29] Concerning the decision to award damages, the Institute argues that the Labour Court misapplied the law because it lacked the power to do so, and, in any event, quantum and causation were not proven. It submits that Mr Mzimele's

evidence of income was inadmissible and inadequate, as tax assessments show declarations to SARS, not actual earnings; as an accountant, he should have produced financials. He also failed to prove the CFO's counterfactual and to account for omitted contingencies.

Mr Mzimwele's case

[30] As noted earlier, Mr Mzimele opposed the appeal and contends that it was impermissible for the Institute to rely on the EEA on appeal, as it had never pleaded an EEA defence at the Labour Court.

[31] Mr Mzimele correctly argues that the Institute's new reliance on the EEA on appeal is impermissible because it was neither pleaded nor canvassed in evidence, and because it contravenes the principle barring new points on appeal. This principle was stated as follows in *Imprefed (Pty) Ltd v National Transport Commission*: [14]

> "The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed."

[32] Turning to the Institute's "backup candidate" point, Mr Mzimele points out that it fails because the process was unlawful, requirements were changed ad hoc, suitability was ignored, and gender alone was prioritised, so it cannot justify bypassing him. It is further contended that the policy argument also fails because the second respondent was not suitably qualified and the Institute never conducted the section 20(4) assessment under the EEA. The only "experience" evidence came from the second respondent, not the employer, contrary to the Act. Therefore, speculation about alternative appointees is misplaced.

[33] The legal question is whether, on a proper application of the law, Mr Mzimele should have been appointed. He argued that on the balance of probabilities, he should have been appointed. He contends that points of law may be raised on appeal where the interests of justice demand. While the Institute's statements on representivity reflect the EEA framework, the flaw lies in its implementation, which is erratic, ad hoc, and politically influenced. The problem, according to him, is not affirmative action per se, but its unlawful application.

[14] [28] [1993] 2 All SA 179 (A) at 107.

[34] Relying on the *Barnard*'s[15] case, the contention is that there is a distinction between a valid equity objective and its implementation, and that even a lawful goal must be executed lawfully, rationally, and fairly. The argument is further that even if gender balance was a legitimate objective, the implementation was unfair and resulted in discrimination against Mr Mzimele; intent cannot salvage an unlawful process.

[35] Accordingly, the facts show unfair implementation, namely, political pressure to appoint a woman; the exclusion of the top-scoring male; the second respondent's failure to meet educational requirements; and the absence of a section 20(4),[16] assessment. He argued that the case of *PSA obo Tlowana v MEC Agriculture*,[17] confirms that candidates who do not meet the minimum requirements should not be shortlisted. The Institute effectively imposed a prohibited quota in accordance with section 15(3),[18] of the EEA, creating an absolute barrier against men. The contention is that in *Solidarity obo Erasmus v Eskom*,[19] rigid shortlisting rules that bar certain groups created an absolute barrier and were unfair. By excluding Mr Mzimele solely because he is male, the Institute engaged in job reservation and unfair discrimination contrary to sections 6(2), 15(3), and 15(4) of the EEA, so the contention goes.

[36] Mr Mzimele accepts that designated employers have duties under section 13(1) of the EEA to implement affirmative action. Even in the absence of a formal plan, implementation must be lawful and fair, and *Gordon*'s case supports the view that unstructured, ad hoc measures are irrational.[20] He contends that Gordon found irrationality where there were no guidelines, no coherent plan, and an arbitrary reversal of a selection, paralleling the Institute's plan-less, data-less, *ad hoc*

[15] *SA Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC).
[16] Section 20(4) of the EEA provides: "Subject to section 15(3), nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups."
[17] [2012] ZALCJHB 121; (2012) 33 ILJ 2675 (LC) (24 February 2012).
[18] Section 15(3) of the EEA provides: "The measures referred to in subsection (2) include preferential treatment and numerical goals, but exclude quotas."
[19] [2024] ZALCCT 18; (2024) 45 ILJ 2073 (LC) (24 May 2024).
[20] See *Gordon v Department of Health: KwaZulu-Natal* 2008 [2008] ZASCA 99; 2008 (6) SA 522 (SCA); [2009] 1 All SA 39 (SCA) ; 2009 (1) BCLR 44 (SCA); [2008] 11 BLLR 1023 (SCA); (2008) 29 ILJ 2535 (SCA).

approach. The result is unfair discrimination. *Gordon* does not mean that every decision without a plan is automatically irrational; designated employers may act without a written plan, but measures must still be rational, lawful, and evidence-based. He argued that in this appeal, any valid aim was undermined by *ad hoc* implementation, making the outcome objectively unfair and irrational.

Legal framework

[37] The Constitution does not place affirmative action measures beyond judicial scrutiny. It authorises only measures that are adequate for their intended purpose, carefully constructed to achieve that purpose, and aimed at the equal enjoyment of rights. Both the objectives pursued and the means adopted are therefore subject to scrutiny, and such measures may not extend beyond what is adequate to achieve the stated aim. Measures that are haphazard, random or overhasty, and that lack a demonstrated causal connection to the objective, do not qualify for protection under section 9(2) of the Constitution.

[38] This means that earmarking posts for black, women or disabled candidates, to the total exclusion of other incumbents, constitutes discrimination on listed grounds. Such discrimination triggers the presumption in section 9(3)[21] of the Constitution that it is unfair, and the party responsible bears the burden of showing that the discrimination is fair under an allowable measure contemplated in section 9(2) of the Constitution.[22]

[39] Suitability remains a merit-based concept grounded in qualifications, training, efficiency and the inherent requirements of the post. Representivity concerns must therefore be addressed through lawful affirmative action measures, not by altering or distorting the statutory meaning of suitability. A management plan, a workforce analysis, a statistical assessment, labour pool data, or other rational criteria demonstrating a clear connection between the chosen measures and the constitutional objective are necessary. A haphazard or overhasty process that

[21] Section 9(3) of the Constitution provides:
"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."
[22] *Public Servants' Association of South Africa and Another v Minister of Justice and Others* 1997 (5) BCLR 577 (T) at 627 – 633.

effectively excludes other groups, irrespective of individual merit, is irrational and inconsistent with section 9(2) of the Constitution.[23]

[40] Accordingly, and in general, an employer engages in unfair discrimination when it directs that only designated groups be shortlisted, thereby nullifying an employee's candidature solely on the basis of race or gender. Where no employment equity plan was in place during the period relevant to the employee's application and shortlisting, the employer lacks a lawful affirmative action framework on which to rely when excluding the employee.

[41] Any policy that lacks the numerical goals, targets, timeframes, monitoring mechanisms, and sufficient flexibility required by the EEA for lawfulness does not constitute a measure contemplated in the Act or in section 9(2) of the Constitution. In the absence of these required elements, the preference for designated candidates amounts in substance to quota-like exclusion, which is impermissible under section 15(3) and fails to meet both the constitutional standards in section 9(2) and the criteria set out in section 42 of the EEA.[24]

[42] The measures contemplated in section 15(2) of the EEA must identify under-representation using national and regional data on the economically active population, set numerical goals, and be measurable and monitorable. They must also remain flexible, avoid creating absolute barriers, and include mechanisms for deviation that prevent disproportionate harm. These measures cannot be applied in a rigid manner that would create an absolute bar to the appointment of other groups, as such rigidity fails the third requirement of the constitutional test, namely the promotion of equality without undue harm. Section 15(4) expressly prohibits measures that impose absolute barriers on non-designated candidates. Any instruction that designates only a group of candidates for shortlisting, therefore, creates such an absolute bar, unlawfully preventing the employee from competing on

[23] *Public Servants' Association of South Africa and Another v Minister of Justice and Others* 1997 (5) BCLR 577 (T) at 642 – 645.
[24] *Solidarity obo Pretorius v City of Tshwane Metropolitan Municipality* [2016] 7 BLLR 685 (LC) at 690 – 703.

merit and contravening the Act's requirement that suitably qualified non-designated candidates must still be permitted to compete fairly.[25]

[43] The proper position is that where valid affirmative action measures are at issue, the claim must be assessed under section 9(2) of the Constitution and section 6(2) of the EEA, rather than through a freestanding unfair discrimination inquiry. In such circumstances, the measure is neither unfair nor presumed unfair, although its implementation remains subject to legal review.

[44] Nevertheless, measures adopted under section 9(2) of the Constitution and section 15(2) of the EEA may use numerical goals but not quotas, which are expressly prohibited by section 15(3). Such measures must also not create absolute barriers for non-designated employees, as required by section 15(4) of the EEA.[26]

[45] Measures that comply with section 9(2) of the Constitution are not presumptuously unfair, because section 9(2) forms a substantive component of the right to equality rather than an exception to it. This presupposes that the measures are directed at persons or categories disadvantaged by unfair discrimination, that they are designed to protect or advance such groups, that they are not arbitrary or capricious, that they are reasonably likely to achieve the intended remedial purpose, and that they promote equality while avoiding abuses of power or the imposition of substantial and undue harm on those who are excluded. The provisions of section 9(2) do not require proof that it was necessary to disadvantage one group to assist another, nor do they demand a showing of the least restrictive means. The proper enquiry is whether the measure is reasonably likely to achieve its remedial purpose. Although the pursuit of equality may sometimes adversely affect the previously advantaged, the measures must not impose substantial, undue harm that undermines the constitutional objective.[27]

[46] Overall, fairness under section 6 of the EEA is assessed holistically, considering the purpose of the measure, its impact, the proportionality of its effects, and the inherent requirements of the job. When these elements are met, and the

[25] *Solidarity obo Pretorius v City of Tshwane Metropolitan Municipality* [2016] 7 BLLR 685 (LC) at 704 - 709.
[26] *SAPS v Solidarity obo Barnard* [2014] 11 BLLR 1025 (CC) at paras 42 – 68.
[27] *Minister of Finance & Another v Van Heerden* [2004] 12 BLLR 1181 (CC) at paras 28 – 44.

employer demonstrates that the measure constitutes a valid affirmative action measure under section 6(2), it operates as a complete defence to a claim of unfair discrimination.[28]

[47] Therefore, designated employers must implement measures in accordance with section 13 of the EEA to achieve equitable representation of suitably qualified persons. While numerical goals are permitted, quotas are prohibited under section 15(3) of the EEA. The implementation of such measures must be assessed for rationality and legality, and any remedial measures must satisfy the three-part test under section 9(2) of the Constitution, namely that they target persons disadvantaged by unfair discrimination, are designed to advance such persons, and promote the achievement of equality.[29]

[48] Appointments must therefore secure efficiency while advancing representivity, to give effect to the constitutional vision of a capable and inclusive public administration. It follows that measures adopted to advance designated groups do not constitute unfair discrimination, because the EEA permits numerical goals, prohibits quotas, and forbids the creation of absolute barriers. The proper enquiry is therefore whether the measure targets persons disadvantaged by unfair discrimination, whether it is designed to advance them, and whether it promotes equality. A measure that differentiates on a listed ground, such as age or gender, constitutes discrimination. Still, it amounts to unfair discrimination only where it unjustifiably impairs dignity or targets a vulnerable or historically disadvantaged group. This aligns with the analytical structure set out in *Harksen*'s[30] case, which requires assessing the nature of the ground, the measure's impact, and whether the differentiation imposes unfair harm.[31]

[49] Unfairness requires assessing the measure's impact, including whether the affected class has experienced past patterns of disadvantage, whether the measure impairs dignity, and whether there is a legitimate purpose underlying the differentiation. The enquiry focuses on the nature and extent of the impact on those

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[28] *South African Airways (Pty) Ltd v Jansen Van Vuuren and Another* [2014] 8 BLLR 748 (LAC) 108 at para 26 – 47.
[29] *Solidarity v Minister of Safety and Security and others* [2016] 5 BLLR 484 (LC).
[30] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); [1997] ZACC 12.
[31] *SA Navy v Tebeila Institute of Leadership, Education, Governance and Training* [2021] 6 BLLR 555 (SCA) at paras 8 – 10.

burdened by the measure, considering their social and historical context and the justification for the differential treatment.

[50] A discriminatory measure remains lawful where it is rationally connected to a legitimate purpose, including the advancement of constitutionally mandated objectives. The inquiry is whether the differentiation serves a legitimate governmental or statutory aim and whether there is a rational relationship between the measure adopted and the purpose sought to be achieved.[32]

[51] Therefore, institutions may set thresholds even if doing so excludes some capable individuals, because drawing lines is inherent to threshold-setting. This is permissible provided that the chosen line falls within the range of reasoned policy choices available to the decision-maker. The law does not require an employer to adopt the most flexible or inclusive mechanism possible. What matters is that the threshold reflects a rational and administratively feasible policy choice, rather than arbitrariness or caprice.[33]

[52] Accordingly, discrimination must be assessed within the broader framework of fairness, considering the interests of the employer, the employee and society, and recognising that not all discrimination on a listed ground is automatically unfair. This is because fairness is an elastic and context-sensitive concept, informed by operational realities, commercial rationality and prevailing societal conditions, provided the employer has not acted arbitrarily or with prejudice.[34]

[53] The EEA applies only to employment policies or practices, which expressly include recruitment procedures and selection criteria. The Constitutional Court in *Sali*'s case,[35] therefore, held that the impugned decision was based on a policy or practice created by waiver rather than on legislation, thereby squarely bringing the matter within section 6(1) of the EEA.

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[32] *SA Navy v Tebeila Institute of Leadership, Education, Governance and Training* [2021] 6 BLLR 555 (SCA) at paras 18 – 20.
[33] *SA Navy v Tebeila Institute of Leadership, Education, Governance and Training* [2021] 6 BLLR 555 (SCA) at paras 21 – 23.
[34] The concept that fairness is contextual and not rigid was firmly established in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2008) 29 ILJ 2405 (CC).
[35] *Sali v National Commissioner of the SAPS* [2014] 9 BLLR 827 (CC) at paras 57 – 65.

[54] The refusal to appoint the applicant may constitute differentiation on a listed ground under section 9(3) of the Constitution and section 6(1) of the EEA, thereby triggering a presumption of discrimination and a further presumption that such discrimination is unfair, unless the employer demonstrates that the differentiation was justified. Under section 11 of the EEA, once the applicant has alleged unfair discrimination on a listed ground, the onus shifts to the employer to prove that the discrimination was fair.[36]

[55] In accordance with Item 2(1)(a) of Schedule 7 to the LRA, read together with Item 2(2)(b) and section 9(2) of the Constitution, unequal treatment is permissible where it is effected through measures designed to advance disadvantaged groups. Courts, therefore, require a rational relationship between the means adopted and the remedial ends pursued, so that ad hoc, random, or naked-preference decisions do not constitute lawful measures. Where the evidence does not establish the existence of a plan or policy grounded in demographic data, representivity analysis and a coherent framework for affirmative action, but instead reflects an assertion unaccompanied by design or structure, it cannot qualify as a measure under either the LRA or the Constitution. In the absence of a proper plan, any such action is ad hoc, arbitrary and unfair.[37]

Damages

[56] Turning to the issue of remedies, section 50 of the EEA provides the Labour Court with the discretionary powers to frame various remedies based on the pleadings and the evidence before it. In this matter, the two remedies that need attention are those provided for under section 50(2)(a) and (b), which are distinct from each other and may be claimed jointly or separately. The remedies are patrimonial (damages) and non-patrimonial or solatium (compensation). The distinction between the two remedies was recognised in *SA Airways*,[38] where the Court held that there is a distinction between the two remedies and that they are distinct from each other. To succeed in each of the claims, the plaintiff needs to

[36] *Sali v National Commissioner of the SAPS* [2014] 9 BLLR 827 (CC) at paras 71 – 75.
[37] *Gordon v Department of Health: KwaZulu-Natal* 2009 (1) BCLR 44 (SCA); [2008] 11 BLLR 1023 (SCA) at paras 15 – 28.
[38] *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1235 (CC); [2000] 12 BLLR 1365 (CC); (2000) 21 ILJ 2357 (CC).

plead and or lead evidence to support such a claim. In this regard, it is important to note that the distinction between the two remedies matters in a discrimination claim.

[57] Patrimonial damages are provided for under section 50(2)(b) of the EEA and can be obtained on proof of actual financial loss, causation and quantification. This remedy does not arise automatically from a finding of unfair discrimination. Where such proof is lacking, the damages claim must fail.

[58] Compensation under section 50(2)(a), by contrast, is a solatium for non-patrimonial harm, including impairment of dignity, and may be awarded on a just and equitable basis notwithstanding the failure to prove patrimonial loss, provided that the award is confined to non-patrimonial injury and does not indirectly compensate for unproven financial loss. Proof of discrimination is sufficient to infer harm and impairment of dignity.

[59] Having regard to the discretion given to the Labour Court by section 50(2)(a) and (b) of the EEA, it follows that an appellate Court may interfere with an award made under this section only in narrow circumstances. These include instances where the Labour Court acted capriciously, applied an incorrect legal principle, acted with bias, failed to take relevant considerations into account, or reached a conclusion that no reasonable court could have reached.[39] It should be emphasised that such relief must be properly pleaded and proved to enable the Labour Court to determine and fashion an appropriate remedy within the scope of the issues placed before it.[40]

Discussion

[60] As stated earlier, the Institute seeks to invoke an affirmative action defence that was neither pleaded in its statement of defence nor advanced as a primary defence at trial. A litigant is bound by its pleadings and may not plead one case while attempting to advance another at trial or on appeal. A new defence not pleaded at trial cannot be entertained on appeal. An appeal based on a new defence pleaded for the first time on appeal would fail on that basis alone. This equally applies in the present matter. The defence of affirmative action was not

[39] *Rapoo v Rustenburg Local Municipality* [2020] 6 BLLR 533 (LAC) at paras 25 -27, (*Minister of Justice and Constitutional Development v Tshishonga* 2009 (4) SA 362 (LC); and *Zungu v Premier of KwaZulu-Natal* 2018 (6) SA 589 (CC).
[40] *Sali v National Commissioner of the SAPS* [2014] 9 BLLR 827 (CC) at paras 82 - 87.

pleaded but raised for the first time at the trial. Ordinarily, this matter should fail on this ground alone, and it would also be the end of its consideration. For completeness, however, the substance of the appeal is fully addressed below.

[61] The correct inquiry into the issue of discrimination is the structured, context-sensitive analysis set out in *Harksen*'s case.[41] The first question is whether the differentiation is rationally connected to a legitimate purpose. The second is whether it amounts to discrimination on a listed ground. If so, the enquiry is whether it is unfair, assessed primarily by impact, purpose, and proportionality rather than by a formal checklist. This is a substantive inquiry. It is not a mechanical rule that the absence of a freestanding plan is automatically decisive.

[62] Even if *Gordon*'s case is considered a caution against *ad hoc* preferences, it is not the sole yardstick. Both the Constitutional Court and the Labour Appeal Court require a holistic fairness assessment under the EEA that balances the remedial aim with the means adopted and their impact, and asks whether, on the contemporaneous materials, the employer has shown a rational design and a non-rigid implementation.

[63] The Institute contends that, even without a written employment equity plan, the decision to prefer a woman for an all-male three-person executive was rational and otherwise justifiable within the contemplation of section 11(1)(b) of the EEA, based on shareholders' expectations, small institutional size, and the constitutional legitimacy of representivity. Proceeding on the most charitable basis to the Institute, and assuming, without deciding, that the section 11 defence may be considered notwithstanding the pleading deficit and pre-trial posture, the defence fails on the merits. There was no contemporaneously designed measure as contemplated by the Act and section 9(2) of the Constitution.

[64] The Institute did not perform or record the section 20(4) of the EEA,[42] inquiry into whether the preferred candidate was suitably qualified when departing from the advertised minima. The panel minutes reveal a post-interview rule that made gender

[41] *Harksen* paragraph 53.
[42] Section 20 (4) of the EEA provides: "When determining whether a person is suitably qualified for a job, an employer must— (a) review all the factors listed in subsection (3); and (b)determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors."

determinative, which operated as a functional quota or absolute barrier rather than a flexible numerical goal. In combination, these features engage the irrationality concern in *Gordon's case* and transgress the constraints affirmed in *Barnard's case*, regardless of institutional size. Indeed, context matters, but so does the fit between ends and means. The Court in *Hugo's case* cautioned that benevolent aims do not immunise a measure if its impact and method entrench unfair exclusion or stereotypes. The decisive question remains whether the record in this appeal shows that the employer's reasons and process reflect proportional implementation rather than a rigid, categorical bar.

[65] The EEA prohibits unfair discrimination within any employment policy or practice in section 6(1). The provisions of section 6(2) provide that affirmative action measures that comply with the Act do not constitute unfair discrimination. The provisions of section 15 require that such measures be consciously designed to achieve equitable representation of suitably qualified persons from designated groups and expressly prohibit both quotas and absolute barriers. The Constitutional Court in *Barnard's case* reaffirmed the test in *Van Heerden's case*, which requires that a restitutionary measure target persons disadvantaged by unfair discrimination, be designed to advance them, and promote the achievement of equality. Even where a valid employment equity plan exists, it must be implemented lawfully and not for an ulterior or capricious purpose. Consistent with that open-textured approach, the Labour Appeal Court has emphasised that fairness under the Act is determined by a value-laden balance of purpose, proportionality, and impact, assessed on the proved facts rather than by labels.[43]

[66] A further constitutional constraint is the anti-stereotyping principle. Blanket, category-based exclusions are suspect unless justified by an individualised, evidence-based assessment. The Constitutional Court in *Hoffmann's case* and the Labour Court in *IMATU's case*,[44] rejected categorical bars that substitute status for

[43] In *Solidarity and Others v Department of Correctional and Others (Police Union and another Amici Curiae)* [2016] ZACC 18; (2016) 37 ILJ 1995 (CC); 2016 (5) SA 594 (CC); [2016] 10 BLLR 959 (CC); 2016 (10) BCLR 1349 (CC) at para 82. The Constitutional Court held that: "One cannot 'prove, on a balance of probabilities', that anything is 'rational and not unfair or is otherwise justifiable', because it is only a fact that can be proved. Whether conduct is rational, fair or justifiable is not a question of fact but a value judgment. See also *Mahlangu v Samancor Chrome Ltd (Eastern Chrome Mines)* [2020] ZALAC 14; [2020] 8 BLLR 749 (LAC); (2020) 41 (ILJ) 1910 (LAC) (18 May 2020).
[44] *IMATU & Another v City of Cape Town* [2005] 11 BLLR 1084 (LC).

case-specific evaluation, thereby reinforcing that legitimate aims must be pursued through non-rigid means.

[67] Ordinarily, a written employment equity plan is expected to show that any affirmative action measure was designed in accordance with section 15 and the test articulated in *Van Heerden*'s case and applied in *Barnard*'s case. In exceptional circumstances, particularly in small or newly established entities, an employer may establish *de facto* design through contemporaneous documentation demonstrating the necessary safeguards. These include a board resolution predating the appointment that sets representivity goals for the relevant occupational level, a workforce analysis using national and regional data on the economically active population that identifies underrepresentation, a recorded section 20(4) assessment of each candidate's suitability, and documentation showing flexibility rather than the creation of absolute barriers.

[68] Without these safeguards, general reliance on values or shareholder pressure is insufficient. The measure then appears as an *ad hoc* intervention inconsistent with the cases of *Gordon*'s and *Barnard*. In this appeal, the question is whether the contemporaneous record shows individual evaluation and non-rigidity in weighing gender, rather than a post-interview, category-based rule. Where a measure functions as a categorical bar and bypasses candidate-specific assessment, courts have found unfairness, notwithstanding a remedial aim. The Institute's reliance on institutional smallness/size or newness, and on the absence of a plan as a tolerable interim state, is misplaced.

[69] The statutory requirement that a measure be designed in accordance with section 6(2) read with section 15 of the Act does not evaporate because of headcount. As mentioned, a design can be demonstrated by *inter alia* contemporaneous documents, such as a board resolution predating the appointment, a workforce analysis against the economically active population, recorded section 20(4) matrices, and deviation mechanisms, even in a small body. In these proceedings, none of these safeguards appears. Instead, the minutes show a post-interview, outcome-driven preference, first by gender and then by province, untethered to any documented criteria or flexibility. That is precisely the *ad ho*c vice condemned in *Gordon*'s case, and it fails the Barnard's case requirement that

measures must neither operate as absolute barriers nor result in the appointment of persons who are not equally up to the task.

[70] Relatedly, the job rationale is inherently narrow. It must be proved and demands indispensability, not operational convenience, and cannot rest on blanket assumptions. The Labour Court in *IMATU*'s case,[45] requires an individualised appraisal rather than generalised risk assertions. The Labour Appeal Court's recent equality jurisprudence, including *Mahlangu*'s,[46] case, reinforces this point by condemning rules that operate as categorical gates, such as a rule that renders a second pregnancy a trigger for unpaid leave, because such rules displace individual assessment with status-based exclusion. The same logic cautions against gender-determinative rules that lack contemporaneous justification and flexibility.

[71] The jurisprudence draws a clear distinction between measures consciously designed to advance equality and ad hoc or opportunistic preferences. In *Gordon*'s case, the Supreme Court of Appeal held that a single appointment justified solely on representivity, without any supporting policy, plan, demographic analysis, or rational design, does not constitute a measure under section 9(2) of the Constitution and is inherently arbitrary and unfair. By contrast, where an employer proves the existence of a valid employment equity plan with numerical goals and a rational connection between the identified underrepresentation and the appointment, courts have upheld such decisions. Those circumstances do not arise here.

[72] It may be accepted that a single appointment of Ms Elleson in this matter can significantly alter the composition of a small executive and that this may legitimately carry weight, but only if the Institute's contemporaneous reasons demonstrate design, flexibility, and candidate-specific justification, rather than a rigid barrier that forecloses a merit-based assessment. Even crediting the Institute's context of a small, all-male executive and the need for visible gender inclusion, the Court must still be satisfied, on the record, that the means were proportionate, evidence-led, and non-rigid, and that any departure from advertised minima was justified by individual

[45] *IMATU & Another v City of Cape* Town (2005) 11 BLLR 1084 (LC).
[46] *Mahlangu v Samancor Chrome Ltd (Eastern Chrome Mines)* [2020] ZALAC 14; (2020) 41 ILJ 1910 (LAC); [2020] 8 BLLR 749 (LAC).

suitability rather than by category alone. Where that showing is absent, the measure shifts from restorative to exclusionary and becomes unfair.

[73] On the record, the authorities require substance over form. They require individualised appraisal, a rational connection between means and ends, and the avoidance of absolute barriers. These requirements cannot be inferred from post *ad hoc* reliance on context alone. To distinguish legitimate numerical goals from prohibited quotas, a quota may be inferred where two or more indicators appear on the record, and there is no evidence of a deviation mechanism.

[74] In this appeal, the record discloses exclusionary language recommending the appointment of a female and giving first preference to a local KwaZulu-Natal female; a change in criteria after interviews, adding gender and province after scores were awarded; a directive that made the gender outcome determinative; and the absence of any deviation mechanism in the contemporaneous materials. Without a plan or without a section 20(4) record, the inference of a functional quota or an absolute barrier is not rebutted by general appeals to shareholder pressure or organisational needs.

[75] Undoubtedly, the Institute could pursue representivity, but not through an ad hoc process. The employer could rebut the inference only through contemporaneous documentation demonstrating genuine flexibility. The outcome here does not rest on a no-plan rule *per se* or on *Gordon's case* alone. It follows from the fairness framework, including the Labour Appeal Court's approach in *South African Airways*, and the failure to demonstrate contemporaneous design, non-rigidity, and individual evaluation.

[76] In this appeal, the record shows that the Institute's executive structure consisted entirely of men, that shareholders exerted pressure to appoint a woman, and that the selection panel regarded gender balance as decisive. To repeat, there was no employment equity plan, no consultation, no demographic analysis, and no structured criteria to show that the appointment formed part of a consciously designed measure to advance equality. The successful candidate did not meet the advertised educational requirements, and the Institute failed to perform the inquiry required by section 20(4) to determine whether she was suitably qualified. The

decision accordingly falls within the category of *ad hoc* preference condemned in *Gordon's case*.

[77] Section 20(4) contemplates a pre-appointment checklist that must be recorded for each candidate. It includes education, with reasons for any deviation from advertised requirements; relevant experience, quantified against the key outputs of the post; the capacity to acquire the required skills, supported by an evidence-based training plan; and comparative fit, demonstrating how the proposed beneficiary meets the inherent requirements relative to competing candidates. Without contemporaneous documentation of these inquiries, the Institute could not rely on section 6(2) because suitability has not been objectively established. The submission that Ms Elleson was nonetheless suitably qualified under section 20(4) confuses the statutory test.

[78] Section 20(4) permits measured, recorded reliance on the ability to acquire capacity, provided the employer maintains a contemporaneous rationale. To emphasise, the Institute's advertisement set out essential minima: a postgraduate accounting honours degree; completed articles; a chartered accountant designation as an advantage; eight years in accounting or finance, with five years at a senior management level. The record contains no section 20(4) worksheet or reasoned deviation. By contrast, the minutes show a pivot to gender and province, while ignoring the advertised criteria and ranking. On these facts, the Institute neither objectively established Ms Ellenson's suitability nor justified departing from the essential minima. The Labour Court's conclusion that she was not suitably qualified is borne out by the record. On the issue of but-for causation, where an otherwise eligible and top-ranked candidate is excluded solely on a prohibited ground, our courts treat reinstatement or its patrimonial analogue as appropriate relief. The Institute's speculation about alternative outcomes does not displace the probable appointment of Mr Mzimele absent the unlawful barrier.

[79] The Institute's reliance on general constitutional values and on its status as a small, developing institution does not satisfy the statutory requirement that affirmative action be designed and implemented through lawful processes. Shareholder pressure cannot replace legislative requirements. On these facts, the process created an effective absolute barrier to Mr Mzimele as a male candidate,

reminiscent of a quota and impermissible under sections 15(3) and 15(4) of the EEA. Thus, even if the unpleaded defence were considered on the merits, it would fail. The appointment did not arise from a lawful affirmative action measure and amounted to unfair discrimination. Effectively, *Gordon*'s case is not distinguishable on any material basis.

[80] Where a process is tainted by the absence of design, the presence of a quota inference, or a failure to conduct and record section 20(4) inquiries, speculation that another candidate would in any event have been appointed does not break causation. The onus rests on the employer to prove, through contemporaneous and pleaded evidence, that a lawful basis existed at the time and would still have prevented the claimant's appointment. *Ex post facto* rationalisation or unpleaded hypotheses do not discharge that burden. Even on the assumption of an alternative candidate, the appointment would have remained unlawful without a designed measure and proper documentation.

[81] In the end, there was no plan, no analysis of the economically active population, no section 20(4) records for any candidate, and a post-interview gender rule adopted under shareholder pressure in an all-male executive environment. These circumstances fail every *de facto* design safeguard, trigger multiple quota-inference indicators, and cannot be cured by reliance on broad-based black economic empowerment. Even if properly raised, the affirmative action defence would fail under *Gordon* and *Barnard*'s cases, including the principles set out above. The onus rested on the employer to prove that, on the same date and the same record, a lawful basis existed that would probably have defeated the claim. The minutes identify Ellenson only within the very framework found to be *ad hoc*, namely, a gender-determinative decision coupled with a KwaZulu-Natal filter, with no plan and no section 20(4) record. The Institute pointed to no contemporaneous design instrument that could lawfully have sustained an alternative appointment at the time. The Labour Court's finding, therefore, remains intact, namely that but for the unlawful sex-based exclusion, the top-ranked candidate would probably have been appointed.

[82] In short, even accepting that context matters, that a single appointment can shift representivity, and that a formal plan is not invariably decisive, the governing test remains the fairness enquiry as articulated by the Labour Appeal Court. The

Institute fails that test because it did not demonstrate contemporaneous design, non-rigidity, or individual evaluation, and instead erected a category-based barrier.

[83] I now turn to deal with the issue of the remedy. Although the Labour Court in its judgment makes reference to both subsections (a) and (b) of section 50(2) of the EEA, it is, however, clear that the pleaded case was for patrimonial damages and not compensation. The damages represent the difference between what Mr Mzimele would have earned and his actual earnings. This finding is based on the pleaded case and Mr Mzimele's testimony. In the statement of case, he claimed to have suffered damages in the amount of R4 663 096.00. In this regard, he relied on his anticipated salary, but for the discrimination, from 1 October 2014 to 2019, calculated at R35 000,00 per month, which was disputed by the Institute.

[84] In support of the claim, Mr Mzimele relied on the tax assessments issued by SARS for the financial years between 2014 and 2019. He also used the salary offered for the post as a comparator for what he would have earned but for the discrimination. He testified that after the termination of his fixed-term employment contract with the Institute, he returned to private practice. He testified during the trial that:

> "When the services were terminated, I went back to the practice. When I got there, my salary was actually erratic. Some months I got nothing, and some months I got some money. There was a year when I was actually getting nothing. I was relying on my wife's chicken business as well as my wife's salary to get going. Some years, there is a year when I did not get anything from the business."

[85] In *BMW (South Africa) (Pty) Ltd v National Union of Metalworkers of SA obo Deppe*,[47] the Labour Appeal Court confirmed that an award of damages under section 50 of the EEA is contingent upon proof of actual patrimonial loss and the existence of a causal nexus between the employer's conduct and the loss suffered. Likewise, in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*,[48] this Court drew a clear distinction between compensation and damages, holding

[47] *BMW (South Africa) (Pty) Ltd v National Union of Metalworkers of South Africa and Another* [2020] ZALAC 22; (2020) 41 (ILJ) 1877 (LAC) ; [2020] 11 BLLR 1079 (LAC).
[48] See *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* [2015] ZALAC 34; [2015] 11 BLLR 1081 (LAC); (2015) 36 ILJ 2989 (LAC).

that compensation operates as a solatium for humiliation or impairment of dignity, whereas damages constitute recompense for proven patrimonial loss and accordingly require evidentiary proof. This distinction was reiterated in *SA Airways (Pty) Ltd v Jansen van Vuuren & another*,[49] where the Court stated:

> "The EEA draws a distinction between "compensation" and "damages", and does not regard them as the same. .... The intention must have been that they connote different kinds of award. In my view, the only rational meaning that can be given to the terms is that "damages" connotes a monetary award for patrimonial loss and "compensation" connotes a In the EEA, "damages" refer to an actual or potential monetary loss (i.e patrimonial loss) and "compensation" refers to the award of an amount as a solatium (i.e to non-patrimonial loss) monetary award for non-patrimonial loss (including a "solatium")

[86] Accordingly, as reaffirmed in *Rapoo v Rustenburg Local Municipality*,[50] a claim for damages must be properly pleaded and substantiated by cogent evidence. The Court emphasised that the mere filing of documents, absent a coherent and particularised damages case, does not constitute proof of patrimonial loss.

[87] It is clear that the issue regarding the relief is whether the Labour Court erred in accepting that the evidence presented by Mr Mzimwele was sufficient proof of the loss he allegedly suffered. In this regard, the onus was on him to prove a causal connection between discrimination and actual financial loss.

[88] Before dealing with the issue of the weight of the evidence tendered regarding the relief granted by the Labour Court, it is important to point out the nature of the relief which was sought by Mr Mzimele. In the statement of claim at paragraph 5.13, he states that he is claiming damages and that, but for the discrimination, he would have earned a salary of "R94 150 per month, net for a period of 5 years commencing from 01 October 20224."

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[49] See *South African Airways (Pty) Ltd v Jansen Van Vuuren and Another* [2014] ZALAC 108 (12 June 2014) at paras 75 – 76 and ***A**RB Electrical Wholesalers (Pty) Ltd v Hibbert N.D* [2015] ZALAC 34; (2015) 36 ILJ 2987 (LAC) where this Court distinguished between compensation as a solatium for humiliation or impairment of dignity, and damages as recompense for proved patrimonial loss, holding that proof of loss is required for the latter.

[50] *Rapoo v Rustenburg Local Municipality* [2020] ZALAC 5; [2020] 6 BLLR 533 (LAC).

[89] In the pre-trial minutes, it is stated that he seeks payment in the total of R4 663 096.00 plus interest. The minutes further indicate that the Institute disputed that he earned R35 00.00 per month. Despite his undertaking to produce proof of the same, none has been produced.

[90] After stating in its introductory paragraph of the judgment, the Labour Court notes that it is dealing with the claim under both subsection (2)(a) and (b), which relate to patrimonial loss. In paragraph [24], it held that:

> "There is no reason to reject the Applicant's claim. He proved that he was unfairly" discriminated against and pleaded and proved his damages. He confirmed in his testimony that he had calculated his damages by reference to his income tax disclosures to the South African Revenue Services for the period 2014 to 2019 (the Income he earned in each of those years; the amount of the mitigation) and the offer of employment given to the Second Respondent."

[91] It is clear from the above that although the Labour Court referred to both sub-sections, its determination was per the claim of Mr Mzimele, confined to the claim of patrimonial damages.

[92] It is generally accepted that whilst tax returns may be accepted as evidence, they are insufficient on their own to conclusively establish financial loss. They show income, not loss *per se*; they reflect declared income to SARS and do not establish what Mr Mzimele would have earned but for the Institute's discriminatory conduct. Put another way, they do not provide conclusive proof of earnings or loss, as they may be incomplete or unreliable and rely on self-reporting. They reflect taxable income, not actual income. In general, they may provide historical earnings. Such evidence needs to be considered with the totality of all other evidence.

[93] Mr Mzimele's tax returns show, to some extent, what money he earned, not what he lost, and any loss, if ever, was caused by business volatility on his version.

[94] The reliance placed on the remuneration earned by Ms Ellenson, the successful candidate, which was introduced during re-examination, does not avail the applicant. The establishment of unfair discrimination does not, without more, constitute proof of the quantum of any patrimonial loss. Whilst the comparator's

salary may serve as a reference point, it is not determinative in the absence of evidence establishing what the applicant would, in fact, have earned had he been appointed. Material considerations relevant to that enquiry were not addressed, including whether the applicant would have been appointed at the same salary notch, at a different level, or on materially different remuneration terms. In the absence of such evidence, reliance on the comparator's salary alone is insufficient to establish the extent of the alleged loss.

Conclusion

[95] It is clear from the above that the Institute unfairly discriminates against Mr Mzimele in contravention of the provisions of the EEA. This constitutes a breach of Mr Mzimele's right to equal treatment and non-discrimination in employment.

[96] It is further clear that the claim as pleaded by Mr Mzimele was confined to patrimonial damages in terms of section 50(2) (b) of the EEA. He, in this regard, failed to discharge his onus of proving actual patrimonial loss. He did not claim non-patrimonial loss.

[97] In the premises, the following order is made:

Order:

1. The applications for condonation for the late filing of the notice of appeal and the record are granted.

2. The appeal is reinstated.

3. The appeal against the finding of the Labour Court that the appellant (the Institute) unfairly discriminated against the first respondent (Mr Mzimele) is dismissed.

4. The order of the Labour Court awarding patrimonial damages to the first respondent, Mr Mzimele, is set aside and substituted with the following order:

    a. The plaintiff's claim for patrimonial damages against the respondent is dismissed.

5. There is no order as to costs.

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E. Molahlehi
Judge President of the
Labour Appeal Court

Mahalelo ADJP and Tokota AJA concur.

APPEARANCES:

For the Appellant:	D. Crampton SC, instructed by Mdledle Incorporated (Heads of argument by M. Pillemer SC)
For the First Respondent:	M. Naidoo SC with S. Tshangana, instructed by Siza Khumalo Attorneys