THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 337/07

In the matter between:

MARTIN GORDON **APPELLANT**

v

DEPARTMENT OF HEALTH: KWAZULU-NATAL **RESPONDENT**

Neutral citation: *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008).

Coram: Scott, Cloete, Mlambo, Maya JJA et Leach AJA
Heard: 16 May 2008
Delivered: 17 September 2008

Summary: Practice – Non Joinder – direct and substantial interest – meaning of – relief sought relevant to enquiry – decision of Labour Appeal Court reversed.
Affirmative Action – Meaning of 'measures designed to . . .' in s 8(3)(a) of Interim Constitution – Rational relationship of measures to objectives examined – ad hoc conduct not a measure as contemplated in s 8(3)(a) – such conduct inherently arbitrary and amounting to unfair labour practice within meaning of Item 2(1)(a) of Schedule 7 of Labour Relations Act 66 of 1995.

ORDER

On appeal from: The Labour Appeal Court, (Zondo JP, Jappie and Basson AJJA sitting on appeal from the Labour Court).

1. The appeal succeeds with costs including the costs of two counsel and the order of the Labour Appeal Court is set aside.

2. In its place the following order is substituted:

'The appeal succeeds with costs. The order of the Labour Court is set aside and the following order is substituted:

(a) It is declared that the appointment of Mr Mkongwa to the post of Deputy Director Administration: Greys Hospital instead of the applicant constituted an unfair labour practice as envisaged by Item 2(1)(a) of Schedule 7 of the Labour Relations Act 1995, in that it discriminated unfairly against the applicant.

(b) The respondent is ordered to pay the applicant the difference between what he would have earned had he been appointed to the said post on the effective date 1 June 1996 and what he actually earned for the period 1 June 1996 to the date of his retirement on 28 February 2003, together with interest at the prescribed legal rate calculated from the date on which each monthly salary payment became due until date of payment.

(c) In the event the parties are unable to agree the amount due to the applicant they are granted leave to approach this court on the same papers, duly supplemented in so far as necessary, for an order determining the amount due.

(d) The respondent is ordered to pay the applicant's costs.'

JUDGMENT

MLAMBO JA (SCOTT; CLOETE; MAYA JJA; LEACH AJA CONCURRING)

[1] This is an appeal, with leave of this court, against the judgment of the Labour Appeal Court (Zondo JP, Jappie and Basson AJJA) dismissing an appeal to that court against the judgment of the Labour Court (Pillay J) which had dismissed the appellant's claim. The judgment of the Labour Court has been reported, see *Gordon v Department of Health, KwaZulu-Natal* (2004) 25 ILJ 1431 (LC).

[2] The respondent, on 11 April 1996, advertised the post of Deputy Director: Administration: Greys Hospital: Pietermaritzburg. The appellant, a white male and Mr Z Mkongwa, a black male, both employees of the respondent, were amongst the applicants. The appellant had started working for the respondent in February 1967 as an assistant administration clerk and had progressed to the positions of assistant senior administration clerk in 1972, administration officer in 1978, senior administration officer in 1985 and, in 1992, was promoted to the position of assistant director – Midlands Hospital Complex comprising Fort Napier hospital, Townhill and Umgeni's C and R Centres. He occupied this position when he applied for the advertised position. On the other hand Mr Mkongwa had started his career with the respondent (at Edendale Hospital) in June 1974 as an assistant administrator and had progressed to the position of administration officer in June 1989. He was in that position when he applied for the advertised position having obtained an Honours degree in Administration.

[3] The selection panel decided, after interviewing all candidates, that the appellant was the most suitable for the post as he was already administering three hospitals at the time. The panel also found that he had exhibited strong leadership, planning and control competencies which they did not find in the

other candidates including Mr Mkongwa. The panel recommended that the appellant be promoted to the post which recommendation was endorsed by Professor Greene-Thompson, the head of the Department of Health in the province. The recommendation was then conveyed to the Provincial Public Service Commission by the respondent. It is not in dispute that, in its letter to the Commission, the respondent recorded that the appellant was found suitable with due regard to five agreed criteria. The Commission did not accept the respondent's recommendation for the appellant's appointment and directed the respondent to appoint Mr Mkongwa instead. It stated that this directive was based on Mr Mkongwa's 'academic qualifications, experience and the constitutional imperative to promote representivity in the public service'. The respondent then appointed Mr Mkongwa to the post.

[4] The appellant, aggrieved by his non-appointment, instituted proceedings in the Labour Court against the respondent claiming that he had been discriminated against unfairly on the arbitrary grounds of his race and colour and that this was an unfair labour practice. He claimed protective promotion, by way of relief, with effect from 1 June 1996, the date on which he contended he should have been appointed. Protective promotion is described in paragraph 9 (1)(c), part B.VI/III of the Public Service Commission Staff Code as follows: 'Protective Promotions are effected on the recommendation of a Commission to protect the position of officers and employees – . . . who are found to have been prejudiced in the filling of a promotion post after such a post had been filled.' This in essence amounts to providing all the benefits of the promotion post to one employee without actually appointing him thereto with the consequence that the appointment of another employee to that post remains intact.

[5] The Labour Court held that appointing the appellant to the post would not have given effect to the 'constitutional imperative' of promoting equality and transforming the public service, and that for that reason he could not be regarded as the most suitable candidate. The Labour Court concluded that the failure to appoint the appellant did not amount to unfair discrimination and

consequently dismissed his claim. The appellant's claim and the basis upon which it was dealt with by the Labour Court were not considered by the Labour Appeal Court (LAC) as that court, having invited the parties to address it on the non-joinder of Mr Mkongwa in the proceedings, reasoned that in the event of the appellant's contention being upheld, ie that he was more suitable for appointment than Mr Mkongwa, this would have amounted to Mr Mkongwa's appointment being 'a wrong appointment'. This, concluded the LAC, meant that Mr Mkongwa had an interest in the proceedings and that the failure to join him deprived him of the opportunity to also have his say. This led the LAC to conclude that the appellant's failure to join Mr Mkongwa was fatal and it dismissed the appeal.

[6] The LAC reached its conclusion by relying, amongst others, on its earlier decision in *Public Servants Association v Department of Justice* (2004) 25 ILJ 692 (LAC) in which it had rejected an appeal on a similar basis. In that matter the LAC upheld a decision of the Labour Court which had on review set aside an arbitration award of the Commission for Conciliation Mediation Service of South Africa (CCMA). The CCMA had ruled that the Department of Justice had committed an unfair labour practice by not appointing the appellants and instead appointing employees who were alleged to have been far less experienced. The Department of Justice had justified its appointment of the successful appointees on the basis that it was advancing representivity in the department. That is the stance of the respondent in this case.

[7] In *Public Servants Association v Minister of Justice* as here, the appellants had not joined the successful appointees. There the LAC reasoned that the appellants' claim that they, and not the successful appointees, were suitable for appointment created a dilemma for the Department of Justice regarding the correctness of its decision not to appoint the appellants. The LAC referred to *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). In that matter a trade union had instituted proceedings seeking the reversal of a decision by the Minister of Labour terminating the appointment of an arbitrator in a dispute between the union and its members

on the one hand and their employer on the other. The union had not joined the employer in the litigation. Fagan AJA restated the principle that a third party must be joined in proceedings if he is shown to have a direct and substantial interest in the subject matter of the litigation. He found in that matter that the employer had a direct and substantial interest in the litigation as it would have had to comply with the arbitrator's award in the event of the arbitrator ruling in favour of the union and its members. Fagan AJA also rejected submissions that the employer, though not cited, was aware of the proceedings as it had been given informal notice thereof. The LAC found that the facts in the *Amalgamated Engineering Union* case were analogous. The LAC reasoned that, notionally, this gave rise to a situation where the successful appointees, if removed from their posts as per the award of the CCMA, could themselves challenge their removal from their posts and, in the event of them being successful, this could potentially place the Department in an untenable position. This situation, concluded the LAC, demonstrated that the successful appointees had a direct and substantial interest in the matter and that failure to join them was fatal to the appellants' case.

[8] The LAC then went on to consider the question whether the successful appointees should 'at least' have been afforded an opportunity to be heard even if there may have been no obligation to join them. In this regard the LAC referred to *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A)[1] and to *Traub and Others v Administrator, Transvaal* 1989 (1) SA 397 (W).[2] In the *Traub* matter Goldstone J had set aside a

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[1] Particularly to the statement at 230I-231A that: 'In my view, the solution to the problems raised by the issues in this case may be found in the common law, and more particularly the rules of the common law which require persons and bodies, statutory and other, in certain instances to observe the rules of natural justice by acting in a fair manner. In recent years our law in this sphere has undergone a process of evolution and development, focusing upon that principle of natural justice encapsulated in the maxim *audi alteram partem* (which for the sake of brevity I will call the "*audi* principle"').'
And at 231F that: 'The *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly.'

[2] Particularly to the statement in 400I-J that: 'A decision that a professional person is unsuitable for a post is potentially of the utmost importance and will, if it remains, be a permanent blot on his good name.'
And further at 401C-D that: 'Where the suitability of a person is the issue, and an adverse decision has serious consequences for that person in relation to his application and in relation

decision of the Director of Hospital Services in the Transvaal turning down applications for appointment by certain doctors without giving them a hearing, a decision confirmed on appeal albeit for different reasons.[3] The *Du Preez* matter dealt with the rights and interests of certain persons who were not given notice of proceedings in which allegations about their alleged complicity in certain criminal actions were to be aired. The LAC found that by analogy, as the successful appointees had already been appointed to their posts when the arbitration commenced in the CCMA, a finding by the CCMA that they were not suitable for appointment to those positions 'could no doubt detrimentally affect their existing rights and interests' and that 'the duty to act fairly obliged the (CCMA) commissioner not to make such a finding without complying with the *audi alteram partem* rule or without having them joined in the proceedings first'. The LAC further rejected a submission that it was not necessary to join the successful appointees as the relief sought was not directed at the setting aside of their appointments. In this regard the LAC found that joining the successful appointees was not solely dependent upon the question of relief. The LAC stated at 705A-B:

'Even if no relief were sought against the appointees, they should have been joined or at least should have been given an opportunity to be heard before the commissioner could make the finding that "as an objective fact" they are not suitable for the posts to which they were appointed. This is so because such a finding would, with or without any relief being sought against the appointees, affect their rights and interests adversely.'

For these reasons the LAC dismissed the appeal.

[9] The *Du Preez* and *Traub* decisions had nothing to do with non-joinder, a fact acknowledged by the LAC. They were concerned primarily with the *audi alteram* principle in circumstances where a public body had failed to afford

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to his career, then I have no doubt that in the absence of a clear provision to the contrary in the statute he must be entitled to be heard before he is made to suffer an adverse decision.'

[3] See *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).

certain individuals a hearing in matters in which their interests and rights were at stake. The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.[4] In the *Amalgamated Engineering Union* case (supra) it was found that 'the question of joinder should . . . not depend on the nature of the subject matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'.[5] The court formulated the approach as, first, to consider whether the third party would have *locus standi* to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.[6] This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.[7]

[10] All the cases I have referred to also illustrate the point that the order or judgment of the court is relevant to the question whether a party has a direct and substantial interest in the subject matter of any proceedings. It is so that in the course of its reasoning a court makes findings and expresses views which do not form part of its judgment or order. An example in point in the employment arena concerns a potential finding by a court that a successful appointee was not suitable for appointment. The 'unsuitable' appointee has no legal interest in the matter if the order will be directed at the employer (the

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[4] *Bowring NO v Vrededorp Properties* CC 2007 (5) SA 391 (SCA) para 21.
[5] At page 657.
[6] See also *Collin v Toffie* 1944 AD 456 at 464; *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) at 521A and *Peacock v Marley* 1934 AD 1 at 3; *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) para 7.
[7] *Bekker v Meyring, Bekker's Executor* (1828–1849) 2 Menz 436.

author of the unsuitable appointment) to compensate the ‘suitable’ but unsuccessful applicant. Of course the successful but ‘unsuitable’ appointee will always have an interest in the order to confirm his/her suitability for the job but this is not a direct and substantial interest necessary to found a basis for him or her to be joined in the proceedings. In a situation where a number of applicants compete for a position, they provide information to the prospective employer to influence the decision in their favour. That is as far as they can take it. Once the employer selects from amongst them it is up to the employer to defend its decision if challenged. This is because the employer, as the directing and controlling mind of the enterprise which is vested with the managerial prerogative to manage it, has a legal interest in the confirmation of its decision as it faces a potential order against it. The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which can lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests.

[11] As already pointed out, the relief sought in this matter and in *Public Servants Association v Minister of Justice* (supra) was not directed at the setting aside of the Department’s decisions and the reversal of the appointment. The LAC was thus incorrect in finding that the facts in the *Amalgamated Engineering Union* case were analogous to those in the *Public Servant’s* case. In the *Amalgamated Engineering Union* case the employer who had not been joined would have been prejudiced, as found by Fagan AJA, because it had a direct and substantial interest in the appointment of an arbitrator regarding a dispute it had with its employees and the union. In the *Public Servants* case there was no potential prejudice to the successful appointees as no relief was directed at them. The LAC further erred in finding that the relief sought was irrelevant in considering whether a party had a direct and substantial interest in a matter. The cases referred to by the LAC do not support this conclusion and as pointed out above they dealt with a completely separate and unrelated principle. In the circumstances the LAC’s

decision that Mr Mkongwa had a direct and substantial interest in the matter and that the failure to join him was fatal to the appellant's case must be reversed.

[12] In the circumstances it becomes necessary to consider the appellant's claim, which was not dealt with by the LAC, that he was the victim of unfair racial discrimination when the respondent appointed Mr Mkongwa and not him. This claim is based on Item 2(1)(a) of Schedule 7 of the Labour Relations Act 66 of 1995 (LRA), which provides:

'For the purpose of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving the unfair discrimination, either directly or indirectly, against an employee on 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.'

The appellant contends that in the absence of a rational policy, plan or programme which justified his non appointment the respondent acted in an inherently arbitrary manner, in failing to appoint him based on his race and colour. This, he says, violated Item 2(1)(a) and therefore was unfair, even if this occurred within the constitutional imperative to advance persons, groups and/or categories of people previously disadvantaged by unfair discrimination.

[13] On the other hand, the respondent's case is that objectively viewed the appointment of Mr Mkongwa is immune from judicial scrutiny as it was a measure in itself designed to achieve the constitutional imperative of promoting equality and transforming the public service. It was submitted that Mr Mkongwa was a black person who was obviously disadvantaged by past unfair discrimination and his preference over the appellant was a measure, in itself without more, designed to achieve his advancement to enable his full and equal enjoyment of all rights and freedoms in the Constitution. This, it was submitted, was the objective of his appointment, which is the important element in the process and not whether there was an overarching policy, plan

or programme in terms of which the appointment was made. It was further submitted that in any event it was not obligatory to have a programme, plan or policy in place to advance this constitutional imperative.

[14] The question therefore is whether the appointment of Mr Mkongwa, a black candidate instead of the appellant, a white candidate, found more suitable by the selection panel, is immunised from judicial scrutiny by the respondent's *ipse dixit*, without more, that it was an affirmative action appointment in furtherance of the constitutional imperative of promoting equality.

[15] Item 2(1)(a) must be read with Item 2(2)(b) in the same schedule which provides:

'For the purposes of sub-Item (1)(a)–
(b) an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.'

These provisions are clearly based on s 8 of the Interim Constitution[8] which was applicable at the time. Section 8 provided:

'Section 8. Equality
1. Every person shall have the right to equality before the law and to equal protection of the law.
2. No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
3. (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons

[8] The Constitution of the Republic of South Africa Act 200 of 1993.

disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.'[9]

[16] The first issue requiring attention is the proper approach to s 8 and Items 2(1)(a) and 2(2)(b). It can hardly be contested that the appellant was discriminated against on the basis of his colour and race. The issue is whether this was unfair and therefore not countenanced by s 8.[10] The thrust of s 8 was to 'guarantee both equality before the law and equal protection of the law, and prohibits unfair discrimination both generally and on the particular grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language'.[11] The section further makes provision for measures designed for the advancement of persons and groups disadvantaged by past racial discrimination. This, in essence permits unequal treatment where the objective is to promote equality.[12] This has been found to contemplate the substantive form of equality as opposed to the formal type. See *Minister of*

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[9] Section 8 was replaced by s 9 of the Constitution of the Republic of South Africa 108 of 1996 which provides:
Section 9 of the Constitution: 'Equality
(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 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.
(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.'

[10] This approach is no different to what s 9(5) of the Constitution envisages as postulated in *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T) at 476J-477A.

[11] Etienne Mureinik: *'A Bridge to where? Introducing the Interim Bill of Rights' South African Journal of Human Rights* (1994) Vol 10 p 31.

[12] See Catherine Albertyn and Janet Kentridge: 'Introducing the right to equality in the Interim Constitution' South African Journal of Human Rights (1994) Vol 10 p 149: 'This clause (s 8(3)(a)) makes it clear that the prohibition of discrimination on the grounds listed in s 8(2) does not require the immediate abandonment of all consciousness of the named classifications. It acknowledges that the achievement of equality will require remedial measures which are geared to redressing both individual and group disadvantage created by a history of oppression and apartheid.' (at 172).

Finance v Van Heerden 2004 (6) SA 121 (CC) para 26-27 where Moseneke J states:

'[26] The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution. As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact. Of this Ngcobo J, concurring with a unanimous Court, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* observed that:
"In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it."
[27] This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage . . ..'[13]

[17] Affirmative action is unquestionably the most embraced means to promote equality and it entails in essence the upliftment of those who were disadvantaged by unfair discrimination. Mahomed J commented in *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC) para 16 that:

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[13] See also the statement by Goldstone J in *Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) at 729F-H that: 'In s 8(3), the interim Constitution contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.'

'Viewed from this angle therefore it is clear that the Constitution aims to redress historical inequities and imbalances. It requires as a constitutional imperative that the public service be broadly representative of the South African community. The attainment of this constitutional objective, in particular in the public service would be impossible without a programme of affirmative action.'

[18] The question that arises in our case is whether the appointment of Mr Mkongwa was a measure within the contemplation of Item 2(2)(b) read in the context of s 8(3)(a). The respondent submits that it was such a measure even though it was ad hoc. The resolution of this question involves an investigation whether the appointment in itself was designed to achieve the constitutional imperative of promoting equality. Section 8(3)(a) contemplates 'measures' whilst Item 2(2)(b) contemplates 'policies' and 'practices' (as the means) to advance the constitutional imperative and both provide that these must be 'designed to achieve . . . adequate protection and advancement . . ..' It has been found that measures that are found to be inherently arbitrary and/or irrational cannot be said to have been designed to achieve the objective of the constitutional imperative of equality. The decision in *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T) illustrates this at p 480A-D where the court said:

'I am respectfully in agreement with the learned Judge in the *Public Servants Association* case that a policy or practice which can be regarded as haphazard, random and overhasty, could hardly be described as measures designed to achieve something. There must indeed be a rational connection between the measures and the aim they are designed to achieve. This view has also been expressed by academic writers, such as Mureinik in "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31. I accept, at least for present purposes, that affirmative action measures are indeed reviewable, as found by Swart J in the *Public Servants Association* case, *inter alia* based on the opinion expressed by *Mureinik*, and argued on behalf of the applicant in this case. In order to honour constitutional ideals and values, and to strive to truly move towards the achievement of substantive equality, proper plans and programs must be designed and put into place. Mere random and haphazard discrimination would achieve very little, if anything, and might be counter-productive.'

See also *Minister of Finance v Van Heerden* (supra) where Moseneke J at 139 said:

'[41] The second question is whether the measure is "designed to protect or advance" those disadvantaged by unfair discrimination. In essence, the remedial measures are directed at an envisaged future outcome. The future is hard to predict. However, they must be reasonably capable of attaining the desired outcome. If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end. Moreover, if it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by s 9(2).'

[19] Our jurisprudence shows that our courts have focused on the question whether policies, plans or programmes put up as measures designed to promote equality were indeed capable of achieving that objective. In *Motala v University of Natal* 1995 (3) BCLR 374 (D) what was sought to be impugned was a plan by the University to limit the number of Indian students in preference to black students, which recognised the several disadvantages suffered by black students in particular. Hurt J had this to say about that policy:

'On the papers before me I was satisfied that the policy described by the deponents for the respondent was a "measure designed to achieve the adequate protection and advancement of . . . a group . . . of persons [black students] disadvantaged by unfair discrimination.' At p 383B-C.

[20] In *Stoman v Minister of Safety and Security* (supra) a white police officer claimed that the failure to appoint him to an advertised post and the appointment instead of a black officer in terms of an Equity Plan of the South African Police Service amounted to unfair racial discrimination as he was the most suitable for the position. The Equity Plan was found by Van der Westhuizen J to be bona fide and designed to contribute to the promotion of equality and the protection and advancement of persons previously

disadvantaged by unfair discrimination.[14] In *Minister of Finance v Van Heerden* (supra) at issue were certain rules of the Political Office Bearers Pension Fund which provided for differentiated employer contributions in respect of members of Parliament. The objective of the rules was to 'ameliorate past disadvantage related to the pension benefits need of new political office bearers'. Having analysed the rules of the fund Moseneke J stated at p 142:

'[52] I am satisfied that the evidence demonstrates a clear connection between the membership differentiation the scheme makes and the relative need of each class for increased pension benefits. The scheme was designed to distribute pension benefits on an equitable basis with the purpose of diminishing the inequality between privileged and disadvantaged parliamentarians. In that sense the scheme promotes the achievement of equality. It reflects a clear and rational consideration of the need of the members of the Fund and serves the purpose of advancing persons disadvantaged by unfair discrimination.'

[21] In *Public Servants Association of South Africa v Minister of Justice* 1997 (3) SA 925 (T) (referred to in *Stoman*) the Department of Justice had earmarked some posts in terms of an interim arrangement to implement affirmative action before the completion of a rationalisation process in the department and in the absence of a finalised affirmative action plan or programme. The only persons who were invited to apply for the earmarked posts and to the interviews were women. No explanation was however advanced for the basis upon which the posts were thus earmarked. The earmarking was criticized by the court as haphazard, random and over-hasty. For this reason the court was of the view that the earmarking of the posts amounted to an 'untrammelled discretion to earmark posts for designated groups without any overall plan or policy'. In this regard the court reasoned

[14] The learned judge stated at 483D: 'My concluding impression is that there is nothing before me indicating that the relevant policies and guidelines of the SAPS regarding measures to achieve equality and representivity do not comply with the constitutional requirements emanating from s 9(2). These policies and guidelines seem to have been created bona fide and with the intention of achieving the relevant ideals. In view of what is before me, I am of the opinion that there are measures designed to contribute to the promotion of equality in general and specifically to the protection and advancement of persons or categories of persons previously disadvantaged by unfair discrimination.'

that s 8(3)(a) required affirmative action measures to be designed to achieve the adequate protection and advancement of disadvantaged groups which was different to haphazard and random action.[15]

[22] It cannot be disputed that in the cases referred to above what was at issue were plans, policies and/or programmes envisaging a pattern of conduct whose objective was to promote equality. Those measures that survived judicial scrutiny are those found to have been rationally connected to their objective. See Albertyn and Kentridge (supra) at p 173 that:

'The better view is that the use of the word "designed" as opposed to "aimed" imports the requirement of a rational relationship between means and ends. In other words, it is not sufficient that the *purpose* of the measures in question is to redress past discrimination – the means selected to effect that purpose must be reasonably capable of doing so. The latter reading is preferable because it is more likely to ensure that affirmative action programmes are carefully constructed in ways which are best able to accomplish what they set out to achieve.'

It is apparent from the cited cases that the plans and/or policies at issue were subjected to scrutiny to determine if they were rationally connected with the constitutional imperative of promoting and/or achieving equality and that ad hoc and random action was found to be incapable of meeting the objective. From this it can be deduced that properly formulated programmes go a long way to satisfying the requirement of rationality. This is so since a properly crafted programme or policy provides a basis upon which it can be measured as to whether it meets the constitutional objective. In *Public Servants Association of South Africa v Department of Justice* there was no policy or plan in place but an ad hoc arrangement which was found to be random and haphazard and therefore not designed to achieve the required purpose. See also *Eskom v Hiemstra NO* (1999) 20 ILJ 2362 (LC). This, in my view, clearly shows that the term 'measures' as set out in s 8(3)(a) as well as the term 'practices' and 'policies' in Items 2(2)(b) of Schedule 7 of the LRA mean

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[15] At 991I-J.

something much more than mere ad hoc or random action as we have in this case.

[23] The injunction that the public service must be broadly representative is an important one. It enjoins those in charge to strive towards representivity. This in my view calls for attention to be focused on the respects in which the service is not representative and what measures should be implemented to achieve the required representivity. This suggests that a properly considered policy or plan to address the situation as opposed to ad hoc means is the way to go to achieve representivity. It must therefore be so that ad hoc and random action is impermissible. Compare *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC) at 1125 para 19 where it was said:

'There appears to be no doubt therefore that for affirmative action to survive judicial scrutiny the following is relevant:

19.1 there must be a policy or programme through which affirmative action is to be effected;

19.2 the policy or programme must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination.'

[24] In casu the appointment of Mr Mkongwa is sought to be justified on the basis that it was a measure in itself of advancing Mr Mkongwa who was disadvantaged by past discrimination. Mr Mkongwa's race was therefore the only basis on which his appointment was sought to be linked to the constitutional imperative by the Commission even though the selection panel did not support it. From the evidence it is clear that the respondent did not have a policy or overarching plan of affirmative action. The Secretary of the Commission, Dr Ndlovu, who testified, was unable to provide a coherent basis for rejecting the selection panel's recommendation. His view was simply that this was a case where affirmative action had to be implemented. He could not provide any evidence of guidelines by his Commission to the respondent in terms of which representivity was to be addressed in the recruitment process.

His evidence demonstrates that the Commission itself had not applied its mind to the implementation of affirmative action: they simply held a view in this case that a black candidate should be appointed. He could provide no evidence of how that appointment would have made the respondent more representative, nor was he able to provide a factual basis of the demographics which prompted the Commission to impose its view on the respondent.

[25] It has to be pointed out, as appears from the cases cited, that the policies, plans and/or programmes involved there were crafted in consideration of the context, such as identifying relevant demographics and the gaps in representivity that had to be addressed through affirmative action. This was not the case here nor was the application of affirmative action one of the criteria applicable in the selection of candidates. These are issues that would have been catered for in a specially formulated plan, policy or programme which would have provided the basis of the appointment. Clearly, the appointment was an ad hoc and arbitrary act. It can never in itself amount to a measure within the contemplation of s 8(3)(a) or s 9(2) which clearly require something much more than an ad hoc act. The appointment was not a measure in itself and was clearly inherently arbitrary and therefore unfair as contemplated in Item 2(1)(a).

[26] Therefore the submission that the appointment of Mr Mkongwa was in itself a measure within the contemplation of s 8(3)(a) is misconceived. Furthermore, the submission that the appointment was a ‘practice’ within the meaning of Item 2(2)(b) is also misplaced. Even if one were to find that the term ‘measures’ in s 8 also contemplates a practice, a single act or appointment is not and can never amount to a practice. The terms ‘practice’ and ‘measures’ presuppose more than one act. The language of the Constitution must be respected. One cannot give a term in the Constitution a meaning inconsistent with it. In *S v Zuma* 1995 (2) SA 642 (CC) para 17 the court said:

‘I am, however, sure that Froneman J, in his reference to the fundamental “mischief” to be remedied, did not intend to say that all the principles of law which have hitherto governed our Courts are to be ignored. Those principles obviously contain much of lasting value. Nor, I am equally sure, did the learned Judge intend to suggest that we should neglect the language of the Constitution. While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single “objective” meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.’

[27] In the circumstances of this case and in view of the absence of a plan or policy in terms of which affirmative action was to be applied, the respondent was obliged to comply with the legislative framework applicable at the time in selecting candidates. There are a number of provisions in the Public Service Act and the Interim Constitution which are relevant regarding appointments in the public service. Section 11(1)(b) of the PSA provides:

’Only the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer in question, and such conditions as may be determined or prescribed or as may be directed or recommended by the Commission for the making of the appointment or the filling of the post, shall be taken into account.’

The high-water mark of this provision is that no person who qualifies for appointment shall be favoured or prejudiced and that suitability amongst others shall be the criteria to be considered when making appointments. Section 212(2) of the Interim Constitution provided inter alia that the public service should ‘promote an efficient public administration broadly representative of the South African community’. In turn s 212(4) of the Interim Constitution provides:

‘In the making of any appointment or the filling of any post in the public service, the qualifications, level of training, merit, efficiency and suitability of the persons who

qualify for the appointment, promotion or transfer concerned, and such conditions as may be determined or prescribed by or under any law, shall be taken into account.'

[28] There is clear emphasis in these provisions that suitable candidates cannot be denied appointment if they comply with stipulated requirements, even though representivity is the objective. Therefore, in the quest to attain representivity, efficiency and fairness were not to be compromised. To justify the failure to appoint a candidate who complied with stipulated requirements it had to be shown that that action was not unfair. The evidence at our disposal is clear that the respondent did not have an affirmative action plan or policy in terms of which it appointed Mr Mkongwa. The evidence is also clear that the selection panel found the appellant to be the most suitable candidate and recommended that he be appointed. It is also common cause that the appellant complied with all the requirements for the post in terms of s 11(1)(b) of the PSA. In the light of all these facts it was clearly unfair not to appoint him. The Labour Court was therefore incorrect to conclude that it was not a requirement for the respondent to have had a plan or programme first before appointing Mr Mkongwa. In the circumstances, the appellant has succeeded in showing that the failure to appoint him was inherently arbitrary and therefore amounted to unfair discrimination which is an unfair labour practice as contemplated in Items 2(1)(a).

[29] It follows that the appeal must be upheld. In the circumstances, the following order is granted:

1. The appeal succeeds with costs including the costs of two counsel and the order of the Labour Appeal Court is set aside.

2. In its place the following order is substituted:

   'The appeal succeeds with costs. The order of the Labour Court is set aside and the following order is substituted:

(a) It is declared that the appointment of Mr Mkongwa to the post of Deputy Director Administration: Greys Hospital instead of the applicant constituted an unfair labour practice as envisaged by Item 2(1)(a) of Schedule 7 of the Labour Relations Act 1995, in that it discriminated unfairly against the applicant.

(b) The respondent is ordered to pay the applicant the difference between what he would have earned had he been appointed to the said post on the effective date 1 June 1996 and what he actually earned for the period 1 June 1996 to the date of his retirement on 28 February 2003, together with interest at the prescribed legal rate calculated from the date on which each monthly salary payment became due until date of payment.

(c) In the event the parties are unable to agree the amount due to the applicant they are granted leave to approach this court on the same papers, duly supplemented in so far as necessary, for an order determining the amount due.

(d) The respondent is ordered to pay the applicant's costs.'

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JUDGE OF APPEAL

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