IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C1149/02

In the matter between:

CEASAR DA SILVA ALEXANDRE **Applicant**

and

THE PROVINCIAL ADMINISTRATION OF THE WESTERN CAPE DEPARTMENT OF HEALTH **Respondent**

JUDGEMENT

MURPHY, AJ

1. The applicant, a white male, alleges that he has been unfairly discriminated against and seeks and order in terms of section 50(2) of the Employment Equity Act 55 of 1998 ("the EEA") directing the respondent to place him retrospectively in level, rank and scale to that of a level 13 employee, commensurate with the position of Director: Engineering and Technical Support with effect from 1 April 2002. In the alternative he seeks an award of damages or compensation.

2. The applicant's claim arises out of his unsuccessful application in late 2001 for appointment to the post of Director: Engineering and Technical Support ("the post"). He alleges that his non-appointment to the post amounts to unfair discrimination on the grounds of race, his application having been turned down in favour of a coloured male.

3. Section 6(1) of the EEA provides that no person may discriminate directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race. Section 6(2) of the EEA provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the EEA. Section 15 of the EEA defines affirmative action measures as measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workplace of a designated employer. Section 15(2) permits measures designed to further diversity in the work place and measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workplace by means of preferential treatment and numerical goals, but not quotas. (Section 15(2)(d) and section 15(3)). “Designated groups” is defined to mean black people, women and people with disabilities. “Black people” is defined in the Act as a generic term which means Africans, Coloureds and Indians. The applicant being a White male is thus not a member of any designated group.

4. Section 2 of the EEA defines its purpose as the achievement of equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experience by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.

5. Insofar as the EEA aims at achieving equitable representation of suitably “qualified” people from designated groups in all occupational categories and levels, it is important to keep in mind the legislature’s recognition that past disadvantageous treatment of the designated groups under Apartheid denied many able people access to educational opportunities and formal

qualifications. For the purposes of the EEA, therefore, a person may be suitably qualified for a job as a result of any one, or any combination of that persons formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job. Employers determining suitability are thus legislatively mandated to review all these factors and to accord due weight to potential capacity (see section 20(3), (4) and (5)).

6. The equality and non-discrimination aimed at by the EEA is consonant with our Constitution's vision of a concept of equality, which in the words of Moseneke J in *Minister of Finance and Another v van Heerden* [2004] 12 BLLR 1181 (CC) @1193D includes "a credible and abiding process of reparation for past exclusion, dispossession and indignity within the discipline of our constitutional framework". The substantive notion of equality at the heart of our constitutional value system perceives restitutionary or remedial action as a central component of the enshrined protection and obliges courts to subject affirmative action measures to a lower level of scrutiny. Such measures are not required to be strictly necessary to achieve a compelling policy objective. It is enough that they be a rational means of advancing the legitimate aims of affirmative action. Judicial restraint and deference is called for in recognition of the need for state action to redress past social injustices. This line of thinking was expressed most eloquently by Sachs J in the *van Heerden* case @1231D-1232D as follows:

> It also means that where disadvantage was imposed because of race, then race may appropriately be taken into account in dealing with such disadvantage…It accordingly makes it clear that properly designed race-conscious and gender-conscious measures are not automatically suspect, and certainly not presumptively unfair...
>
> Remedial action by its nature has to take specific account of race, gender and the other factors which have been used to inhibit people from enjoying their rights. In pursuance of a powerful governmental purpose it inevitably disturbs, rather than freezes, the *status quo.* It destabilises the existing state of affairs, often to the

> disadvantage of those who belong to the classes of society that have benefited from past discrimination.
>
> Yet, burdensome though the process is for some, it needs to be remembered that the system of state-sponsored racial domination not only imposed injustice and indignity by those oppressed by it, it tainted the whole of society and dishonoured those who benefited from it. Correcting the resultant injustices, though potentially disconcerting for those who might be dislodged from the established expectations and relative comfort of built-in advantage, is integral to restoring dignity to our country as a whole. For as long as the huge disparities created by past discrimination exist, the constitutional vision of a non-racial and a non-sexist society which reflects and celebrates our diversity in all ways, can never be achieved. Thus, though some members of the advantaged group may be called upon to bear a larger portion of the burden of transformation than others, they, like all other members of society, benefit from the stability, social harmony and restoration of national dignity that the achievement of equality brings.

7. Although the present matter has been pleaded, constructed and argued within the parameters of the EEA, which has at its heart this conception of equality, an appreciation of the substantive and restitutionary notion mandated by the Constitution has been singularly absent in the parties' presentation of their cases. The applicant's broad claim that he is entitled to equal treatment which is colour blind fails to get beyond a conception of formal equality and non-discrimination which requires identical treatment. The respondent, on the other hand, has met the claim within the applicant's paradigm with a defence that the preferred candidate, a member of a designated group, was chosen on merit and insofar as equitable representation on the basis of race was a consideration, it was merely of secondary importance. The respondent's affirmative action defence therefore strikes me as somewhat muted. Obviously, the respondent must plead its case on its own interpretation of the facts and is entitled to a decision on the merits of its arguments supported by the evidence. Nevertheless, one cannot avoid the impression that it too regards affirmative action measures as a suspect category and in anticipation of strict judicial scrutiny opted to build its case primarily on an appointment

based on merit and an assertion of remedial equality less confident than one might otherwise have expected from an organ of state charged with setting the pace.

8. As far as *onus* is concerned, it is incumbent on the applicant to show that he was discriminated against on the basis of his race. Once such is established, the respondent bears the onus of establishing that the discrimination was fair (see section 11 of the EEA).

9. The thrust of the applicant's case is that by virtue of his experience and qualifications he was the most suitably qualified and skilled candidate for the post of Director: Engineering and Technical Support and was so far ahead of the successful candidate, Mathys, that the only reasonable inference to be drawn was that Mathys was appointed solely on the basis of his race and membership of a designated group.

10. In its response to the applicant's statement of case, the respondent, as already explained, based its defence on Mathys's merit as a candidate. Mathys, it was contended, was selected as the most suitable candidate by the selection panel based on his general profile and his competencies. The panel was impressed by his confidence, professionalism, strategic knowledge and relevant experience in and exposure to all the critical post requirements. In spite of the applicant's extensive experience, qualifications and experience acting in the post, he scored less than Mathys in the interview. To the extent that affirmative action considerations played any role, the selection panel had regard to the numerical targets contained in the respondent's employment equity plan in terms of which both white and coloured males were adequately represented, but considered the appointment of a coloured male as preferable to that of a white male, because white males were significantly over represented, whereas coloured males were not.

11. The post in contention was advertised externally in the Sunday Times on 18 November 2001 and internally through the department's registry, internet and internal mail system on 13 November 2001. With one important difference, the advertisements are identical. The advertisement states at the outset that the department was seeking a "dynamic, motivated and hands-on manager with the ability to work through engineering and technical challenges in considerable detail". The post is identified as being a senior managerial position with the responsibility for the provision of the following services:

    - Hospital engineering services.
    - Clinical engineering services.
    - Laundry services.
    - Orthotic and Prosthetic services.
    - Occupational and equipment safety services.
    - Laboratory and x-ray imaging services.

    Additional duties included:

    - Labour relations.
    - Financial and personnel management.
    - Technical investigations and recommendations.
    - Answering ministerial enquiries.
    - Policy development.
    - Strategic and infrastructure planning.

12. Applications were invited from persons in possession of an appropriate degree in engineering and the built environment, or a high level technical qualification or managerial qualification, plus extensive experience in hospital engineering or a closely related technical field. The specific competencies sought included:

- Excellent written and verbal communication abilities.
- An engineer's certificate of competency or other occupational health and safety qualification.
- A high degree of computer literacy.
- Knowledge of the work's function.
- Clinical engineering experience.
- Experience of project management.

13. The important difference between the internal and external advertisement is that the internal advertisement was introduced by a statement affirming that the department's employment equity imperatives. Thus it stated:

> In line with the employment equity plan of the Department of Health it is our intention with this advertisement to achieve equity in the workplace by promoting equal opportunities and fair treatment in employment through the elimination of unfair discrimination.

Why this policy prefix was not included in the external advertisement in the Sunday Times was not adequately explained in evidence. Most likely it can be attributed to an administrative oversight.

14. The applicant is a man of considerable learning and experience in his chosen fields of engineering and project management. He commenced service with the respondent in 1989 when he was appointed as an engineer at the Western Cape Regional Hospital's branch. He was promoted to Senior Engineer in September 1990, Principal Engineer in July 1991 and thereafter to Deputy Chief Engineer in June 1993. In 1995 he was appointed Chief Engineer: Hospital Engineering Services Western Cape, which position he still occupies. As such he is head of the hospital Engineering Department, situate within the Directorate of Engineering and Technical Support Services. His position is a senior one, and includes oversight of all the functions of general, clinical and medical engineering, the procuring, maintaining and

installing of equipment and the maintenance of hospital repair and renovation work. He has responsibility for a R60 million budget to supply all services to hospitals in the region, other than in the academic hospitals and has 150 staff directly under his management in the business units accountable to him. His job is graded at 11/12. He holds the degrees, BSc Engineering, M.Tech BA and a variety of certificates and diplomas. He is also a part-time lecturer in project management at the Cape Technikon.

15. During 1995 the applicant played a central role in the team tasked, as part of the process of restructuring, to come up with a new structure for the Provincial Department of Health. He was thus instrumental in the proposal, organisation and establishment of the Directorate: Engineering and Technical Support within the department. He initially did not apply for the post of director within the Directorate, but served on several occasions as the Acting Director. He testified that he believed he was appointed as Acting Director because he had been instrumental in the establishment of the directorate and was the only qualified person in the province with the requisite experience, skills and qualifications to fulfil the tasks and functions associated with the post. On 1 November 2001 the applicant was again appointed as Acting Director by means of a letter addressed to him by Mr A Cunninghame, Chief Director: Professional Support Services. He was appointed "for the period until the post of Director is permanently filled or until further notice". The letter includes the following cautionary remark:

> Please note that your appointment in this acting capacity may not be regarded as an entitlement, or a privileged position, in the event of your making application for the position of Director.

16. When the post was advertised during November 2001, the applicant decided to apply for it with the encouragement and support of Mr Cunninghame. From his vantage point, he believed that appointment to the position required a degree in engineering, or in a related field such as architecture and preferably

a master's degree in business or public management. He thought the advertisement requirement of a "high level technical qualification or managerial qualification" would not be enough. In his view it was necessary for the candidate to have substantial experience and degree level qualifications, both of which he had. He also felt he met all the criteria for the post. He has been exposed to the various sub-directorates of hospital engineering, was possessed of superior writing and presentation skills and holds a certificate of engineering competency, which he regarded as absolutely essential. Although he conceded not having a high level of computer skills, he saw himself as having the basics and the requisite standard of computer literacy. From his evidence, it also appeared that he had extensive knowledge of the work' functions, the administrative tasks, institutional relationships, financial budgetary issues and engineering tasks associated with the job. As he saw it, he was the only person with the skills, experience and qualifications in the department capable of taking up the post. In addition, he was in receipt of letters of commendation, had been categorised as "preferentially promotable" and had scored 89% on his most recent performance appraisal. Taking all this into account, he concluded that he was the best person for the job.

17. The applicant was short listed for an interview and was interviewed along with eight other candidates on 18 March 2002. As previously stated, he was not successful and the post was given to Mr ED Mathys, a Coloured male who prior to his appointment had held the position of Deputy Director: Technical Services in the department.

18. By all accounts the interview was not a happy experience for the applicant. Mr Cunninghame in his testimony described the applicant's performance in the interview as "embarrassing". Judging from some of his comments and the obvious emotion he displayed while giving testimony, the applicant remains deeply aggrieved by what he perceived to be unfair treatment during the

interview. His complaint, in general terms, was that the interview of 30mins duration was far too short, that he was not given enough time to elaborate on his skills, experience and valuable contribution and that he was cut short when he tried to show the panel the 35 “books” he has written on project management and related subjects, which he had brought along to the interview. (In passing it should be noted that the “books” to which the applicant claims authorship have not been published in the conventional sense, but are more in the form of lecture notes for dissemination to his students.) The applicant was also aggrieved that he was not taken through his Curriculum Vitae and was restricted to answering questions which the members of the interview panel had previously agreed upon amongst themselves. At the end of the interview he felt totally dissatisfied to the point that he concluded the interview with an impassioned plea not to be held hostage to affirmative action and an expression of disappointment that he had not been allowed to do himself justice in the way he saw fit. He chose also remind the panel of his special skills and interests in the area of project management which he regarded as the most important criterion and which formed the topic of the written lecture notes that he had brought along to the interview.

19. Later in his testimony the applicant was less than complimentary about Mathys’s skills, experience and qualifications. Basically, he considered Mathys as significantly less qualified and experienced than him especially in project management. I intend to examine Mathys’s suitability for the job in more detail later, suffice it at this point to note that the applicant’s attitude was that Mathys did not deserve his appointment on merit.

20. In cross examination the applicant was pressed on a number of issues regarding the requirements for the job and the suitability of the other candidates in comparison to him. It is unnecessary to traverse this evidence in any detail. In summary, the applicant submitted that despite the cautionary

remark in the letter appointing him as Acting Director he did indeed entertain an expectation of being appointed on the basis of Cunninghame's encouragement and his categorisation as preferentially promotable. He furthermore made it quite plain that he considered all the other candidates either as his subordinates or inferior. Nonetheless, he was obliged to concede that his experience was restricted to working in the environment of smaller hospitals, that he lacked technical expertise in clinical engineering (although he did have experience in managing clinical engineering) and while basically conversant with computers was not expert in the systems applicable throughout the hospital network. It was put to him that he was a good theoretical person, but not an adept "hands-on" person. It was also said that he had an authoritarian negotiating style, to which he admitted at times being prescriptive, saying he had little time for participatory management while "the ship is sinking". Finally, it was put to him that during the interview he was not focused, did not answer the questions directly, gave a speech and had a tendency to lecture the panel. To this he replied that he had been anxious to explain himself and had sensed that the panel was not interested.

21. The respondent called three witnesses, all of whom were members of the selection panel: Mr A R Cunninghame, Chief Director: Professional Support Services; Dr Phillip Carter, Chief Director at Tygerberg and Mrs B Arries, Chief Director Human Resources Management of the Western Cape Department of Health. All three gave testimony relevant to the short listing, interview and selection processes.

22. There were 34 applications for the advertised post, 23 from internal candidates and 11 external. The task of drawing up an initial short list fell to Mr Cunninghame. He went through each application and assessed the candidate against the job description, the competencies and duties as spelt out in the advertisement. He set up a spreadsheet reflecting the qualifications of each candidate and scored them against the key responsibility areas of the

post. He based the scores entirely on the curriculum vitae and attempted to be as objective as possible. In terms of existing policy at respondent, at least 50% of the members of the selection panel are required to be involved in drawing up the short list which also has to be accepted by the head of department and the executive authority. Accordingly, Cunninghame submitted his spreadsheet to Prof Household (the Chairman of the panel) and Ms Arries, who then met with him, interrogated the shortlist and proposed changes to his recommendations. During this process, Cunninghame insisted that all candidates who were employed within the directorate should have the benefit of an interview. The final shortlist was then extended to include 9 candidates rather than the initial 5. The short list was made up of five White males, two White females, one Coloured male and one Black male who was a Zambian citizen.

23. The interview panel consisting of Cunninghame, Household, Carter and Arries met and drew up a list of eight questions for presentation to each candidate. The respondent's policy requires that exactly the same questions be put to each candidate. Each panel member was allocated the same two questions to ask of each candidate. The questions were of a general nature aimed at providing the candidate an opportunity to elaborate on his/her curriculum vitae to test his/her judgement on managerial and financial issues and to gain insight into their vision and evaluation of policy concerns facing the public service, such as the idea of public/private partnerships, preferential procurement and employment equity. All three witnesses confirmed that all eight questions were put to each candidate, and that each interview lasted approximately 30 minutes. One of the applicant's grievances was that he was not given enough time and was asked only six questions. Although not too much turns on the matter I accept the respondent's version on this. The three panellists who testified struck me as ethical and considerate professionals and it is unlikely that they would have denied the applicant an opportunity to

speak to each question. After all, the questions had been reduced to writing and distributed to each panellist.

24. Each panellist had a score sheet and during the interview allocated scores for managerial ability, vision and leadership, appropriate experience and knowledge, communication and interpersonal skills and service delivery. The score of each panellist under each head was aggregated and a total score was recorded for each candidate. The three panellists confirmed that after scoring there was a discussion about the overall impression created by each candidate. In other words, the numbers were not decisive. This was followed by a discussion about employment equity and whether a certain appointment would advance the respondent's employment equity policy.

25. On an aggregated basis, Mathys scored marginally better than the applicant. However, the applicant marginally outscored Mathys on managerial ability, vision and leadership and appropriate experience and knowledge. Mathys fared better than the applicant in communication and interpersonal skills, as well as in service delivery.

26. An overview of the panellist's evidence reveals that Mathys was selected as the preferred candidate for the following main reasons. Although Mathys was not a certificated engineer, he did have substantial experience and hands-on technical skills in clinical engineering and occupational health and safety. He also had far superior computer skills and better hands-on experience within the larger hospitals. Cunninghame, in particular, emphasised the importance of such know-how to the job. The building management section of the hospitals in particular have computerised monitoring of airconditioning, fire security, electricity, access and other operational functions. The system automatically generates information on maintenance and heavy engineering and involves sophisticated, complex control software and hardware. In the various technical positions he had held in the hospital system, Mathys had

been able to acquire a sophisticated level of computer literacy, and had been responsible for the design and maintenance of the information systems and all data processing in the hospital engineering department. Against this it was felt that the applicant had not expressed much interest in acquiring computer skills as one might have expected from a Chief Engineer. From the panel's point of view, all technical managers needed to be conversant with computers as a communication an analytical tool. The applicant's computer skills were limited to a working knowledge of a few basic software applications such as power point and word processing. By contrast Mathys had programming skills and hardware knowledge. He also had extensive clinical engineering skills and some relatively high level managerial experience in the larger academic hospitals.

27. With regard to the applicant's performance, it is clear that the panel was equally impressed with his skills, experience and qualifications. The applicant was seen as a man who could get the job done. The panellists were, however, less impressed by his communication and interpersonal skills on the basis of his performance during the interview. His tendency to lecture and make speeches, to which he repeatedly succumbed while giving evidence, appears to have sealed his fate. From my observations of the applicant in the witness box he is evidently a learned, cultured and dynamic man, passionate about his pet subject, programme management. His proclivity to venture forth at length and in detail undoubtedly will serve him well in his capacity as a lecturer at the technikon. The same quality, however, could legitimately be seen as less valuable in a technical manager. The applicant also displayed a measure of emotional volatility. One naturally has sympathy with his sense of grievance, but under pressure this tended to transform into somewhat intemperate and dismissive observations about the qualities of others. Reading between the lines of the panellist's evidence, it was this attribute, or shortcoming in interpersonal skills, which ultimately disqualified the applicant. As previously stated, Mr Cunninghame with some discomfort testified that he

was taken aback by the applicant's performance during the interview and was embarrassed by his lecturing of the panel, saying that the interview went down badly, especially the applicant's long explanation and passionate plea that employment equity should not be applied. During his testimony the applicant made no bones about his distaste for the policy of employment equity, complaining that "White males have no future". Cunninghame also testified that he had in the past appointed the applicant to the employment equity task team of the provincial government, but that the applicant had not attended any meetings beyond the first one because of his "firm views" and "intolerance towards people with a different view point".

28. The motivation which eventually served before the provincial cabinet for the appointment of Mathys captures the panel's preference in the following succinct terms.

> During the interview Mr Mathys impressed the selection panel with his confidence, professionalism, strategic knowledge and relevant experience in/exposure to all the critical post requirements. It was also apparent from his responses to questions that he has excellent managerial skills.
>
> After in-depth discussions the selection panel unanimously agreed that Mr Mathys meets all the critical post requirements as advertised and that he provided more in-depth answers than the other candidates. In addition, the panel in its entirety allocated the highest points to him and it was unanimously agreed that his general profile and competencies make him the most suitable candidate for the post.
>
> The promotion of Mr ED Mathys to this post will not promote employment equity. The panel, however, felt that due a shortage of appropriately trained and experienced Blacks in the engineering field the deviation by nominating a Coloured male will not have such an impact on the numerical targets than nominating a White male.

29. The motivation goes on to explain why the other candidates were not appointed, and in particular made the point that the appointment of the Black male who was a Zambian citizen would have indeed promoted employment

equity, but it became clear during the interview that he did not possess adequate knowledge and experience in the duties attached to the post.

30. Ms Arries testified that the selection in this instance was conducted in accordance with the policy framework contained in Exhibit F, a document titled *"Project T2000: Selection and Appointment of Personnel"* dated 12 October 2000. The policy document confirms that at least 50% of the selection panel were required to be involved in the shortlisting of candidates and that the applications of persons who did not meet the threshold requirements normally need not be considered further. Threshold requirements are defined as being those requirements for the position as stated in the advertisement for the post.

31. It is clear also from Exhibit F that the procedures which the panel followed in regard to the interviews in this case were in the main sanctioned in terms of the policy. Thus there was a duty on the panel to compile a questionnaire directed towards testing the candidates' skills and knowledge of the management level competencies and key performance areas. The panel was obliged to expose all the candidates to the same questions, although follow up questions are allowed depending on responses. Of particular importance was the panel's duty to probe the projected potential of candidates whose appointment would enhance representativeness. The policy directive regarding the ultimate decision is expressed in the following terms:

> The decision concerning the most suitable candidate to be recommended for appointment/promotion/transfer to the post must be based on merit as well as the employment equity targets of the department. However, "potential" may be considered by the selection panel as one of the facets in their horizontal comparison of candidates, provided that such potential is assessed to be realisable within a reasonable time frame as determined by the panel, with reference to the position, exigencies and needs of the position and the employer. The candidate who scored the highest points in the selection process may thus be passed over and a candidate

> with a relative lower score may be regarded as the most suitable candidate in all the circumstances.

32. As already stated exhibit “F” is the policy document which governed the selection process involving the applicant and hence the employment equity considerations were to be approached in accordance with the prescriptions of that document. However, subsequently the respondent has amended its policy and has adopted an approach to employment equity that is less flexible than that provided for in exhibit “F”. This document (exhibit “A” page 60), titled “Recruitment and Selection Policy Department of Health Western Cape Provincial Health Administration”, according to Ms Arries, became effective on 15 May 2002. Clause 13.5 provides as follows:

> Once the selection procedure has been completed, consideration may be given to the representivity profile of the organisation/component. What this means is that while numerical targets have not been reached, affirmative action measures may be made applicable to the selection process in accordance with the requirements of the applicable affirmative action programme as stated in the departmental and regional employment equity plan as well as those developed at institutional level. In the event that the numerical targets in respect of representivity has been reached, or where no candidates from the designated group have applied or have been short listed, the candidate shall be assessed exclusively in terms of the core competencies/functional terrain of the job.

33. The difference between the two policies is that the earlier policy would allow consideration of employment equity issues, even where the numerical targets in respect of representivity have been reached. Whereas under the new policy it would be impermissible to do so and decisions would have to be based exclusively on merit. One doubts whether such a policy advances the spirit and purpose of employment equity and the notion of substantive equality as endorsed by our legislative and constitutional framework. However, because the earlier policy applied in this matter, there is no need to

adjudge the implications of the new policy falling short of the constitutional and legislative framework.

34. The applicant's contention that he was unfairly discriminated against on the basis of race is basically founded on three pillars. The first is that he was obviously the most suitably qualified candidate for the position and was informed as much. Secondly, the successful candidate, Mathys, did not meet the threshold criteria of the job as advertised. Thirdly, Mathys was not in fact appointed on merit, but on the basis of his race.

35. For the purpose of argument, I am prepared to accept that Cunninghame at some stage may very well have told the applicant that he was the most suitably qualified person for the job and on the basis of qualifications and experience he was a serious competitor. However, such an understanding has to be weighed against the qualification in the letter appointing him as Acting Director that he should have no expectation of appointment to the position. Nor should his categorisation as "preferentially promotable" carry much weight. As Cunninghame testified, the concept of preferentially promotable has lost relevance since 1994. Under the previous government the public service had a merit system which basically aimed at protecting people in service. If a person is categorised as preferentially promotable then an outside applicant contending for the same post would have no chance against a person who enjoyed the status of "preferentially promotable". Since the establishment of the new democratic government, however, and the opening up of the public service, the concept of preferentially promotable has been discarded as it would serve to entrench formerly advantaged civil servants at the expense of South African citizens previously excluded and would totally undermine the policy objective of demographic representivity. Moreover, and perhaps most importantly, the applicant's claim to have been the best man for the job is predicated on too narrow an understanding of the concept of "suitably qualified". The applicant's assumption that his

qualifications and experience ought to have been sufficient to secure him the job assumes a notion of suitably qualified that is not consistent with the policy in Exhibit F or sub-sections 20(3) and (4) of the EEA which all clearly recognise potential or the “capacity to acquire, within a reasonable time, the ability to do the job”. In other words, the panel would have been entirely within its rights, had it done so, to have weighted Mr Mathys’s capacity and potential to do the job as more important than the applicant’s qualifications. Moreover, there is nothing in clause 13.5 of the now applicable policy which would prevent it from doing likewise in the future.

36. The second finding which the applicant urges me to make, in order to draw an inference of unfair discrimination based on race, is that when one has regard to the fact that Mathys did not meet the threshold requirements of the advertisement, the conclusion is inescapable that the overriding consideration was one race and was not based rationally on the qualifications of Mr Mathys.

37. There was much debate in evidence and argument about the exact level of Mathys’s qualifications. I tend to agree with the applicant that Mr Mathys was only in possession of an N3 Certificate and three N5 credits at the time of the interview. The debate was about whether such entitled him to be described in terms of the advert as a person in possession of a “high level technical qualification”. From the evidence presented, it is clear that an N3 Certificate is equivalent to a Senior Certificate and that an N5 would be equivalent to a tertiary qualification. Mr Cunninghame insisted in his testimony that Mathys’s qualifications could be described as a high level technical qualification. According to him, a high level qualification as envisaged in the advertisement would depend on the age and experience of the candidate. For a candidate in his thirties, a T4 would be the minimum, however, a NTC5 would suffice for an experienced person in his fifties.

38. For what it is worth, I am of the view that an N3 Certificate probably does not suffice as a high level technical qualification. Accordingly, there may be some merit in the contention that Mathys did not meet the threshold requirements. But, to my mind, it does not follow that any irregularity committed by the respondent in allowing him to be interviewed is of such a nature to permit me to draw an inference that the applicant has been discriminated against on prohibited grounds. Or that any such irregularity in granting Mathys an interview is sufficient to afford the applicant a remedy under the EEA. I caution to add that I make no finding that such an irregularity did in fact occur, particularly in view of the ambiguous terms in which the policy deals with threshold requirements. Exhibit “F” provides that threshold requirements for positions are those identified in the advertisement. It goes on to provide that the applications of persons who do not meet the threshold requirements *need* not be considered further, but makes allowance for exceptional cases for persons lacking qualifications who are employed by the public service, permitting condonation provided the person undertakes further education. I am not persuaded that the policy obliges selection panels to exclude entirely persons who do not meet the threshold requirements, although Dr Carter in particular testified that interviews usually proceed on the basis that the threshold requirements have been met. Whatever the case, it does not follow that an irregular interview of one candidate means that the ultimate non-appointment of any of the others amounts to a form of unjustifiable racial discrimination, or that such of itself justifies any such inference. Some case could perhaps be made for an alleged unfair labour practice, based on an unsupportable decision to shortlist an unqualified candidate, but that is not the cause of action here.

39. The third leg of the applicant’s argument is that Mathys was not appointed on merit because he did not have the necessary skills and experience to be appointed to the post. Cunninghame’s evidence on Mathys’s abilities was to my mind convincing. Moreover, Mathys has proven to be a great success in

the job and this evidence in particular remains unchallenged. Although Mathys certainly lacks formal qualifications, he has significant technical experience in the hospital system. He also has played a role in the management of the Engineering Department of Groote Schuur Hospital and at Red Cross Hospital served as Head of Clinical Engineering. The applicant by contrast has not worked at any of the major academic hospitals. While it is correct that a professional engineer such as the applicant would have advanced design skills based on a high level of academic knowledge, an engineering technician of the order of Mr Mathys would have significant practical skills and would have played a direct role in managing personnel and finances, thus producing observable or measurable results. Cunninghame also testified that at both Groote Schuur and Red Cross Mathys has been involved in a number of projects which had been well planned and executed. Since his appointment, Mathys has inherited the hospital renewal project and has excelled as a project manager operating with a R4 billion project budget to upgrade the provinces hospital services. Moreover, for the reasons elaborated earlier, the panel was justified in attaching weight to Mathys's far superior computer knowledge and better communication and interpersonal skills. In the premises, I am satisfied that Mathys was indeed appointed on merit.

40. That said, I am also satisfied that a racial consideration was indeed brought to bear in the appointment process, as is evident in the motivation presented to the provincial cabinet. That racial motivation was essentially to the effect that the appointment of a Coloured male would have a less negative impact on the numerical targets aiming at equitable representation of the designated groups. The documentation related to the appointment in this instance reveals that at salary level 13 the respondent's target in respect of Coloured males was 26.9% and in respect of White males was 10.3% of the staff complement. The factual position was that 32% of the posts were occupied by Coloured males and 25% by white males. Thus the conclusion that the appointment of

Mathys would not advance the targets is in some sense correct. However, the figures show that in the White male category the target was significantly exceeded, whereas the same was not the case in respect of Coloured males. Accordingly, the conclusion that the appointment of a Coloured male would have a less detrimental effect on targets was also correct. The question then is whether such was a legitimate consideration or whether it amounted to a form of unjustifiable racial discrimination entitling the applicant to the relief he seeks.

41. In my opinion the panel's reliance on this secondary consideration was entirely legitimate and did not amount to racial discrimination. Such reliance was entirely consistent with taking affirmative action measures consistent with the purpose of the EEA and thus in accordance with section 6(2)(a) of the EEA which provides that it is not unfair discrimination to do so. Section 6(2)(a) of the EEA, like section 9(2) of the Constitution, overtly acknowledges that substantive equality requires measures to be enacted to make up for inequalities of the past, including the denial of opportunity to persons in designated groups, like Mathys, who have been unable to obtain formal qualifications. Having reached the conclusion that Mathys was more meritorious than the applicant, it was legitimate for the panel to bolster its decision by taking account of the fact that the appointment would achieve a more preferable affirmative action outcome. Even had the applicant scored better than Mathys, it would have been permissible under the then existing policy contained in Exhibit "F" to have advanced the aims of affirmative action by attaching greater weight to Mathys's potential. This would be so under the respondent's previous policy even though the targets had been reached in respect of Coloured males and White males. As already said, this may be debatable under the now applicable clause 13.5.

42. The point also deserves emphasis that targets are indeed targets and not quotas. Under our law of discrimination sight must not be lost of the overall

purpose of the EEA which imposes a duty on employers to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure more equitable representation in all occupational categories and levels in the work force. Regardless of whether Mr Mathys's race was a primary or secondary consideration, his appointment in some measure redresses the disadvantage he no doubt experienced in the employment context as a result of his having been classified as Coloured under the previous dispensation. In short, insofar as any racial consideration operated to affirm Mathys's appointment, such did not amount to unfair discrimination within the contemplation of section 6 of the EEA.

43. To sum up I am satisfied that Mathys was indeed appointed on merit and to the extent that any racial consideration played a part it was of a secondary nature and justified within the overall scheme and context of section 6 of the EEA. In the premises, the application must be dismissed.

44. Normally, in an instance such as this costs should follow success in the suit. Even were I to make such an award here, wasted costs were occasioned by a postponement at the behest of the respondent during the course of the trial entitling the applicant to at least some of his costs. However, this is an occasion in which I am inclined to exercise my discretion not to make a costs award against either party. The issues raised were clearly deserving of adjudication and the applicant has rendered and continues to render exemplary service to the respondent. The dictates of equity are against a costs award.

45. Accordingly I make the following orders:

46.1 The application is dismissed

46.2 There is no order as to costs.

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MURPHY AJ

DATE OF TRIAL :	6-10 SEPTEMBER 2004
DATE OF JUDGEMENT:	
APPLICANT'S LEGAL REPRESENTATIVES:	Adv T Moller instructed by Jan S de Villiers attorneys.
RESPONDENT'S LEGAL REPRESENTATIVES:	Adv M Solomon instructed by the State Attorney.