REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Reportable

Case no: D529/11

In the matter between

ANTHONY ROBIN BRINK **Applicant**

and

LEGAL AID SOUTH AFRICA **Respondent**

Heard: 28 May 2014

Delivered: 18 September 2014

Summary: Claim based on unfair discrimination under section 6 (1) of the Employment Equity Act ('EEA') - the applicant sought an order that failure to appoint him to the post of Senior Litigator was unfair discrimination on prohibited grounds namely his conscience, belief or political opinion - applicant said he was an acutely unpopular and widely reviled leading dissident activist in the most politically inflamed AIDS treatment controversy – circumstantial evidence – principles of equality- in discrimination cases creating an inference that the employer lied can give rise to the extremely important inference that lying was for a particular reason such as to cover up a discriminatory purpose – act of discrimination not proved.

JUDGMENT

CELE J

Introduction

[1] This is a claim based on unfair discrimination brought under section 6 (1) of the Employment Equity Act[1] ('EEA'). The applicant sought an order declaring that in aborting his appointment to the post of Senior Litigator, Pietermaritzburg, following his recommendation by a duly constituted selection panel, the respondent unfairly discriminated against him on grounds prohibited by section 6 (1) of the EEA, namely on grounds of his conscience, belief or political opinion. Upon such a declaration he then sought an order in the following terms:

1. to direct the respondent to appoint him to the post, retrospective to 1 January 2010;

2. to pay him damages for lost income in a sum equivalent to the salary he would have earned had he been appointed to the post on that date;

3. to compensate him for *iniuria* in the sum of R1 million;

4. to pay him *mora* interest at the prescribed rate on his damages for lost income, computed month to month from this commencement date to date of payment, and on his compensation award from date of judgment to date of payment;

5. to publish the order made in the case once in the *Sunday Times* newspaper and for a period of one year on the respondent's website in the 'About us' tab; and

6. to pay his costs on the scale as between attorney and client.

[2] The respondent denied having discriminated against the applicant. It pleaded in its amended response to the applicant's amended statement of claim that budgetary insufficiency caused it to simultaneously abort its recruitment of Senior Litigators for its Pietermaritzburg, Durban and Mthatha Justice Centres.

[1] Act Number 55 of 1998

Factual Background

[3] While there are contradictory versions in the evidence led by the parties, there are many respects where their evidence was not in dispute. I shall accordingly allow myself to be guided by the parties' approach in briefly outlining the evidence of what turned out to be a lengthy trial. To them, I am indebted. The respondent created a number of posts which were then approved by the its Board of Directors on 24 November 2006 at the instance of the respondent's Management Executive Committee to remedy the respondent's lack of professional staff that were senior enough to take on cases of a highly complex nature.It was proposed that the respondent would build up such capacity at each province linked to a High Court unit. Such senior litigators would be able to undertake more complex work as well as support and mentor other High Court staff. In KwaZulu-Natal, the respondent issued an advertisement for two of such posts for Durban and Pietermaritzburg. After the simultaneous advertisement of the nine new Senior Litigator posts in October 2007, six were filled. A Kimberley post was re-advertised in May 2009 while the Pietermaritzburg and Durban Senior Litigator posts were re-advertised in June and again in August 2009. The applicant, an advocate, was one the applicants. He was successful in securing an interview in the recruitment for the Pietermaritzburg post.

[4] On 12 November 2009, the applicant was interviewed with other shortlisted candidates for the respondent's Senior Litigator post at Pietermaritzburg. Duly constituted under the respondent's Policies and Procedures on Recruitment, Induction, Probation and Relocation ('Recruitment code'), the selection panel comprised the respondent's senior lawyers in the region. In November 2009, the selection panel unanimously recorded its recommendations of the applicant and Durban High Court Unit Manager Mr Bongani Mngadi. The recommendation report does not specify who was recommended for which post, but the respondent admits that the applicant was selected for Pietermaritzburg and by implication Mr Mngadi for Durban. The selection was cast as a 'Recommendation for Next Round Interviews'. Provision was made at the foot of the recommendation for the National Operations Executive (the

NOE) Mr Nair to approve or reject the selections, by signing in either the 'Recommendation accepted' or 'Recommendation not accepted' box.

[5] On the same day that the panel signed the recommendation, KwaZulu-Natal Regional Human Resources Manager (the HRM) Mr Baboo Brijlal emailed it as a scanned attachment to the KwaZulu-Natal Regional Operations Executive (the ROE) Mr Vela Mdaka for transmission to Mr Nair and to the National Human Resources Executive (the HRE) Ms Clark, along with the CVs attached of all interviewed shortlisted candidates, including the CVs of the two persons who were not recommended in that selection process for the second round of interviews. The reason why Mr Brijlal also sent Mr Mdaka for transmission to Mr Nair the CVs of the candidates not recommended was because he had received telephone instructions so to do.

[6] On 26 November 2009, Mr Mdaka forwarded the recommendation and CVs to Mr Nair, but not to Ms Clark. On receiving the recommendation Mr Nair neither recorded his approval nor his disapproval of the applicant and Mr Mngadi by signing the recommendation either way. His reason for not doing so forms the central issue of the case. On 3 December 2009, the applicant telephoned Mr Brijlal to ask for the interview results. Having chaired the interview, taken the minutes, and co-signed the recommendation of the applicant, Mr Brijlal knew the results but his response was that he was not free to disclose them and instructed the applicant to wait.

[7] On 14 April 2010, now five silent months since his interview, the applicant telephoned Ms Clark for information about the state of affairs. She responded that she had not heard of him before and knew nothing of the pending recruitment process but undertook to enquire further, and within a couple of hours of the applicant's call, reverted by email:

> 'I have looked into this matter and can confirm it is still in progress and has not been concluded. I will endeavour to expedite the process in which I am not directly involved at this stage. … Thanks for your keen interest. We hope to conclude the matter soon.'

[8] Ms Clark invited the applicant to contact Mr Brijlal for updates. Mr Brijlal was the probable source of her information, because Mr Nair and the Chief Executive Officer (the CEO) Ms Vidhu Vedalankar were out of the Braamfontein National office, having just briefed the Parliamentary Portfolio Committee in Cape Town on the respondent's Strategic Plan 2009–2012. On about 19 April 2010 the applicant telephoned Mr Brijlal for updates, but he had none to give. Over the next few days thereafter and following Mr Nair's and Ms Vedalankar's return to office, the applicant repeatedly tried reaching Ms Clark by telephone again, but was unable to get through, and despite his messages left requesting that she return his calls she did not do so.

[9] On 22 April 2010, the applicant emailed Ms Clark, stating his pressing practical reason for needing to know the upshot of the recruitment process one way or the other. Ms Clark's response on 30 April 2010 was, inter alia, that:

> 'The process is where it is. It is your decision as to whether you wish to wait to allow us to complete the process or whether you wish to withdraw. Applying for a job is done at the applicant's own risk. Being called to an interview is not a guarantee of being appointed to the position. I think you should allow us to complete the process at the pace we have decided. At this stage it is not even clear which applicants will be considered in the second round or if indeed we will proceed with a second round. If we require further information or follow-up from yourself, our organisation will contact you.'

[10] On 12 July 2010, which was eight months since his interview, the applicant wrote to Ms Vedalankar enquiring when his appointment might be finalised, mentioning his conclusion from Ms Clark's invitation that he 'withdraws' from 'the process' that he had indeed been selected and recommended by the selection panel, and not eliminated. On or about 27 July 2010, Ms Vedalankar read the applicant's letter and emailed Mr Nair about it on 29 July 2010 saying:

> 'I am not sure what is happening with these senior litigator appointment [sic] but we need to finalise the process and advise the persons interviewed of the

> outcome. Please will you look into this and discuss with Mandi [Clark] and then discuss with me.'

[11] On 3 August 2010, having been asked by Ms Vedalankar to provide a response to the applicant's letter to her, Mr Nair wrote to the applicant saying that the recruitment process to finalize the appointments for all vacant Senior Litigator posts was put on hold due to various reasons. He said that he could then confirm that they would not be proceeding with the filling of any of those posts. He was to request the HR department to send out regret letters to all persons who were interviewed during the first round of interviews. Indeed, on 16 August 2010, Mr Nair instructed Mr Mdaka to inform his HR section to regret all persons who attended senior litigator interviews for both Pietermaritzburg and Durban. On 23 August 2010, Mdaka sent such letters in identical terms to the applicant and to Mr Mngadi, and to one of the unsuccessful applicants, Mr van Wyk, but not to the other, Mr Ngcamu. There was an apology for the delay in informing candidates of the outcome of the interview process.

[12] On 30 August 2010, the applicant delivered a request to Ms Vedalankar qua the respondent's information officer under section 11 (1) of the Promotion of Access to Information Act 2 of 2000 ('PAIA') for 51 specified records concerning the Pietermaritzburg Senior Litigator recruitment and its cancellation, or sworn certification under section 23 (1). By the end of September 2010, Vedalankar had not responded within the 30-calendar-day timeframe prescribed by section 25, read with section 4 of the Interpretation Act 33 of 1957, which the applicant took to be amounting to a deemed refusal under section 27. At the applicant's request the PAIA Unit of the South African Human Rights Commission ('SAHRC') came in and elicited an undertaking to do so.

[13] On 18 October 2010, Ms Vedalankar expressly refused the applicant's entire request for records pertaining to the abortion of his recruitment, alleging a budgetary justification for freezing the appointment by averring, inter alia, that:

> 'Due to the effects of the recession, anticipated funding for the 2010/11 financial year did not materialise. This had the effect of cutting our baseline

> funding by a significant amount. It was accepted that this required a reduction to our staff establishment in the 2010/11 financial year in order to meet this shortfall. Since early this year, management has had to identify positions which could be frozen. In July 2010 the NOE and CEO took the decision that all senior litigator posts that were vacant would be immediately frozen. Therefore the three vacant Senior Litigator positions for Durban, Pietermaritzburg and Mthatha have been frozen.'

[14] On 11 October 2010, Ms Vedalankar had informed the Justice Portfolio Committee that the respondent's budgetary uncertainty had already been resolved in principle saying that:

> 'the Minister did get involved and he had assisted .['the OSD money'] was in the mid-term adjustment ,we are on track on all components of our Business Plan and we are confident that we will deliver this Business Plan in this financial year also. So we don't have any problem areas that we would like to report on. We do have challenges in terms of some of the funding issues like OSD but at the moment we are in the process of fixing it. In fact the Minister has been involved in that which relates to OSD Phase 1 and Phase 2 funding.'

[15] In her second letter to the applicant of 28 January 2011, refusing his first PAIA request again, as well as his second in December 2010 for further records to test the veracity of her budgetary justification for cancelling his appointment, even refusing and returning his compulsory request fee prescribed by section 22 – Ms Vedalankar reiterated her budgetary explanation for aborting the applicant's appointment saying that:

> 'the explanation furnished by me to you on 18 October remains valid and will be clarified and added to where possible. I, and the Legal Aid SA under my watch, have never sought to make any decisions regarding the Senior Litigator posts on any ground other than the budget constraints which you have rejected.'

<u>Occupational Specific dispensation (OSD) and Respondent's financial standing</u>

[16] Effective from July 2007, the Department of Justice and Constitutional Development (DoJ&CD) introduced the Occupational Specific Dispensation

(OSD), a salary incentive scheme aiming to assist, recruit and retain specialists in the legal profession who had gained at least 10 years active legal court experience and who were still actively involved in litigation or court work. The OSD was subsequently extended to the respondent. In November 2009, the respondent had already commenced implementing OSD phase 1, and it received funding for this during the 2009/10 financial year as per its annual report for 2009/10 which recorded that the OSD phase 1 shortfall of R23million in the 2009/10 financial year was received from the DoJ&CD. The 'shortfall' had arisen because funding for the implementation of OSD phase 1 in 2009/10 had not been included in the respondent's baseline budget for 2009/10 as expected, having regard to a written assurance by the Director General of the DoJ&CD given on 5 February 2009 in which he had committed himself to adjust the baseline of the respondent in the Adjustment Budget with R69, 6million, inter alia, to cover the implementation of the OSD. As the annual report recorded, funding for OSD phase 1 for 2009/10 was paid by the Department later in the year.

[17] On 25 February 2010, the respondent's Legal Services Technical Committee (LSTC), chaired by Mr Nair, resolved to invite motivations from interested regions for the reallocation of the redundant Senior Litigator budget for Kimberley to another Justice Centre. The Legal Aid Guide ratified by both houses of Parliament explains the LSTC's function within the respondent:

> 'The Board delegates authority to the CEO, the Management Exco, LSTC, other committees and officials through its Approval Framework. The LSTC's collective responsibility is managing the legal services delivery programme, the execution of all Board strategy, policies, programmes and plans relating to the legal services delivery programme of the Legal Aid South Africa'.

[18] According to the respondent's Annual Report 2009/10, the budget for 2010/11 was approved by the Board on 27 February 2010. It included provision for salaries for nine Senior Litigator posts. On 15 March 2010, responding to the LSTC's invitation, the Eastern Cape management region applied for the creation of a new Senior Litigator post at Mthatha. On 24 March 2010, two weeks after a realization by of the budgetary issues that

suddenly confronted the Respondent on 10 March 2010, the LSTC resolved to abolish the Kimberley Senior Litigator post, to create a new Senior Litigator post at Mthatha, to transfer the budget, and to immediately commence recruitment for it. The LSTC took this decision on the strength of the Eastern Cape ROE Mr Thembile Mtati's pressing motivation for the transfer of the post to Mthatha, where he urged it was sorely needed, for the reason inter alia that they were then having one Senior Litigator who was stationed at Port Elizabeth. He said that it was a huge challenge for one person to provide support to the whole Region. Two weeks earlier on 10 March 2010, on learning that its OSD funding allocation had not been included in its baseline budget, the priority for transferring the budget and recruiting for a Senior Litigator at Mthatha was designated 'Immediate'. The same consideration was not accorded to the finalisation of the Pietermaritzburg and Durban Senior Litigator appointments. The budget for the new post was transferred from the vacant, 'redundant', equivalent post at Kimberley; and, as mandated by the LSTC, the new Mthatha Senior Litigator post was immediately advertised in April.

[19] On 13 April 2010, in a follow-up query to the Director General, Vedalankar now raised the prospect that unless the respondent received its outstanding OSD phase 1 allocation, staff cuts would be unavoidable, saying that:

> 'we will be forced to effect the necessary adjustments to our 2010/11 Budget so as to accommodate the R23 million budget shortfall of OSD phase 1. The primary impact of that will unfortunately have to be on service delivery at courts including increased delays and backlogs as a result of us reducing the number of practitioners that we can make available at courts'.

[20] Quite irrespective of the 'budgetary issues that suddenly confronted the Respondent' on 10 March 2010, the respondent's First Quarter Report for April to June 2010, presented to the Portfolio Committee on 11 October 2010, shows that it created 82 new budgeted posts during this period. To fill these and previously established posts, 82 more staff were employed, including 17 principal attorneys and professional assistants, 11 supervisory staff/managers, and 49 candidate attorneys. On 13 October 2010, the day after the

respondent's presentation of its First Quarter Report, the Government Communication and Information System news agency Bua News quoted Board Chairperson Mlambo JP stating:

> 'The organisation was also on track to achieve its objectives for the period under review by completing the expansion of its national footprint. This included the establishment of six new Justice Centres and 27 satellite offices in the past three years, as well as the launch of a client call centre in June 2010.'

[21] In the first quarter April to June 2010, the respondent appeared to have increased its total number of budgeted establishment posts by 3.3% (2513 to 2595) – almost as many as the 3.9% increase (2419 to 2513) for the whole of 2009/10. Following a nil net increase (more resignations than recruitments) in the third quarter September to December 2009 (1136 to 1129) and a 1.6% increase in the fourth quarter January to March 2010 (1129 to 1147), legal staff recruitment appeared to have spiked in the first quarter April to June 2010, increasing by 2.3% (1147 to 1173). In the first quarter April to June 2010, total staff recruitment appeared to have increased by 3.5% (2352 to 2434) – greater than the increase of 3.1% (2281 to 2352) for the whole of 2009/10.

[22] On or about 24 May 2010, Mahikeng Senior Litigator Mr Nzame Skibi was selected and recommended for lateral transfer. However, according to the respondent Mr Skibi was shortlisted for a second round of interviews in Johannesburg. There was no mention of any second round interview for him in the recommendation, nor was any such shortlist drawn.

[23] A report to Board on 16 July 2010 recorded that

> 'On the 14 July 2010 Legal Aid COO [Makokoane] met with both Doj DDG [Deputy Director General of the Department of Justice and Constitutional Development], Mr Vuso Shabalala, as well as Adv Pieter du Rand, Legal Aid SA board member in order to clarify the position of DoJ regarding the outstanding OSD funding of R53.8 million for the 2010/11 budget period, as well as the MTEF baseline. DoJ has indicated that they do not have funds to cover for the R53.8 million OSD shortfall. The Executive Authority [i.e. the

> Minister] has however in a meeting with the Legal Aid SA Board Chairperson expressed his wish to have Legal Aid SA service delivery maintained and that DoJ should make funds available to cover the OSD shortfall through the mid-year budget adjustments in September/October 2010.'

[24] On 14 or 15 July 2010, Mr Makokoane asked Mr Nair to identify some vacant posts that might be frozen to save on salary costs with a view to mitigating the budgetary deficit that the respondent anticipated as a result. It had budgeted in the expectation of receiving its OSD phase 1 allocation and was paying OSD phase 1 salary increases to its staff, so the Department's failure to transfer this allocation threatened a budgetary deficit. Then on 15 July 2010 and under the subject heading 'Budget cuts – Reduction in Criminal Court Coverage – July 2010.xlsx', Mr Nair emailed Mr Makokoane a spreadsheet, copied to Ms Vedalankar, Ms Clark and Chief Financial Officer Ms Rebecca Hlabatau, in which he identified and motivated thus:

> ' my first cut of 56 practitioner posts at JCs [Justice Centres]. I have not looked for paralegal and admin positions at JCs yet. This amounts to a potential savings of R16m which is much lower than what is required. In terms of this cut, I have ensured that DC will not be lower than 80% coverage whilst RCs will not be lower than 90% coverage. If we need to find more savings from practitioner positions, then we will need to agree lower coverage levels for District and Regional courts.'

[25] On 16 July 2010, Makokoane submitted a 'Report to Board' in which he recommended Nair's proposal to freeze recruitment to 56 vacant practitioner posts serving the lower criminal courts, but not more of them, nor of any lighter 'paralegal and admin positions' which Nair had mooted if needs be. Specifically, 'To provide for the anticipated OSD shortfall funding of R23.8 million', Makokoane recommended in his Report to Board that:

I. Savings from the 2010/11 financial year be used to fund the OSD shortfall;

II. District Court coverage be approximately no lower than 80% coverage, while Regional Court coverage is reduced to no lower than 90%

coverage, for the remaining part of the 2010/11 budget period. This will derive a saving of about R16 million to cover the shortfall.

[26] Among the measures to mitigate the probable deficit proposed in his 'Report to Board', Mr Makokoane advised that the recruitment process would be reviewed, centralizing the decision of the filling of posts at Executive level, with due regard to the need to prioritise critical positions. Mentioned generically in the 'Report to Board', the Pietermaritzburg Senior Litigator post was 'a critical position'. Since the temporary freeze on recruitment to some public defender posts amounted to a potential savings of R16m which was much lower than what was required i.e. R23.8 million. Mr Makokoane proposed making up the difference with unspent budget savings. On 31 July 2010, the Board agreed with the executives and resolved to approve the mitigating measures in response to the OSD shortfall as proposed in paragraph 4 of the 'Report to Board', namely to temporarily hold recruitment to 56 vacant practitioner posts serving the lower criminal courts, but only until the end of the financial year, and to use savings from the 2010/11 financial year to fund the OSD shortfall. The reason the Management Executive Committee sought the Board's approval was that its proposal to temporarily freeze recruitment to a limited number of public defender posts was a deviation from its Business Plan, also referred to as the 'Annual Performance Plan', based on the Board's Strategic Plan, and section 1.2 of the Approval Framework required that the Board must be consulted before any such change.

[27] Besides the temporary freezing of a number of practitioner posts serving the lower criminal courts, legal staff recruitment otherwise continued in the following quarter July to September 2010, and increased by 1.7% that is 1173 to 1193. For instance, the respondent advertised in August 2010 to recruit a 'Supervisory Professional Assistant' for its Pinetown Justice Centre, and a 'High Court Unit Professional Assistant' for its King William's Town Justice Centre. On 9 July 2011 Ms Vedalankar informed the Access to Justice Conference in her presentation that the respondent had recruited 2489 staff including 1932 lawyers, whereas the First Quarter Report, that is 1 April–30 June 2010, showed 2434 staff including 1855 lawyers, which is a difference of

77 more. The same figures appear in the respondent's Annual Report for 2010/11. That is, in the nine months following its decision in July 2010 to temporarily freeze recruitment to some practitioner posts serving the lower criminal courts the respondent recruited 77 more lawyers.

[28] Being mindful of the respondent's version that Mr Nair decided on 16 August 2010 to communicate the respondent's decision that the recruitment process to finalize the appointments for all vacant Senior Litigator posts was put on hold due to various reasons, the events of the respondent relating to the recruitment process followed in the subsequent months will not be outlined any further. The only exception is to point out that the financial assisstance that had been promised by the Minister of the DoJ&CD in October 2010 was finally paid over to the respondent on 15 December 2010, some months after the applicant was appraised of the outcome of the recruitement process.

The Applicant's version

[29] The applicant was the only witness for his case. While he initially indicated that there were employees of the respondent whom he wanted to call as his witnesses, he changed track and dispense with them.

[30] The applicant testified that when applying for the post he was mindful of two handicaps, one quite legal, and the other gravely illegal. As a white male he faced the constitutional imperatives of employment equity and affirmative action; but in the result the selection panel duly certified upon a proper demographic analysis of the Pietermaritzburg and Durban Justice Centres that his and Mr Mngadi's appointments to the respective posts would conform to the respondent's employment equity targets. Although he had not been able to eliminate race prejudice as a possible reason for the abortion of his appointment by the respondent's national office, he said that it looked unlikely to him in light of its confirmation of the appointment of a White male as High Court Unit Manager at the Cape Town Justice Centre in the face of protests by other staff of colour that this went against the respondent's employment equity policies, and in light further of the fact that that White male was subsequently promoted to Senior Litigator there. That suggested to the applicant that there

was not any culture of racism in the respondent's national office; and picking up on this, the respondent's counsel, Mr du Toit made the point in cross-examination that race prejudice as a possibility had been eliminated from the case. That then stood as a common cause ground.

[31] Concerning his second handicap, the applicant testified that he was an acutely unpopular and widely reviled leading dissident activist in the most politically inflamed and morally polarised domestic policy dispute in the democratic era, the AIDS treatment controversy. He testified that he had ignited this with the draft of a book he had written, *Debating AZT*, later published under the subtitle *Mbeki and the AIDS drug controversy* (Exhibit 2A), which he had sent up to government in manuscript in 1999, and which, former President Thabo Mbeki confirmed directly to the authors of two books exhibited by the applicant,[2] had 'sparked' (Mbeki's word) his enquiry into the safety of the drug, announced in the National Council of Provinces on 28 October 1999, and his wider enquiry into the integrity of the American HIV-AIDS paradigm generally.

[32] The applicant quoted some of what he called the many effusively positive commendations of his critique of the drug by high-ranking scientists, most significantly by Professor Richard Beltz PhD, Emeritus Professor of Biochemistry, Loma Linda University School of Medicine, California, US, who first synthesized it in 1961 (and not, the applicant said, Horvitz in 1964, as generally credited), saying:

> 'you are justified in sounding a warning against the long-term therapeutic use of AZT, or its use in pregnant women, because of its demonstrated toxicity and side effects. Unfortunately, the devastating effects of AZT emerged only after the final level of experiments was well underway. Your effort is a worthy one. I hope you succeed in convincing your government not to make AZT available.'

[2] Allister Sparks, *Beyond the Miracle: Inside the New South Africa*, Cape Town: Jonathan Ball, 2003, page 286; and Mark Gevisser, *Thabo Mbeki: The Dream Deferred*, Cape Town: Jonathan Ball, 2007, page 729.

[33] In court the applicant exhibited a bottle containing a minute quantity of AZT supplied for research use and read from its label: 'TOXIC Toxic by inhalation, in contact with skin and if swallowed. Target organs: Blood Bone marrow. In case of accident or if you feel unwell seek medical advice immediately (show the label where possible). Wear suitable protective clothing.' He also exhibited a bottle of AZT capsules marketed by the pharmaceutical corporation GlaxoSmithKline for deliberate human ingestion, bearing no such warning. The deadly toxic hazard label and Beltz's support for the applicant in his campaign against the drug are quoted on the cover of the applicant's book, *Poisoning our Children: AZT in Pregnancy* (Exhibit 2C).

[34] On the other hand, the applicant cited a collection of vituperative attacks on him in the media and elsewhere over the years, with the *Sunday Times*, for instance, having referred to 'such loathed personalities as Anthony Brink' for 'supporting [Mbeki] at the outset of the AIDS-denial debate'. The London *Guardian* damned 'Anthony Brink the man who is credited with introducing Mbeki to HIV denialism, who has helped cost the lives of tens of thousands of people needlessly deprived of effective treatments.' He cited an article in *Time* magazine repeating the conventional western wisdom that for 'denying citizens life-saving anti-HIV drugs' he 'may have cost 365,000 South African lives, according to a study by Harvard researchers.' Aggressively intolerant general opinion and sentiment against critics and opponents of these drugs was epitomised, the applicant suggested, by a reference in the context of the controversy by a judge of the High Court (before her appointment) to then Health Minister Dr Manto Tshabalala-Msimang as a 'criminal'. Illustrating the intense antagonism against him for opposing AZT, the applicant quoted from a 'Public Health Warning' issued by the Democratic Alliance in October 2005, naming him, he said, like someone named in the Government Gazette as a Communist by the apartheid Minister of Justice, as the 'No.1. Ranking' AIDS dissident in the country, 'so dangerous' that such 'Aids denialists' with their 'false and dangerous views' and natural criminal propensity should be both politically and professionally neutralised:

> 'The DA calls on the media, the public, and professional organisations to, for example, wherever possible exclude these individuals from positions of

> authority; deny their dissident views publicity; and take vigorous steps to pursue official action in respect of any infringements of the law.'

[35] He said that the public enemies list, headed by him, was reproduced on the Nelson Mandela Centre for Memory website, host of the 'Heart of Hope' archive. The applicant testified that his main political opponents, the Treatment Action Campaign ('TAC'), a political action group promoting ARV drugs, had got him banned by the Advertising Standards Authority from publishing his case against AZT in the print media, and that under the ban no printing-works may reproduce it either.

[36] The applicant pointed out that the extraordinarily heated tenor of the controversy was a fact notorious to the judiciary, and he cited several references to this in judgments of the High and Constitutional Courts: 'In our country the issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention.' There is 'deep anxiety and considerable hysteria' about it. There has been much 'discord' in the 'boisterous and, at times, unseemly debate with regard to the efficacy or otherwise of antiretroviral treatment'. To sum it up, as the applicant put it, 'Politically, I stink.'

[37] The applicant referred to an interview with the respondent's Ms Vedalankar on 10 November 2009, two days before his own, in which she held up as the respondent's 'most significant accomplishment' the fact that the respondent had:

> ' funded the constitutional litigation on behalf of the Treatment Action Campaign to get the government to roll out anti-retrovirals to pregnant mothers who were HIV positive to prevent the transmission of the virus from mother-to-child in all state hospitals. This case is arguably one of the most significant impact cases as it has resulted in preventing loss of life of a large number of babies who would otherwise have contracted HIV AIDS.'

[38] The applicant said that in her introduction to the respondent's 'Impact Litigation' booklet in March 2011, Ms Vedalankar again singled out for special mention the respondent's financial support for the TAC in the case, and frankly

underscored its propaganda value to put down the dissenters in the epistemological and political contest between the believers and the recusants:

> 'Not many people are aware that the Impact Litigation Unit funded, amongst others, the challenge brought by the Treatment Action Campaign in the Constitutional Court to make treatment available to those suffering from HIV/AIDS at a time when many were still questioning the link between HIV and AIDS.'

[39] The applicant testified that he had opposed the TAC in the case by way of an urgent amicus curiae application to the Constitutional Court which he drew for the late Professor Sam Mhlongo, bringing to the court's attention the fact that the single clinical study on which the TAC's entire case was based had just been rejected as a worthless shambles by the US Food and Drug Administration; but that, although described by the then Chief Justice Chaskalson in the debate as a 'compelling argument', his application had been dismissed as out of time. The applicant opined that the Constitutional Court's judgment had been 'a disaster'. He produced a copy of his book about the case, *The trouble with nevirapine*, and quoted commendations on its back cover (Exhibit 2B) by Dr Jonathan Fishbein MD, formerly Director of the Office for Policy in Clinical Research Operations, Division of AIDS, National Institute of Allergy and Infectious Diseases, US National Institutes of Health: 'an expertly written piece about this very dangerous drug'; and by Professor Andrew Herxheimer MB, FRCP, Emeritus Fellow of the UK Cochrane Centre, Oxford; tutor in clinical pharmacology and therapeutics at Charing Cross and Westminster Medical School, London University (ret.); advisor to the WHO; founder of *Drug Therapeutics Bulletin*; co-founder of the International Society of Drug Bulletins; and co-founder of DIPEx.org saying:

> '…an amazing job … brilliantly dissects an avoidable tragedy: how misconceptions and misunderstandings about a new medicine caused a pointless, costly and toxic mess that still needs clearing up.An important story with lessons for all of us'.

[40] The applicant pointed out that the respondent spent R200 000 a year, and previously twice and thrice as much, on its 'HIV/AIDS Strategy and Roll Out

Plan' which it prioritised as a 'KEY' operating policy, and that accordingly, it was institutionally aligned with and invested in the conventional HIV-ARV-AIDS paradigm to which he was opposed and which he worked for many years to debunk as a 'profoundly harmful, fundamentally racist error in our time'. He referred to a mailing list he had discovered of some of the world's leading ARV-promoting activists, of which Ms Vedalankar and Mr Nair were members.

[41] The applicant testified that, he was certain that his deeply unpopular minority political engagement in the controversy would be found out with a simple Google search on his name, he disclosed it in his CV submitted in support of his application for the post, and in a Personal and Political History handed in at the interview; and the selection panel's recommendation of the applicant referenced it: 'Candidate demonstrated his capability to undertake high level research. Candidate is a prolific writer/author with many commendations cited on his CV.'

Concern on the justification for aborting the applicant's appointment

[42] In relation to the respondent's budgetary justification for aborting the applicant's appointment, the applicant gave evidence with reference to the respondent's records about some transient budgetary uncertainty for a few months in 2010, seeking to demonstrate that this never had any bearing on Senior Litigator recruitment and the abortion of his recruitment. Most of the evidence, which was statistical in nature, forms part of the factual background as it came across as common cause.

[43] When the applicant was interviewed and recommended for the Pietermaritzburg Senior Litigator post in November 2009, the respondent had already commenced implementing OSD phase 1, and it received funding for this during the 2009/10 financial year. As regards the respondent's settled expectation of receiving the OSD funding which the DoJ&CD had committed to pay, the applicant said that Ms Vedalankar later confirmed to him on 28 January 2011 that in conducting those recruitment processes parallel with the fundraising drive, the respondent acted under the impression that the

DoJ&CD would honour its promise to extend OSD funding to it which it did in December 2010. He said that on 10 March 2010, however, the respondent learned from a copy of the OSD letter of DoJ&CD to National Treasury received on that day that contrary to confirmed reports by the DoJ&CD, the Department did not recommend a budget baseline adjustment for MTEF 2010/13 for the respondent. That situation was to result in a budget deficit for the respondent in its 2010/11 MTEF cycle, as Ms Vedalankar put it in her query to the Director General a week later on 18 March 2010. That was because the respondent had already budgeted for 2010/11 on the basis of the DG's commitment[3]. He said that the respondent later put it in the pleadings that it was on 10 March 2010 that budgetary issues suddenly confronted it.

[44] He testified that in April or May 2010, and to his exclusion, Mr Mngadi was informally told verbally that the Senior Litigator recruitment was off. He said that on or about 24 May 2010 and following the advertisement and interviews of the shortlisted candidates of the Mthatha Senior Litigator post in April, Mahikeng Senior Litigator Mr Nzame Skibi was selected and recommended for a lateral transfer and he was appointment to it. He said that contrary to the respondent's false denial in the pleadings that the Mthatha candidate was recommended for appointment, the selection panel indeed recorded that he was recommended for that position on the basis that he came across as the strongest candidate, with substantiating reasons duly noted. He again said that contrary to the respondent's false allegation, confirmed by Mr Nair on affidavit, that Mr Skibi was shortlisted for a second round of interviews in Johannesburg, he was not, and there was no mention of any second round interview for him in the recommendation, nor was any such shortlist drawn.

[45] In relation to the 'Budget cuts – Reduction in Criminal Court Coverage – July 2010' he averred that by 'cut' Mr Nair meant freezing recruitment to the vacant lower criminal court posts in question, not abolishing the posts, and that indeed no posts were cut. Contrary to the respondent's allegation in its original response that 'Nair's email to the COO had not been specific about other posts or measures to be recommended for the cost cutting process', the

[3] as Vedalankar recorded in her follow-up letter to the DG on 13 April 2010

applicant contended that the record both of the contents of Mr Nair's email and its heading 'Reduction of Criminal Court Coverage' showed that Mr Nair had indeed been specific. According to him, Mr Nair did not propose to Mr Makokoane and other management executives that cancelling the Senior Litigator recruitments and freezing the three remaining vacant Senior Litigator posts could achieve further cost savings and that the recruitment process to finalize the appointments for all vacant Senior Litigator posts' had already been put on hold due to various reasons, as Mr Nair alleged to the applicant a couple of weeks later.

[46] The applicant contradicted the version of the respondent that budgetary constraints constituted the reason for aborting the recruitment process. In essence his reasons were, inter alia, that:

- Mr Nair had in November 2009 decided to reject his application after he had read applicant's CV in which the applicant had disclosed his work and literary contributions on the debate around the alleged effect of AZT and or Nevirapine (anti-retrovirals) on HIV positive pregnant women, which he said was his life's work;

- Mr Nair did not agree with applicant's medical opinion on anti-retrovirals and that Mr Nair's name and that of the CEO appeared on an email list of people who promoted Western medicines to treat AIDS in South Africa;

- In any event, the budgetary constraints were resolved in October 2010 by a ministerial promise. In December 2010, the respondent received the additional funds that had been withheld. The freezing of the Durban and Mthatha Senior Litigator posts was a camouflage in order to justify terminating the Pietermaritzburg process and that such budget constrains were an afterthought;

- There had been a marked increase in recruitment of staff by the respondent in 2010 and the respondent's December 2010 recruitment/vacancy/budget statistics reflected that the Pietermaritzburg and Durban Senior Litigator posts remain budgeted

vacant posts, and not frozen, as Ms Vedalankar falsely alleged to the applicant on 18 October 2010;

- The "next round" of interviews for Senior Litigator was unlawfully instituted in 2008 because Mr Nair had no power to do this.

- Ms Vedalankar's and Mr Nair's claims to have aborted the Senior Litigator recruitments and to have frozen the posts were *ultra vires* and legally incompetent even on their own version. The engagement of Senior Litigators was an integral part of the respondent's Board's Strategic Plan to develop and increase the respondent's capacity to deliver expert litigation services to indigent litigants by creating a pool of specialist professionals to attend to complex matters in specialist and High Courts, including the Supreme Court of Appeal and Constitutional Court. The Strategic Plan was key to respondent's operations and it complied with the National Treasury Regulations.

- The respondent's annual Business Plan for implementation by the LSTC was based on the Strategic Plan; and section 1.2 of the Approval Framework permitted the Business Plan to be changed by the LSTC, provided that (a) the Board was consulted before any such change, and (b) the full Management Executive Committee gave its final approval. The LSTC Terms of Reference prescribed likewise saying that any decision taken by LSTC that was of a policy nature which impacted on the Business Plan was to be referred to management or to the executive body for approval;

- A decision to 'terminate' three substantially completed Senior Litigator recruitments and to indefinitely freeze recruitment to one third (3/9) of the respondent's critical, top-echelon specialist legal professional Senior Litigator posts was a decision to change the Business Plan.

- Where Board approval was required to temporarily hold recruitment to some lower court practitioner posts, as indeed it was, Board approval was all the more required to abort the substantially complete

recruitments of three Senior Litigators and to indefinitely freeze recruitment to the three critical posts;

- No record existed to show that the Board was consulted before such alleged decision was taken, as it had to be. To the contrary, Mr Nair confirmed on affidavit on 8 April 2011 that the Board was not informed of the decision. No record existed to show that the full Management Executive Committee gave its final approval of any such decision to abort the recruitments and to freeze the posts.

- No record existed to show that Mr Nair duly originated the freezing of recruitment to one third of the respondent's top echelon of critical vacant professional staff posts. No record existed to show that Ms Vedalankar agreed to that, as she had to. No record existed to show that all Committees were informed thereafter, as it had to be done.

- No record existed to show that Mr Nair ever motivated to Ms Vedalankar a change in the organizational structure by dint of the freezing of' Senior Litigator positions, for discussion and finalisation with her, as Ms Vedalankar alleged to the applicant in her October 2010 letter.

- In short, notwithstanding her delegation by the Board for all the responsibilities of the Accounting Officer as provided for in the Public Finance Management Act and her unrestricted authority in managing the respondent, Ms Vedalankar did not have the power under the Approval Framework to deviate from the Board's Strategic Plan. She had no power to change the Management Executive Committee's Business Plan based on it to recruit Senior Litigators, and to decide with Mr Nair off the record without:

  - First consulting the Board;
  - A supporting resolution of the LSTC;
  - obtaining the full Management Executive Committee's agreement; and

- thereafter informing all committees to abort three substantially completed Senior Litigator recruitments and to indefinitely, and practically permanently, freeze recruitment to one third of the respondent's vacant budgeted critical Senior Litigator establishment.

2 Respondent's version

[47] The Respondent called Mr Nair to testify on its behalf. He testified that applicant's claim of discrimination on the basis alleged whether it be political opinion or race was totally untrue. He confirmed that on or about 23 November 2009, he received an email from Mr Mdaka, together with attachments which contained the recommendation of the regional select committee on the recruitment of two Senior Litigator posts for Durban and Pietermaritzburg. Because it was close to the end of the year for the respondent, he knew immediately that the earliest period at which the second round of interviews could be held was in mid-February of 2010. He read Mr Mdaka's covering email on 26 November 2009 but did not open and read the attached recommendation and CVs because this would have been premature. He merely placed the bundle of documents he had received in his drawer without reading and scrutinising the recommendation. It was in July 2010 that he received an email query from the CEO regarding the recruitment process of Senior Litigator posts by the Applicant. It was thereafter that he first opened and read the recommendation with its attachments to find out who the applicant was. By then it was the end of the following year, 2010, or early in 2011. At the time he received the recommendation from Mr Mdaka, the respondent had no budgetary issues preventing the applicant's appointment. The reason the applicant's and Mr Mngadi's recruitment was not proceeded with was because he knew about the two-and-a-half month delay.

[48] He testified that on receiving the recommendation and CVs he did not do anything. There was nothing for him to sign, because he had to pass all the CVs of all the candidates interviewed by the selection panel to the second round interview panel. The regional office mistakenly included provision in the recommendation report for him to sign his approval or disapproval of the selection panel's recommendation. He testified as to the origin, the

composition and the importance of the next round of interviews. He stated that the second panel, the National panel, was not a rubber-stamp of the first panel in that it also had to satisfy itself from all the applicants who were interviewed, that is, including those who may have not been recommended for further interviews, who it wanted to interview.

[49] He intended setting up the second round interviews the following year. These could not be held before mid-February 2010, because Mlambo JP was on recess and January was the executives' busiest period at the beginning of the last quarter of the financial year when they took stock of coverage under the Business Plan, held their Management Executive Committee meeting at the end of the month, and prepared for the Board meeting in February.

[50] He first heard the applicant's name when his complaint was received in July 2010, but did not know his political views. He had no views of his own on ARVs besides what he read in the media, which was that the roll-out seems to have contained the pandemic facing the country. The applicant's political views played no part in the matter. Neither he nor Ms Vedalankar were aware of these because he did not open the email attachments. The reason the posts were frozen had nothing to do with the applicant's position on ARVs and he was not discriminated against on this basis. He did not immediately abort the applicant's recruitment on receiving the CVs and recommendation.

[51] At the end of 2009 when the Treasury released its budget allocation letter, the respondent learned that expected funding for OSD phase 1 was not included in its budget, despite promises. At its meeting with the respondent in January 2010 the Department confirmed it would provide this funding. Ms Vedalankar's letters to the Department in March and April 2010 showed that at about that time the executives began to deliberate intensively on the possibility that the Department would not fulfil its financial commitments. They immediately realised that the over R23 million shortfall could not be accommodated with minor cuts and that it would impact on staffing and limit coverage at courts, as Ms Vedalankar's April letter mentioned.

[52] To his mind recruitment of Senior Litigators was not an urgent consideration. There was a real possibility that the respondent would not get the money. He did not think filling the posts appropriate so he decided to delay this until clarity around the funding issues was obtained. There was no need for him to inform anyone. The reason he did not inform the Justice Centre Executives that Senior Litigator posts might be cut was that he did not want to create panic. He had an informal discussion with Mr Mdaka in March or April 2010 and told him of the delay, saying they needed to wait to see how the financials turn out. Mr Mdaka did not tell him then that two candidates had been recommended.

[53] On 29 July 2010, Ms Vedalankar enquired about the applicant's letter to her. He informed her and Ms Clark that he had delayed the recruitment in view of the financial uncertainty, because he did not think it prudent to fill the post while the respondent faced a funding shortfall. Ms Vedalankar then advised that they rather take the decision to freeze the posts so that the recruitment process did not hang in the air. She felt it appropriate to freeze the posts. He concurred. Ms Clark agreed. He then informed the applicant and instructed Mr Mdaka to send regret letters to all applicants. Since Senior Litigator posts are at grade LP10, section 8.2.2 (b) of the Approval Framework empowers him and Ms Vedalankar to abolish such posts between them. He must agree and she has final approval. Mr Mngadi was definitely not told in April or May 2010 that the Senior Litigator recruitment had been cancelled, because the posts were not frozen until July. If such a statement was made to Mr Mngadi, it did not come from him.

[54] Nothing in the Recruitment code prevents the holding of second round interviews. All CVs had to be sent to the second round panel. It would look at all four CVs and consider whether anyone besides a recommended candidate would be interviewed again. It was free to interview whoever it wanted. Previously the second round interview panel did not support a recommendation. It often came to a contrary recommendation. All Senior Litigators had been interviewed twice. The second panel had sat three times. It had interviewed all candidates interviewed by the selection panels again.

After the second round interview panel makes its recommendation, the ROE decides on the appointment with the NOE and CEO.

[55] He said that he wrote the 'Report to Board' of November 2011. The reason he told the Board that recruitment challenges prevented the filling of the Senior Litigator posts, and not budgetary constraints as alleged to the applicant and to court, was because when he wrote this he was aware that three posts had been vacant for a long period since end of 2007 until frozen in July 2010. They had failed to attract suitable candidates. There was no guarantee that the second panel would have accepted the applicant. Had the second panel sat, he would have had serious problems with the recommendation of the applicant for four reasons. He did not meet the minimum requirements; he had not actively represented clients in the High Court in the previous three to four years; he didn't see any mention in his CV that his Supreme Court of Appeal and Constitutional Court cases had been reported, so assumed he had not practised in those courts; and the weight of his experience was civil whereas the major part of the respondent's services were criminal defences and it wanted Senior Litigators to handle criminal appeals. He could only speculate why the applicant had been shortlisted in the first place.

[56] There had been no demand for a Senior Litigator in the Northern Cape, so they had invited other regions to motivate why they needed such a post. The LSTC approved the transfer of the Kimberley post to Mthatha. He was aware that in giving the Eastern Cape permission to proceed with the recruitment, they were still under financial constraints. He knew that while the Eastern Cape could continue, it would still have to come to his desk, and if funding was not resolved he would delay the process until certainty was obtained. He saw the recruitment as facilitative, so that once the funding issue was resolved they would not have to start again. After the LSTC resolved to recommend transferring the Kimberley post to Mthatha, Ms Vedalankar's approval was needed. They met and she said she would think about it. He supported it, but she did not. They discussed it again. He was unable to persuade her. She finally decided she was not happy. She did not agree. So the transfer was aborted in early July 2010. He knew of no record of Ms

Vedalankar's rejection of its decision to transfer the Kimberley Senior Litigator budget to Mthatha. The decision to cancel the Mthatha Senior Litigator recruitment had nothing to do with budget considerations. He verbally instructed the Eastern Cape ROE that the Mthatha Senior Litigator recruitment process had to stop. The Eastern Cape selection panel never signed the recommendation and that is why it was never received by the national office.

[57] His email to COO Mr Makokoane on 15 July 2010 was never supposed to be an exhaustive list of posts to be frozen. The cuts he proposed did not result in the respondent acquiring the budget needed to cater for the shortfall. All he did was slow down the recruitment process. His intention was to convey to the Board and stakeholders that the impact of cutting lower court posts would be very significant, because these practitioners take the majority of cases, so the cuts would seriously affect delivery. The lower criminal court practitioner posts are critical posts. No posts are more important than they are. The reason these lower court positions, not High Court positions, are critical posts, is that they are at the coalface, and High Court is a minor part of the workload. Senior Litigator posts are more to assist other practitioners. They are nice to have but can be done without in tough times. Regarding Parliament's concern that all critical posts be filled, this did not apply to the respondent, but only to the Department of Justice and Constitutional Development.

[58] He said that when the government launched the South African National AIDS Council, Ms Vedalankar had been appointed to it. She then delegated the position to him. They later discontinued with it. That is how he thinks his name had got onto the email group. The test for legal aid funding was not based on ideologies but whether a substantial injustice would result. The respondent's funding of the Boeremag defence was evidence of this. The respondent could not be expected to employ the applicant in view of his charges that its officers had lied about the circumstances in which his recruitment had been aborted.

Evaluation

[59] The applicant has brought his claim under section 6 (1) of the EEA. It provides:

> '(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth'.

[60] Section 6 (1) of the EEA has a resemblence to section 9 (3) of the Constitution Act which proves that:

> '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'.

[61] When paraphrased, the applicant's complaint is that he was not accorded equal treatment which he would ordinarily be entitled to[4] in the processing of his application for a Senior Litigator's post. He said that he was unfairly discriminated against by the respondent. Discrimination or differentiation, to employ a neutral descriptive term, lies at the very heart of equality jurisprudence in general and of the section 9[5] right or rights in particular[6]. In the case of South African Police Service v Solidarity obo Barnard [7] Court sketched out the applicable legal framework within which the principles of equality apply in South Africa and had the following, inter alia, to say:

> '[28] Our constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. The foremost provision in our equality guarantee is that everyone is equal before the law and is entitled to equal protection and benefit of the law. But, unlike other constitutions, ours was designed to do more than record or confer formal equality.
>
> [29] At the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class. Beyond these

[4] In terms of section 9 (1) of the Constitution of the Republic of South Africa Act, 1996, (the Constitution Act).
[55] Of the Constitution Act.
[6] See paragraph 23 in the case of *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 at 1024.
[7] [2014] ZACC 23 handed down on 2 September 2014.

plain strictures there were indeed other markers of exclusion and oppression, some of which our Constitution lists[8]. So, plainly, it has a transformative mission. It hopes to have us re-imagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.

[30] Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory[9]. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.

[31] We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged. The scope of this "visionary and inclusive constitutional structure"[10] was stated in *Fourie*:

> '[T]he founders committed themselves to a conception of our nationhood that was both very wide and very inclusive. It was because the majority of South Africans had experienced the humiliating legal effect of repressive colonial conceptions of race and gender that they determined that henceforth the role of the law would be different for all South Africans. Having themselves experienced the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law, the majority committed this country to particularly generous constitutional protections for all South Africans'.[11]'

[8] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 76.
[9] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) at para 43.
[10] *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241 (SCA) at para 25.
[11] Id at para 9.

[62] Commenting on the steps taken to promote substantive equality, the Court proceeded to say that remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, such measures must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society. It pointed out that restitution measures, important as they are, cannot do all the work to advance social equity. A socially inclusive society idealised by the Constitution is a function of a good democratic state, for the one part, and the individual and collective agency of its citizenry, for the other. Our state must direct reasonable public resources to achieve substantive equality for full and equal enjoyment of all rights and freedoms.[12]

[63] In respect of the Employment Equity Act, which the applicant relies on, the Court said that the mission of the Act is diverse. For now, its important objects are to give effect to the constitutional guarantees of equality; to eliminate unfair discrimination at the workplace; and to ensure implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce representative of our people. The Act expressly prohibits unfair discrimination.

[64] As a point of diparture the present case is not one where there was evidence of remedial measures that had to be implemented so as to promote substantive equality to advance the position of people who suffered past discrimination. Therefore, the concessions which were made at the Constitutional Court on behalf of Ms Barnard[13] which then shaped the nature of the enquiry do not, in my view, find application in the present matter. If my understanding of the Barnard decision of the Concourt is correct, then the determination of the issue at hand as well as the controlling law should still be the one outlined in *Harksen v Lane and Others*[14]which the Supreme Court of Appeal in the Barnard decision paraphrased in the following terms:

[12] See paras 32 and 33.
[13] See para 52 of the judgment.
[14] 1997 (11) BCLR 1489 (CC)

> 'The starting point for enquiries of the kind under consideration is to determine whether the conduct complained of constitutes discrimination and, if so, to proceed to determine whether it is unfair.'

[65] The applicant accordingly carried the burden to prove the existence of the discrimination he complained of[15]. Should he be successful, the discrimination is then presumed to be unfair and the respondent has then to rebut the presumption. For purposes of this matter, conscience, belief and political opinion are the grounds on which the case of the applicant can possibly be premised. The applicant testified that he was an acutely unpopular and widely reviled leading dissident activist in the most politically inflamed and morally polarised domestic policy dispute in the democratic era, the AIDS treatment controversy. He said that he had ignited this with the draft of a book he had written, *Debating AZT*, later published under the subtitle *Mbeki and the AIDS drug controversy.* The applicant testified that he was certain that his deeply unpopular minority political engagement in the controversy would be found out with a simple Google search on his name, he disclosed it in his CV submitted in support of his application for the post, and in a Personal and Political History handed in at the interview.

[66] It must now be ascertained whether a failure by the respondent to appoint the applicant to a Senior Litigator position was due to him being an acutely unpopular and widely reviled leading dissident activist on the AIDS treatment controversy. The respondent's denials of the alleged discriminatory practice were described by the applicant as nothing short of a pretext for prohibited discrimination. In some employment discrimination cases in which an issue of pretext arises the respondent often provides all sorts of seemingly legitimate reasons to justify its behaviour. The applicant may fight to discredit these justifications and may prove that the employer acted based on discriminatory and impermissible motive. However, the applicant will rarely, if ever, ferret out any sort of 'smoking gun' or affirmative evidence demonstrating discrimination

[15] See Kadiaka v Amalgamated Beverage Industries (1999) 20 *ILJ* 373 (LC) para 34 and Germishuys v Upington Municipality [2001] 3 BLLR 345 (LC) at para 77.

by the employer.[16] The question facing triers of facts in discrimination cases is often both sensitive and difficult to discern. Thus, creating an inference that the employer lied can give rise to the extremely important inference that the employer lied for a particular reason such as to cover up a discriminatory purpose.[17] Such are the contentions that have been made by the applicant in this matter.

[67] In this matter the applicant had to surmount an arduous task of discharging the onus resting on him through circumstantial evidence. Circumstantial evidence, it must however, be noted, does not always carry less evidential weight than direct evidence.[18] The applicant could not produce any direct evidence that Mr Nair knew that he was an acutely unpopular and widely reviled leading dissident activist on the AIDS treatment controversy. Relying on circumstantial evidence the applicant submitted that the Court should find that Mr Nair read not only the email accompanying the recommendation but also his CV as forming part of the bundle of documents submitted to him by Mr Mdaka. The applicant pointed out a number of facts and circumstances in the case of the respondent to suggest that Mr Nair was not generous with the truth and therefore that the respondent's version was a pretext which was given by an employer who acted based on discriminatory and impermissible motive.

[68] In his pleaded case and in his initial approach at trial in court, the applicant attributed discriminatory acts against him, on the part of Mr Nair, Ms Clark, Ms Vedalankar and Mlambo JP, the Chairman of the Board. He later exonerated all but Mr Nair, blaming the respondent for not supplying him timeously with the information he had sought from it.

[69] On 14 April 2010, the applicant telephoned Ms Clark for information about the state of affairs of his application. He would have introduced himself to her during that telephone call. He accepted her response that she had not heard of him before and knew nothing of the pending recruitment process as she

[16] See *Reeves v Sanderson Plumbing Products Inc*, 530 US 133, 140 (2000) which relied on *U. S. Postal Serv. Bd of Governors v Aikens*, 460 U. S. 711, 716 (1983).
[17] *Reeves* supra.
[18] See in this regard *Cloete v Birch* 1993 (2) PH F17 (E).

undertook to enquire further. On 12 July 2010, the applicant wrote to Ms Vedalankar enquiring when his appointment might be finalised and on or about 29 July 2010 Ms Vedalankar emailed Mr Nair about it saying that she was not sure what was happening with the senior litigator appointments but that they needed to finalise the process and advise the persons interviewed of the outcome. From those discussions and correspondence it could be concluded as a probability that neither Ms Clark nor Ms Vedalankar knew of the applicant, at that stage, his belief that he was an acutely unpopular and widely reviled leading dissident activist notwithstanding. Other than from reading his CV, the applicant has also not suggested that Mr Nair knew of him. I conclude therefore, based on Mr Nair's evidence that, with the exception of possibly having read the CV of the applicant, Mr Nair did not know of the applicant.

[70] Mr Nair denied having read the CVs which came with the e mail from Mr Mdaka. While this evidence was challenged by cross examination, it was left intact as Mr Nair was not shaken but remained adamant on it.

[71] He said that because it was close to the end of the year, he knew immediately that the earliest period at which the second round of interviews could be held was in mid-February of 2010. Reading the attached recommendation and CVs would be premature. He merely placed the bundle of documents he had received in his drawer without reading and scrutinising the recommendation. Mr Nair's version must be seen against the nature of the work done by him. He was based at the National office. He would receive recruitment documents from all nine provinces in South Africa for processing and further transmission. He did not just deal with recruitment documents only. He received and worked with various reports and he generated some reports. Essentially and because of his position, he dealt with numerous documents at different times. He received the email from Mr Mdaka as part of the routine correspondence that would come to his office. There is no suggestion at all that there was something unusual or out of the ordinary which would attract his curiosity to the bundle with the email, such that I should find that he probably read the applicant's CV. Upon receipt of these documents he knew what was to be

done with them at a particular period. From February to July 2010 Mr Nair was then pre-occupied with a deficient budget of the respondent until he received an email of 29 July 2010 from Ms Vedalankar enquiring about the applicant. I hold therefore that the applicant has not succeeded in showing that Mr Nair probably read his CV at around the time of its receipt.

[72] Without reading the CV of the applicant and without having prior knowledge of him, Mr Nair could not possibly have aborted the recruitment of the applicant by discriminating him on the basis of the applicant being an acutely unpopular and widely reviled leading dissident activist on the AIDS treatment controversy. It must follow that the applicant has not shown that he was meted with any different treatment than was given to the recommended candidates for Durban and Mthatha. In my view, the defence raised by the respondent is not a pretext for a discriminatory and impermissible motive. Accordingly the presumption of unfair discrimination does not arise. On this basis alone the claim of the applicant must fail.

[73] There was also the issue of Mr Nair having to sign in support of or at variance with the recommendation. The applicant made a big issue of this matter. I see no reason why. Mr Nair was still to sit as a panellist in the second level interview. It made nonsense of the process if he had to prejudge the issues by confirming or disagreeing with the recommendation. If he signed, he would have to recuse himself from the next step. The provision for signing made sense where there was to be no further interviews and was probably designed for the single interview processes.

[74] While the applicant attacked the second stage interview, he did not suggest that it was a violation of Section 6 (1) of the EEA. The applicant also attacked the various acts of Mr Nair, Ms Clark and Ms Vedalankar in failing to have him appointed. The basis of that attack was never laid as it was never suggested that it also fell within the purview of section 6 (1) of the EEA. It was the choice of the applicant not to seek to review the decision of the respondent in not appointing him. The applicant contended that the senior litigator position was a critical position. How critical these posts were must have depended on different circumstances in various regions of the respondent. In Kimberly for

instance the post was made redundant. There would have to be evidence to demonstrate in a particular area the extent of a high need for a senior litigator and no such evidence was adduced in this case.

[75] In the circumstances, and having reflected on the law and justice of this matter on the issue of costs, the following order will issue:

1. The application is dismissed.

2. The applicant is to pay the costs thereof.

Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

1. For the applicant: In person

2. For the respondent: Adv.P.Mokoena SC and Adv. T.Machaba