

SOUTH AFRICA / JUDGMENT

Benjamin v University of Cape Town (C1041/2001) [2003] ZALC 100; [2003] 12 BLLR 1209 (LC) (19 September 2003) [2003] ZALC 100

COURT
Labour CourtBEFORE
Ndlovu AJCASE / FILE NUMBER
C1041/2001

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IN THE LABOUR COURT OF SOUTH
AFRICA
HELD AT CAPE TOWN
CASE NO. C1041/2001

In the matter between: RICHARD BENJAMIN
 Applicant
 and
 UNIVERSITY OF CAPE TOWN Respondent

JUDGMENT

NDLOVU AJ

- [1] The Applicant's dispute emanated from his unsuccessful application for appointment as Senior Subject Librarian, W H Bell Music Library of the Respondent, the University of Cape Town (the AUCT@).
- [2] When the dispute arose the Applicant was in the employ of the UCT as a librarian in the General Library. In his statement of claim he sought an order directing the UCT to employ him to the post concerned; alternatively, to pay him compensation in terms of Section 50(ii) (a) of the Employment Equity Act 55 of 1998; or alternatively, compensation for the violation of his constitutional rights in the amount equivalent to 24 months' remuneration at the rate of the salary payable to the incumbent of the post in question.

[3] In terms of the parties= pre-trial minute the Court was required to decide on the following

issues:

A3.1 Whether the failure to appoint the Applicant and the appointment of Ms Strauss to the position of Senior Subject Librarian, W H Bell Music Library constitutes unfair discrimination in terms of section 6(1) of the Employment Equity Act 55 of 1998 (the AEEA@) on the basis of sex, alternatively because the Applicant is better qualified than the successful candidate.

3.2 Whether an Applicant may enforce a general right to fair labour practice in terms of Section 23 of the Constitution, that has not been given effect to in legislation, in the Labour Court.

3.3 In the alternative [to paragraph 1.1 above], whether the failure to appoint the Applicant violates the Applicant=s right to fair labour practice[s] as in terms of Section 23 of the Constitution.

3.4 Whether the procedure followed in the selection process violates the Applicant=s right to fair labour practices in terms of Section 23 of the Constitution@.

[4] In September 2000 the UCT advertised the post Senior Subject Librarian: W H Bell Music Library (Athe said post@) in the print media . The requirements for a successful candidate were advertised as follows:

- * A university degree (preferably in Music, or if not, other musical training) and a post-graduate diploma in library and information science or an equivalent qualification;

- * At least 3 to 5 years experience in a Music Library;

- * Substantial subject expertise in music;

- * Good knowledge of electronic resources in music;

- * Music collection development experience;

- * Staff supervisory skills;

- * Proven management skills in an information services position; and

- * A working knowledge of one European language would be advantageous.

[5] The Applicant submitted his application for the said post. His qualifications included a Bachelor of Music (BMus) degree and a post-graduate diploma in library and information service. He further averred that he possessed almost every aspect of the requisite appropriate experience, as advertised.

[6] On 23 October 2000 the Applicant, together with other candidates who had been short-listed with him, was called for interview, which he duly attended. However, in January 2001 he was advised by the UCT=s personnel department that his application was unsuccessful. Mrs Julian Strauss, also an employee of the UCT, was appointed to the said post.

- [7] The UCT claimed that for some period of time there was serious staff conflict that prevailed in the music library which then necessitated and prioritised the requirement of sound managerial experience on the part of the successful candidate in order to resolve the said staff conflict. Hence, the selection committee focused their attention more on managerial experience. The Chairman of the selection committee was Mr Massawe, in his capacity as the UCT=s Manager: Humanities Information Services.
- [8] Several witnesses, including the Applicant himself, gave evidence in support of his case. The first witness was Robin Josephine Gherasim, being one of the three candidates who were interviewed with the Applicant for the said post on 20 October 2000. Gherasim was also unsuccessful. She had previously worked in the music library, both as assistant librarian and librarian-in-charge, during the period October 1983 to February 1990.
- [9] As at the time of her application for the post Gherasim had already been elevated to the position of Information Project Officer which was at pay-class 10 level, higher in relation to the said post, which was at pay-class 9 level. She had, however, been informed that in the event of her application being successful, her salary would not be reduced. She told the Court that even though the said post was lower than her current position in status, she had applied because she enjoyed working in the music library.
- [10] Gherasim told the Court that during her interview she was asked questions about her qualifications, her experience on the subject music knowledge, as well as her current job as information project officer. She was asked only one question about the acrimony between the two staff members in the music library. She was then asked how she would resolve the conflict. However, she said, the focus of the entire interview was on her knowledge of music as a subject.
- [11] Prior to the interviews being conducted a memorandum was drawn up by Professor Peter Klatzow of the Music Department, known as the S A College of Music, which contained a profile on each candidate=s suitability for the said post, as recommended by Klatzow.
- [12] In terms of the Klatzow=s Report Gherasim was ranked the lowest of all the candidates. Klatzow reported that, due to her laziness, Gherasim had caused a disaster in the music library when she had previously had a stint there. Gherasim told the Court that the Klatzow=s document was not shown to her prior to the interview. However, she conceded that some questions were put to her about the backlog in the processing of the music library purchases during her time.
- [13] This witness further told the Court that one of the members of the selection committee, Ms Cecilia Walter, had told her of her dissatisfaction and frustration occasioned by the selection committee=s recommendations not being accepted by the Library Director, Ms Joan Rapp. As a result, Walter had expressed her unwillingness to serve in any of the selection committee in the future.

- [14] She testified further that she spoke to Massawe, who was also upset about Rapp refusing to accept the committee's recommendation. In her 7 years' experience in the music library, she reckoned that the requirements for the said post were (a) the subject knowledge in music, attainable through the acquisition of a bachelor's degree in music (B Mus), and (b) a minimum of about 5 years' experience in a music library.
- [15] The witness conceded that the selection committee did not have a final say in staff appointments. It only made recommendations. She had a B Mus. degree and an honours degree in librarianship.
- [16] Gherasim further told the Court that she was not happy about not getting the job. However, she did not feel she was discriminated against on the ground of her being a female, because the successful candidate was also a female. She pointed out that Strauss did not have a music degree. Therefore, according to her, Strauss did not have the subject music knowledge.
- [17] The next witness was the Applicant himself, Richard Langner Benjamin. He applied for the said and was unsuccessful. He held a B. Mus degree. Prior to the interview he spoke to Massawe over the phone. Massawe informed him that during the short-listing process his (the Applicant's) qualifications and experience had been found to be excellent. The only concern was that he required to submit an updated reference (testimonial). He told the Court that he had then furnished Massawe with the name of Mr John Andrea, the Deputy Librarian of the University of the Western Cape (UWC) together with Andrea's contact details. Indeed, there was a communication between Massawe and Andrea which resulted in Andrea e-mailing Massawe a testimonial on the suitability of the Applicant for the said post.
- [18] The Applicant told the Court that during his interview he was asked questions pertaining to the requirements for the said post as advertised. However, at some point, questions were asked on his supervisory knowledge and experience. He said when he left the interview room he had felt quite positive about getting the job. Massawe even shook his hand and invited him for an orientation of the music library.
- [19] After about 6 weeks without hearing of the outcome of his application, the Applicant decided to phone Massawe and inquire. He said Massawe told him that Rapp was sitting on the selection committee's recommendation and not making a decision. During that telephone conversation Massawe had uttered some disparaging words about Rapp.
- [20] On a subsequent date the Applicant bumped against Massawe on the floor of UCT libraries and they discussed about this matter. Massawe told him that there was a management crisis at the UCT Library and that the said post had been offered to another person. Massawe told him that the terms of reference for the said post had since been changed and, as a result, the UCT was then looking for a person who could solve the management crisis in the music library. On that day Massawe sounded a changed man in his attitude. He was then negative and dismissive of the Applicant.

- [21] The Applicant further told the Court that he held a B. Mus degree and a post graduate diploma in library and information science. He had the relevant experience, which included the following:
- * 5 years in the music library
 - * 4 years in the main library
 - * 7 years in Apre-university@ music.
- [22] He said he also had staff supervisory skills, in that when he was at the UWC he had an assistant librarian and two student assistants reporting to him. He acknowledged, however, that the UCT=s music library was much bigger and, therefore, had more library staff. Further staff supervisory experience was acquired when he was in charge of a subtropical gold fish farm where he was supervising farm workers.
- [23] The Applicant then referred to various aspects of both the appropriate knowledge of the subject music and the music library experience, which he said he was in possession of and without which one could not competently and efficiently perform in the said post. He testified that Strauss did not have most of these qualifications and experience. For instance, Strauss did not have a degree in music, which the Applicant understood to be the threshold on suitability for the said post. He referred to the selection committee=s report which stated clearly that although Strauss was excellent in other aspects, she lacked the music subject knowledge. The Applicant contended that, for that reason, it meant Strauss could not do half the job involved in the said post.
- [24] The Applicant further testified that he was shown the Klatzow Report only two days before the interview. He was never asked any question on that report.
- [25] He felt that not being appointed to the said post, despite being appropriately qualified and experienced thereto, was an assault on his dignity. His rejection had taken an enormous toll on his life. He submitted that Strauss was put into the job for some arbitrary reason.
- [26] In answer to cross-examination, the Applicant said he had assumed that his discrimination was gender-based. The assumption was based on the fact that the successful person was a female and that there was no other rational explanation he could find for the decision. He conceded that he had no facts to substantiate his averment in this regard.
- [27] He further stated that Massawe told him that the person who was appointed (Strauss) had not even applied for the job. He did not know where the allegation came from that he had said that he was not appointed because he was better qualified than Strauss.
- [28] The Applicant further told the Court that he had not known all the members of the selection committee prior to the interview. Those were Massawe, Walter and (Mr) Tuffin. She had also never met Rapp.

[29] He had worked for 10 years at the UWC library and as far as he was concerned there were no shortcomings in his performance there.

However, about 4 years of his time at the UWC library he was not on a full-time basis.

[30] In his curriculum vitae (Athe CV@)the Applicant stated that when he was at the UWC Music Library the enrolment in the Music Department had waned, resulting in their music library being deprived of the full-time status. The Applicant was thereupon appointed to the position of Science Faculty Subject Librarian serving the departments of Maths, Physics, Chemistry, Applied Maths and Statistics and (in addition, when there was a staff shortage) Botany, Zoology, Microbiology and Biochemistry. He conceded that although he did not have university qualifications in any of the abovementioned subjects, he managed to proffer library assistance therein.

[31] The Applicant could not dispute an assertion that Strauss was preferred over him because she had more supervisory and proven management skills. He contended, however, that he had supervised more people at the fish farm. It was put to him that his fish farm management experience was irrelevant to the management experience required for the said post. He further told the Court that he worked as manager of the fish farm for some 7 - 8 months.

[32] The third witness was Cecilia Winniefred Mary Walter. She was employed by the UCT as Senior Librarian: Humanities Section (Main Library). She was a member of the selection committee which interviewed the Applicant and two others for the said post on 23 October 2000.

[33] The witness was referred to the UCT=s document titled: APolicy and Procedures for Recruitment and Selection@, which was amongst the documents in the court file. Walter told the Court that she could not remember whether she read the document prior to the interview. The document was approved for implementation on 2 September 1998. The witness could not recall whether the selection criteria were discussed before the interview but she added that they would normally talk about that before the interview began.

[34] She did not think that the selection committee considered the recruitment process as provided in the document. She also could not remember how the committee screened the applications.

[35] Walter acknowledged that sometimes the selection criteria were adjusted at the interviews if circumstances relating to the post in question changed.

[36] The witness told the Court that the selection committee recommended the Applicant for the said post. She had felt upset when their recommendation was not accepted. She had taken it personally as she thought the rejection reflected on her integrity. She admitted she did say afterwards that she would never be involved with selection committees again.

- [37] The witness further said she thought that she was also involved in the interviewing of Strauss. However, she was not sure about it. Strauss had been known to her as a colleague prior to the said post being advertised. She said it was within her personal knowledge that Strauss was Ahighly regarded as a manager@.
- [38] Michael Paul Tuffin was the next witness for the Applicant. He was the Acting Director of the S A College of Music. During the time of interviews for the said post he was the Senior Lecturer holding the portfolio of library matters. He served on the selection committee which dealt with this matter. He further served on the committee which sat on 19 December 2000, during which session Strauss was interviewed and selected.
- [39] The witness further testified and confirmed that there was a staff conflict in the music library, which necessitated the management skills becoming a paramount requirement for the said post. The friction among the staff concerned was of a racial nature. There were four staff members involved in the conflict, including the senior library assistant.
- [40] In answer to cross-examination, Tuffin told the Court that Strauss had subsequently performed superbly to the extent that it was then pleasant to work in the Music Library. He testified that she (Strauss) had involved herself fully in the library management. As he described it, Ashe had been incredibly helpful@. He further told the Court that Strauss had marvellous knowledge of a computer. She was also very firm on the staff and had a lot of managerial experience. He testified that prior to Strauss >s appointment to the said post the music library was in a chaotic condition. The witness further told the Court that the fact that the Applicant was a male person did not in any way play a role in the selection of the suitable candidate.
- [41] He told the Court that although he had received the Klatzow Report he did not remember using it. He did not give it to the committee colleagues either, although he might have discussed it with them.
- [42] The next witness to testify on behalf of the Applicant was Julian John Massawe. He was employed by the UCT as Manager for Humanities: Information Services. The music library fell under his line function. He chaired the select committee on 23 October
2000. The Chairman=s Report (included at pages 21 - 23 of the court bundle) was compiled and signed by him on the basis of the selection committee=s deliberations. He said he recalled that at some point he sought the advice of the human relations colleague before he submitted the final report to the Director, Ms Rapp. He did not formally consult with the other members of the committee. Although he did not recall, but he would have informed the other selection committee members about the report at each drafting stage. He was not sure whether they saw the final version of the Report. After finishing the Report he and Ms Tilney (the human resources advisor) approached Rapp to discuss the Report.

- [43] The witness pointed out however, that at that stage the Report was not in the typed form but only a handwritten draft. He told the Court that he and Tilney had gone to Rapp in order to seek her advice on the matter as well. He told the Court that in terms of that draft the selection committee had recommended the Applicant as the most appointable of the three candidates who had been interviewed. He added that at the same time they had, however, expressed concerns about the Applicant's lack of managerial skills. In other words, it was a draft recommendation which was subject to qualification.
- [44] Massawe then referred to the staff conflict in the music library at the time. He said, as a result of that situation, Rapp had proposed that the selection committee should cast their net wider in order to get someone with proven managerial expertise. At one point Rapp intimated that the said post should be re-advertised. However, the fact was considered that there were other applications in respect of Pay-Class 9 positions, which could be looked into. This consideration was taken because the said post also fell under the Pay-Class 9 category.
- [45] Massawe told the Court that he then returned to the committee members and informed them of Rapp's instruction and that they had to conduct an extra search for a suitable person with proven managerial skills. He went back to the long list, that is, the list of all the applications that had been received. He checked on the CV's of all the applicants with a view to see if there was anyone with sound managerial experience. They went to the human resources department to check on the list of applicants in respect of other positions. It was there that they managed to get the name of Strauss who had applied for a relief position in some other section. This relief position was still a senior post, being at pay-class 9 level.
- [46] Although Massawe testified about the name of Strauss being brought forward for consideration for the said post, he said he was not quite sure about how this was achieved. He kept on uttering phrases such as: AI can't remember precisely ...@; AI don't think we@, AI am sorry, I can't remember precisely how this happened ...@; AI can't remember, but I doubt ...@; AI have a vague recollection ...@, etc.
- [47] Massawe was then asked by Mr de Waal (for the Applicant) as to why in the Chairman's Report he (Massawe), in his description of the selection criteria for the said post, left out the word Amusic@ in almost all the requirements for the said post, contrary to the wording of the requirements as advertised. In the Chairman's Report the selection criteria were described as follows:

AUniversity Degree, preferably in Music and a Post Graduate Diploma in Library and Information Studies; at least three to five years library experience; sound subject knowledge; good knowledge of electronic resources; staff supervisory skills and proven management skills in an Information Service position@.

- [48] In response, Massawe stated that the omission of the word Amusic@ was apparently occasioned by the fact that the selection criteria in the Report were in a summary form and were not meant to be a copy of the advertisement. Mr de Waal=s persistent line of questioning on this point eventually inclined the Court to caution him of the rule against cross-examining his own witness.
- [49] In response, Massawe stated that it was all the time known that the subject under discussion was Music. Therefore, he did not find it necessary to keep on repeating the word Amusic@ in his summary.
- [50] He further told the Court that during the interview of Strauss it came to light that she had worked with music collection at Port Elizabeth Technikon where she was the Head of the Educational Library. At UCT she also worked with audio-visio material, tape recordings and DVD=s.
- [51] The witness further testified that the composition of the selection committee that interviewed Strauss was the same as the one which interviewed the Applicant and two others, namely, Massawe, Tuffin, Walter and Tilney.
- [52] In reply to cross-examination by Mr Oosthuizen SC (for the Respondent) Massawe told the Court that since Strauss>s appointment had performed excellently in the music library. The witness, as the line manager of the music library, had received reports on a regular basis with regard to Strauss=s performance. He said Strauss had considerably improved the areas such as the collection department, the bibliographic construction, the overall organisation of the collection, staff development management, as well as dissemination of information to the UCT=s clients, especially the immediate clientele, that is, the SA College of Music, the academic staff and students. Over and above this, she also dealt with the outside clients.
- [53] Massawe confirmed that the selection committee had been concerned about the Applicant=s lack of managerial experience. This shortage in the Applicant=s qualities had nothing to do with him being a male. It also had nothing to do with the Applicant being allegedly better qualified than Strauss.
- [54] Strauss had further told the committee that she was willing to improve her musical knowledge. Tuffin, who was a senior music lecturer, volunteered to help her in that regard.
- [55] That basically summed up the Applicant=s case.
- [56] The evidence on behalf of the UCT=s case was adduced from Ms Ann Louise Tilney and Ms Joan Rapp.
- [57] Ms Tilney was employed by the UCT as its Human Resources Advisor, which was part of the Human Resources Management Department. She had been attached to that department for 14 years. The compilation of advertisements for vacant posts was normally done by her department in consultation with the Director or Budget holder for the area where the vacancy existed, such as a Dean. Thereafter a selection committee would be nominated to

make recommendations of the best candidate for the job. The line manager of the area concerned would become the chairperson of the selection committee. It would be ensured that members of the selection committee were familiar with the UCT=s recruitment and employment policy. A sub-committee of the selection committee would be formed to take the responsibility of short-listing the candidates for interview.

- [58] Once all short-listed candidates were interviewed, the selection committee would discuss the merits of the candidature. Thereafter a recommendation would be made and forwarded to the Director, who would then make a final decision on the matter. The Director was not bound by the recommendation of the selection committee. If the Director was not in agreement with the recommendation, he or she would give a direction to the selection committee as to the conduct of further proceedings in the matter. She (Tilney) testified that, indeed, the recommendations of selection committees were not always accepted by the Director or Budget holder, as the case might be.
- [59] The witness acknowledged that the UCT=s recruitment and employment policy (contained at pages 53 - 73 of the court bundle) was in place at the time of the interview of the Applicant and two others. This document was to ensure consistency in the recruitment procedure. The witness further testified that she was present, as a member of the selection committee, during the interviews of both the Applicant and Strauss. She told the Court that she did not see the Klatzow report prior to the interview. She had seen the Report for the first time only on the Monday preceding the day of her testifying in Court.
- [60] Tilney further told the Court that their major concern with regard to the Applicant=s position was the fact that the Applicant lacked management skills especially in the context of the said post. At that time there was a very serious inter-personal staff conflict in the music library and it appeared to be escalating. As a result of that conflict certain systems did not appear manageable. That was why it was felt strongly that the successful candidate must have proven managerial experience. The Applicant=s lack of this experience was discussed by the committee. Thereafter the Chairman Massawe and herself approached Rapp in that regard.

Although she could not recall the specifics of their meeting with Rapp, she told the Court that they did express to Rapp their concern about the Applicant=s lack of managerial experience. It was her understanding that they, as the selection committee, did not have the final say in the matter. They considered the way forward on the basis of two options, namely, to readvertise the said post or to consider other applications in respect of other posts which had been received. The latter option was preferred. Hence, the name of Strauss came up. Strauss had applied for a relief position of senior librarian. She had been short-listed for that post. Thereupon, an interview was arranged and held with Strauss for the said post.

- [61] She further testified that Strauss was the former Head of the UCT=s Education Library, which was larger than the Music Library. During her interview she showed leadership qualities. She was asked questions about her managerial experience and her account thereof impressed the committee. As a result, the committee formed the impression that Strauss was the most suitable candidate for the job. According to the witness, Strauss had in fact exceeded the committee=s expectation.
- [62] Tilney further stated that Tuffin, as a music expert, had explored the music aspect knowledge from Strauss. Tuffin felt that Strauss did have the sound basic grasp of music and that she could read it. Further, Tuffin had said he was prepared to give Strauss the necessary guidance. Hence, the committee recommended her for the said post.
- [63] The witness stressed that Strauss was preferred over the Applicant because of her sound managerial experience. The fact of the Applicant being male and allegedly better qualified did not play any role in him not being employed. Strauss started on the job on 1 April 2001.
- [64] The witness told the Court that the selection criteria as reflected in the Chairman=s report was only a summary of what the advertisement contained. In this regard she agreed with Massawe. She testified that the mere fact that the word Amusic@ was largely omitted in the report did not mean that the committee was blind of the fact that the subject matter was music. Although according to Strauss=s CV she did not have any formal music training, she had had exposure to sheet music, audio-visual materials and other materials relevant within the music library. She pointed out that the heading of the Chairman=s report read:

ASelection Committee for the post of Senior Subject Librarian; (Pay Class 9); WH Bell Music Library; UCT Libraries@

and that therefore, everything that appeared thereunder had to be read within that context, that is, that it had to do with the music library.

- [65] It was pointed out to the witness (during cross-examination) that the word Amusic@ was mentioned four (five ??) times in the advertisement and yet only once in the report. In response, the witness pointed out that the advertisement was aimed for the external audience and, for that reason, it had to be specific; whilst the report was only for internal purposes. She stated that in her experience she had never seen the chairperson=s report being a verbatim copy of the advertisement concerned. The witness further stated that the selection committee was entitled to add to or adjust the selection criteria to suit the circumstances. In this regard she referred to paragraph 5.1 of the recruitment and employment policy (at page 63 of the court bundle) which provided that the Acriteria may be expanded upon@ so long as it was not inconsistent with the advertisement. As a result, the committee had readjusted the criteria to prioritise management skills for the said post. The committee had then looked through all other CV=s, searching for proven management experience and some music knowledge, without excluding the other criteria. The witness further referred to the advertisement where it said that a successful candidate required to have Aa university degree (preferably in music)@. She pointed out that this did not mean

that it had to be a music degree, necessarily. Further, it was to be recalled that Strauss had submitted her CV in respect of the position of a relief senior librarian in the general library. The CV was used for the purpose of considering her for the said post.

- [66] The staff conflict in the music library was between the senior library assistant and the library assistant. It was a matter widely known in the broader library environment. It was for that reason that the requirement was included of Asound managerial skills@. The said conflict had started to develop in such a way that it was affecting adversely the whole operation of the music library. There was no way that this aspect could be ignored. Otherwise, it would amount to negligence on the part of the UCT=s authorities.
- [67] Each member of the selection committee was allocated specific questions (to put to the candidates) depending on their respective specific fields. The questions constituted each committee member=s working record.
- [68] She could not recall what specific questions she asked. However, as a human resources advisor she reckoned the questions could have been about inter-personal skills, human relations and other incidental issues emanating from a particular candidate=s answers.
- [69] Rapp was employed as the Respondent=s Executive Director of Libraries. She started in 1998. She was the one who made the final decision to appoint Strauss.
- [70] She told the Court that the selection committee made a recommendation to her. She was not bound by the recommendation. Before making a decision she would reflect on the matter and try to get a better overview of all relevant factors. If she felt that the selection committee had not sufficiently considered certain aspects she would either refer the matter back to the committee or simply reject their recommendation. However, she said about 80% of the recommendations she had accepted.
- [71] She recalled that the present case was reported to her. But it was hard for her to remember the exact conversation which she had with the committee. She recalled that there were three candidates involved. The Applicant did not have experience in managing people. This aspect was important because there was a history and an existing situation of supervisory, management or organisational problems in the music library. The person who had left the post had not done well. There was a number of other issues that came to attention. There were security breaches and laxity. For instance, in some cases, security wires had been disengaged before closing hours in order that someone could return to the building later, probably for some illicit activities.
- [72] When the matter was discussed with her, two options came up, namely to re-advertise the said post or to look through other applications which had been received for a Pay-Class 9 position. She decided to go for the latter option. Consequently the name of Strauss came up.

- [73] She told the Court that Strauss had a wealth of management and supervisory experience and had a broad knowledge of the library. As a result of her (Strauss) having such combination of skills and ability, she was appointed. The fact that the Applicant was a male or allegedly better qualified, did not play any role in him not being appointed. The witness added that, in fact, she did not view the Applicant as better qualified than Strauss.
- [74] She further told the Court that for the two years Strauss was in office she had performed exceptionally well. She (Strauss) had undertaken several initiatives to clean up the problems the witness had cited.
- [75] The witness further told the Court that at UCT the librarians did not normally have expertise in the libraries they were in charge of. For example, the medical library was not headed by a person who had medical qualifications. The same applied to the commerce librarian, architectural librarian, art librarian, biology librarian, etc. The requirements as published in the advertisement were mere guidelines.
- [76] The witness was asked whether she agreed that paragraph 11.5 of the UCT=s recruitment and employment policy had to be strictly observed. The paragraph reads:

A11.5 The Selection Committee should ensure that the recommended candidate fulfils the minimum publicised criteria and is appoint able@.

- [77] In response the witness said she was not aware whether that provision was a guideline or prescribed mandate. She said it had to be remembered that the institution of music library operated within the context of the General Library. It was not just standing on its own.

[78] That concluded the case for the Respondent.

[79] The issues which were either common cause or not in dispute included the following:

79.1 During September 2000 the UCT published an advertisement for the vacant post of Senior Subject Librarian: WH Bell Music Library.

79.2 Of the people who submitted applications for the said post only three were short-listed and the Applicant was one of them. Strauss, who had originally applied and been short-listed for a relief position on the same pay-class level, was subsequently appointed for the job.

79.3 Both the Applicant and Strauss were employed by the UCT in different capacities.

79.4 The advertisement incorporated eight requirements, constituting the selection criteria, which had to be satisfied by a successful candidate. These were:

- * At least 3 to 5 years experience in a Music Library;
- * Substantial subject expertise in music;
- * Good knowledge of electronic resources in music;
- * Music collection development experience;

- * Staff supervisory skills;
- * Proven management skills in an information services position; and
- * A working knowledge of one European language would be advantageous.

79.5 The Applicant and other two candidates were interviewed by a selection committee on 23 October 2000. They were all unsuccessful.

In the order of their preference (albeit unsuccessful) the Applicant topped the list.

79.6 As stated already, Strauss had originally applied for a relief position of senior librarian in the general library. She had submitted her CV for that vacancy and had also been short-listed. She was subsequently invited for interview in respect of the said post and was interviewed on 19 December 2000.

79.7 The selection committee consisted of the following members (who were all the UCT=s employees):

Mr Massawe: (Manager: Humanities Information Services);

Ms CWM Walter (Senior Librarian: Humanities - Main Library);

Mr MP Tuffin (Acting Director: Department of Music).

79.8 The Chairperson=s (Massawe=s) Report which incorporated the profile of all interviewed candidates (including Strauss) and the recommendation, was drawn up. In terms of the Report the selection criteria for the post was described in the following manner:

- * A university degree, preferably in music and a post graduate diploma in library and information studies;
- * At least 3 to 5 years library experience;
- * Sound subject knowledge;
- * Good Knowledge of electronic resources;
- * Proven management skills in an information service position.

79.9 The Report referred to an employment policy document titled A Policy and Procedure for Recruitment and Selection@. In terms of this document the recruitment procedure involved, initially, the appointment of a selection committee. The responsibilities of the selection committee included:

- * the development of a fair selection criteria (5.1)
- * the systematic measurement of candidates A against the set of explicit job related criteria, both at the initial screening of candidates into lists A, B and C, and when interviewing@ (5.2)

* development of a set of standard questions based on the criteria for the post ... which will be put to each candidate ... (5.3)

* a discretion to contact referees not specifically mentioned by the Applicant (5.5)

* not permitted to recommend a candidate for appointment to the permanent staff establishment without interviewing the candidate concerned;

79.10 On the question of selection criteria, the selection committee must ensure that:

* AWhenever possible, rigid criteria related to formal qualifications should be avoided. As far as possible, criteria should be defined in terms of skills rather than formal educational requirements in order to avoid building on past disadvantage. (8.2)

* The value of experience in different types of organisations and situations needs to be recognised@. (8.3).

79.11 The recruitment strategies dictated, among other things, that:

* AAll recruitment exercises must involve a rigorous, productive search for appoint able candidates who are South African and are black, women and/or disabled by means of targeted advertising, net working and, as appropriate, >head-hunting=@ (9.1)

* AInformal >head-hunting= for qualified Applicants particularly from the designated groups (was) acceptable but should not replace advertising to as wide a group as possible@ (9.3)

* The selection committee may identify potential Candidates (internal and external) for the post, bearing in mind the need to change UCT=s staff profile and for departments to meet employment equity targets@ (9.4).

79.12 The procedure for the short-listing of candidates involved, among other things, the following:

* There are three lists, namely A, B and C lists, into which all Applicants are categorised.

* AThe A list is for Applicants who, based on the papers, are the most promising candidates (the proposed short-list). The B list should comprise of secondary candidates who may be worth investigating. The C list is for Applicants who do not meet the minimum criteria for the post@ (10).

79.13 Both the Applicant and Strauss were placed in the A list.

79.14 After the interviews were concluded the selection committee=s chairperson would prepare and send a report to an official who was designated by the Vice-Chancellor to consider the selection committee=s report and make a decision. In the report the chairperson must motivate why, in the opinion of the selection committee, the recommended person was considered the best candidate (12.1).

- [80] The recruitment and appointment of staff is a function and power assigned to and conferred upon the UCT, which it performs and exercises as part of the fulfilment of its operational requirements as an educational institution. It is the process which, together with other operational activities, serve to attain the ultimate goal, namely, the general success of the institution in all its spheres of educational business.
- [81] Indeed, in essence the Applicant's case constitutes an application for review and setting aside of the UCT's decision to appoint Strauss, instead of the Applicant, and to appoint the Applicant to the said post; alternatively to grant the Applicant appropriate compensation.
- [82] The UCT is a public educational institution and those people appointed to run its management and administration are functionaries the exercise of whose powers need not be lightly interfered with. In *Pharmaceutical Manufacturer's Association of SA and Others: In re Ex Parte Application of the President of the Republic of South Africa and Others* 2000(3) BCLR 241 (CC) the Constitutional Court made it clear that -

As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, the Court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision (at paragraph 90).

- [83] Recently, this Court in *Basson vs Provincial Commissioner (Eastern Cape) Department of Correctional Services* [2003] 24 ILJ 803 (LC) at 820 C-F; [2003] 4 BLLR 341 (LC) at 355 I - J/356 A - B, stated as follows:

The courts are, generally, wary and reluctant to interfere with the executive or other administrative decisions taken by executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions, for the smooth and efficient running of their administrations or otherwise in the public interest. Indeed, the court should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorised executive or administrative decisions must always be referred for ratification prior to their implementation. Otherwise, the authority of the executive or other public functionaries, conferred on it by the law and/or the Constitution, would virtually become meaningless and irrelevant, and be undermined in the public eye. This would also cause undue disruptions in the state's administrative machinery, @.

The administrative decisions shall only fall within the purview of judicial review and be set aside, where they are found to be patently arbitrary or capricious, objectively irrational, or actuated by bias or malice, or by other ulterior or improper motive @.

- [84] It does appear that on the basis both on paper and through interviews, whilst the Applicant had seemingly better subject music qualifications than Strauss, he (the Applicant) had less managerial experience than her. She clearly had far more relevant managerial experience.

- [85] The Applicant=s principal complaint appears to be based on the fact that he had higher qualifications than Strauss in the field of music. Indeed, this appeared to be the case. However, it would appear, on the evidence, that for one to head a library in any specific department one did not need to have a qualification in the field of the department concerned. The Director of Libraries, Ms Rapp gave evidence, which was not gainsayed, that it was normal practice at UCT that librarians did not have expertise in the specific field of study related to the libraries they were heading. She gave examples that the commerce librarian had no commercial background; the head of the medical library did not have medicine as a qualification; the architectural librarian was not an architect; the art librarian was not an artist and the biology librarian was no biologist.
- [86] It would seem the practice at UCT, as alluded to in the preceding paragraph, likewise obtained at UWC where the Applicant served from 1989 to 1998. In his CV the Applicant stated that when the Aenrolment in the Music Department was on the wane it was decided that the Music Library no longer deserved a full-time qualified staff member and (the Applicant) was appointed to the position of Science Faculty Subject Librarian serving the departments of Maths, Physics, Chemistry, Applied Maths and Statistics and in addition when there was a staff shortage, Botany, Zoology, Microbiology and Biochemistry@. The Applicant acknowledged that he had no qualification in any of these fields, yet he was appointed to the apparent overall position of AScience Faculty Subject Librarian@.
- [87] It was also noted that the Applicant did not allege that he was appointed as acting librarian but in the full capacity of librarian for the said science faculty. I should imagine that the Applicant fully and genuinely believed that he served satisfactorily, if not well, when he performed in the capacity of the science faculty subject librarian aforesaid. Otherwise, if he doubted his performance in that regard he would have hesitated to include such appointment in his CV.
- [88] His argument that the music library was unique and that the same practice as in other libraries could not successfully apply to it, seems to me to be unreasonable and without foundation. I am unable to comprehend on what empirical basis a music library could be placed on a different footing in this regard from other libriries.
- [89] A lot was alleged by the Applicant and on his behalf about the UCT having committed irregularities by not following its own recruitment and employment policy - during the recruitment and selection process in respect of the said post. It should be pointed out, however, that such irregularities, if they did exist, must have resulted to the non-appointment of the Applicant to the said post. In my view, any irregularity, procedural or substantive, committed by the UCT but which had no bearing to the issue of non-appointment of the Applicant to the said post, would be irrelevant.
- [90] The majority of the witnesses called by the Applicant gave evidence which was, invariably or occasionally, as the case might be, either hostile or unfavourable to the Applicant=s case, as illustrated hereunder.

- [91] Gherasim was not impressive as a witness. In the first place, she was the Applicant=s competitor for the said post. There was not the slightest doubt, in my mind, that had she been appointed she would certainly not have labelled the selection committee and the entire selection process with all names and descriptions that she did in her testimony. She was simply labouring under a deep frustration for her own loss and, therefore, fighting her own cause. Any outcome that would bring about the reversal of the UCT=s decision to appoint Strauss (or anyone else, for that matter - including the Applicant) would be a victory for her.
- [92] Remarkably, the evidence of Gherasim consisted mainly of criticism of the selection process but did not include criticism of the selection committee=s decision of not recommending the Applicant for appointment. In other words, it seems to me, she would have had no problem with the selection process if it favoured her, which would clearly have meant the same fate for the Applicant. There was nowhere in her evidence where she submitted that the Applicant was the best qualified and most suitable for the job.
- [93] At one point Gherasim was asked whether she was herself better qualified than the Applicant. Instead of giving a direct answer, she replied that she had an honours degree in librarianship and a degree in music (B Mus). They both had about the same number of years experience (i.e. about 11 years). This kind of response tended to suggest that she considered herself as better qualified, as the Applicant did not have an honours degree but only a junior degree. This therefore showed that she was only concerned about the alleged irregularities in the selection process to the extent only that such irregularities resulted to her not getting appointed. To that extent, regrettably, her evidence was of no significance and relevance. Indeed, she was not a credible and reliable witness.
- [94] Walter was part of the selection process, having been a member of the selection committee. She told the Court that the Applicant was recommended for the said post. When the recommendation was not accepted by the rightful authority she became upset and took it personally as though the decision negatively impacted on her own integrity. It is hard to comprehend why she became upset in the light of her knowledge that the selection committee=s function was only to make a recommendation and that the final decision lay with the Director, Ms Rapp. Her reaction was therefore ludicrous and irrational, to say the least.
- [95] This witness did not attempt to compare the Applicant with Strauss, in terms of their respective suitability or potential to filling the said post. The selection committee, of which she was part, had, in terms of her evidence, recommended the Applicant to the exclusion of two other candidates, who did not include Strauss. In other words, when the Applicant was recommended, Strauss had not yet come into the picture. It was notable that when she had to express an opinion on Strauss=s character and ability, she commended her. For instance, when she said: AWhat I know is that she (Strauss) was highly regarded as a manager@ and that she was a Avery competent and intelligent person@.

- [96] There was nowhere in Walter=s evidence where she described the Applicant in a manner near the description she gave of Strauss as mentioned above.
- [97] It was incomprehensible why the Applicant called Tuffin and Massawe as his witnesses. There was not a single point favourable to the Applicant which these witnesses testified about. Instead, they both vigorously supported the UCT=s case in every respect. As a result, their examination-in-chief was at times conducted in a manner that bordered cross-examination and, in contrast, their cross-examination more polite and friendly as though it was a re-examination of one=s own witness. However, despite their hostile attitude as such, these two witnesses remained the Applicant=s witnesses. The effect of their evidence served only to damage the Applicant=s case than to support or strengthen it. To the extent that their entire evidence was at complete variance with the Applicant=s version, a body of serious material contradictions was created in the Applicant=s case and which remained indelibly uncured.
- [98] The evidence of how Strauss performed in the said post (after her appointment) would generally be irrelevant and inadmissible in the present matter, since such performance was an ex post facto to the issue in dispute. However, the evidence was admitted because it was adduced not by the Respondent=s witnesses in support of its case, but by the Applicant=s own witnesses (namely, Tuffin and Massawe), having been elicited under cross-examination by the Respondent=s Counsel. Indeed, that was during the vigorous demolition process of the Applicant=s case by his own witnesses.
- [99] On the other hand, the evidence in support of the UCT=s case was straightforward, credible, rational and more reliable. The evidence of the two witnesses, Ms Tilney and Ms Rapp, was not only corroborative of each other, but was further corroborated by the Applicant=s two witnesses Tuffin and Massawe in all and every material respects, and, to a lesser extent, by that of the other Applicant=s witness, Ms Walter.
- [100] The Applicant=s own evidence did not support his allegation that he was discriminated against on the ground of sex or gender. He admitted that he had no specific facts to back his allegation in this regard. He merely alleged sex or gender discrimination because he had no rational explanation@ for his non-appointment. This was absurd and it bordered on abuse of the court process.
- [101] In my conclusion, the evidence before the Court did not show, beyond a balance of probabilities, that the UCT, by not appointing the Applicant and instead appointing Strauss to the said post, thereby committed either an unfair labour practice or an unfair discrimination, or violated any of the Applicant=s rights enshrined in the Constitution.
- [102] As for the question Awhether an Applicant may enforce a general right to fair labour practice in terms of Section 23 of the Constitution, that has not been given effect to in legislation, in the Labour Court@, I do not find any relevance of this general question on the specific issues before the Court. A specific question based on this aspect has been answered. To my mind, there was no need for the same question to be repeated, differently

framed, in general terms. The Court is not a forum where parties conduct their research of the law. Incidentally, however, a reference may be made in this regard to the remark made by the Court in *Simelela and Others v MEC for Education, Eastern Cape and Another* [2001] 22 ILJ 1688 (LC) (per Francis AJ, as he then was) where the Court said:

A.... [an] employee is not precluded from relying directly on the Constitution to enforce his or her right not to be subjected to unfair labour practice@.

[103] As I have said already, this question does not seem pertinent to the case before me. I propose, therefore, not to comment any further thereon.

[104] On the question of costs, there seems to be nothing to persuade the Court to deviate from the general and traditional rule that Acosts follow the result@ and the rule shall, therefore, apply.

[105] In the result, the Applicant=s claim is dismissed with costs.

NDLOVU, AJ

Appearances:

For the Applicant : Adv J de Waal

Instructed by : Cheadle Thompson & Haysom

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For the Respondent : Adv. A Oosthuizen SC

Instructed by : Deneys Reitz Inc.,

Date of Judgment : 19 September 2003

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