IN THE ARBITRATION BEFORE

NGWAKO MAENETJE SC AND MICHAEL BISHOP

In the arbitration between:

CRICKET SOUTH AFRICA NPC Claimant

and

GRAEME CRAIG SMITH Respondent

ARBITRATION AWARD

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I INTRODUCTION

[1] This is an arbitration that arises from the earlier process of Social Justice and Nation Building conducted by the Claimant (**CSA**). That process included an investigation by the Social Justice and Nation-Building Ombudsman, Adv Dumisa Ntsebeza SC together with Adv Fumisa Ngqele (**the Ombudsman**). The Ombudsman conducted an inquisitorial process to assess a wide range of allegations about how CSA and individuals within CSA had conducted themselves. Its mandate was to contribute to truth, healing and reconciliation in the game of cricket.

[2] Part of the Ombudsman's work included assessing allegations about the Respondent (**Mr Smith**). Mr Smith was the long-term captain of the national men's cricket team (**the Proteas**), from 2003 to 2014. He had then been appointed as CSA's first Director of Cricket (**DoC**) in December 2019.

[3] In its interim report of 10 December 2021, the Ombudsman made four "tentative findings" concerning Mr Smith:

[3.1] The Ombudsman found that, as Captain, Mr Smith likely had some influential role in decisions between 2012 and 2014 not to select Mr Thami Tsolekile for the Proteas.

[3.2] The Ombudsman found that Mr Smith's conduct leading up to his appointment as the DoC in December 2019 evinced racial bias against Black leadership at CSA.

[3.3] The Ombudsman concluded that when Mr Smith appointed Mr Mark Boucher as the head coach of the Proteas in December 2019, he unfairly discriminated on the basis of race against Mr Enoch Nkwe.

[3.4] The Ombudsman reasoned that, while Mr Smith and CSA had, in March 2020 concluded a contract that purported to create an independent contractor relationship between them, in fact their relationship was one of employer and employee.

[4] These findings were not binding on Mr Smith or CSA. They were part of an inquisitorial process. The parties, however, desired a final determination of their truth or falsity.

[5] In line with the arbitration provisions in their disputed 2020 Independent Contractor Agreement, the parties concluded an arbitration agreement. That agreement referred the following issues for arbitration:

> *4.1 Whether the Respondent is an employee of CSA or an independent contractor;*
> *4.2 Irrespective of the outcome in 4.1:*
> *4.2.1 whether in the period 2012 to 2014 the Respondent influenced decisions of the selectors of the national Proteas cricket team not to select Mr Thami Tsolekile as a wicket-keeper by reason of his race;*
> *4.2.2 whether the Respondent's proposal that he report to the Board of CSA and not the CEO during negotiations in November or December 2019, and later agreeing to report to the CEO, evinces racial bias against black leadership at CSA; and*
> *4.2.3 whether the Respondent's conduct with regard to the appointment of Mark Boucher as Proteas Head Coach,*

amounted to unfair racial discrimination with respect to Enoch Nkwe.

[6] We are not asked to make any consequential award – we are merely required to determine these disputed issues of law and fact.

[7] Before outlining how we fulfilled that task, it is necessary to emphasise that we were not asked to determine whether the Ombudsman was right or wrong. This is a new and different process. The Ombudsman's mandate was inquisitorial and wide-ranging. Ours is adversarial and specific. The evidence that we considered was very different from the evidence presented to the Ombudsman. While our conclusions depart from the Ombudsman's "tentative findings", that is in no way a criticism of the Ombudsman, nor an indication that it was inappropriate for the Ombudsman to make the findings it did, given the process it followed and the evidence it heard.

[8] These are also not disciplinary proceedings. The parties agree that Mr Smith is not an employee, and CSA has therefore not sought to discipline him under the ordinary rules of labour law. It is instead an ordinary private arbitration – albeit one with the unusual feature that neither party seeks monetary or mandatory relief.

[9] In concluding our own mandate, we followed the following process:

[9.1] A pre-arbitration meeting was held which agreed a timeline for the exchange of pleadings and the rules that would govern evidence.

[9.2] CSA filed a statement of claim which asked the arbitrators to make our own determination of whether Mr Smith was an independent contractor

or an employee. It asked us to answer the other questions posed in the Arbitration Agreement in the affirmative.

[9.3] Mr Smith filed a statement of defence. Mr Smith also filed a conditional counterclaim in which he asked us to find that he was an independent contractor, and to answer the other three questions in the negative.

[9.4] From 7-9 March 2022, we heard evidence. CSA called Mr Tsolekile and Mr Gift Mathe (its Manager in Coach Education Development). Mr Smith testified on his own behalf. He also confirmed the accuracy of an affidavit he had provided to the Ombudsman.

[9.5] In addition, the parties agreed to the admission of certain witness statements and affidavits. Mr Smith had procured statements from Mr Andrew Hudson, Mr Linda Zondi, and Mr Pholetsi Moseki, which CSA admitted. CSA also admitted certain portions of an affidavit Dr Jacques Faull had made to the Ombudsman.

[9.6] The parties then exchanged heads of argument and we heard oral argument on 22 and 23 March 2022.

[10] CSA was represented by Adv Ngcukaitobi SC, assisted by Adv Mitchell and Adv Ngwenya, instructed by Cliffe Dekker Hofmeyr Inc. Mr Smith was represented by Adv Duminy SC, assisted by Adv Khoza, instructed by Becker Kemp Attorneys. We are very grateful for the productive manner in which the attorneys and counsel conducted the arbitration, and for counsel's helpful written and oral submissions. We are also grateful to Mr Aadil Patel and Mr Dylan Bouchier for their assistance in managing the arbitration.

[11] In order to avoid further suspense, we think it is appropriate to summarise our findings on the four issues we have been asked to address:

[11.1] We conclude that the agreement between CSA and Mr Smith was an independent contractor agreement, not an employment relationship (**the Independent Contractor Issue**).

[11.2] We conclude that while Mr Smith influenced the selectors not to select Mr Tsolekile between 2012 and 2014, CSA did not prove that he did so because of Mr Tsolekile's race (**the Tsolekile Issue**).

[11.3] We conclude that CSA did not prove that Mr Smith's conduct in negotiating his contract as DoC evinced racial bias towards Black leadership in CSA (**the Black Leadership Issue**).

[11.4] We conclude that the CSA did not prove that Mr Smith's appointment of Mr Boucher was unfair racial discrimination against Mr Nkwe (**the Boucher/Nkwe Issue**).

[12] To explain why we reached those conclusions, we begin with a discussion of the meaning of unfair discrimination. We then consider the four issues in the chronological order that they arose – the Tsolekile Issue, the Black Leadership Issue, the Boucher/Nkwe Issue, and the Independent Contractor Issue. We end by considering costs.

II THE MEANING OF UNFAIR DISCRIMINATION

[13] The question in three of the four issues we are asked to decide concerns whether Mr Smith acted in a racially biased manner.

[14] As we detail below, there is some inconsistency in precisely what we are asked to address. The questions posed concerning the Tsolekile Issue and the Black Leadership Issue do not use the language of "unfair discrimination", while the Boucher/Nkwe Issue is specifically framed as one of unfair discrimination. Nonetheless, CSA urged us to treat the question about Mr Smith's role in Mr Tsolekile's non-selection as one of unfair discrimination. It made no submissions about his attitude to Black leadership.

[15] We unravel below precisely what issue we are asked to address. To do so it is first necessary to understand the legal concept of unfair discrimination. We begin with a general outline of the concept, and then consider several key issues that are relevant to the disputes before us.

AN OVERVIEW OF UNFAIR DISCRIMINATION

[16] The concept has its legal genesis in s 9 of the Constitution. Section 9(3) provides that the "state may not unfairly discriminate directly or indirectly against anyone" on a range of grounds including race. Section 9(4) imposes the same prohibition on private persons.

[17] Section 9(5) of the Constitution deals specifically with the issue of onus. It provides that discrimination on a listed ground such as race "is unfair unless it is established that the discrimination is fair." This reflects an important principle

of unfair discrimination analysis – there are always two stages. First the claimant must show discrimination, then the respondent may try to show it was fair. The concept contemplates that treating people differently on a listed ground may sometimes be justifiable.

[18] Section 9(4) of the Constitution also requires national legislation "to prevent or prohibit unfair discrimination". That legislation is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (**the Equality Act**). The Equality Act was enacted after the Constitutional Court had already established a body of jurisprudence interpreting s 9 of the Constitution (and its predecessor, s 8 of the Interim Constitution[1]). It largely reflects and codifies that jurisprudence, rather than marking any substantial new invention or departure.

[19] The Equality Act defines "discrimination" in s 1 as:

> *any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-*
> *(a) imposes burdens, obligations or disadvantage on; or*
> *(b) withholds benefits, opportunities or advantages from,*
> *any person on one or more of the prohibited grounds*

One of the defined "prohibited grounds" is "race".

[20] Section 6 generally prohibits unfair discrimination on all prohibited grounds. Section 7 specifically prohibits unfair discrimination on the basis of race. It provides a non-exhaustive list of examples, which includes:

> *"(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;*

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

> *(c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;*
> *…*
>
> *(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.*"

[21] Section 13 deals with the shifting burden of proof. Section 13(1) provides:

> *If the complainant makes out a prima facie case of discrimination-*
>
> *(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or*
>
> *(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.*

[22] This provision was discussed in *Social Justice Coalition* where Dolamo J held that s 13(1) imposes a "*less stringent test than the normal balance of probabilities*".[2] Precisely what this means, and what a claimant needs to establish to shift the burden to a respondent, remains unclear. It is also uncertain whether this particular burden shifting applies to arbitration proceedings such as these which are not, strictly, proceedings in terms of the Equality Act.

[23] Fortunately, CSA did not place any reliance on s 13(1); it did not allege it had met only the prima facie burden of establishing discrimination and that Mr Smith had failed to discharge his onus to disprove discrimination. So we need not

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[2] *Social Justice Coalition and Others v Minister of Police and Others* [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC) at para 67.

resolve these complexities. We have approached the matter on the ordinary constitutional basis that the claimant must show discrimination on a balance of probabilities.

[24] CSA did, however, rely on the second part of the onus shift contained in s 13(2). This reflects the position under s 9(5) of the Constitution – discrimination on a listed ground "is unfair, unless the respondent proves that the discrimination is fair". That is bedrock constitutional law, and despite Mr Smith's reservations about whether the Equality Act applies, we apply that shift in onus.

[25] Section 14 of the Equality Act usefully sets out what a court must consider in determining whether discrimination is fair. Section 14(1) – reflecting s 9(2) of the Constitution[3] – provides that it is not unfair discrimination "to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons". The provision defends affirmative action measures from attacks as unfair discrimination.

[26] Section 14(2) and (3) then describe how a court should assess whether a respondent has proven that discrimination is fair. Section 14(2) sets three basic issues to consider: the context; the factors in s 14(3), and "whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned." The section 14(3) factors are:

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[3] See *Minister of Finance and Other v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC).

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity.

[27] This list reflects a combination of the factors the Constitutional Court has held are relevant to a fairness analysis,[4] and the factors in s 36(1) of the Constitution for assessing whether the limitation of a right is justifiable.

[28] Section 6 of the Employment Equity Act 55 of 1998 also prohibits unfair discrimination in employment policies and practices, which includes "recruitment procedures, advertising and selection criteria" and "appointments and the appointment process". While the parties did not rely on this statute, it seems to us that it is in fact the applicable statute for the appointment of Mr

[4] See *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) at para 52.

Boucher and the non-appointment of Mr Nkwe. At that time it is undisputed that Mr Smith was an employee, and the issue in dispute is CSA's (and Mr Smith's) appointment or appointment process of an employee. However, nothing turns on the issue as the test for unfair discrimination is materially the same under both the Equality Act and the Employment Equity Act.

[29] Finally, CSA emphasized the need to take a broad and contextualized approach to assessing unfair discrimination. We agree with that. The primary purposes of prohibiting unfair discrimination are to identify and undo historical discrimination and ensure a more equal and just society. The concept must be applied with that in mind. But that is still consistent with adopting a clear analytical structure for assessing claims of unfair discrimination.

SPECIFIC ISSUES

[30] In line with that general outline of the structure and content of an unfair discrimination analysis, there are five issues that are particularly relevant to adjudicating the disputes between the parties:

[30.1] The distinction between direct and indirect discrimination;

[30.2] What a claimant must show to prove indirect discrimination;

[30.3] The role of causation in unfair discrimination analysis;

[30.4] Causation by omission; and

[30.5] The relationship between affirmative action and unfair discrimination.

Direct and Indirect Discrimination

[31] Discrimination can occur both directly and indirectly. Direct discrimination is easy – it happens when the prohibited ground is expressly the reason for treating one group differently from another. A law that limits marriage to opposite-sex couples discriminates on the basis of sexual orientation.[5] Laws that deny Black women the marital benefits afforded to White women and Black men discriminate on the overlapping bases of race and gender.[6] And if an organisation expressly refused to employ somebody because of their race, it will discriminate directly against that person.

[32] Direct racial discrimination is sometimes blatant – it is there in black and white. But it is often surreptitious. Particularly when we are talking about individual conduct, not laws, racial discrimination is likely to be hidden below the surface. A person may come up with a variety of reasons that are not race-based to justify their conduct that is, in truth, based on race.

[33] Here, the task of an adjudicator in civil proceedings is the ordinary one when assessing evidence of intent without direct evidence. We must assess whether the inference a party seeks to draw is consistent with all the proved facts, and is "the most plausible one amongst a number of possible inferences."[7]

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[5] *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC).
[6] See, for example, *Gumede (born Shange) v President of the Republic of South Africa and Others* [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC).
[7] *ST v CT* 2018 (5) SA 479 (SCA) at para 42. See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734 and *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614G

[34] Indirect discrimination occurs when "conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination".[8] It plays an important role in uprooting entrenched and sometimes invisible barriers to true substantive equality. It "is meant to avoid rules and practices which are not directed at or against people with a particular protected characteristic but have the effect of putting them at a disadvantage."[9] Indirect discrimination attacks the "invisible structure" that constrains "many who must deal within that structure but have characteristics that do not match those of persons intended to benefit from the structure."[10]

[35] Two classic judgments of Chief Justice Langa show two ways that indirect discrimination can occur:

[35.1] In *Walker*, the City of Pretoria treated residents differently for the purposes of electricity tariffs based on where they lived. Facially, the rule was based on geography, not race. But because Apartheid left us with racially segregated cities, the effect was that overwhelmingly Black areas were treated differently from overwhelmingly White areas. This constituted indirect discrimination.[11]

[35.2] *Pillay* concerned the code of conduct for Durban Girls' High School.[12] The code prohibited girls from wearing nose studs. This seemingly

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[8] *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (CC) at para 31.
[9] *Essop & Ors v Home Office (UK Border Agency)* [2017] UKSC 27; [2017] 3 All ER 551 at para 1.
[10] *Fraser v Canada (Attorney General)* 2020 SCC 28 at para 35, quoting Mary Eberts and Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38 NJCL 89 at 92.
[11] *Walker* (n 8) at para 32.
[12] *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

neutral rule was held to indirectly discriminate against the claimant – a girl of South Indian Tamil descent who voluntarily wore a nose stud as an expression of her religion and culture.

[36] The recent decision in *Damons* is another example.[13] A policy for the promotion of firefighters required applicants to meet a certain level of physical fitness. This neutral requirement discriminated against disabled persons who could not meet those physical requirements.

[37] In cases of indirect discrimination, a claimant does not need to show intent. That would undermine the purpose of prohibiting indirect discrimination – if you can show intent, the discrimination is direct. Instead, discrimination "must be determined objectively in the light of the facts of each particular case."[14]

Proving Indirect Discrimination

[38] An important question for assessing the Boucher/Nkwe Issue is precisely what a claimant must show to prove indirect discrimination. The key requirement is that the rule or practice has a "disproportionate impact" on one group defined by a listed ground.

[39] That does not require that the apparently neutral rule has exactly the same impact as a blatantly discriminatory rule would. To take *Walker* as an example, it was not necessary that Mamelodi and Atteridgeville be 100% Black, and that old Pretoria be 100% White. There was still indirect discrimination even if some

[13] *Damons v City of Cape Town* [2022] ZACC 13.
[14] *Walker* (n 8) at para 43.

White people were affected by the rule meant to assist Black people and vice versa. *Walker* is in some ways easy because the areas were "overwhelmingly" separated by race.

[40] But where is the line? Consider a law that impacts negatively on 100 people. 51 of those people are women while 49 are men, does that show indirect discrimination on the basis of sex or gender? Is the line at 60/40? 70/30?

[41] Our jurisprudence has not yet had to answer this question:

[41.1] In *Mvumvu* the Constitutional Court held that a law limiting the compensation that could be recovered by passengers in public transport indirectly discriminated on the basis of race.[15] Jafta J reasoned that poor people were more likely to use public transport, and that "the vast majority of poor people in this country are black people".[16]

[41.2] The Equality Court in *Social Justice Coalition* reached a similar conclusion on the distribution of police resources. The claimants had produced statistical evidence showing that the Whiter an area, the more police resources they received – even though the policy sought to achieve the opposite.[17] The Court accepted the statistical evidence without considering exactly what degree of disparate impact was required.

[41.3] Again, in *Mahlangu*, the Court found a rule treating domestic workers differently from other workers indirectly discriminated on race and sex

[15] *Mvumvu v Minister of Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC).
[16] Ibid at para 28.
[17] *Social Justice Coalition* (n 2).

because the "overwhelming majority" of domestic workers were Black women.[18]

[42] The best the cases do is to say there must be a "disproportionate impact"[19] or a "disparate impact"[20] on people defined by a listed ground. But how different must the impact be to be "disproportionate"? And what must a claimant do to show disproportionate impact? Our case law, as yet, offers no answers.

[43] Foreign law offers some assistance. In *Fraser v Canada (Attorney General)* the Supreme Court of Canada held that two types of evidence are useful in establishing indirect discrimination – "evidence about the situation of the claimant group" and "evidence about the results of the law."[21] The different evidence is useful in different types of cases.

[44] The first is the type of evidence at issue in *Pillay* – evidence that members of the claimants cultural and religious community wear nose studs. That was enough to show that a rule prohibiting nose studs discriminated. It was not necessary to lead statistical evidence about how many learners of the school were part of that community and how many were not. It was enough to show there was one learner who was affected by the rule.

[45] The second type of evidence is useful where "the pool of people adversely affected by a criterion or standard includes both members of a protected group

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[18] *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); 2021 (2) SA 54 (CC) at para 93.
[19] Ibid at para 92.
[20] *Pillay* (n 12) at para 44.
[21] *Fraser* (n 10) at para 56.

and members of more advantaged groups".[22] This will generally be statistical evidence showing that one group in the pool was more affected than another.

[46] This is the evidence that had to be led in *Social Justice Coalition*. The applicants claimed that the effect of neutral rules about allocating police resources were that areas with a higher percentage of Black people received fewer resources. While there were White people living in primarily Black neighbourhoods and vice versa, overall the statistical evidence showed that the pattern of police resource allocations tracked race and poverty.

[47] What must that statistical evidence show? How disproportionate must the impact be? Abella J ultimately concluded that "[t]here is no universal measure for what level of statistical disparity is necessary to demonstrate that there is a disproportionate impact, and the Court should not, in my view, craft rigid rules on this issue." Instead, the purpose of statistical evidence "is to establish 'a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance'."[23]

[48] Abella J explained that, ideally, a claimant should present both types of evidence. But that is not always required: "In some cases, evidence about a group will show such a strong association with certain traits — such as pregnancy with gender — that the disproportionate impact on members of that group 'will be apparent and immediate'."[24]

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[22] Ibid at para 58.
[23] Ibid at para 59, quoting C Sheppard "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*" (2001) 46 *McGill LJ* 533
[24] Ibid at para 61, quoting *Kahkewistahaw First Nation v Taypotat* 2015 SCC 30; [2015] 2 SCR 548 at para 33.

[49] The United Kingdom Supreme Court has followed a similar approach. In *Essop*, Lady Hale emphasised that it is not a requirement that "every member of the group sharing the particular protected characteristic at a disadvantage."[25] Rather, "it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence."[26] The Court did not seek to draw a line for the extent of disparate impact that would constitute discrimination, but it seems that any statistically significant impact would suffice.[27]

[50] In our view, the upshot of this jurisprudence – which we think South African courts are likely to follow when the issue arises – is this:

[50.1] In an indirect discrimination claim, the issue is not whether any individual member of a group has been negatively affected, but whether that group as a whole has been disproportionately burdened compared to others.

[50.2] That may require either evidence about the characteristics of the group, or statistical evidence about the rule's impact, or both. What is required depends on the case. As the onus is on the claimant to establish discrimination, it must lead the evidence.

[50.3] When an indirect discrimination claim is that all people are affected by a rule, but some are affected more, there must ordinarily be a statistically

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[25] *Essop* (n 9) at para 27.
[26] Ibid at para 28.
[27] *Essop* was actually two consolidated cases. The first case concerned an assessment that civil servants seeking promotion had to take. The statistical evidence showed that the pass rate of Black and Minority Ethnic applicants was 40.3% that of White applicants. The second case concerned disparate pay for Muslim chaplains in the prison service. The statistical evidence showed that – because Muslim chaplains had only been permanently employed from 2002 – their pay was on average £31 847 compared to £33 811 for Christian chaplains.

significant impact on the complainant's group. Precisely what constitutes sufficient impact will depend on the case.

Causation

[51] Causation is a requirement for discrimination, but the nature of the causation is different for direct and indirect discrimination. This flows from the text of the Equality Act, our jurisprudence, and the nature of the two types of discrimination.

[52] The Equality Act defines "discrimination" as an act or omission "which" imposes burdens or withholds benefits on a prohibited ground. It must be the act or omission that imposes the burden or withholds the benefit. An act – even if based on a prohibited ground – which does not impose a burden is not discrimination.

[53] For direct discrimination, the claimant must show a causal link between her less favourable treatment and the prohibited ground. She must show she was denied a benefit because of her race or sex. It is not enough to say that a person was treated less favourably, and that they are a member of a previously disadvantaged group without making the causal connection. For example, imagine a random member of the public tells his friend in private that he thinks player X should not be selected for the Proteas because he is Black. That player is ultimately not selected because he gets injured. That person is a racist. But

he has not caused the loss of an opportunity, and so is not guilty of discrimination.[28]

[54] For indirect discrimination, the claimant must merely show that the act or omission caused the less favourable treatment. The UK Supreme Court has explained this distinction:

> *the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment … but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. … It is dealing with hidden barriers which are not easy to anticipate or to spot.*[29]

[55] It is not necessary, for indirect discrimination, to show the link between intent and effect. The claimant need only prove the disproportionate effect in the way discussed above.

Discrimination by Omission

[56] The Equality Act recognizes that either an act or an omission can constitute discrimination. We have no doubt that is also the case under the Constitution.

[57] When we are talking about laws or policies, discrimination by omission is relatively straightforward. It could be the omission of a particular provision that

[28] We leave aside the possibility that the speech itself may impose a burden, or may constitute hate speech. That is not the case CSA has made because it points to no direct racist speech by Mr Smith.
[29] *Essop* (n 9) at para 25.

causes the discrimination. In the case of *Bwanya*,[30] for example, it was the omission of the words from a statute that caused the discrimination.

[58] But when we are talking about conduct, not rules, it seems more complicated. In delict an omission is only actionable if there was a duty to act positively to prevent harm. That duty exists "if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm."[31]

[59] In our view, the same basic principle must apply to assessing discrimination by omission. We all fail to do numerous things every day. If we had acted in a variety of different ways, it would have had numerous effects in the real world. Some of those untaken acts may have prevented discrimination. And numerous different acts could have prevented discrimination. An employee could prevent her employer from refusing to employ someone because of their religion by speaking up at a meeting, putting their concerns in writing, threatening to resign in protest, preventing someone from attending a meeting, or trying to mislead her employer about the person's religion. All of those acts, if taken, might have prevented the discrimination. But she can reasonably be liable only for failing to take those acts that she could reasonably have a duty to take.

[60] Naturally, what is reasonable in the context of delictual liability is very different from what is reasonable in the context of unfair discrimination. Liability for discrimination by omission is not limited to omissions that could also impose

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[30] *Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51; 2022 (4) BCLR 410 (CC)

[31] *Van Eeden v Minister of Safety and Security* [2002] ZASCA 132; [2002] 4 All SA 346 (SCA) at para 9.

delictual liability. But the basic principle – that the claimant must identify an act that the respondent had a duty to take and didn't – remains the same.

[61] In addition, the test for causation for omissions must be the same for unfair discrimination as for delicts. The ordinary test is to replace the defendant's omission with hypothetical reasonable action and determine whether that would have prevented the harm.[32] This test must be applied flexibly but it remains the basic tool to assess whether omissions cause harm. We see no reason it should not be applied to discrimination by omission. The omission must be imagined away and replaced with hypothetical positive conduct that complied with the duty.

[62] In delictual cases, a plaintiff must show both factual causation and legal causation.[33] In an unfair discrimination case, in our view, a claimant would only need to show factual causation. The limiting discipline of legal causation would be performed in the fairness analysis. We approach the matter on that basis.

Affirmative Action and Unfair Discrimination

[63] The Constitution and the Equality Act recognize the need for affirmative action to undo the wrongs of the past. The Constitutional Court has held that affirmative action measures "are integral to the reach of our equality protection."[34] That must be so because unless we "root out systematic or

[32] *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) at para 41.
[33] Ibid at paras 38-9.
[34] *Minister of Finance and Other v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 30.

institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow."[35] That is why affirmative action measures that meet the requirements of s 9(2) or s 14(1) are not discrimination and require no further justification.

[64] But that does not mean that the failure to effect affirmative action on its own constitutes unfair discrimination. CSA's arguments often flirted with this idea, although it disavowed advancing it directly.

[65] We were referred to no authority for that proposition, and we are aware of none. Such a failure may contravene a constitutionally legitimate statute, or employment policy that requires affirmative action measures. But that is a distinct legal complaint from unfair discrimination.

[66] Rather, as CSA argued, the failure to give effect to affirmative action measures may be relevant evidence of a person's intent, or provide the context to analyse their conduct. It may also play a role in the fairness analysis. But the relevance of not promoting affirmative action measures for an unfair discrimination complaint will depend on the context – it will not on its own establish discrimination.

[35] Ibid at para 31.

III THE TSOLEKILE ISSUE

[67] The issue we have been asked to decide is whether, in 2012 to 2014, Mr Smith influenced decisions of the selectors of the national Proteas cricket team not to select Mr Thami Tsolekile as a wicket-keeper by reason of his race.

[68] We first summarise the evidence on this issue. We then decipher precisely what issue we are required to address, and what case CSA has made. We then consider whether CSA has established discrimination either by commission or omission.

THE EVIDENCE

[69] Mr Tsolekile and Mr Smith gave evidence on this issue. Mr Smith introduced statements by Mr Hudson and Mr Zondi who were both members of the Board of Selectors for the Proteas during all or part of the period. Mr Hudson was the convenor of selectors throughout that period. Mr Zondi was a selector from July 2013. These statements were admitted by CSA.

[70] Together, this evidence tells the following story.

[71] Mr Tsolekile was a young prodigy. Always a wicket-keeper batter, he was brilliant from High School. He played for his provincial team from the age of 15. He captained both the SA Schools XI and the SA U19 XI. Mr Smith played under him in both those teams. Mr Tsolekile went on to play for the senior Western Province team.

[72] Mr Smith was also a brilliant cricketer from a young age. An opening batter, he made his test debut in 2002 and immediately excelled. He became the captain

of the Proteas in 2003. Mr Tsolekile made his test debut on the tour to India in 2004 – under Mr Smith as the captain. By his own admission, Mr Tsolekile had a poor tour and was dropped thereafter. Mr Smith continued to captain the Proteas.

[73] Meanwhile, Mr Tsolekile went back to his province and worked hard to get back into the Proteas' team. He was a regular in the SA 'A' team. By 2012, he was the first-choice wicket-keeper and captain of the SA A team. He was the vice-captain of his provincial team, the Lions. He was playing the best cricket of his life.

[74] However, he faced difficulty making it into the Proteas' test team (Mr Tsolekile was only competing for the test team, not the ODI or T20 teams). Two people stood in his way. Mr Boucher was the established wicket-keeper. He had been in that role for more than a decade and was recognised as one of the best wicket-keepers in the world.

[75] But there was another potential successor. Mr Abraham Benjamin de Villiers was – according to Mr Hudson – "one of the very best batsmen in the world at the time, and also an accomplished wicket-keeper". In Mr Tsolekile's words: "I think AB was phenomenal when it comes to batting." Mr Smith described him as "South Africa's best cricketer of all time across all three formats of the game, and one of the greatest players the game has ever seen." He was entrenched in the Proteas' test team as a specialist batter. And, while he was not the regular keeper for his provincial team, he had kept wicket before. By 2012, he had kept wicket in three tests and 56 other international matches. He was the first choice wicket-keeper for one day internationals and T20Is.

[76] But in 2012 it looked like it might finally be Mr Tsolekile's turn. Mr Boucher was in the twilight of his career and there was talk of retirement. Although Mr Smith denied knowledge of this, Mr Tsolekile testified that Mr de Villiers had publicly indicated that he did not want to keep wicket anymore because of a bad back.

[77] It was against this background that, Mr Tsolekile was rewarded for his hard work with a national CSA contract that began on 1 April 2012.

[78] It is worth pausing in the narrative now to discuss how players are selected to represent the Proteas. We were provided with CSA's selection "Policies, Procedures & Guidelines" (**the Selection Guidelines**). Although dated October 2013, it was accepted that it reflected the position from 2012 to 2014.

[79] Selection decisions are made by a selection panel (also called a selection committee). That panel is made up of five voting selectors (the convener of selectors, the Proteas head coach, and three independent selectors) and two non-voting selectors (the head of high performance and CSA's transformation manager).

[80] The Proteas' Captain is "not a member of the panel". But the selection panel "should have due regard to the views of the Captain who is entitled to freely and strongly indicate his preferences in selection." We return to exactly what role Mr Smith played as captain later.

[81] One of the guidelines binding the selection panel is to "[a]dhere to Transformation guidelines and imperatives". Those are set out in paragraph 5 of the Selection Guidelines. It states that CSA expects "that the selection committee will play its role in ensuring that Transformation is aggressively

achieved at all levels without compromising the principle of merit selection." It then sets various targets for the number of players of colour that should be included in different size squads. Importantly: "Where selection between 2 players are debatable and neither is a clear choice, preference should be given to the player of colour (e.g. both have similar track records and ability)."

[82] The process requires the convener of selectors to "forward selected squad … to CSA Transformation Manager for review against strategic imperatives and policies. And concern must be raised with the Convener and referred to CEO if not resolved." This presumably refers to whether the selected squad meets the transformation guidelines.

[83] Finally, to understand how selection operates, it is necessary to distinguish between awarding a national contract, being selected for a squad, and choosing the playing XI:

[83.1] A certain number of players are awarded contracts each year. That means that CSA pays them for that period, irrespective of whether or not they play. The selection panel determines who gets national contracts.

[83.2] For each series or competition, the selection panel then selects a squad of 14 or 15 players. Nationally contracted players are more likely to be selected, but selection is not limited to players with contracts.

[83.3] For a tour, the selection panel selects one selector to travel with the team. He will serve as lead selector. He, together with the head coach, selects the playing XI for each match. In addition the tour selector "must keep panel members in SA informed of injuries and thought processes

on team strategies etc. prior to selection and, wherever possible, obtain input and build consensus prior to the final XI being selected".

[84] With that background, we return to 2012. There were three important test series coming up in the 2012/13 season. In July to August 2012, South Africa would tour England for four tests. In November 2012, they would tour Australia for three tests. And in January 2013, New Zealand would visit South Africa for two tests.[36]

[85] Mr Tsolekile testified that, around the time he was awarded his contract, Mr Hudson told him, while he was unlikely to play against England or Australia, he could or would play in the home series against New Zealand.

[86] There is a disagreement about exactly what Mr Hudson told Mr Tsolekile. Mr Tsolekile was adamant that he was given a guarantee he would play against New Zealand. Mr Hudson, in his statement, denies that it was a guarantee, but said he told Mr Tsolekile he was likely to get his shot against New Zealand. It is not necessary to resolve this dispute. Whatever Mr Hudson told Mr Tsolekile, there is no claim that Mr Smith gave any assurances – for or against Mr Tsolekile – at this time. It was not even alleged by CSA that Mr Smith was aware of any promise. It is enough to say that once he received his national contract, Mr Tsolekile had a reasonable expectation that he would play for the Proteas, at least, when New Zealand toured South Africa.

[36] The evidence presented suggested that the tests were in South Africa in December 2012 and January 2013. Other objective sources suggest that the tests were in January 2013. Whatever the correct position is, this does not influence the outcome we have reached.

[87] Mr Tsolekile was not, however, selected for the 15-man touring squad to go to England in July 2012. Mr Boucher was selected as the first-choice wicket-keeper. There was initially some debate about whether Mr De Villiers was selected as the backup keeper or just as a batter. But Mr Tsolekile ultimately accepted that Mr De Villiers – despite his misgivings about keeping in tests – was selected as the back-up wicket-keeper to Mr Boucher.

[88] Unfortunately, Mr Boucher was injured in a warm-up game on the England tour. He was keeping wicket and a bail hit him in the eye, ending his playing career. Mr Boucher would go on to a career as a cricket coach, and we will return to him later.

[89] Mr Tsolekile was called up to replace Mr Boucher in England. However, he was brought in as the replacement wicket-keeper, not the first-choice wicket-keeper. That makes sense. Mr De Villiers was the back-up keeper in the squad. When the first-choice keeper was injured, he stepped in. Mr Tsolekile was called in as back-up in case Mr De Villers was injured.

[90] But there was more to the selection decision than simply following the existing order of preference. Mr Hudson explained the selectors' thinking as follows: "De Villiers taking the wicket-keeping gloves gave the team the 'X factor' and allowed us, the Selectors, to select an extra batter at No. 7." The statement was put to Mr Tsolekile who agreed with the proposition that this was "a strategy that will make complete sense and was something which played very strongly in favour of the Proteas cricket team". He accepted that there were "very good cricketing reasons to prefer AB de Villiers to yourself for a position in the test starting 11".

[91] Mr Smith's evidence on this point was that Mr Boucher's injury created "an opportunity to bring in Mr Jean Paul Duminy who was a frontline top order specialist batsman. In turn, that lengthened your batting line up with seven … top batting performers. .. [S]o to be able to add somebody like [Mr Duminy] at 7, plus he brought an all-round capability which was his bowling as well".

[92] As to his involvement in the selection decision, Mr Smith testified that he recalled Mr Gary Kirsten – the head coach at the time – "consulting me on the strategy. I agreed with the cricket strategy that was being put in place and then he went off to deliberate with the selectors." The strategy was to replace Mr Boucher with Mr Duminy, and thereby to lengthen the batting lineup.

[93] As a result, Mr Tsolekile did not play in England. Mr De Villiers was selected as the wicket-keeper for all four tests. There was no Black African in the Proteas team that played the tests in England. There were, however, five Black players – Hashim Amla, Alviro Petersen, Vernon Philander, JP Duminy and Imran Tahir played all four tests. The Proteas won the series in England and ascended to number one in the world test rankings.

[94] There is no direct evidence, concerning the England tour, that Mr Smith actively influenced the selectors to exclude Mr Tsolekile from the playing XI. Instead, it appears to be accepted that Mr De Villiers was selected because of his ability as a batter, not because of his race. It is also common cause that Mr Smith supported that decision and did not use his influence to advocate in favour of selecting Mr Tsolekile for the playing XI in England.

[95] The same pattern followed for the 2012 tour to Australia. Mr De Villiers was selected as the first-choice wicket-keeper. Mr Tsolekile was selected as the

back-up to Mr De Villiers. Mr De Villiers played all three test matches. Mr Tsolekile played none.

[96] The reason was the same. Mr Smith said that he had "a brief discussion with Gary [Kirsten]", and that they decided to follow the same strategy that had succeeded in England. Again, Mr Smith did not speak against Mr Tsolekile, or in his favour. He accepted the strategy followed by the selectors that had been successful in England.

[97] Mr Tsolekile himself did not complain about his treatment at the time, or in his evidence. He appeared to accept that the same "cricketing reasons" that justified selecting Mr De Villiers in England still applied in Australia.

[98] However, Mr Tsolekile mentioned that Mr Makhaya Ntini – a former Proteas fast bowler, and one of the few Black Africans to play for the Proteas – had publicly stated that Mr Tsolekile would have been selected if he was white. Mr Tsolekile did not support this claim at the time. He told journalists that it was Mr Ntini's opinion. He indicated that he did not want to upset the team environment. CSA did not rely on Mr Ntini's opinion in argument, and we say nothing more about it.

[99] The Proteas won again in Australia and retained the number one test ranking. Again, there were no Black African players, but several Black players.

[100] The team returned to South Africa for the two-test home series against New Zealand. This is the series which Mr Hudson had promised Mr Tsolekile he would play in.

[101] But that is not what happened. Instead, Mr Tsolekile again did not get a game. Mr De Villiers was selected for both tests. Mr Hudson's explanation is that, as Mr De Villiers wished to continue keeping wicket, the selection committee decided to "retain the unquestionable momentum that the team had created".

[102] There was some debate about whether Mr Smith was specifically consulted about excluding Mr Tsolekile in favour of Mr De Villiers for the New Zealand tour. Mr Smith ultimately said that he was not consulted about selection. But in his statement of defence, and in his earlier testimony, he had not drawn such a strict embargo on his influence. In our view, it is likely that Mr Smith was consulted for the New Zealand tour in the same way he had been for the two previous tours – he was presented with a proposal and asked for his comment.

[103] Mr Hudson broke the bad news to Mr Tsolekile. Mr Hudson's version is that he explained the selectors' thinking which Mr Tsolekile "understood but was not happy about". Mr Tsolekile claims that Mr Hudson told him that Mr Smith did not want him to play in the team, and that was the reason for his exclusion.

[104] Both Mr Hudson and Mr Smith denied this was true. Mr Hudson also denied ever having told Mr Tsolekile that Smith urged the selectors to exclude him. "[T]he decision not to select him to play was", Mr Hudson stated, "the view of the selection panel."

[105] Mr Tsolekile initially claimed that he had spoken to Mr Zondi around the same time and Mr Zondi had also told him that Mr Smith was the reason for his exclusion. However, Mr Zondi only became a selector in July 2013 – several months after the New Zealand series. Mr Tsolekile accepted that the

conversations with Mr Zondi may have happened later in the year. But insisted Mr Zondi had told him Mr Smith was to blame for his exclusion.

[106] Mr Zondi denies this. His evidence was: “Mr Smith did not influence the decision of the selectors not to select Mr Tsolekile as a wicket-keeper by reason of his race.” Rather, in Mr Zondi’s experience, Mr Smith “would get the team from the Convenor and at the moment the selection panel said this was the starting XI, he would accept that.” By contrast, Mr Zondi had actively lobbied for the selection panel to include Mr Tsolekile. He was ultimately outvoted.

[107] Ultimately, CSA did not rely on the alleged statements of Mr Hudson and Mr Zondi that Mr Smith had actively sought to exclude Mr Tsolekile. We find it unlikely that such statements were made, both because there is no direct evidence that Mr Smith ever actively sought Mr Tsolekile’s exclusion, and because there was no need for Mr Hudson to seek to blame Mr Smith for the decision not to play Mr Tsolekile.

[108] It is necessary to mention another issue that fell by the wayside in CSA’s case. Shortly after his exclusion from the team to play New Zealand, there was a report on radio that Mr Smith had said that if Mr Tsolekile was selected to play for the Proteas, he (Mr Smith) would retire. Mr Tsolekile was informed of this rumour by friends and later heard it on the radio. Shortly afterwards, Mr Smith called Mr Tsolekile and denied there was any truth to the rumour. Mr Tsolekile accepted Mr Smith’s denial, and accepted that this rumour on its own was not a reason to accuse Mr Smith of racism. We say nothing more about it.

[109] That then takes us to the final of the four tours – Australia’s tour to South Africa in March 2014. There was an unusual absence of evidence of what occurred

between January 2013 and 2014. South Africa played three test series during that time (in February 2013 against Pakistan at home, in October 2013 against Pakistan away, and in December 2013 against India at home). Mr De Villiers continued to keep wicket. Mr Tsolekile remained a contracted player, but did not play. We heard no evidence about these tours. We do not know whether Mr Tsolekile was in the squad for those tours, or why he was excluded either from the squad or the playing eleven.

[110] Mr Tsolekile's complaints resumed for the 2014 home tour against Australia. Again, Mr De Villiers was the wicket-keeper and Mr Tsolekile sat on the sidelines. This was also the introduction of Mr Quinton De Kock to test cricket. He played in the second test against Australia at what was then called Port Elizabeth and is now Gqeberha. He did not keep wicket, but played only as a batter.

[111] Mr Smith explained that the team had lost the first test in Centurion, and had then flown on staggered flights to Port Elizabeth. When he arrived in Port Elizabeth Mr Smith "found out that there were a few injuries and concussions and a few changes that had already been made to the team". He says he "interacted with Russel Domingo the coach on some of those things at the time". That presumably included the inclusion of Mr De Kock.

[112] Mr Smith's daughter was seriously injured during the course of the second test. He retired from international cricket after the third and last test against Australia in Cape Town.

[113] Mr Tsolekile's complaint about this series was that Mr De Kock was being "groomed" to take over from Mr de Villiers as the wicket-keeper. And that is

what ultimately happened. On the next away test series – against Sri Lanka in July 2014 – Mr De Kock kept wicket while Mr de Villiers returned to playing only as a batter. Mr Tsolekile's position was that Mr de Villiers had agreed to keep wicket only while he was the natural successor. Once there was a new, White, wicket-keeper, Mr de Villiers was again unwilling to keep wicket. However, there was no evidence that Mr Smith was aware of or partook in any such plan – either by the selectors or Mr de Villiers.

[114] The final issue addressed in Mr Tsolekile's testimony was an attack by Mr Smith on his credibility because of his later guilty plea for involvement in match fixing. In our view, Mr Tsolekile was an honest witness who fairly made concessions and sought to present his grievances as he saw them. While there were discrepancies in the details of his evidence – for example the timing of his conversation with Mr Zondi – those do not detract from the overall thrust of evidence.

THE NATURE OF THE ISSUE

[115] Three questions arise concerning what we are required and permitted to adjudicate:

[115.1] What issue was referred to arbitration?

[115.2] Can CSA expand its pleaded case?

[115.3] What are we not required to decide?

[116] First, the issue we are asked to adjudicate in terms of the Arbitration Agreement is not presented as a legal question, but a factual one. We are asked to decide whether Mr Smith "influenced decisions of the selectors of the national Proteas cricket team not to select Mr Thami Tsolekile as a wicket-keeper by reason of his race". The Agreement does not mention the concept of unfair discrimination. CSA's statement of claim, concludes that Mr Smith's "use of his influence to persuade the selectors to exclude Tsolekile from selection was discriminatory and based on Tsolekile's race." But other than that, it does not reference unfair discrimination.

[117] Yet CSA argued its case as if the issue before us was whether Mr Smith unfairly discriminated against Mr Tsolekile. Was it permitted to do so?

[118] In our view, it was. While there is notionally a difference between a factual inquiry about whether or not Mr Smith used his influence to exclude Mr Tsolekile, and the legal question of whether Mr Smith unfairly discriminated, as CSA's case was limited to a claim of direct discrimination (either by commission or omission) there is a significant overlap between the two inquiries. It does not seem to us it would serve the parties to adopt too narrow an approach to this question. If anything, by arguing the case as one of unfair discrimination, CSA made its case harder as it added a requirement of causation that may not have been necessary to adjudicate the pure factual question the Agreement appeared to present.

[119] Second, the case that was ultimately presented by CSA differed markedly from the case that was pleaded. Mr Smith objected to this and sought to hold CSA to its pleaded case.

[120] What case did CSA plead? It is best summarized in paragraph 46 of the Statement of Claim: “During the period 2012 to 2014, Smith used his influence to exclude Tsolekile from selection, and one of the bases for this exclusion was Tsolekile’s race.” The only facts pleaded to support that case are the bare bones of the account set out above – Mr Tsolekile’s contract, Mr Boucher’s injury, Mr De Villiers filling the keeping gloves until the end of the Australia 2014 tour. In fact, CSA pleaded a fact that it later accepted was false – that Mr De Kock was selected ahead of Mr Tsolekile as wicket-keeper in 2013 (Mr De Kock was only selected in 2014, and then only as a batter).

[121] There is no mention in this pleaded case of an obligation on Mr Smith to use his influence in favour of Mr Tsolekile’s inclusion, because Mr Tsolekile is Black. Nor is there any suggestion that it was Mr Smith’s failure to champion Mr Tsolekile’s case that constituted an influence “to exclude Tsolekile” because of his race.

[122] Yet CSA ultimately sought to argue both that Mr Smith had actively sought to exclude Mr Tsolekile, and that his failure to speak in favour of Mr Tsolekile’s selection constituted unfair discrimination.

[123] The first leg – discrimination by commission – was clearly pleaded. But should CSA be permitted to advance the second leg – discrimination by omission? In our view, it should not.

[124] "Holding parties to pleadings is not pedantry."[37] It is a vital element to ensure fairness in adversarial proceedings. This is true in constitutional disputes, including disputes about alleged unfair discrimination.

[125] The Constitutional Court recently re-affirmed the importance of pleadings in *Damons v City of Cape Town* – a case of unfair discrimination (in that case under the Employment Equity Act 55 of 1998). Mr Damons was a firefighter for the City of Cape Town. He had been permanently disabled by negligent conduct of a City official during a training exercise. He continued to be employed by the City and applied for promotion to the position of Senior Firefighter. But the policy governing the promotion of operational firefighters required Mr Damons to demonstrate a degree of physical fitness he could not meet because of his disability. Mr Damons accepted that it was that policy that applied to his application for promotion.

[126] His pleaded case was that the City's failure to waive the requirement of physical fitness in the policy for operational firefighters was unfair discrimination on the ground of disability. The difficulty with that was that physical fitness for operational firefighters is – as even Mr Damons accepted – an inherent requirement for the job. That is a complete defence to the claim of unfair discrimination.

[127] The difficulty arose because the minority judgment of Pillay AJ interpreted the pleadings to instead be a claim that the City had failed to create a policy for the promotion of non-operational firefighters. This shift, Majiedt J held for the

[37] *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 114 (Jafta J, dissenting), quoted with approval in *Damons v City of Cape Town* [2022] ZACC 13 at para 118.

majority, was impermissible. He emphasized that, “even in matters relating to the exercise and protection of constitutional rights” courts (and arbitrators) are bound by the pleadings. The pleadings “define the nature of [the parties’] dispute, and it is for the court to adjudicate upon those issues”.[38]

[128] That rule is not absolute. There may be instances where the parties or the court may venture beyond the pleadings. But they may do so only if “no prejudice will be caused to any party”.[39]

[129] The case based on omission is plainly a different case from the one Mr Smith was asked to meet. Whether there was a duty on Mr Smith to speak, whether he breached that duty, and whether his silence caused Mr Tsolekile not to be selected appear nowhere in the pleadings. The question is whether CSA’s reliance on an unpleaded omission caused prejudice to Mr Smith.

[130] In our view it did.

[131] For the reasons given earlier, it seems to us that an omission can only constitute discrimination if: (a) there was a duty to act; and either (b) the failure to act was based on a prohibited ground and caused the discrimination (direct discrimination); or (c) the failure to act was based on neutral grounds but had a disproportionate impact on members of a protected group (indirect discrimination). Mr Smith was not alerted to the need to lead evidence on issues that would have been relevant to a case based on omission.

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[38] Ibid at para 117, quoting *Fischer v Ramahlele* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) at para 13.
[39] Ibid.

[131.1] He could have led evidence about the relative roles of the captain, the selectors and the transformation manager. Was it the captain's role to speak up for transformation? Or was it assumed that his role was to speak primarily on strategy, team dynamics and so on?

[131.2] He could have led evidence on whether him speaking out would have made any difference. We know that Mr Zondi was unable to convince the selection panel to pick Mr Tsolekile. Would they have been swayed by Mr Smith?

[131.3] He could have led evidence that his reasons for keeping quiet did not have a disproportionate impact on Black players. Or he could have led evidence that, while he had been silent about Mr Tsolekile, he spoke up for the inclusion of other Black players. Recall, it is not enough for a claim of indirect racial discrimination to show that a neutral rule prejudiced one Black person – indirect discrimination requires a showing that it prejudiced Black people generally relative to White people.

[132] Mr Smith did not directly lead any of this evidence, because it was not relevant to the case CSA asked him to meet. It only became apparent that it was CSA's case during the cross-examination of Mr Smith, and crystallised only in written and oral argument.

[133] In addition to the question of fairness and prejudice is a consideration of our powers as arbitrators. It is clear from the arbitration agreement that we are empowered only to consider the matters raised to the extent that they fall within the terms of reference as defined in paragraph 4 of the arbitration agreement.

Those matters are further defined by the pleadings as envisaged in paragraph 7 of the arbitration agreement. The pre-arbitration minute signed by the parties on 20 February 2022 is to the same effect. Clause 7(2) of the Arbitration Agreement allowed the parties, at any stage, to seek to amend their pleadings, and for us to permit such an amendment – provided it remained within the confines of the four referred issues. They did not do so. We do not have inherent powers to decide matters that are not pleaded. As arbitrators we are bound by the pleadings.[40]

[134] Accordingly, in our view, it would not be fair to Mr Smith to permit CSA to advance the claim based on an omission.[41] There is therefore no reason to consider the merits of the case based on omission.[42]

[135] However, in case we are wrong on that score, we consider the merits of CSA's new claim.

[136] Third, it is worth stating what the case is not about:

[136.1] The case is not about whether Mr Tsolekile was treated unfairly in a general sense. It is impossible not to be sympathetic towards Mr

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[40] *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others* [2012] ZASCA 4 at para 18:

> *(c) Arbitrators, including arbitral appeal tribunals, are bound by the pleadings. The only difference between the two in this regard, as I see it, is that on appeal the pleadings also include notices of appeal and cross-appeal. Unlike a court, arbitrators therefore have no inherent power to determine issues or to grant relief outside the pleadings. Arbitrators who stray beyond the pleadings therefore exceed their powers as contemplated by s 33(1)(b).*

[41] We may have felt differently about holding CSA to its pleadings if – as is often the case in the Equality Court – the claimant was a poor, unrepresented accused pleading unfair discrimination against a large, well-resourced individual. But that is not the case here. CSA is a large institution, and was ably represented throughout. There is no reason why it could not have properly pleaded its case.

[42] *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) at para 61-62.

Tsolekile. He worked for years to get another chance in Proteas colours. He was given a national contract and was given some form of promise that he would play. He was on the brink of achieving his dream and making his way back into the Proteas team. For good reasons or bad, he was never given the chance to prove his worth. That a year after his national contract ended Mr Tsolekile became embroiled in a match-fixing scandal only exacerbates the tragedy of his story. But *Damons* reminds us that "a retreat to pity reasoning" is no substitute for careful analysis of the law.[43] The only question for us is whether Mr Smith (actively or passively) influenced Mr Tsolekile's exclusion because Mr Tsolekile is Black. It can be true both that Mr Tsolekile was treated unfairly, and that Mr Smith did not unfairly discriminate against him.

[136.2] The case is also not about whether Mr Tsolekile was systematically excluded by virtue of his race by CSA. The Ombudsman found that CSA was guilty of systematic racism in failing to select Mr Tsolekile. We are not asked to affirm or reject that finding. We are asked only about whether Mr Smith's conduct constituted unfair discrimination. While his conduct must be judged against the background of what occurred within the institution, he cannot be held individually liable for a systemic wrong unless it can be shown that he contributed to that wrong. In addition, CSA did not ask us to make a finding that it

[43] *Damons* at para 119.

was guilty of systemic racism and that Mr Smith was culpable only because he was a cog in that machine.

[137] With those limits in mind, we now consider whether CSA showed discrimination either by commission or omission.

DISCRIMINATION BY COMMISSION

[138] Did CSA establish its primary claim that Mr Smith actively influenced the selectors to exclude Mr Tsolekile because of his race? Put in the language of unfair discrimination, did CSA show direct racial discrimination by Mr Smith?

[139] Let's begin with two basic propositions – one legal, one factual.

[139.1] We have no doubt that if Mr Smith had in fact persuaded the selectors not to include Mr Tsolekile in the playing XI because Mr Tsolekile is Black, that would constitute direct racial discrimination. It would amount to the withholding of a benefit, opportunity or advantage. It would be based on race. It would be textbook direct discrimination. That would be the case whether Mr Smith told the selectors he was motivated by race or not. The question would be whether race was the reason Mr Smith acted.

[139.2] Mr Smith influenced the decisions of the selectors. That is plain from both the selection policy which required the selectors to consult Mr Smith, and the evidence of Mr Hudson, Mr Zondi and Mr Smith himself. While there was a debate about the degree of Mr Smith's influence, all accepted he was consulted, and nobody suggested the

selectors ignored his input. That includes influencing them not to select Mr Tsolekile. Mr Smith's evidence was that he supported the decision of the selectors to play an extra batter or allrounder instead of a specialist wicket-keeper. How much that influenced the selectors, we do not know. But to the extent that Mr Smith had influence, he used it to favour a strategy which left no room for Mr Tsolekile.

[140] CSA's case on direct discrimination boils down to whether Mr Smith's support for the selector's proposal was based on race, or based on what was termed in the arbitration "cricketing reasons". CSA argued that the cricketing reasons were "pre-textual". That means that the reasons given were not the true reasons. The true reason, CSA contended, was that Mr Tsolekile was Black.

[141] There was, ultimately, no direct evidence of this. CSA abandoned the reliance on the supposed statements by Mr Hudson and Mr Zondi that Mr Smith had demanded Mr Tsolekile's exclusion. Nor did CSA rely on the radio reports about Mr Smith's threatened retirement if Mr Tsolekile was selected.

[142] Instead, CSA's case was built on bricks made of inference. The argument went like this: At the time Mr Boucher was injured, Mr Tsolekile was the best wicket-keeper in the country. He should have been selected based purely on his cricketing ability. In addition, there were no Black African players in the Proteas team. Therefore, the only possible reason that he was not selected was because he was Black, and Mr De Villiers was White. The argument that Mr Tsolekile was not selected for "cricketing reasons" was, CSA urged us to find, a ruse.

[143] There are two problems with this argument – it is inconsistent with the facts, and it fails to show causation.

[144] First, it is debatable whether Mr Tsolekile was a better wicket-keeper than Mr De Villiers. He referred to statistics establishing that he was, but did not produce any statistics. Mr Tsolekile clearly had more domestic wicketkeeping experience, while Mr De Villiers had more international experience – albeit primarily not in test matches. There was no suggestion by CSA that Mr De Villiers was not a sufficiently competent wicket-keeper – merely that Mr Tsolekile was better.

[145] In the end, it doesn't matter who was the better wicket-keeper because it was undebated that Mr De Villiers was the better batter. Indeed, Mr De Villiers earned his place in the Proteas as a batter alone. If he could keep wicket as well, the Proteas could field an additional batter or allrounder.

[146] There was, therefore, a non-race based reason – a cricketing reason – not to select Mr Tsolekile. It allowed the selectors two for the price of one. Because Mr de Villiers earned his spot in the team purely as a batter, the selectors did not need to select a specialist wicket-keeper. They could instead select another batter. That gave the Proteas an advantage over other teams who selected a specialist wicket-keeper who was not as proficient as a specialist batter.

[147] CSA never questioned that this was good cricketing strategy. Mr Tsolekile accepted that it was a sound strategy. CSA's case, therefore, must be that Mr Smith's racist motives conveniently aligned with a reasonable cricket strategy – both of which required Mr Tsolekile's exclusion. But in the absence of any positive evidence of a racist motive, we are left to accept that Mr Smith more

likely wanted his team to win, and supported a strategy he thought would help them do that.

[148] Whether that decision complied with CSA's transformation guidelines in the Selection Policy is irrelevant for the claim of active racial discrimination. It was possible for Mr Smith to act contrary to those transformation guidelines, and still act for strategic rather than racist reasons.

[149] In short, it is not possible to draw the inference from the facts that the only possible reason Mr Tsolekile was not selected was his race. Indeed, it seems more likely that the reason he was not selected is the reason that Mr Smith and Mr Hudson gave – the ability to select an additional specialist player.

[150] Second, if the claim is one of unfair discrimination (not merely the fact that Mr Smith influenced the selectors), then CSA was required to show that Mr Smith's conduct caused Mr Tsolekile not to be selected. CSA sought to emphasise the influence Mr Smith had, not just as a captain, but as one with a long and successful career. The implication is that, had Mr Smith not agreed for racist reasons with the selectors to exclude Mr Tsolekile, he would have been selected.

[151] This submission does not hold up. CSA's case is that the supposed "cricketing reason" was a "pre-textual" excuse to exclude Mr Tsolekile because he was Black. But CSA accepted that the proposal to exclude Mr Tsolekile came from the selectors, not from Mr Smith. Mr Smith did not plant the idea in their heads – he merely agreed with it. His positive conduct of agreeing with their proposal did not change the course the selectors were already on.

[152] CSA also chose not to call any of the selectors to ask them the obvious question – If Mr Smith had not supported your strategy, would you have selected Mr Tsolekile? Instead it accepted their statements that Mr Smith did not influence the exclusion of Mr Tsolekile because of his race. We are, therefore, without evidence of whether Mr Smith's acquiescence in fact caused Mr Tsolekile's exclusion. That is why CSA was forced to argue that it was Mr Smith's inaction that caused Mr Tsolekile's exclusion.

[153] We conclude, therefore, that CSA has not established that Mr Smith directly influenced the selectors not to select Mr Tsolekile because of his race. That leads to the next strand in CSA's argument – discrimination by omission.

DISCRIMINATION BY OMISSION

[154] We set out our views below on the case based on discrimination by omission. This would be relevant only if we had considered that we have the power to determine such a case and there would be no prejudice to Mr Smith in doing so. Our views are expressed relatively briefly given our conclusion above regarding our powers and likely prejudice to Mr Smith.

[155] The argument CSA pursued vigorously in oral argument was that Mr Smith owed a duty to speak in favour of Mr Tsolekile's selection. This duty arose because: Mr Tsolekile was the best wicket-keeper in the country, he was a Black African, there were no Black Africans in the team at the time, and CSA and Mr Smith were under a duty to promote the racial transformation of the team. Even if Mr Smith did not actively seek to exclude Mr Tsolekile because of his race, CSA argued that his failure to advocate for Mr Tsolekile's inclusion

constituted unfair discrimination on the basis of race. As Mr Ngcukaitobi put it, if you are "in the room" when racial discrimination occurs, your silence itself constitutes discrimination.

[156] Again, it is helpful to set out some basic propositions that flow from what we have discussed above:

[156.1] Discrimination can occur by omission. We have outlined the law on that issue earlier.

[156.2] This is not an affirmative action claim. Mr Ngcukaitobi expressly confirmed this. The argument was not that by failing to speak in support of Mr Tsolekile, Mr Smith denied him a benefit he was owed because of his race by virtue of CSA's transformation policy, or any other law. Rather, CSA relied on its transformation obligations to inform an ordinary unfair discrimination claim.

[157] The key questions are whether Mr Smith owed a duty to speak in favour of Mr Tsolekile and, if so, whether the failure to do so caused discrimination against Mr Tsolekile.

[158] The duty that CSA asserts is not one to speak out against active racial discrimination, but one to speak up for affirmative action. We have already concluded that Mr Smith was not actively motivated by race. There is no evidence that the selectors "in the room" told Mr Smith they wished to exclude Mr Tsolekile because he was Black and Mr Smith said nothing. Rather, the case is that Mr Smith had a duty to speak up for Mr Tsolekile because he had a duty to promote transformation.

[159] We prefer not to express an opinion on whether Mr Smith had a duty to speak. Even if Mr Smith had such a duty, CSA was required to show that his silence caused Mr Tsolekile's exclusion. Discrimination requires some causal connection between an omission and the denial of a benefit or the imposition of a burden. For the reasons given earlier, SA had to prove at least factual causation. It failed to do so.

[160] As we set out above, to show causation, we are required to replace the omission with conduct that would have fulfilled the duty. Here, we need to consider what would have happened if Mr Smith had actively spoken for Mr Tsolekile's inclusion because of his race.

[161] CSA failed to lead evidence that established causation. As this is about discrimination, not fairness, the onus was on CSA to do so. Presumably because of the way the case was pleaded, and then developed, this issue was never put to Mr Smith. And CSA called none of the selectors to ask them if they would have changed their position if Mr Smith had spoken in favour of Mr Tsolekile because of his race. As Mr Zondi's statement shows, there is no guarantee that even if a selector spoke in favour of Mr Tsolekile, it would have made any difference.

[162] We cannot conclude, on the evidence before us, that if Mr Smith had argued for Mr Tsolekile's inclusion, he would have been selected. We simply do not know. Accordingly, even if Mr Smith had a duty to speak, we cannot find that his failure to do so constituted unfair discrimination.

CONCLUSION ON MR TSOLEKILE

[163] In summary, we hold as follows concerning Question 2:

[163.1] Mr Smith did not actively seek to exclude Mr Tsolekile from selection because of his race.

[163.2] Mr Smith did not speak in support of Mr Tsolekile's selection. But:

[163.2.1] This was not a case CSA pleaded, and it should not be permitted to advance it. We also do not have powers to determine it because as arbitrators we are bound by the pleadings read with the arbitration agreement.

[163.2.2] If we had the power to decide the matter of discrimination by omission, we would have found against CSA because it failed to establish the element of causation.

[164] Accordingly, we make the following award: In the period 2012 to 2014 the Respondent influenced decisions of the selectors of the national Proteas cricket team not to select Mr Thami Tsolekile as a wicket-keeper but CSA did not prove that he did so by reason of Mr Tsolekile's race. Therefore, Mr Smith's actions did not constitute unfair discrimination against Mr Tsolekile.

III THE BLACK LEADERSHIP ISSUE

[165] The second question we address is framed in these terms in the Arbitration Agreement:

whether the Respondent's proposal that he report to the Board of CSA and not the CEO during negotiations in November or December 2019, and later agreeing to report to the CEO, evinces racial bias against black leadership at CSA

[166] In a nutshell, the allegation is that Mr Smith was not willing to report to Mr Thabang Moroe (who is Black) when he was the CEO of CSA. But he changed his tune when Mr Moroe was suspended and Dr Jacques Faull (who is White) was appointed as Acting CEO.

[167] CSA did not advance any evidence or argument on this issue. It asked us to make a finding, but did not indicate in any way what it thought the correct finding should be. Mr Smith led detailed evidence on the issue and urged us strongly to find that his conduct did not "evince racial bias".

[168] To assess this argument, we again need to look at the facts and then assess if CSA has made its case.

THE FACTS LEADING TO MR SMITH'S APPOINTMENT

[169] Mr Moroe first approached Mr Smith to be the DoC on 10 July 2019 when he met him in Southampton during the Cricket World Cup. Mr Moroe told Mr Smith that he wanted to engage him about the new role of DoC that CSA was developing.

[170] Mr Smith and Mr Moroe met again on 19 August 2019 in Cape Town where Mr Moroe again sought to gauge Mr Smith's interest in the role. Mr Moroe described the envisaged role in broad outline to Mr Smith.

[171] On 28 August 2019, Mr Smith flew to Johannesburg to meet with Mr Moroe to again discuss the DoC role. To Mr Smith's surprise, they met at Dr Ali Bacher's house. Dr Bacher is a former CEO of CSA, but at the time was not formally involved in the organisation. Dr Bacher and Mr Moroe sought to persuade Mr Smith to accept the DoC role. Mr Smith said he would continue to engage, but he was about to leave to commentate on South Africa's test series in India. They agreed to "formalize things and progress discussions" while Mr Smith was in India.

[172] While commentating in India, Mr Smith exchanged messages and calls from Mr Moroe about the position. Mr Smith, who was considering other job opportunities, emphasized to Mr Moroe that he needed a more concrete offer – a clear description of the role and a draft contract for him to consider. Mr Moroe promised to provide this, but did not deliver. Mr Smith became frustrated by the lack of progress.

[173] On 14 October 2019, Mr Moroe confirmed to Mr Smith that he had "submitted a paper to [the Remuneration Committee]" about Mr Smith's salary and that he would send a draft contract when the round robin process was completed. On 17 October 2019 Mr Smith asked Mr Moroe if there had been any progress as he was "holding off other opportunities and will need to make a decision soon."

[174] The next day, Mr Moroe informed Mr Smith that the "HR chairperson wants to go through formalities … but the whole board is supportive of my choice being you!" Mr Smith responded with some frustration: "I have not received any information as yet as regards the proposed package and have not seen contract details. It makes it very difficult to properly assess the proposal at this stage."

Mr Moroe, seeking to assuage Mr Smith's concerns, responded: "I will send it to you as it is tailored for you and nobody else." Still, Mr Smith did not receive a draft contract.

[175] On 20 October 2019, while Mr Smith was still in India, Mr Moroe asked him to send his CV to CSA. Mr Smith responded on 22 October 2019 saying that he would only be able to do so when he arrived home. He also noted that the DoC job had been advertised. Mr Moroe had not informed him that the job would be advertised. Mr Moroe explained in a WhatsApp message that "I have to advertise so I don't bring negative perception to the company". Mr Smith eventually sent his CV and further documents that CSA needed to complete his application.

[176] Mr Smith was invited to attend an interview for the position on 7 November 2019. The day before, he was told he would have to make a presentation on a range of strategic issues that the DoC would need to address. He attended the interview but was unable to make the presentation at such short notice. He was unaware that other people had also been interviewed. In fact several others had been interviewed.

[177] On 9 November 2019, Mr Moroe called Mr Smith to tell him he had got the job, and that he needed to go to Johannesburg to discuss the position with him and Mr Chris Nenzani – the Chairperson of CSA's Board. Mr Nenzani is Black. At this point Mr Smith still did not know what the salary was, or what his job description would be. He had received only an organogram that showed where the DoC role would fit in CSA's structure. The organogram reflected that the DoC would report to the CEO.

[178] Mr Smith wrote Mr Moroe an email on 12 November 2019 with evident exasperation. He told Mr Moroe that “we really need to get into agreement phase, it’s crucial we deal with terms and conditions and mandates before anything else”. Mr Moroe responded the same day saying that Mr Smith is “the preferred candidate” but that he wanted to meet with him and Mr Nenzani to discuss what would be expected of the DoC.

[179] Two days later, on 14 November 2019, Mr Smith informed Mr Moroe that he was “no longer available for the director of cricket role”. Mr Smith explained that “on every occasion when trying to deal with the agreement, the package, my roles and responsibilities and mandates, the process had fallen short and/or stalled”. The scope of the DoC role, Mr Smith complained, “has not been clear”. He pointed to the fact that CSA had advertised for the position of convenor of selectors, whereas he had been told that appointment would be the prerogative of the DoC. Ultimately, Mr Smith said he did not “feel that the timing is right for me … to make the difference that is currently needed in SA cricket”, and he was not confident that he would “have the suitable authority, operational and political support to properly fulfill the role.”

[180] In his testimony, Mr Smith stated that “the false promises had created a lot of doubt and uncertainty in my mind.” He referred to other public challenges of CSA regarding the treatment of critical journalists, sponsors withdrawing, board members resigning, and CSA’s financial crisis. What he was “grappling” with was: “can you be successful in this role”. Mr Smith had come to a point where, despite his desire to contribute to South African cricket, he no longer felt he could be successful in the DoC role.

[181] Mr Smith released a public statement the same day stating that he was withdrawing his interest for the role. In his words at the time, he had “not developed the necessary confidence that that I would be given the level of freedom and support to initiate the required changes.”

[182] Despite pulling out at the eleventh hour, Mr Smith testified that this did not affect his relationship with Mr Moroe.

[183] Mr Smith’s withdrawal prompted a phone call from Mr Nenzani the same day to try to convince Mr Smith to “get back in, to consider coming back to taking the job.” They had a discussion about the job and it appears that Mr Smith indicated he was willing to reconsider his decision to withdraw.

[184] Mr Smith and Mr Nenzani spoke again the next day, 15 November 2019. (This is also an important discussion for understanding the appointment of Mr Boucher we consider next). Mr Smith’s chronology (attached to his affidavit before the Ombudsman) stated “I did not want to report to the then CEO but to the board”. In his testimony, Mr Smith said this statement was “not entirely accurate”. He said that the real issue was that he “wanted access to the board” because “both the DoC and the CEO need to work constructively together”. For Mr Smith, that meant that the DoC had to have direct access to the Board, and not only through the “filter” of the CEO. It was not about Mr Moroe himself, but the nature of the DoC role.

[185] The meeting between Mr Smith and Mr Nenzani finished with them agreeing to meet a week later in Cape Town. They met at the Cullinan Hotel in Cape Town on 22 November 2019, together with Mr Moroe and Prof Shirley Zinn, an independent board member. The meeting was mostly an opportunity for CSA

to convince Mr Smith that he was “the right person for the job”, and to explain to him how the DoC role would operate within the CSA structure. They explained that the DoC would be an invitee to board meetings. That satisfied Mr Smith.

[186] Mr Smith agreed to restart the process of discussing terms, but had not yet accepted the role. He liaised with Mr Moroe who, on 26 November 2019, sent him a draft contract. Mr Smith and his advisors reviewed the contract.

[187] On 2 December 2019, Mr Moroe sent a long WhatsApp message to Mr Smith assuring him that “you are the man for this job” and assuring him that “nobody will interfere with you delivering your job, let alone me.” He ended: “This position is for you, Chief.” He sent another message later the same day asking for Mr Smith’s comments on the contract. Mr Nenzani also sent a message to Mr Smith on 3 December 2019, asking him to sign the contract. Mr Smith said he was still going through it.

[188] On 6 December 2019, before the contract could be finalized, Mr Moroe was suspended as CEO. The suspension had nothing to do with Mr Smith, who learnt about it in the media. The next day, CSA appointed Dr Faull as its Acting CEO.

[189] At the time Dr Faull was appointed, the Proteas had no coaching staff, and no selectors. The English men’s cricket team was about to arrive in the country for a tour that would begin with the Boxing Day test on 26 December 2019 – less than three weeks away.

[190] On 8 December 2019, Dr Faull contacted Mr Smith to talk about a range of issues in the contract. The next day, Mr Smith in fact started his work as DoC, although no contract had yet been signed. An amended contract was sent to Dr Faull on 10 December 2019.

[191] The next day, Mr Smith met with Dr Faull in Paarl. He first signed a fixed term employment agreement until the end of March 2020, that was backdated to 9 December 2019.

[192] Mr Smith also met with Mr Nkwe, Mr Boucher and Mr Francois Du Plessis (the Proteas' captain) in Paarl. He spoke with all those present and appointed the coaching team for the upcoming England series. That meeting is central to the dispute concerning Mr Nkwe and Mr Boucher, and we return to it below.

[193] The final relevant fact for the claim of bias against Black leadership in CSA concerns a proposal Mr Smith made in negotiating his relationship with CSA after his fixed employment contract ended. Mr Smith's short term employment would end at the end of March 2020. In early 2020 Mr Smith and CSA were negotiating the extension of their relationship in the form of an independent contractor agreement. Mr Smith proposed a clause that read: "if the Contractor feels that he is unable to work with any permanently appointed Chief Executive Officer during the Term, he shall be entitled to terminate this Agreement on 30 days' written notice to CSA." Dr Faull was still the Acting CEO at the time. CSA objected to the clause, and Mr Smith signed the Independent Contractor Agreement without it.

DID MR SMITH EVINCE RACIAL BIAS AGAINST BLACK LEADERSHIP AT CSA?

[194] The question posed in the Arbitration Agreement is: "whether the Respondent's proposal that he report to the Board of CSA and not the CEO during negotiations in November or December 2019, and later agreeing to report to the CEO, evinces racial bias against black leadership at CSA".

[195] In light of the chain of events set out above, the inevitable answer is No. It is unsurprising that CSA chose not to actively pursue this issue as the facts cannot sustain a claim of racial bias by Mr Smith. There are five core reasons.

[196] First, CSA presented no positive evidence that Mr Smith's actions were motivated by racial bias against Mr Moroe or other Black leadership at CSA. It did not lead evidence of Mr Moroe, Mr Nenzani, Mr Moseki or any other Black leader at CSA that Mr Smith acted in a racist manner or did not respect them because of their race.

[197] CSA's case was – again – built entirely on inference. Mr Smith refused to report to the CEO when the CEO was Black, but was willing to report to the CEO when the CEO was White. The only explanation for this conduct, CSA contended, was racial bias. The same warnings about inferences set out earlier apply here – if the inference is inconsistent with the facts, it cannot be drawn.

[198] Second, the claim is that Mr Smith would not report to Mr Moroe because he was Black, and insisted on reporting to CSA's Board. But the Board was led by a Black African – Mr Nenzani. Seven of the nine members of the Board were Black. If Mr Smith was motivated by racism, why would he be willing to report to a predominantly Black Board, but not a Black CEO?

[199] The obvious answer was that the race of the CEO was not the issue. Mr Smith continued to report to Black leadership at CSA – to Justice Yacoob and Mr Lawson Naidoo who replaced Mr Nenzani as chair of the Board, and to Mr Moseki, who replaced Dr Faull as Acting CEO. There was no suggestion that his relationship with any of those leaders was affected by racial bias. Mr Smith who testified that his relationships with Black leadership at CSA was "very good". Mr Moseki testified that he had "worked will with all of" the Black leaders of CSA and that he had "not seen or experienced any racial bias" by Mr Smith towards him "or other members of Black CSA management."

[200] Third, the timing does not support the inference CSA sought to draw. Mr Smith initially withdrew from the process on 14 November 2019. But after coaxing by Mr Nenzani, he agreed to return to negotiations. The question of how the DoC would report was largely resolved at the meeting of 22 November 2019, while Mr Moroe was still the CEO.

[201] Mr Smith engaged with Mr Moroe about the terms of the contract from 22 November 2019 until Mr Moroe was suspended. Mr Smith did not know that Mr Moroe would be suspended before he assumed the DoC position. Nor did he know that a white person would replace Mr Moroe as CEO.

[202] The basic premise for CSA's case – that Mr Smith changed his mind on reporting to the CEO only once Dr Faull replaced Mr Moroe – was simply not borne out by the evidence.

[203] Fourth, even if there was evidence that Mr Smith's willingness to report to the CEO changed when Mr Moroe was suspended and Dr Faull was appointed, it does not follow that the only plausible reason is racial bias. Mr Smith's reasons

for wanting to report directly to the Board were reasonable. There were two interrelated reasons:

[203.1] For Mr Smith it was not about formal reporting lines, but about being able to communicate his views on cricketing issues directly to the Board, instead of through the CEO. He was worried that he would be unable to do his job effectively if there was a filter.

[203.2] He had been frustrated by the process. This was not because Mr Moroe was Black, but because the process of headhunting him for the role of DoC had been poorly handled by Mr Moroe. However, Mr Smith later accepted that he would report to Mr Moroe despite his frustrations – he accepted as much at the meeting of 22 November 2019.

[204] It is true that there is some inconsistency between Mr Smith's statement in his chronology, and his evidence. But CSA never challenged Mr Smith on this part of his evidence. It seems most likely that Mr Smith was motivated by both concerns, and that they were assuaged by the intervention of Mr Nenzani and the guarantee he would be invited to Board meetings.

[205] Fifth, Mr Smith's proposal that he be allowed to terminate his Independent Contractor Agreement if the CEO changed was not explored in evidence. Mr Smith testified that his discussions with CSA on the contract were "pretty much non-existent" and that there were conversations "in the background" between CSA and his attorney, Mr David Becker. It is unclear if Mr Smith himself proposed the clause, or why.

[206] But even if Mr Smith proposed the clause it is not on its own evidence of a racial motive. If CSA had already established racial bias by Mr Smith, we could see how the proposed termination clause would fit into that pattern. But the opposite is true – the rest of the evidence does not establish that Mr Smith was racially motivated. The proposal is equally consistent with a concern that he needed to be able to work closely with the CEO – whatever their race – to be effective. Ultimately, Mr Smith abandoned the proposal. The proposal alone – without any other evidence to support racial bias – is not enough to find that Mr Smith was racially biased against Black leadership.

[207] Accordingly, we find that CSA did not prove that Mr Smith's proposal that he report to the Board of CSA and not the CEO during negotiations in November or December 2019, and later agreeing to report to the CEO, evinced racial bias against black leadership at CSA.

IV THE BOUCHER/NKWE ISSUE

[208] The question we are asked here is "whether the Respondent's conduct with regard to the appointment of Mark Boucher as Proteas Head Coach, amounted to unfair racial discrimination with respect to Enoch Nkwe".

[209] Our answer is that CSA failed to prove such a case. While there were certainly flaws in the way that Mr Boucher was appointed, they do not establish unfair racial discrimination by Mr Smith against Mr Nkwe.

[210] To explain why, we address the following topics:

[210.1] How and why Mr Smith appointed Mr Boucher;

[210.2] Whether CSA can depart from their pleaded case;

[210.3] Whether Mr Smith discriminated directly against Mr Nkwe; and

[210.4] Whether Mr Smith discriminated indirectly against Mr Nkwe.

THE FACTUAL BACKGROUND

[211] To assess whether Mr Smith unfairly discriminated against Mr Nkwe when he appointed Mr Boucher as head coach, we need to answer the following questions:

[211.1] What were the respective qualifications of Mr Boucher and Mr Nkwe?

[211.2] How and why did Mr Smith appoint Mr Boucher?

[212] The evidence on these issues came from the testimony of Mr Smith and Mr Mathe (CSA's Manager in its Coach Education Department), and from the statements of Dr Faull and Mr Moseki.

The Qualifications

[213] Both Mr Nkwe and Mr Boucher had strong qualifications for the job.

[214] Mr Nkwe had played first class cricket for 12 years, before becoming a coach. In 2016, Mr Nkwe obtained a level 4 coaching certificate – the highest available certificate. He was the coach of one of South Africa's professional teams – the Highveld Lions. He won the coach of the year in 2019 and had won multiple trophies in the 2018/19 season. He had also been the assistant coach of the

Netherlands – an associate member of the International Cricket Council. Most recently, Mr Nkwe had served as the interim coach for the Proteas on their ill-fated tour to India in 2019. He then returned to his position at the Lions.

[215] Mr Boucher had similarly strong qualifications. He had played international cricket for 12 years until 2012 when injury ended his career. He did not have a formal coaching qualification but, because of his international playing experience, he qualified for admission to CSA's level 3 programme. Since 2016, he had been the coach of the Titans – another of South Africa's professional teams. He had won the coach of the year award for the 2017/18 season. He had also won several domestic trophies as head coach.

[216] Both were able coaches. According to Dr Faull, there was "no reason to doubt [Mr Boucher's] ability to coach at international level." And the same could surely be said about Mr Nkwe who had just been given the reins of the Proteas, albeit temporarily.

[217] There were two primary differences between the two. Mr Boucher had over a decade of international playing experience, while Mr Nkwe had limited international experience. But Mr Nkwe had a level 4 coaching certificate, whereas Mr Boucher had no formal coaching certificate.

[218] We consider the relevance of international playing experience in the next section, because that is the reason Mr Smith preferred Mr Boucher. But it is important to consider the evidence on the role of coaching certificates.

[219] Most of the curriculum for a level 4 certificate concerns, leadership and management. As Mr Mathe put it 80% of the course was about: "how do you

put an operational excellence structure, how you manage performance, manage performance of your players and as well as of your coaching staff and how do you apply continuous improvement principles". 20% of the course is about coaching the technical skills of batting, bowling and fielding.

[220] Mr Mathe explained that if you want to be coach in professional structures, you need to have a level 4 certificate. However, he also accepted that CSA did not have a "consistent practice" of requiring that the Proteas coach have a level 4 certificate. Mr Boucher had been appointed as a professional coach at the Titans without any certificate (although CSA had expressed some concern about this). Mr Kirsten had been appointed as the head coach of the Proteas with only a level 3 certificate. Mr Mathe later said that level 4 was recommended but that CSA does not "have a set policy … to say that from a coaching perspective there needs to be that minimum requirement."

[221] CSA relied on two advertisements – one in 2017 for the position of Proteas' head coach, and one in 2019 for the position of head coach of the SA A team – to support the importance of a level 4 coaching certificate. Both listed the following as "essential requirements pertaining to the candidate's skills, qualifications and experience":

> *(a) A level 4 Cricket Coaching Certificate or equivalent international accredited qualification would be advantageous;*
> *(b) At least 10 years' cricket coaching experience with 5 years of those being coaching at the highest domestic level in an ICC Full Member country;*
> *(c) Intimate knowledge of international cricket;*
> *(d) Experience in coaching at international level will be an advantage;*

(e) Experience in having played first class cricket will be an advantage; and

(f) Good mentoring and motivational skills.

[222] It is unclear which of these were truly "essential requirements", and which were merely advantageous factors. As there was no advert for the 2019 Proteas' head coach, it is not necessary to parse the advert too closely. The parties appeared to fairly accept that – in practice – both a level 4 certificate and international playing experience were relevant factors, but neither were absolute minimum requirements.

[223] In sum, Mr Boucher and Mr Nkwe were both highly qualified coaches. They both had excellent recent domestic coaching records. Neither ticked all the ordinary boxes, but they had different strengths. Mr Nkwe had the formal training, Mr Boucher had the international experience.

The Events up to 15 November 2019

[224] Mr Smith's decision took place against the background of CSA's attempts to headhunt him for the DoC position narrated above. So, to understand Mr Smith's decision, we need to go back to July 2019. The Proteas had a disastrous World Cup campaign, failing to make it into the knockout rounds. The head coach at the time – Mr Otis Gibson – resigned after the World Cup. This was also when Mr Moroe first approached Mr Smith about taking on the DoC role.

[225] The Proteas' next assignment was a tour to India. Mr Smith was commentating on that tour, but was already starting to think about what he would do if he

ultimately got the job as DoC. CSA had not yet appointed a new head coach to replace Mr Gibson. Mr Enoch Nkwe was seconded from his position as head coach of the Gauteng Lions as interim head coach for the India series. One of the things Mr Smith was thinking about in India as he contemplated the DoC role was who he thought should coach the Proteas.

[226] The tour was another disaster for the Proteas who lost all three tests. Mr Smith said that the team was “rudderless”, that their “performance was way off par”, and that there was “quite a lot of on field in-fighting between the players”. On Mr Smith’s evidence, these observations regarding the team informed his later assessment of what was required of a new head coach.

[227] Although formally a commentator, Mr Smith testified that he was “intricately watching the Indian Tour, not from just a media perspective but I was analysing as a coach, as a DoC to see kind of you know looking at the team environment, the players, how they were operating you know”. While he was assessing the team environment, Mr Smith was also considering who he thought would be the right person to take the Proteas team forward as head coach. As he put it – “so putting my cricket hat on, you start to assess.”

[228] There were two things he considered – the needs of the team and the available coaches. First, Mr Smith “spent a lot of time analysing the team environment, that was probably the most extensive thing that I did, I looked at the player group, I looked at the leadership of the team, I looked at the experience of the team, I considered the strengths and weaknesses of the team”. As he explained

> *for me the key was to understand the environment, seeing the group of players, where they were, their experience, kind of what I thought they*

needed from a personality, from a, the challenges that we are going to face over the next period. So you try and bring this whole picture together I mean if the team was very experienced and had a captain that was going to be around for the next 10 years, you know maybe the decision would have been different.

[229] Against that background, Mr Smith "then went and considered who were in professional positions that had knowledge of these players, who had either coached against them, coached with them, I looked at some of the coaching, I briefly looked at some of the coaching records". This was not in any way a formal process. He did not gather CVs, or prepare spreadsheets of respective experience of possible applicants. It seems to have all occurred in Mr Smith's head.

[230] This "process" had certain obvious shortcomings:

[230.1] Mr Smith did not provide a comprehensive list of who he considered. He testified that he "gave consideration to all coaches in South Africa" and "considered most of the professional coachers around". He recognised that "getting an international coach was going to be difficult". Mr Smith stated that he "definitely did" consider Mr Nkwe. But it is unclear whether he ever truly considered him for the head coach position, or only for an assistant coach position. It is not convincing on the evidence that he definitely considered Mr Nkwe for the head coach position. Immediately after saying he "definitely" considered Mr Nkwe, he said: "I didn't only consider the coach, I considered the entire management team." It is also not clear what

other coaches – Black or White – Mr Smith considered as potential candidates.

[230.2] CSA argued that Mr Smith's version contradicted the claim in his statement of defence that he did not perform a "comparative evaluation" between Mr Boucher and Mr Nkwe. There is substance to this complaint. Mr Smith admitted he never followed a formal process to compare qualifications. He followed an informal, internal process. The problem is that the process is entirely internal to his head. There are no external indications at all of what that internal process entailed. While it is certain there was no ordinary "comparative evaluation", it is also unclear whether Mr Smith ever directly compared Mr Nkwe to Mr Boucher.

[230.3] While he had a rough sense of what people's respective experience were, he did not have a detailed, accurate information. For example, he admitted that he was not certain at the time exactly how long Mr Nkwe had played domestic cricket, or how long he had been a professional coach.

[230.4] It did not afford any of the people floating about in Mr Smith's head as possible coaches the opportunity to make their case for selection, to correct any misperceptions, or point to information Mr Smith did not know.

[231] Of course, at this stage Mr Smith was not the DoC. He was not an employee of CSA at all. He was merely a potential candidate for a new role that might have the power to appoint the head coach at some time in the future. As he put it,

approaching possible candidates about the job "would have been a mistake, I wasn't formally appointed yet. How can I do that, why would they have discussed their CV's with me. I would have then told the public that I was in the running of the DOC role which I wasn't. I mean, I knew I was but I could not publicly state that." He testified that he did not talk to any possible candidate – and particularly not to either Mr Nkwe or Mr Boucher – about their possible appointment until 11 December 2019.

The Events After 15 November 2019

[232] It is not entirely clear how long Mr Smith's internal monologue went on. But by 15 November 2019 when he spoke to Mr Nenzani about again becoming available for the DoC role, he had more or less made up his mind – Mr Boucher was his man. Mr Smith testified that Mr Nenzani "was acutely aware of my idea that I wanted [Mr Boucher] to take over as head coach." They discussed it at that meeting, and Mr Nenzani did not object to Mr Smith's preference for Mr Boucher. They agreed that, if he accepted the position, Mr Smith would have the authority to appoint the coaching team.

[233] Despite this, Mr Smith said he was not "100% clear" about whether he would appoint Mr Boucher. Not much seems to turn on whether Mr Smith was 100% clear, or 99% clear. He clearly communicated to Mr Nenzani that, if he took the DoC job, he planned to appoint Mr Boucher as the head coach. Mr Smith did not alter his view after 15 November 2019. Nor was there any further process between that date and 11 December 2019 when Mr Boucher and Mr Nkwe were

appointed. Whether Mr Smith had completely or mostly made up his mind on 15 November 2019 does not alter the unfair discrimination analysis.

[234] But why did Mr Smith choose Mr Boucher? His given reasoning is summarised in this passage:

> *a head coach of a national team is an extremely high pressurised position, you are at the cold face of the world media, the world crowds, people don't care about CSA' equity proposition, they care about results and I felt that CSA and the team at the time needed someone that had extensive, extensive experience in dealing with conditions, with the pressures that come with the international game. I knew that this team was going to lose extensively upfront, it was going to take time to build it and I felt that I need a character that could handle that.*

[235] There is a little to unpack here:

[235.1] Mr Smith's clear focus was on a coach that would make the team successful. He explained that about 80% of CSA's income is generated by the Proteas. That 80% is made up primarily of broadcast deals, and then from sponsorship. Mr Smith stated that the two things that were key in generating this revenue were good governance, and a successful team. The more successful the team was, the more money CSA could generate. That money would go not only to the Proteas, but would "fund the entire process from grassroots up to national men and women."

[235.2] The team was not successful in 2019. It was a team in transition that – in his view – required a particular type of coach to bring them successfully through that transition and back to winning ways.

[235.3] In choosing between Mr Boucher and Mr Nkwe, he thought that the most important characteristic for being able to lead that team at that time was international experience. In his view, that experience would enable the coach to handle the pressure, and to build the team. He made that decision based on his "extensive cricket knowledge".

[235.4] There is no evidence of a choice between Mr Boucher and Mr Nkwe as head coach. The evidence suggests that he always preferred Mr Nkwe for the position of assistant coach and Mr Boucher for head coach.

[236] CSA did not, at the time, question the wisdom of Mr Smith's view based on his admittedly extensive international experience. Far from it. Mr Nenzani and Mr Moroe, and then Dr Faull, were all aware before Mr Smith was appointed as DoC that he wanted to appoint Mr Boucher as head coach. They were presumably also aware of the basic reasons – although we did not receive direct evidence of this. They appointed him knowing he wanted to appoint Mr Boucher as head coach and Mr Nkwe as assistant coach. Nobody at CSA resisted his choice – on either cricketing or transformation grounds – or asked him to reconsider his preference.

[237] Indeed, Mr Moseki's evidence was that there was not "much debate within CSA when Mr Boucher was proposed". It was approved by the Board, the HR Manager, himself as the CFO, the Company Secretary and Dr Faull. "I do not recall", he tells us, "any of these persons suggesting that at the time such appointment was racially discriminatory or unfair to Mr Enoch Nkwe."

[238] That leads to the actual appointments on 11 December 2019. Until then, Mr Smith was not the DoC. He signed his contract on that day. He then immediately met with Mr Boucher and Mr Nkwe. He explained to both of them that he intended to appoint Mr Boucher as head coach and Mr Nkwe as assistant coach. He did not know, at that point, whether they would accept.

[239] Mr Smith told Mr Nkwe that the reason he had decided to offer him the assistant coach position and to offer Mr Boucher the job as head coach was that Mr Nkwe lacked international experience, and that the assistant coach position would allow him to gain that experience. He said that the plan was that Mr Boucher would be head coach until the 2023 world cup, and that Mr Nkwe would then be the "preferred candidate" to take over as head coach. Mr Smith's sense was that Mr Nkwe "bought in" to this proposal.

[240] This was not an "interview" for Mr Nkwe. Mr Nkwe's only options were to accept or reject the position of assistant coach. Mr Smith was communicating his decision that he had already made.

[241] Mr Smith also made six other appointments: Mr Zondi as convenor of selectors; Mr Charl Langeveld as bowling coach; Mr Justin Ontong as fielding coach; Mr Ashwell Prince as head coach of the SA A side; Mr Volvo Mashibalele as the team manager; and Ms Siphokazi Sokanyile as media manager. All six are Black.

[242] Mr Smith followed no further process after his appointment before making the appointments. He made them immediately after signing his contract. He claimed that he had no choice. CSA had no coaches and no convener of selectors. There had been several recent scandals including, most recently, the

suspension of the CEO. In Mr Smith's words: "At the time South African cricket was at ground zero, it was a highly pressurized environment, the media, public, it was far beyond boiling point." Adding to the pressure was the imminent arrival of the England team for a test series that would begin on 26 December 2019. The Proteas team needed to assemble 8-10 days before that to prepare. That left no time, Mr Smith contended, for advertising or calling for CVs. He had to act.

[243] CSA criticised this approach. It argued that Mr Smith could have made interim appointments and then taken more time to make final appointments. Mr Smith's response was that CSA's directive to him was to make a long-term appointment. He also felt the team needed stability. He said he did not even consider making an interim appointment.

[244] The manner in which these appointments were made was clearly undesirable. Despite the head coach position being vacant since Mr Gibson left in August 2019, CSA did not advertise the position. The reason – presumably – was because they were awaiting the appointment of the new DoC.

[245] But their inaction and delay placed Mr Smith under pressure. He had no power until 11 December 2019. He was then faced – as an employee of CSA – with an imminent tour and the need to make permanent appointments. He made the appointments, and in doing so gave up the benefits that a full process would have given him. Mr Smith testified that he "absolutely would have loved more time" to make the appointments. If he had been appointed earlier, "there would have been lots of time to run interviews, to do informed process to get the CV's

to then interview people to have discussions, I would have had 2, 3 months to do it, that would have been fantastic … in hindsight I would have loved that."

[246] It is easy to speculate with hindsight about how Mr Smith might have handled the situation better. Perhaps he could have followed a truncated process – calling for CVs from a shortlist – or made an interim appointment. Or he could have asked CSA to advertise the position even before his appointment. But we accept that the environment at the time was an extremely difficult one. And there were obvious benefits to acting swiftly and making permanent appointments to try and restore some of the trust and stability that CSA had been missing. We are mindful of Sachs J's warning that to "scrutinise each de-contextualised action with hindsight from an armchair point of view would be to set an unrealistically high standard."[44]

[247] CSA also contended that the supposed urgency was illusory because Mr Smith had already decided on 15 November 2019 to appoint Mr Boucher without any formal process. This is true, but we think it not entirely fair to Mr Smith. The sense of urgency did not commence on 11 December 2019. It seems to us that Mr Smith felt an urgent need to act well before then but could not do so until he was formally appointed. Moreover, when Mr Smith told CSA prior to his appointment that he intended to appoint Mr Boucher, it could have insisted that he advertise the position and follow a proper appointment process. It never did so.

[248] Finally, we note that there was some quibbling about whether Mr Smith formally "appointed" Mr Boucher and Mr Nkwe or merely recommended them. This

[44] *Walker* (n 8) at para 134.

seems like a distinction without a difference. While CSA had to conclude employment contracts with them, and formally took the decision, it had already agreed with Mr Smith that it would accept his choice. In reality, Mr Smith's decision was final.

[249] That then is the factual background to assess the complaint concerning Mr Boucher and Mr Nkwe. We move next to consider what case CSA pleaded.

THE PLEADED CASE

[250] As with the dispute concerning Mr Tsolekile, CSA's case diverged from the case it had pleaded. The case it pleaded was this:

[250.1] Mr Nkwe was better qualified than Mr Boucher (he had a level 4 coaching certificate, to Mr Boucher's level 2 certificate, and eight titles as a domestic coach to Mr Boucher's five). Moreover, appointing Mr Nkwe would have promoted transformation.

[250.2] CSA's practice prior to the appointment of Mr Boucher was to require the head coach to have a level 4 coaching certificate.

[250.3] Mr Smith did not call for either coach's CVs, or interview them prior to making his decision.

[250.4] In those circumstances, the only explanation for Mr Smith's conduct was racial bias against Mr Nkwe.

[251] This is a case of direct discrimination, albeit one that is again built on inference, not positive evidence.

[252] In argument, Mr Ngcukaitobi initially said that he did not advance this case. When questioned, he changed his mind and said that he did advance a case of direct discrimination. That was the case pleaded and he was fully entitled to pursue it.

[253] But by the time the matter was argued, the main case that CSA advanced was one of indirect discrimination. That case runs like this:

[253.1] The reason Mr Smith preferred Mr Boucher over Mr Nkwe was that Mr Boucher had extensive international playing experience.

[253.2] But because of the history of racial discrimination in South African cricket, that is not a neutral criterion. Because relatively few Black players have played international cricket until recently, there are few if any Black people who could meet that criterion.

[253.3] Accordingly, while Mr Smith's decisive criterion may appear race neutral, it has a disproportionate impact on Black people, and therefore amounts to indirect discrimination.

[254] This case gets to precisely the type of implicit biases that – whether intentionally or not – are often used to justify the appointment of White people over Black people. The past denial of opportunity is used to continue to deny opportunity. Overcoming the impact of historical discrimination is the very reason why the Constitution and the Equality Act permit affirmative action measures. In practice, this type of discrimination may to be a far more prevalent threat to substantive equality than naked racism.

[255] But the case is not foreshadowed in any way in the pleaded case. It was no surprise to CSA that Mr Smith would claim that international playing experience was the reason he appointed Mr Boucher. He said so in his affidavit before the Ombudsman. He said that, in addition to his success as a domestic coach, Mr Boucher

> *"had substantial international experience of having played at the highest level in different conditions across different continents over a prolonged period of time. Hence, his ability to maximise the strengths of different players in varying conditions across the globe was an immensely valuable attribute that put him ahead of other candidates at the time."*

[256] If CSA believed that Mr Smith's primary reliance on that factor was what constituted unfair discrimination, it could and should have pleaded that case. But the claim of indirect discrimination only emerged when Mr Ngcukaitobi cross-examined Mr Smith.

[257] The failure to plead it caused obvious disadvantage to Mr Smith. He did not answer that case on the pleadings or in the evidence. He did not call witnesses to show that, in fact, relying on international experience could not have a discriminatory impact because there were enough Black coaches who met the requirement. As we explain below, the evidence on the issue is patchy at best.

[258] It is also unfair because it affected how Mr Smith answered the case. CSA brought Mr Smith to meet a case of direct discrimination on the basis of race. His answer was: I did not rely on race, I relied on Mr Boucher's international playing experience. CSA was naturally entitled to argue that Mr Smith was lying and that he was in fact racially motivated. But what the indirect discrimination claim does is something very different. It avoids undermining the credibility of

the reason Mr Smith says he acted on by accepting it, but unfairly challenging it on a different basis and thus shifting from the case pleaded. CSA accepts Mr Smith's claim that he acted solely because of Mr Boucher's international playing experience, and says that apparently non-racial reason constitutes racial discrimination. CSA may be right; but it was required to plead that case, not to wait for Mr Smith to walk into a trap and then spring it.

[259] Finally, we note that the pleaded case is arguably inconsistent with a claim of indirect discrimination. The pleaded case is that Mr Smith unfairly discriminated against Mr Nkwe. But by its very nature, an indirect discrimination claim is not aimed at a specific person but disadvantages a category of people.

[260] Accordingly, however important it is to root out implicit biases that continue to create "built-in headwinds" for previously disadvantaged groups, in our view CSA was not permitted to advance a case it did not plead. We also do not believe that we have the powers to decide a case not pleaded by CSA. CSA was more than ably represented throughout and has no excuse for seeking to make a new case that was not pleaded.

[261] We only express brief views on the issue of indirect discrimination below. This would also be relevant only if we had powers to determine such a case and Mr Smith would suffer no prejudice if we did.

[262] Before we do so, we again emphasise what we are not asked to determine. We are not asked to decide whether Mr Nkwe or any other potential candidates were treated fairly. For what it is worth, it seems obvious that they were not. The process that CSA – including its employee Mr Smith – followed was patently unfair. It denied people the opportunity to even apply for the job, or for

those who might be considered to convince CSA why they should be appointed. It placed all the power in the hands of Mr Smith, without subjecting him to any procedural or substantive limits. Whether this unfair process was justifiable in the circumstances also falls outside our mandate.

[263] We are asked only to consider whether Mr Smith unfairly discriminated against Mr Nkwe on the basis of race. A process can be objectively unfair to all participants without constituting unfair discrimination.

[264] We are also not asked to consider whether CSA unfairly discriminated against Mr Nkwe. Our focus is only on Mr Smith's conduct.

DIRECT DISCRIMINATION

[265] The simple question for deciding if there was direct discrimination is whether we believe Mr Smith that his reason for preferring Mr Boucher was international playing experience, and not race. Again, CSA pointed to no direct evidence that Mr Smith was motivated by race. But it argued that, in the circumstances, the most probable inference is that he chose not to appoint Mr Nkwe because he was Black.

[266] In our view, that is not the most likely inference. The factors that CSA points to – both individually and collectively – fail to establish that race, rather than an honest belief that Mr Boucher would be the better coach, was the reason for Mr Smith's decision.

[267] First, a large plank of CSA's case was that Mr Nkwe had a level 4 coaching certificate, and Mr Boucher did not. This is true. CSA's pleaded case was that

"CSA's practice, before the appointment of Boucher, was to require that the head coach of the Proteas men's team … had to have a level 4 coaching certificate." But the evidence did not show that a level 4 certificate was a pre-condition for appointment as head coach:

[267.1] The advertisement for the Proteas head coach job in 2017, and for the SA A head coach job in 2019 set various "essential requirements" for the job, one of which was a level 4 certificate. But the text states that the certificate would only be "advantageous", not necessary.

[267.2] That reflected CSA's actual practice. The previous coach, Mr Gibson, did not have a level 4 certificate. Mr Mathe assumed he must have had an international equivalent, but there was no evidence of that. Before Mr Gibson, Mr Domingo did have a level 4 certificate. But the coach that preceded him was Mr Kirsten, who only had a level 3 certificate. CSA pointed out that, when he was appointed, Mr Kirsten had just won the World Cup as the coach of India. But that just demonstrates that, for CSA, experience can trump qualifications, and that a level 4 certificate was not an absolute requirement.

[267.3] CSA provided Mr Smith with no criteria at all for the appointment in 2019. It headhunted him precisely to use his own cricketing experience to – among other tasks as DoC – choose the head coach. CSA determined that the Proteas would be best served by giving Mr Smith a free hand, rather than telling him what criteria to consider. That position is inconsistent with the argument that overlooking a Black coach with level 4 should best be explained by racism.

[268] A coaching certificate is obviously valuable. But the evidence did not show that it was a pre-requisite, or that it was necessarily more valuable than other types of experience. Appointing someone with a lower level certificate who has multiple other attributes – strong domestic coaching and international experience – can reasonably be explained on non-discriminatory grounds.

[269] Second, CSA accepted that Mr Smith's preference for a coach with international playing experience was a legitimate reason to prefer one coach over another. Mr Smith's central assertion was this: After a disastrous 2019 World Cup and Indian tour, the Proteas needed a head coach with significant international experience to rebuild the team. His case was not that the head coach always needed international playing experience, but for this team and this time, that experience was vital. CSA accepted this in 2019 when the decision was made – nobody suggested to Mr Smith that his decision was unjustifiable, or that it was impermissible or improper to overlook Mr Nkwe. And CSA did not attack this claim in cross-examination, nor did it lead evidence that Mr Smith's assessment was implausible, or frivolous. Mr Mathe acknowledged that all factors had to be balanced, and that international playing experience was an important factor. Put differently, if Mr Boucher and Mr Nkwe were the same race, Mr Smith's reasons for choosing Mr Boucher would have been entirely unobjectionable to CSA.

[270] CSA's case – although it was never put this bluntly – must be that Mr Smith's given reason for preferring Mr Boucher was not his true reason. It was a reasonable basis for his decision, that conveniently allowed him to disguise his true, racist motive. Put differently, Mr Smith relied on international playing

experience to justify not selecting Mr Nkwe, but the true reason Mr Smith did not want to appoint him is because of his race.

[271] There was no direct evidence that Mr Smith's given reason was in truth manufactured. And our assessment of Mr Smith's evidence as a whole is that he honestly wanted the Proteas to succeed and honestly believed that Mr Boucher was most likely to achieve that. We do not believe that the evidence suggests that he would have consciously appointed someone who he thought was not the best person for the job because of their race.

[272] That leaves open the possibility of sub-conscious bias. When analysing the merits of Mr Boucher and Mr Nkwe, Mr Smith may have been influenced by an implicit bias against Black people. He may have assessed Mr Boucher more favourably and Mr Nkwe less favourably as a result. It is almost impossible to meaningfully assess if this was the case. We all have sub-conscious biases that affect us in ways of which we are not aware. In our view, the way to deal with them is through indirect discrimination claims that seek to eradicate the effects of unconscious bias, rather than playing the role of psychologist and assessing people's unconscious motives.

[273] Third, on 11 December 2019, Mr Smith did not only appoint Mr Boucher – he also appointed Mr Nkwe as assistant coach, Mr Zondi as Convenor of Selectors, and several other assistant coaches and managerial staff. All, save for Mr Boucher, were Black. Mr Nkwe was to be groomed to take over from Mr Boucher. This does not fit neatly with CSA's claim that Mr Smith would prefer White coaches over Black coaches because of their race.

[274] Mr Ngcukaitobi urged on us that appointing Black people to assistant positions, rather than leading positions promotes the stereotype that Black people are only suited to subservient roles. It does not, therefore, count against their charge of race-based discrimination by Mr Smith. That is a legitimate concern and a worrying stereotype. But it does not follow that every time a White person is appointed with a Black subordinate the only explanation is racism. It may be the explanation, but it may not be.

[275] In this case, we are not persuaded on the evidence presented, and on a balance of probabilities, that Mr Smith's appointment of Mr Nkwe as assistant coach and not head coach was motivated by racism, and not by his assessment of what was best for the Proteas. While Mr Nkwe was in an assistant position, Mr Zondi and Mr Mashibalele were not.

[276] Fourth, Mr Nkwe should have achieved an advantage in terms of CSA's transformation policies. There was again some unnecessary quibbling about the details. But we accept the general proposition that CSA had a transformation policy that required preference for Black applicants, including Black applicants for coaching positions, and that Mr Smith was generally aware of that policy.

[277] But if Mr Nkwe should have been appointed because he had similar qualifications to Mr Boucher, but he was Black, is the failure to appoint him necessarily evidence of racial discrimination? CSA again disavowed an affirmative action claim. CSA did not contend that, because Mr Nkwe was denied the benefit he was entitled to under CSA's transformation policies, he had been unfairly discriminated against.

[278] Its case was an ordinary one of racial prejudice against Mr Nkwe because he was Black. But the failure to afford Mr Nkwe the benefit of CSA's transformation policy is not necessarily evidence of racial bias. It is equally consistent with Mr Smith's clear statement that his primary concern was the success of the Proteas. He believed that Mr Boucher was more likely to achieve that than Mr Nkwe, and wanted to appoint him even if it was inconsistent with CSA's transformation requirements. We can criticize that decision, but it does not necessarily show racial bias against Mr Nkwe.

[279] Fifth, CSA argued that Mr Smith did not follow a fair process to select Mr Boucher – he did not call for CVs, conduct interviews, or even put his concerns about Mr Nkwe's lack of coaching experience to him. All this is true. The process followed to appoint the head coach was not fair. Nor was it a reasonable way to choose a head coach. Mr Smith seemed to accept as much.

[280] But it is not clear to us that the unfair process on its own is evidence of racial bias. If Mr Smith had made his decision by putting two names in a hat and pulling one out, it would have been arbitrary, but would not have been evidence of direct racial discrimination. For the process to be evidence of racial discrimination, CSA would have to show that it was designed or intended to disadvantage Black candidates, or to disadvantage Mr Nkwe specifically because he is Black. Without that showing, the process is merely unfair, not racist.

[281] We do not think that CSA has shown that Mr Smith wanted to avoid a fair process in order to further a racially discriminatory agenda. Mr Smith was headhunted by CSA precisely for his cricketing experience and expertise. He

used that expertise to make a determination of who would be the best head coach. Whatever may be said in hindsight, we believe that at the time, he did not believe it was open to him to follow a formal process.

[282] This is not a case where CSA had asked Mr Smith to follow a more formal process and he refused, or insisted that he be allowed to appoint the head coach without a formal process. CSA knew from 15 November 2019 that Mr Smith wanted to appoint Mr Boucher and never questioned either the merits of that decision or the process Mr Smith followed to make it. To the contrary, they affirmed and supported his decision and his process.

[283] In that context, whatever the flaws in the process – and there were many – we do not believe they are evidence of a racist motive, rather than the consequence of delay and the perceived need to take urgent stabilizing action.

[284] For these reasons, we conclude that while there is no fact that can conclusively rule out the inference of a racist motive, racism is not the most probable explanation for Mr Smith's appointment of Mr Boucher. It is more likely that he was motivated by his honest belief that Mr Boucher would make the better coach for the team at the time. His reasons for that belief are plausible. If that was the reason, then the decision not to appoint Mr Nkwe was not direct discrimination because it was not "based on" race.

INDIRECT DISCRIMINATION

[285] That leads to CSA's alternative argument of indirect discrimination, i.e., that Mr Smith's decisive criterion of international playing experience disproportionately

excluded Black coaches who were far less likely to have that experience because of historical exclusion from international cricket.

[286] As noted earlier, we do not believe CSA should be able to rely on this argument as it was not pleaded. We consider it in the event that assessment is wrong.

[287] In our view, the argument would fail because CSA failed to lead the necessary evidence to show that the neutral criterion had a disproportionate impact.

[288] This is the type of case where both types of evidence identified in *Fraser* were needed. On the one hand, it can rightly be accepted that Black players were excluded from previous playing experience and therefore, as a general category, are less likely to have that experience than White players. Although no detailed evidence was led on this, it seemed to be common cause.

[289] But that is not the end of the inquiry because the pool of potential head coaches is not all former Proteas' players. The pool is rather those who had the combination of attributes that would have made them eligible. That would likely include all the current domestic coaches, and South Africans coaching overseas. There are good reasons to expect that that pool would not share the same racial make-up as the pool of all former Proteas players. It would include people who had not played internationally (like Mr Nkwe and Mr Domingo) and might be weighted towards Black people because of affirmative action measures at domestic level.

[290] All of this is, naturally, speculation because the issue was not properly pleaded. But it is not self-evident that the pool of potential coaches who had previous international experience would disproportionately exclude Black people. CSA

therefore had to lead the necessary statistical evidence to establish indirect discrimination.

[291] The evidence on the actual make-up of the pool was very limited. Mr Smith was cross-examined on this issue. He initially said that, in his opinion in 2019 there was "no one that was in current coaching positions in South Africa" that was Black and had international player experience. But he later qualified that "there is people that meet the international experience but their coaching record wasn't good". He referred to Mr Ashwell Prince, who Mr Smith appointed as the head coach of the SA A team. Later he mentioned Mr Robin Peterson (who is Black) as a potential candidate – he also had international experience, but we know nothing about his coaching record.

[292] In our view, a fair reading of Mr Smith's evidence is not that there were no other Black coaches with international experience, but that there were none with the recent success of Mr Boucher and Mr Nkwe.

[293] The Ombudsman Report mentions Mr Roger Telemachus as someone with extensive international playing experience, who also had a level 4 coaching certificate at the time (we heard no evidence about Mr Telemachus). The Ombudsman report also reveals that Mr Paul Adams had extensive experience and had previously coached domestically (again, we heard no evidence about Mr Adams).

[294] We do not therefore have clear evidence of what the landscape of domestic coaches looked like in 2019. How many active domestic coaches were there? How many were Black? And how many of those Black coaches had international experience? Those are the three simple pieces of information that

would have allowed us to evaluate CSA's claim of indirect discrimination. That is all information that CSA has ready access to. Yet it did not lead that evidence.

[295] The evidence we do have shows the opposite. Of the five people mentioned as possible candidates – Mr Boucher, Mr Nkwe, Mr Prince, Mr Telemachus and Mr Peterson – four are black, and three of those four have extensive international playing experience. On that (admittedly limited) sample the criterion Mr Smith says he used might potentially not have had a disparate impact on the basis of race. The relevant evidence was simply not presented by CSA and is not before us.

[296] Where does this leave us? In our view, as intuitively attractive as the claim of indirect discrimination is, it was not established before us. It would not have been difficult for CSA to do so. It need merely have led evidence of the pool of potential coaches (either just current domestic coaches, or including South Africans coaching overseas, or including foreign coaches), how many of those were Black, and how many had international experience. Without that evidence, we are unable to say, on a balance of probabilities that Mr Smith indirectly discriminated by making international experience his decisive criterion.

CONCLUSION ON BOUCHER/NKWE ISSUE

[297] In conclusion, we make the following findings:

[297.1] CSA pleaded a case of direct discrimination and was not permitted to advance a case of indirect discrimination.

[297.2] CSA did not establish that Mr Smith directly discriminated against Mr Nkwe on the basis of his race.

[297.3] If we considered the case of indirect discrimination, CSA did not prove, through the leading of relevant evidence, that Mr Smith indirectly discriminated against Mr Nkwe.

[298] Accordingly, we make the following award: The CSA did not prove that Mr Smith's conduct with regard to the appointment of Mr Boucher as Proteas Head Coach, amounted to unfair racial discrimination with respect to Mr Nkwe.

VI INDEPENDENT CONTRACTOR ISSUE

[299] The final issue we are asked to address is whether the second contract CSA and Mr Smith concluded was an employment contract, or an independent contractor agreement. The contract in issue is the second one they concluded in April 2020, which expired at the end of March 2022.

[300] Strangely, there is no dispute between the parties on this issue. The parties agree that they concluded an independent contractor agreement. That would have to be the case otherwise the other disputes discussed above would surely have been resolved in ordinary disciplinary proceedings.

[301] The issue was referred to arbitration because of the Ombudsman's finding that "the true nature of the relationship between CSA and Mr Smith is still that of an employer and employee". The Ombudsman's reasons were that: Mr Smith was initially appointed following an advert and interview process; the DoC reports to the CEO; Mr Smith was empowered to appoint employees; and that CSA and

Mr Smith failed to explain why they concluded an independent contractor agreement.

[302] This issue can be easily resolved. There is no doubt that CSA and Mr Smith intended to, and did in fact, conclude an independent contractor agreement.

[303] As to their intent, the agreement is titled “Independent Contractor Agreement”. Mr Smith is referred to as “the Contractor”. Clause 10.2 reads: “The relationship between CSA and the Contractor shall not be deemed to be one of employer/employee and the Contractor specifically agrees that CSA shall not in any way be liable to the Contractor under the provisions of any legislation purporting to create such an employment relationship.” Plainly, they intended to conclude an independent contractor agreement.

[304] The contract itself follows the form of an independent contractor arrangement. Mr Smith was not bound by CSA’s policies because he is an employee, but on a “voluntary basis”.[45] Mr Smith was not paid a salary, but is required to invoice for his services and is responsible for the tax on those services – including VAT – as an ordinary contractor would be.[46] Mr Smith was required to pay for out of pocket expenses, and then claim those from CSA.[47] Mr Smith indemnified CSA for liability, where it would ordinarily be vicariously liable.[48] Mr Smith remained entitled to do other work,[49] and did in fact do other work for remuneration. Mr

[45] Independent Contractor Agreement para 1.3.
[46] Independent Contractor Agreement para 4.
[47] Independent Contractor Agreement para 4.11.
[48] Independent Contractor Agreement para 7.
[49] Independent Contractor Agreement para 3.6.

Smith granted a royalty-free licence to CSA to use his name, image and likeness.[50]

[305] This is obviously an unusual arrangement. Mr Smith, in many ways, resembles a senior employee of CSA. He is integrated in their structure and works full time for CSA for CSA's interests. He testified that the main reason for the independent contractor arrangement was that "as a public figure, you have lots of engagements outside your core business." There may also be questions about the propriety of Mr Smith being appointed as an independent contractor, and not an employee.

[306] But whether it was wise, or lawful, or typical is not the question before us. We are asked only to assess what CSA and Mr Smith in fact did. And there is no doubt that what they did is conclude an independent contractor agreement.

VII CONCLUSION AND COSTS

[307] The Arbitration Agreement affords us the power to award costs on any scale we consider just. Mr Duminy urged us to award costs against CSA because it had "dragged" Mr Smith to this arbitration. But there was no evidence of why the parties agreed to arbitrate these issues. It may have been that Mr Smith wanted the arbitration in order to clear his name from the tentative findings made against him by the Ombudsman. We do not know.

[308] Whatever the reason that CSA and Mr Smith concluded the arbitration agreement, we think Mr Smith is entitled to his costs. The genesis of the

[50] Independent Contractor Agreement para 11.2.

arbitration is the Ombudsman process that CSA initiated. CSA effectively abandoned one of the issues it had initially agreed to arbitrate, and did not advance any of the arguments in its statement of claim on that issue. Mr Smith has been successful on the two issues that CSA did argue. On the Independent Contractor issue, it seems that both parties wanted a resolution of the uncertainty raised by the Ombudsman. CSA never sought a finding either way, but merely asked us to determine the dispute.

[309] Mr Smith therefore achieved substantial success. We see no reason not to grant him his costs.

[310] Accordingly, we make the following award:

[310.1] In the period 2012 to 2014 the Respondent influenced decisions of the selectors of the national Proteas cricket team not to select Mr Thami Tsolekile as a wicket-keeper but the CSA did not prove that he did so by reason of Mr Tsolekile's race. Mr Smith's actions were not proved to constitute unfair racial discrimination against Mr Tsolekile.

[310.2] Mr Smith's proposal that he report to the Board of CSA and not the CEO during negotiations in November or December 2019, and later agreeing to report to the CEO, was not proved to evince racial bias against black leadership at CSA.

[310.3] Mr Smith's conduct with regard to the appointment of Mr Boucher as Proteas Head Coach, was not proved to amount to unfair racial discrimination with respect to Mr Nkwe.

[310.4] Mr Smith was, until 31 March 2022, an independent contractor and not an employee of CSA.

[310.5] CSA shall pay Mr Smith's costs, including the costs of two counsel.

NGWAKO MAENETJE SC

MICHAEL BISHOP

CHAMBERS, SANDTON AND CAPE TOWN

21 APRIL 2022