IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN]

Reportable

Case no: CA4/2019

In the matter between:

K NAIDOO & OTHERS **Appellants**

and

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA **Respondent**

Heard: **25 February 2020**

Delivered: **07 May 2020**

Coram: Davis and Sutherland JJA and Murphy AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The Parliament of the Republic of South Africa requires security services. To that end, the Secretary of Parliament maintains a Parliamentary Protection Service. Employees, styled Protection Officers, are deployed on a range of duties from access control to surveillance of the establishment assets to acting as orderlies

during sessions of Parliament. The appellants, unsuccessful applicants *a quo*, are Protection Officers, many of long-standing.

[2] Apparently, Parliament is not a sedate place. In recent times the proceedings have been characterised by an earnest liveliness and the demands on the Protection Officers to exhort members of Parliament to observe an appropriate degree of decorum have increased. In response to these developments, the Secretary recruited additional security staff. They have been styled Chamber Support Officers and are to perform an orderly function during sessions of Parliament. The Chamber Support Officers have been engaged at rates of pay higher than the longer-serving Protection officers. This discrepancy is the subject matter of the grievance which matured into the dispute which is the origin of the present litigation.

[3] The appellants brought an application before the Labour Court alleging unfair discrimination and invoking the provisions of section 6 of the Employment Equity Act 55 of 1998 (EEA). In a pre-trial conference, agreement was reached to limit the issues to be put before the court to a question of law. In effect, the sole controversy put before the court amounts to an exception to the case pleaded by the appellants.

[4] The scope of the question to be answered by the court *a quo*, and in this appeal, appears from the terms of the agreement and the pertinent paragraphs in the statement of case and the statement of defence in response thereto. The relevant passages are cited.

[5] The agreement recorded in the pre-trial conference minute is thus:

> ‘16. At the pre-trial held on 3 April 2017, a discussion was held about the potential shortening of proceedings by way of arguing the point raised in para 44.3 (and further) of the respondent’s statement of response as a separate legal point up front. From the respondent’s perspective, the essential issue is whether the applicants’ description of the alleged wage disparity is capricious, baseless, unfair and unreasonable and unjustifiable, establishes an arbitrary ground of

discrimination for the purposes of section 6(4) read together with section 6(1) of the EEA.

17. The applicants agree that the matter be scheduled for 1 day and that both parties will submit heads of argument on the issue whether the applicants' description of the alleged wage disparity as capricious, baseless, unfair and unreasonable and unjustifiable establishes an arbitrary ground for discrimination for the purposes of section 6(4) read together with section 6(1) of the EEA.'

[6] The Statement of case averred the following:

'26. The wage disparities between PO's and SPO's versus SCO's and SCSO's constitutes wage discrimination on an arbitrary ground. The decision to pay higher salaries to the SCO's and SCSO's are capricious and based on an act of nepotism by the manager, Mr Van der Spuy, who decided to head hunt his erstwhile colleagues from the SAPS. The applicants' fundamental right to human dignity is severely tarnished by these baseless, unfair and unreasonable wage disparities and they are also discriminated against based on their longer years of service. There is simply not justification whatsoever for the fact that the Chamber Support Officers are being remunerated at a higher level than that of the applicants.

27. The Respondent's actions are further arbitrary in that the only reason why the initial intake of Chamber Support Officers where remunerated higher than that of the applicants is because they were employed by the SAPS whereas the applicants were not. Many of the applicants however used to be in the employment of either the SAPS or the SANDF. The mere fact that the Chamber Support Officers were employed by the SAPS at the time that Phase 1 was implemented constitutes an arbitrary ground that was capricious, unjustifiable and unreasonable.'

[7] The statement of defence averred thus in response:

'44. Ad Paragraph 26

44.1 The contents are denied.

44.2 ….

44.3 Even if the applicants establish some form of (unjustifiable) wage disparity, this is not based on an arbitrary ground of discrimination. Indeed, the applicants advance nothing that qualifies (in law) as an arbitrary ground of discrimination. The applicants' description of the conduct in question as being capricious, baseless, unfair and unreasonable and unjustifiable, does not serve to establish an arbitrary ground of discrimination. The same applies to the applicants; reliance on length of service and alleged nepotism, both of which is misconceived.

44.4. In relation to the allegation of nepotism, the fact that Mr Van der Spuy worked for the SAPS 14 years ago and that the CSO's, CCS's were drawn from the ranks of the SAPS, cannot conceivably constitute nepotism. The decision to recruit from the ranks of the SAPS was not that of Mr Van der Spuy; of the 37 appointees, Mr Van der Spuy knew only one of them distantly; all applicants went through a rigorous and objective recruitment and selection process, during the course of which a number of applicants were eliminated; and appointments were not made by Mr Van der Spuy, but rather by a panel (on which he sat).

45. Ad Paragraph 27.

45.1 The contents are denied.

45.2 The applicants again misconceive the legal position: employment by the SAPS (or non-employment by it) does not constitute an arbitrary ground of discrimination. Again, the applicants' use of the words "capricious, unjustifiable and unreasonable" does not serve to establish an arbitrary ground of discrimination.

45.3 This notwithstanding, the higher wage rates paid to the SCO's in comparison to the PO's is not "only" attributable to the fact that the former were employed by the SAPS at the time of their recruitment, as is alleged. And the fact that "many" of the applicants were allegedly previously employed by the SAPS / SANDF (presumably a long time ago, having regard to their pleaded length of service with the respondent of 5 to 25 years) does not advance their case of discrimination.'

[8] The point of departure, thus, is the proper interpretation of sections 6(1), 6(4) and 11 of the EEA and an application of that proper meaning to the parties' respective averments to determine whether a cognisable cause of action has been pleaded. The text of the sections reads:

> '6. Prohibition of unfair discrimination
>
> (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.
>
> [Sub-s. (1) substituted by s. 3 (*a*) of Act No. 47 of 2013.]
>
> (2) …. (3)
>
> (4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.
>
> (Underlining supplied)
>
> '11. Burden of proof
>
> (1) If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—
>
> (*a*) did not take place as alleged; or
>
> (*b*) is rational and not unfair, or is otherwise justifiable.
>
> (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that—

(*a*) the conduct complained of is not rational;

(*b*) the conduct complained of amounts to discrimination; and

(*c*) the discrimination is unfair.

[S. 11 substituted by s. 6 of Act No. 47 of 2013.]"

[9] The question posed to the Court *a quo* by the pre-trial conference agreement was therefore whether the averments make out a case within the provisions of section 6(1). Plainly their case was not encompassed by the listed grounds and the critical averment was therefore that their averments were covered by the suffix to the list "…any other arbitrary ground."

[10] In the Court *a quo*, the thrust of the debate was whether a "narrow" or a "broad" interpretation of the compass of the phrase "…any other arbitrary ground" should prevail. In essence, this distinction (shorn of its nuances which are addressed hereafter) posited, on the one hand, that the compass is limited to a ground which is analogous to the listed grounds, and on the other hand, posited conduct requiring simply to be alleged to be arbitrary, in the sense of being "capricious."

[11] In the Court *a quo*, it was held that the section was to be interpreted as having the narrow compass. The Labour Court thereupon upheld the preliminary point that no cause of action cognisable by section 6(1) had been pleaded. The appellants' case was consequently dismissed; the propriety of the order dismissing the case is addressed, discretely, hereafter.

[12] The conclusion of the Labour Court that the narrow compass interpretation was to be preferred was reached after a consideration of conflicting decisions in the Labour Court on the critical issue, divergent academic writings and in deference to a decision in the Constitutional Court. It is to that debate that we now turn.

Analysis of the Law

[13] The text of section 9(3) of the Constitution of the Republic of South Africa, 1996 reveals itself to be the *font et origo* of the list in section 6(1) of the EEA. Section 9 reads:

> 'Equality
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."
>
> (underling supplied)

[14] The controversial phrase in section 6 (1): … any other arbitrary ground…" was added to section 6(1) in an amendment effected in 2013. The explanatory memorandum accompanying the Amendment Act states that the amendment was effected to bring section 6(1) into line with section 187(1)(f) of the Labour Relations Act (LRA).[1] It is important to note that section 187(f) of the LRA echoes

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[1] 187 Automatically unfair dismissals
(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is-
(a) ……(e)

the substance of section 9(3) of the Constitution, but adds, in its text, at a spot before the list, the phrase: "…including but not limited to..". Also, the provisions in section 1 of in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) that address the "prohibited grounds" which constitute unfair discrimination, echo the list in section 9(3).[2]

The 'Narrow' compass of Section 6(1)

[15] The decision in *Harksen v Lane NO* 1998 (1) SA 300 (CC) [3] is the seminal decision on the interpretation of statutory provisions listing grounds of unlawful discrimination. The decision laid down an approach to interpretation and application of section 8 of the Interim Constitution, which section addressed equality, and which is the forerunner of section 9 in the final Constitution, cited above. The text of section 8 list omitted as listed grounds the following: pregnancy, marital status and birth. These grounds were added to the list in section 9 in of the Final 1996 Constitution. The relevant portion of Section 8 reads thus:

> '(1) every person shall have the right to equality before the law and to equal protection of the law.

(f) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility" (underlining supplied).

[2] Section 1, definitions, of *Pepuda Act 4 of 2000*: " 'prohibited grounds' are-

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or

[Para. *(a)* substituted by s. 30 of Act 8 of 2017 (wef 2 August 2017).]

(b) any other ground where discrimination based on that other ground-

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph *(a)*;

(subsection (b) should be read with the decision in *Harksen v Lane NO at [54]*, which seems to be the inspiration of this formulation.)

[3] Curiously, the paragraph numbers in this judgment in the SALR differ from the paragraph numbers in the original version published by the Constitutional court as CCT 9/97.

> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
> (3)….
>
> (4) *Prima facie* proof of discrimination on any of the grounds specified in ss (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established." (underlining supplied)

[16] *Harksen v Lane NO* was concerned with sections of the Insolvency Act 24 of 1936 that were adverse to an insolvent's spouse and were alleged to cause the unlawful expropriation of a spouse's property. The Court addressed at length the approach to adjudication about equality and discrimination. With reference to earlier decisions of the Constitutional Court, the distinction was drawn between the concept of "differentiation" and the concept of "unfair discrimination".[4] The Court then recognised two classes of "grounds":

> '[47] Section 8(2) contemplates two categories of discrimination. The first is differentiation on one (or more) of the 14 grounds specified in the subsection (a 'specified ground'). The second is differentiation on a ground not specified in ss (2) but analogous to such ground (for convenience hereinafter called an 'unspecified' ground) which we formulated as follows in *Prinsloo*:
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> 'The second form is constituted by unfair discrimination on grounds which are not specified in the subsection. In regard to this second form there is no presumption in favour of unfairness. . . .
>
> Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. . . . (U)nfair discrimination, when used in this second form in s 8(2), in the context of s 8 as a

[4] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) and *President, RSA v Hugo* 1997 (6) SA BCLR 708 (CC).

whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

. . .

Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of s 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of s 8(2) as well.'

There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner."

(underlining supplied)

[17] Further, In *Harksen v Lane NO* at [54] a process of analysis was laid down:

"[54] At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on s 8 of the interim Constitution. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human

> dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).
>
> *(c)* If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)."
>
> (underlining supplied)

[17] This formulation, establishing a need to link the alleged unlisted ground to the listed grounds by reference to the core value of human dignity, has been endorsed several times. It is the foundation of the line of authority that supports the narrow compass interpretation of section 6(1) of EEA.

[18] In *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* [2009] 12 BLLR 1181 (LAC), this Court addressed the question whether the adverse treatment meted out to the employee because of depression fell within the compass of the automatic unfair dismissal remedy in section 187(1)(f) of the LRA. The approach adopted by this Court was that derived from *Harksen v Lane NO*. At [24] - [25] this Court held:

> '[24] It is not strictly necessary to decide whether the concept of 'disability' as set out as a ground in s 187(1)*(f)* describes the condition suffered by respondent. The uncontested evidence of the respondent supported by a letter from his psychiatrist does support such a conclusion in that he had suffered from depression. The description of depression is also set out in his statement of case.

> Depression is a form of mental illness; see *Diagnostic and Statistical Manual of Mental Disorders IV* . But, even were his condition not to be considered a form of disability as set out in s 187(1)*(f)*, unquestionably the discrimination suffered by respondent as a result of his 'mental health problem' had, in the words of Stein AJ, 'the potential to impair the fundamental dignity of that person as a human being or to affect him in a comparably serious manner'.
>
> [25] Expressed differently, the question can be posed thus: did the conduct
>
> of the appellant impair the dignity of the respondent; that is did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human dignity of respondent? See for the source of this approach, *Harksen v Lane NO & others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC); *Hoffmann v SA Airways* 2001 (1) SA 1 (CC); (2000) 21 ILJ 2357 (CC).'

[19] In *Ndudula v Metrorail* (2017) 38 ILJ 2565 (LC), the Labour Court considered an averment that a difference in wages paid to new employees, albeit in error, amounted to unfair discrimination pursuant to section 6(1) of the EEA. The applicants in that matter took up the stance that if they relied on the phrase "any other arbitrary ground", it was unnecessary to specify a 'ground' and it was sufficient to describe conduct which was inherently arbitrary. The court held that the complaint did not articulate a "ground" within the compass of section 6(1). The Court held that:

> '[73] The crux of the test for unfair discrimination is the impairment of human dignity or an adverse effect in a comparably similar manner, not the classification of the ground as listed or unlisted as is evident from the quotation from *Harksen*. The constitutional distinction between listed and unlisted grounds affects only the burden of proof and nothing else. Differentiation on both a listed and analogous ground amounts to unfair discrimination only if the differentiation has indeed *affected human dignity or has had an adverse effect in a similar serious consequence*.

> [74] This means that the test for unfair discrimination is the same for differentiation on both listed and unlisted grounds. That being the case unfair discrimination on listed and unlisted grounds, respectively, are not different forms of unfair discrimination. The Constitution does not render differentiation on a listed ground automatically unfair.
>
> ….
>
> [76] The conclusion to this reasoning is that unfair discrimination may occur on a listed or unlisted ground. The common factor is that the differentiation must affect human dignity or must have a similar serious consequence. The distinction between listed grounds and analogous grounds is one that finds application only with regard to the burden of proof, both in the Constitution and in s 6.'

[20] In the Court *a quo*, Prinsloo J followed the approach in *Harksen v Lane NO* and as illustrated in *Ndudula v Metrorail.* Accordingly, it was held that:

> '[31] …. I am inclined to follow, in fact I am bound to follow *Pioneer Foods*[5] and *Metrorail*, where the narrow interpretation was accepted. In *Metrorail* it was effectively held that an arbitrary ground is nothing more and nothing less than a ground analogous to a listed ground, as contemplated in *Harksen.* The crux of the test for unfair discrimination is the impairment of human dignity or an adverse effect in a comparable, similar manner and not the classification of the ground as listed or unlisted. The distinction between listed and unlisted grounds affects only the burden of proof. Differentiation on both a listed and analogous ground amounts to unfair discrimination only if the differentiation has indeed affected human dignity or has had an adverse effect with a similar serious consequence.'

Critique of the Broad Compass of Section 6(1)

[21] Support for the rationale of a broad compass was first articulated in in the Labour Court in *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC).

[5] *Pioneer foods (Pty) Ltd v Workers against Regression* (2016) 37 ILJ 2872 (LC): a matter which dealt with the question whether a differentiation of wage rate based on length of service could constituted an act of discrimination within the meaning of section 6(1) of EEA.

That case was concerned with the question whether or not a refusal by a Business to employ a former employee of a rival Business could constitute a residual unfair labour practice as provided for in article 2 of the 7th schedule to the LRA.[6] That court held that no case of unfair discrimination had been made out. Reference was made to the test in *Harksen v lane NO*. In addressing the meaning of "arbitrary," in the critical, obiter, passage which reads:

> '[42] This discrimination was not done on any of the specified grounds and so the primary ground, ie arbitrary grounds, must engage our attention. What then are arbitrary grounds? An arbitrary ground is a ground which is capricious or proceeding merely from whim and not based on reason or principle (see L Baxter *Administrative Law* at 521-2 relying on *Beckingham v Boksburg Licensing Court* 1931 TPD 280 at 282).
>
> [43] In my view, without attempting to be exhaustive, unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless. But even if there is a reason, the discrimination may be arbitrary if the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job-seeker and is not morally offensive. The discrimination must be balanced against societal values, particularly (as emphasized repeatedly by the Constitutional Court) the dignity of the complainant and a society based on equality and the absence of discrimination….'
>
> (underlining supplied)

[22] In *NUMSA v Gabriels (Pty) Ltd* (2002) 23 ILJ 2088 (LC), at [14] – [17] Waglay J (as he then was) concluded that *Kadiaka* was wrongly decided and did not follow it. At [14] the rationale for not following *Kadiaka* was articulated as being a failure to adhere to the dictum in *Harksen* that an act of unfair discrimination under the

[6] . I might add that, in my view, it is in any case, doubtful if this decision addressing a quite different provision and set of circumstances is at all a helpful source of analysis. Moreover, it was decided before the 2013 amendments to the EEA.

rubric of arbitrary had to be analogous to the listed grounds. Waglay J alluded also to a line of authority in the Labour Court consistent with this view.[7]

[23] A notion similar to that in *Kadiaka* about the significance of the idea of an "arbitrary" ground was articulated by *D'arcy du Toit* in considering the meaning to be given to the post-amendment section 6(1).[8] The thesis advanced was that the phrase " … any other arbitrary ground" had to be saved from redundancy. Thus, it must be understood to add something distinctive to the listed grounds. This thesis assumed the addition of a fresh class of grounds that is amorphous and is knowable simply by the external manifestation of capriciousness. Its broad scope was argued to be desirable.

[24] This is a radical idea. It would make section 6(1) a font of a remedy for grievances with virtually no limits. But the EEA is not intended to be a catch all or a panacea. Indeed, the EEA is the instrument of section 9 of the Constitution and therefore its mission is to give teeth to that Constitutional guarantee within the scope of the terms expressed in that section. Section 9 is not an all-encompassing injunction, rather its purpose is to give recognition to the value of our humanity and provide a remedy for aggression against us on the grounds of our intimate attributes, whether inherent or adopted. In other words, section 9 has a specific and concrete *focus,* intelligible within the context of the historical experience of South Africa's legacy of oppression. The writers, *Garbers and Le Roux,*[9] rightly caution against being seduced by the idea that anti-discrimination law can be weaponised to solve all labour market ills. Other vicissitudes of life find remedies elsewhere, not least of all in the panoply of protections in Labour Legislation.

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[7] See: Lagadien v University of Caope Town (2000) 21 ILJ 2469 (LC); Ntai SA Breweries Ltd (2001) 22 ILJ 214 (LC)

[8] *D'arcy Du Toit,* "Protection against unfair Discrimination: Cleaning up the Act?" (2014) 35 ILJ 2623 – 2636, at esp pp2626-2628.

[9] *Christoph Garbers and Pieter Le Roux,* "Employment Discrimination into the Future, 2018 (2) Stell LR 237 -269.
at p249.

[25] In *Chitsinde v Sol Plaatjie University* [2018] 10 BLLR 1012 (LC), the issue was whether it was an act of unfair discrimination that only one candidate in a series of job interviews was required to write a test. The case failed on the facts. However, at [31] of that judgment, the Court endorsed the view that the 2013 amendments introduced a self-standing ground of arbitrariness and, as in *Kadiaka,* this meant capriciousness. As I understand the judgment these remarks were obiter. Regrettably that Court paid very little attention to the jurisprudence of the Constitutional Court with regard to section 9 of the Constitution which is also the source of section 6 of the EEA which is predicated, as already noted, on the basis that the prohibited grounds are all designed to protect the dignity of an affected person .That is the starting point of any inquiry regarding discrimination This conclusion is reinforced by the 'words' any other arbitrary ground". The insertion of the word 'other' supports the conclusion that the phrase "any other arbitrary ground" was not meant to be a self-standing ground, but rather one that referred back to the specified grounds, so that a ground of a similar kind would fall within the scope of section 6. None of these important considerations were taken into account by the Court. In addition, the Court, ostensibly, did not have the benefit of the views of *Garbers and Le Roux* to which I now turn in some detail.

[26] *Garbers and Le Roux* offer a critique of the broad compass idea and, in great detail, eviscerate the thesis.[10] It is unnecessary to address all of their reasoning to demonstrate a convincing rejection of the broad compass interpretation. The essential point is that the phrase to which meaning must be attributed is " … any other arbitrary ground" and not the word "arbitrary," free from its context and function. In this context the word "arbitrary" is not a synonym for the word "capricious." The injunction in section 6(1) is to outlaw, not "arbitrariness", but rather to outlaw unfair discrimination that is rooted in "another" arbitrary ground (the syntax of " …any other…" cannot be understood as otherwise than looking back at what has been stipulated in the text that precedes it). Capriciousness, by

[10] *Christoph Garbers and Pieter Le Roux,* "Employment Discrimination into the Future, 2018 (2) Stell LR 237 -269

definition, is bereft of a rationale, but unfair discrimination on a "ground" must have a rationale, albeit one that is proscribed. The glue that holds the listed grounds together is the *grundnorm* of Human Dignity. The authors express this view, with which I agree:[11]

> "Discrimination is about infringement of dignity (or a comparably serious harm), about an identifiable and unacceptable ground and about the link directly or indirectly) between that ground and the differentiation. Should a ground not be listed, it should meet the well-established test for unlisted grounds: it must have the potential to impair the fundamental human dignity of a person (or have a comparably serious effect) and has to show a relationship with the listed grounds.'

[27] Accordingly, the decision by the Prinsloo J in the Court *a quo* to apply the narrow compass interpretation of the phrase "…any other arbitrary ground…" in section 6(1) is endorsed by this Court.

Is there a cognisable case pleaded on the narrow compass interpretation?

[28] The next step is to consider whether, upon the narrow compass construction of section 6 (1), the appellants have pleaded a cognisable case. What exactly is averred by the appellants? Allusions are made to nepotism, differences in years of service and recruitment of the Chamber Support Officers from the ranks of persons who were members of the SAPS at that moment of recruitment. The responsibility for this grievance is alleged to be the brainchild of their manager, Van der Spuy. A fair reading of these averments reveals that the critical allegation is that a group of persons have been given preferential treatment based on their affinity with Van der Spuy who is a fan of the SAPS: in a word, this is nepotism.

[29] Do these averments that the protection officers are the victims of nepotism meet the test in *Harksen v Lane NO*? In my view it does not**.**[12] Nepotism, in any case,

[11] Ibid At p 261
[12] See *Harksen v Lane NO* at [50].

cannot be countenanced, even more so in the case of Parliament. However this court is required to determine this dispute in terms of the EEA and nepotism is not a necessary affront to human dignity, in neither the sense contemplated by section 9 of the Constitution, nor in section 6 (1) of the EEA. To be neglected because of nepotism implies no characteristic of a person so victimised nor does it invoke any pejorative perspective of such person, whether inherent or adopted. Nepotism differs from, for example racism, where the bearer of authority or of power rejects X because of X's race and prefers Y because of Y's race. If what Van der Spuy has done is indeed to prefer his chums to the appellants; ie behaved nepotistically, that conduct, however wrongful, is not unfair discrimination within the purview of section 6(1).

[30] In the appeal, counsel for the appellants correctly conceded that the Statement of Case, filed by the appellants, had been composed on the premise that the broad compass applied and that if the argument in support of the broad compass failed, the statement of case had not made out a proper cause of action. This is a correct concession because the ground relied upon in the statement of case, if indeed it can properly be understood to be a "ground" is not analogous to the listed grounds in section 6(1).

[31] Accordingly, the appeal must be dismissed in relation to the point agreed to be decided.

The Order of the Court a quo dismissing the appellants' case

[32] It is not clear why the Court *a quo*, in consequence of upholding the exception, dismissed the appellants' case. The terms of the agreement in the pre-trial conference minute do not expressly provide for such an outcome if the respondent was successful.

[33] The usual consequence of a successful exception is the affording of an opportunity to amend, if that is possible. I express no view as to whether, in this

case, an alternative form of pleading could conceivably rescue the appellants' case. However, such an opportunity ought to be afforded to the appellants.

[34] Of course, if the appellants cannot upon reflection, articulate a case that is encompassed by section 6(1) as interpreted by this Court, they shall be obliged to abandon the case or in other proceedings endeavour to articulate a case that addresses the true gravamen of their grievance.

Costs

[35] Given the nature of the controversy, the conflicting case-law and the need to resolve the existence of rival interpretations being in the public interest, it is appropriate that no costs order be made.

The Order

(1) The appeal is dismissed.

(2) Paragraph 1 of the order of the Court *a quo* is confirmed.

(3) Paragraph 2 of the order of the Court *a quo is set aside.*

(4) The appellants may serve a notice of amendment within 30 days of the handing down of this judgment, failing which the application is dismissed.

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Sutherland JA

I agree

_____

Davis JA

I agree

_____

Murphy AJA

APPEARANCES:

FOR THE APPELLANTS:	Adv C. De Kock, Instructed by Bargraims Attorneys
FOR THE RESPONDENT:	Adv A Redding SC, with him A Myburg Sc and Adv A Montzinger. Instructed by the State Attorney Cape Town