

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA110/2019

Not Reportable

In the matter between:

TSHWANE UNIVERSITY OF TECHNOLOGY

Appellant

and

PAUL MARABA

First Respondent

LYDIA KHWINANA

Second Respondent

MATHILDA LEGWALE

Third Respondent

Heard: 6 May 2021

Delivered: 17 May 2021

Coram: Coppin JA, Savage and Molefe AJJA

JUDGMENT

SAVAGE AJA

- [1] This appeal, with the leave of the Court *a quo*, is against the judgment and orders of the Labour Court (Mabaso AJ) delivered on 23 August 2019 in terms of which the appellant, the Tshwane University of Technology, was found from 1 April 2011 to have unfairly discriminated against the respondents, Mr Paul

Maraba, Ms Lydia Khwinana and Ms Matilda Legwale, on the basis of their social origin. The appellant was ordered retrospectively to increase the salaries of the respondents to the same as that earned by Ms S Kloppers from 1 April 2011 to date of judgment or until the date of termination of their employment with the appellant. No order of costs was made.

- [2] At the outset of the hearing, the appellant's application to have the appeal reinstated was granted. This followed the appeal having been deemed to have been withdrawn in that the record was not filed within the 60-day period provided in Rule 5(8) of the Rules of this Court, with no extension having been granted in terms of Rule 5(17).¹ The first respondent, who represented himself in the appeal, did not oppose this application; nor did the second and third respondents, for whom there was no appearance at the hearing of the appeal. The appellant's attorney explained the delay of 122 days as having been the result of various difficulties encountered during the Covid-19 pandemic, including in obtaining documents and the correct version of the audio record of proceedings before the Labour Court. The appellant's further application to have the late filing of the heads of argument condoned was also not opposed and the application for condonation in this regard was similarly granted.

Background

- [3] The appellant was established following the merger of the former Pretoria Technikon, the Technikon Northern Gauteng based in Soshanguve and the Technikon North-West based in Ga-Rankuwa. During the merger process, all positions across the three institutions were evaluated and graded by an external consulting firm. By agreement with organised labour, employees whose positions were downgraded to a lower grade as a result of the merger had their salaries capped. The merger came into effect on 19 November 2008

¹ Rule 5(17) states: 'If the appellant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal, unless the appellant has within that period applied to the respondent or the respondent's representative for consent to an extension of time and consent has been given. If consent is refused the appellant may, after delivery to the respondent of the notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties. Any party wishing to oppose the grant of an extension of time may deliver an answering affidavit within 10 days of service on such party of a copy of the application.'

at which point the salaries of 253 employees employed in different job functions across each of the three institutions were capped. The salary cap was to remain in the system until salary disparities were worked out of the system. However, following the merger, a wage dispute led to an advisory award being obtained as a consequence of which it was agreed between the appellant and organised labour that from 1 April 2011 the cap placed on salaries following the merger would be removed.

- [4] All three respondents were employed as professional nurses, a job category which from the date of the merger was graded at level 9. The first respondent, Mr Paul Maraba, was employed after the merger at the appellant's Ga-Rankuwa campus on a grade 9 level. The second respondent, Ms Lydia Khwinana, was employed prior to the merger at Technikon Northern Gauteng on a grade 9 level and remained on the same level after the merger based at the appellant's Shoshanguve campus. The third respondent, Ms Matilda Legwale, was employed after the merger at the appellant's Ga-Rankuwa campus on a grade 9 level.
- [5] In 2012, the respondents instituted a claim in terms of section 10 of the Employment Equity Act 55 of 1998 ('the EEA') against the appellant. Following the unsuccessful conciliation of the dispute, the matter was referred to the Labour Court. In their amended statement of claim, the respondents' pleaded case was that nursing staff from *'the previously well-resourced and advantaged Pretoria Technikon remained higher on salaries scale and benefits than the nurses from historically disadvantaged institutions thereby perpetuating historical and apartheid divide'*; and that, although the appellant promised to resolve salary differentials, this did not occur in *'utter disregard for the laws of this country inclusive of the respondent on policy guidelines on employment equity and anti-discrimination laws'*. As a result, it was pleaded that *'(t)he designated group suffered discrimination and exclusion almost uniformly by the respondent's perpetuation of historical discrimination and disadvantage simply due to their social origin'*.
- [6] In its response to the amended claim, the appellant denied any form of discrimination against by the respondents.

Proceedings before the Labour Court

- [7] During the trial of the matter, the appellant's only witness, Ms Maria Van Heerden, a director of human resources, testified to a list which recorded the employees across all three institutions, employed in different occupations and job grades, who had had their salaries capped on the merger coming into effect and before the cap was lifted on 1 April 2011. She denied the respondents' contention that there was evidence of discrimination against them in the salary earned by Ms Sarina Kloppers, a professional nurse who was employed at what was previously the Pretoria Technikon. Before the merger, Ms Kloppers was employed on the higher grade 8 level at a higher salary. Following the merger, her job grade was adjusted to grade 9. While her salary was initially capped, this cap was lifted for all employees with effect from 1 April 2011 following the agreement entered into with the unions. The result was that Ms Kloppers' salary was, as with other employees who had had the cap on their salaries lifted, increased to more than that received by the respondents although all were employed as professional nurses on grade 9. Ms Van Heerden accepted that there was a salary differentiation between Ms Kloppers and the respondents but denied that this amounted to discrimination on the grounds of social origin because Ms Kloppers was employed at a previously white institution. Her evidence was that employees who benefited from the removal of the cap were based at all three of the appellant's campuses, including Shoshanguve and Ga-Rankuwa. In proof of this, Ms Van Heerden referred to the example of Mr D T Basini from Technikon Northern Gauteng, who was employed in a grade 6 position prior to the merger, but who after the merger was moved to grade 9 at the Shoshanguve campus, with his salary capped. When salaries were uncapped in April 2011, this included that of Mr Basini.
- [8] The evidence of the first respondent was that only the third respondent remained employed by the appellant. He stated that he had resigned from his employment with the appellant in 2017 as he could not tolerate the continuous discrimination he faced given that the appellant would not rectify the salary

discrimination which had arisen. The second respondent was no longer employed by the appellant as she had retired.

[9] In its judgment, the Labour Court found that the appellant –

‘unfairly discriminated against the [respondents] based on remuneration as a result of their social origin because their former institutions were previously based in the historically disadvantaged institutions which were under-resourced, as the [appellant] failed to present a justifiable ground for its conduct. The [appellant's] action amounts to *"perpetuation of inequality and this advantage to others on the other hand"*. However, I conclude that discrimination based on race is not founded under the circumstances and the facts of this case.’

[10] The Court concluded that the appellant's conduct in paying the respondents less remuneration than Ms Kloppers from 1 April 2011 constituted unfair discrimination based on social origin. The appellant was therefore ordered to increase the salaries of the respondents retrospectively from 1 April 2011 to the same as earned by Ms Kloppers, with payment to those respondents no longer employed by the appellant to be limited to the date of the termination of their employment with the appellant.

Submissions on appeal

[11] Counsel for the appellant denied that the appellant had discriminated against the respondents on the basis of social origin or in relation to the campuses at which they were employed; and disputed that any differentiation in salary between Ms Kloppers and the respondents amounted to discrimination. It was contended that the Labour Court had erred in finding that discrimination had been proved and that the appeal should therefore be upheld, with the orders of the Labour Court set aside and replaced with an order dismissing the respondents' case.

[12] The first respondent, who was the only respondent to file heads of argument in opposition to this appeal, persisted that the appellant had discriminated against the respondents on the basis of their social origin and that they had lacked opportunities and prospects of growth as a result of the appellant's

conduct. He accepted that there were employees such as Mr Basini who had had their salaries capped in institutions other than the Pretoria campus and who had benefited from the decision to uplift the cap, but argued that it was the effect of the decision to uncap salaries that was unfair.

Evaluation

- [13] Section 6(1) of the EEA expressly prohibits direct or indirect unfair discrimination against an employee on grounds which include social origin.² Social origin in international human rights treaties refers to a person's inherited social status, descent-based discrimination by birth and economic and social status.³ Discrimination on this ground has been defined by the Committee of Experts of the International Labour Organisation ('ILO') to include discrimination on the basis of class, caste or socio-occupational category.⁴
- [14] The test for unfair discrimination set out in *Harksen v Lane NO and others*⁵ applies equally to discrimination claims in labour law.⁶ The first step is to establish whether the appellant's policy or practice differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the

² Section 6(1) of the EEA provides:

"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."

³ Committee on Economic, Social and Cultural Rights *CESCR General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2)* E/C.12/GC/20 (4–22 May 2009) at [24]. Angelo Capuano. "The Meaning of 'Social Origin' in International Human Rights Treaties: A Critique of the CESCR's Approach to 'Social Origin' Discrimination in the ICESCR and Its (Ir)relevance to National Contexts Such as Australia." *New Zealand journal of employment relations* 41.3 (2016): 91 at 97.

⁴ Committee of Experts on the Application of Conventions and Recommendations, Equality in Employment and Occupation: Report III (Part 4B): General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No 111) and Recommendation (No 111), International Labour Conference, Agenda Item 3 (1988) 53 [54] ('General Survey 1988') quoted in Capuanop, Agelo Giving Meaning to Social Origin in International Labour Organization (ILO) Conventions, Fair Work Act 2009 (CTH) and the Australian Human Rights Commission Act 1986 (CTH): Class Discrimination and Its Relevance to the Australian Context 84 at 85.

⁵ *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) at para 50.

⁶ *Mbana v Shepstone & Wylie* [2015] ZACC 11; 2015 (6) BCLR 693 (CC); (2015) 36 ILJ 1805 (CC) at para 25.

discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair.⁷

- [15] Since the claim of unfair discrimination had been raised by the respondents, the burden of proof in terms of section 11 of the EEA was placed on the appellant, as employer, to show that the discrimination alleged did not take place or that it is justified. This is distinguishable from a claim of discrimination on an arbitrary ground, in which case, in terms of section 11(2), the burden is on the complainants to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.
- [16] The appellant accepted that there was differentiation in the amounts paid to the respondents and Ms Klopper. The evidence indicated that this differentiation arose from the decision to uncap salaries, a decision which was made in response to labour demands to this effect and so as to maintain labour peace. The unrefuted evidence before the Labour Court was that the decision to uncap salaries was applied across the three institutions which had been merged into the appellant and across different occupational categories and grades. There was therefore no evidence that the decision to uncap salaries was applied only to the previously advantaged campus of Pretoria or limited to particular occupations or job grades.
- [17] Whether there has been differentiation on a specified (or unspecified) ground is a question which must be answered objectively. The evidence placed before the Labour Court showed that the differential treatment that arose from the decision to uncap salaries was not attributable to the respondents' social origin. As much was evident from the fact that employees such as Mr Basini, who although employed at a previously disadvantaged campus, enjoyed the benefit of a higher salary after the cap was removed from his salary, despite the geographical location at which he was employed.
- [18] It follows that while the decision to uncap salaries did have the effect of differentiating between people employed in the same occupation and job

⁷ *Mbana (supra)* at para 26.

grade, this was not shown to have occurred on the basis of their social origin. Ms Klopper's salary was uncapped in the same manner as it was for other employees employed in different occupational categories and grades across all three of the appellant's campuses. The unrefuted evidence before the Labour Court clearly indicated that the differentiation which occurred as a result of the uncapping of salaries after the merger did not amount to unfair differentiation on the basis of the respondents' social origin. It follows that the appellant proved that there was not unfair differentiation against the respondents and consequently that it had not discriminated against the respondents on this basis.⁸ In finding differently, the Labour Court erred.

[19] For these reasons, the appeal must succeed. There is no reason in law or fairness why an order of costs should be made in this matter, nor did the appellant seek such an order.

Order

[26] For these reasons, the following order is made:

1. The appeal is upheld.
2. The order of the Labour Court is set aside and substituted as follows:
"1. The applicants' claim of unfair discrimination is dismissed."

SAVAGE AJA

Coppin JA and Molefe AJA agree.

⁸ *Harksen* op cit. at paras 44-47.

APPEARANCES:

FOR THE APPELLANT:

Mr H Gerber

Instructed by Clarinda Kügel Attorneys

FOR FIRST RESPONDENT:

In person

FOR FURTHER RESPONDENTS:

No appearance

LABOUR APPEAL COURT