



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PA10/2019

FUNDISWA MDUNJENI-NCULA

Appellant

and

MEC, DEPARTMENT OF HEALTH

First Respondent

DR T MBENGASHE

Second Respondent

Heard: 24 August 2021

Delivered: 20 September 2021

Coram: Davis JA, Coppin JA and Kubushi AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This case concerns both the scope of the section 6 of the Employment Equity Act 55 of 1998 ('EEA') and the evidence which is required to trigger its application. In this appeal, the appellant contends that she was unfairly discriminated against on

the basis of gender in that she was paid less remuneration in performing the same or similar work to that of her fellow male employees.

The factual matrix

- [2] Much of the relevant factual matrix is common cause. In May 2014, the Department of Health, Eastern Cape ('the Department') advertised a position of Senior Legal Administrative Officer at a salary range of between R 317 241.00 and R 771 078.00 per annum. The appellant applied for this position and was shortlisted and subsequently interviewed. At the time that she made her application, she had been employed at the Chris Hani Municipality earning a salary of R 504 038.44 per annum at a grade 8 level. She remained in this position from 1 July 2012 until 31 May 2014. However, from 1 July to 18 November 2014, that is immediately prior to being informed that she was the successful candidate for employment, she had been employed by Adv Xola Stewart Nyangiwe as a legal researcher at which stage she was earning R 30 000 per month. Under cross-examination, she conceded that this was the amount that she had earned prior to assuming office in the Department.
- [3] On 20 October 2014, she was thus offered the position of Senior Legal Administrative Officer and accepted this offer on 23 October 2014 on condition that she would be remunerated in the amount of R 658 998.50. Her counter offer was not accepted by the respondent and on 1 December 2014 she reported for duty, notwithstanding that she continued to request to a review of her salary.
- [4] Following an attempt to resolve the issued internally, the second respondent authorised that a revised offer be made. In terms of this revised offer, instead of the appellant being paid R 340 716 per annum, she would be paid at the equivalent level of the remuneration received at her previous employer, being R 360 000.00 per annum. Accordingly, on 2 March 2015 she was informed of the revised offer in the amount of R 361 623.00.

Material aspects of appellant's case

- [5] In support of her case that she had suffered discrimination in breach of ss 6(1) and (4) of the EEA, the appellant sought to invoke a set of comparators based on remuneration offered to three other employees. In the first place, she referred to a recommendation that had been made by the respondents to offer the position in which she was ultimately employed to a Mr Ganyaza. He was offered a remuneration package in the amount of R 532 278.00. The appellant contended that both she and Mr Ganyaza met the minimum requirements relevant for the post and that other than gender differences nothing separated the two of them in terms of qualifications and requisite experience. Nonetheless, the offer that she received was far lower than that made to him being in the initial amount of R 340 716.00 compared to R 532 278.00. Significantly for the purpose of this case, Mr Ganyaza declined the offering of employment as a result of which the appellant was appointed.
- [6] In addition, the appellant referred to an offer of employment made to a Mr Manxiwa on 9 March 2015, again in the amount of R 340 716.00. Mr Manxiwa was not satisfied with this initial offer and on 13 May 2015 he requested an increase to an amount similar to that which he earned in his previous employment at the Department of Education. After further communication between Mr Manxiwa and respondent a revised offer of R 610 716.00 per annum was made to him.
- [7] The appellant raised a third case. Mr Ngozi had also applied but unsuccessfully for the post into which the appellant was appointed. It was common cause that he was the appellant's subordinate in the organisation but received a higher salary than the appellant, albeit that she was his supervisor. However, it appeared that Mr Ngozi had been in the employ of the State from 1983 and had been a legal administrative officer since 2003. He had over 13 years of experience with the Department and according to respondents it was his length of service which resulted in him earning a higher salary at the level of a legal administrative officer than the newly appointed senior legal administrative officer, being the appellant .

- [8] On the basis of these comparators, the appellant contended that it had suffered discrimination in contravention of s 6 of the EEA and thus sought relief from the court *a quo*

The judgment of the court *a quo*

- [9] Basing her judgment on *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC), Lallie J held that the appellant had been required to establish that sex or gender was the reason for the disparate treatment which formed the basis of her claim. After examining the cases the appellant alleged were appropriate comparators Lallie J concluded “It is common cause that Ganyaza was never an employee of the respondent. I therefore accept that he cannot be used by the applicant as a comparator to establish that he earned more than her when they were doing work of the same value. As he declined the position he was never an employee. He neither worked for nor earned a salary from the respondent. The applicant could also not establish that her salary offer was less than Ganyaza’ because of her gender or sex. It is common cause that when the respondent offered Manxiwa the position the salary scale was the same as the one it offered the applicant. The applicant did not establish discrimination on grounds of sex or gender. The respondent proved that she was remunerated in terms of the relevant legal prescripts which justified her comparators’ higher salaries. As the respondent’s decision to hire Manxiwa at a higher salary was unlawful, the unlawful salary rate cannot be relied upon to prove discrimination”. It was on this basis that Lallie J dismissed the appellant’s claim.

The Appeal

- [10] In order to determine the appeal, it is necessary to examine the applicable law. 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, ethnical social origin,

colour, sexual orientation, age, disability, religion, HIV status, conscious, belief, political opinion, culture, language, birth or any other arbitrary grounds.'

[11] An important amplification is given to this provision in terms of s 6(4) of the EEA which provides:

'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 sub-section 1, is unfair discrimination.'

[12] The burden of proof required in a case brought in terms of s6 of the EEA is set out in s 11(1):

'(1) If unfair discrimination is alleged on a ground listed in s 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.'

[13] There has been a considerable debate in the Labour Court with regard to the phrase "on any other arbitrary ground"; in particular whether "arbitrary grounds" in s6(1) includes not only the prohibition of discrimination on a ground that undermines human dignity but any ground which has shown to be irrational. In *Naidoo and others v Parliament of the Republic of South Africa* [2019] 3 BLLR 291 (LC) Prinsloo J, after a careful analysis of the jurisprudence generated in the Labour Court on this question, (see in particular *Pioneer Foods (Pty) Ltd v Workers Against Regression & others* (2016) 37 ILJ 2872 (LC)) held at para 31 "the crux of the test for unfair discrimination is the impairment of human dignity and adverse affecting the comparable similar manner and not the classification of the ground as listed or unlisted. The distinction between listed and unlisted grounds effects only the burden of proof differentiation on both the listed an analogous ground amounts to unfair discrimination only of the differentiation has indeed

affected human dignity or has had an adverse effect in a similar serious consequence.”

[14] It is significant that the EEA provides in terms of s 6(1) for a prohibition of unfair discrimination “any other arbitrary grounds” By comparison the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) also introduces a concept of analogous grounds which are defined in s 1 of PEPUDA as:

- ‘(b) any other ground where discrimination based on that other ground –
 - (i) causes or perpetuates systemic disadvantages;
 - (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 one of the listed grounds.’

[15] It is therefore arguable that the phrase ‘any other arbitrary grounds’ extends beyond the genus of the listed grounds set out in s 6 (1) of the EEA in that the use of ‘other arbitrary grounds’ encompasses a broader scope than the specific provisions of analogous grounds in PEPUDA. However, in *Harkson v Lane NO* 1998 (1) SA 300 (CC) at para 46 the Constitutional Court, albeit in the interpretation of the equality provision in terms of s8 of the Interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993), said the following about meaning of discrimination: “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.’ Although *Harkson* was decided in terms of s 8 of the Interim Constitution, the court’s approach clearly dictates adherence to the narrow approach to the meaning of “other arbitrary grounds”. It is however not necessary to decide this particular question in the present case.

[16] The appellant's case was clearly based on discrimination on the grounds of gender. Her argument was that on the basis of the three alleged comparative cases which she raised, the respondents are in breach of s6(1) read together with s 6(4) of the EEA. In other words, the appellant's case had to be established on the basis that the differentiation of salary between the three other employees and herself amounted to discrimination on the basis of her sex/gender. Regrettably, the facts do not show that any of the three cases that she raised as the basis of comparison justify the conclusion that any salary differentiation was based on a prohibited ground of discrimination. In the first case, Adv Ganyaza was never employed by the Department. Indeed, his details were not provided on the table of comparators which the parties agreed should form the basis of the case presented to the court *a quo*.

[17] Turning to the case of Mr Manxiwa, the appellant correctly noted that on 26 August 2015, the Department made an offer to him in the amount of R 610 716.00. However, on 13 September 2016, the respondents were informed by the Department of Public Administration that this offer was an unlawful one. Thus, in the letter sent to the second respondent on 13 September 2016 by the Department of Public Administration, the following appears with regard to Mr Manxiwa's salary:

'It should be noted that Occupational Service Dispensation (OSD) for legal Qualified Personnel is a different salary dispensation regulated by a Collective Agreement and deemed a career change for Public Servants not covered by an OSD. Furthermore, paragraph 26 of the Ministerial Determination stipulates that an employee appointed to advanced production and supervisory post must start on the minimum notch attached to the specific post.

Taking the above into consideration, Mr Manxiwa's non-OSD salary is not protected upon appointment into an OSD post. I therefore advise that Mr Manxiwa is correctly appointed and remunerated on the minimum salary notch of Senior Administration (MR-6) post.'

- [18] In December 2016, Mr Manxiwa left the employ of the Department. Significantly, in terms of lawful remuneration to which Mr Manxiwa was entitled, it was conceded that he had been correctly offered the same remuneration that had initially been offered to the appellant being R 347 160.00. It can hardly be argued that a revised salary offer which was unlawful can be used as a basis to ground a case of discrimination on the grounds of gender.
- [19] In the case of Mr Ngozi as I noted earlier in this judgment, he has been employed by the State from 1983 and had been a legal administrative officer from 2003. His 13 years of experience with the Department meant that he had received various salary increments during the course of his career. In short, the difference between the amount that he was remunerated and that which was offered to the appellant was a direct result of his length of service which caused him to be the recipient of grade progression and hence salary increases. In short, the differentiation between the salary received by the appellant and Mr Ngozi was based on the manifestly rational ground of length of service and could therefore not be employed on any basis as a cause of action grounded in the EEA.
- [20] In summary, the appellant's case was based on three alleged comparators which I have analysed in this judgment. None of these cases provides the requisite evidence to show that any differentiation in salary between the appellant and any of the three cases was based on discrimination sourced on the ground of gender or sex. In one case an individual had not been employed by the Department. In another the claim of differentiation was based on an unlawful act and in the third the differentiation was based on length of service.
- [21] In the result, the approach adopted by the court *a quo* must be upheld. Accordingly, the appeal is dismissed with costs.

Davis JA

Coppin JA and Kubushi AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Adv M Simoyi

Instructed by Java Inc

FOR THE RESPONDENTS:

Adv A Rawjee

Instructed by the State Attorney