THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: CA4/2023

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA **Appellant**

and

PHOLILE HOYO **Respondent**

Heard: **7 May 2024**
Delivered: **6 November 2024**
Coram: **Savage ADJP, Mlambo JA and Davis AJA**

JUDGMENT

SAVAGE, ADJP

Introduction

[1] This appeal, with the leave of the Labour Court, is against the judgment and orders of that Court in terms of which it was found that the appellant, the Passenger Rail Agency of South Africa (PRASA), had unfairly discriminated against the

respondent, Mr Pholile Hoyo, on the basis of his race and/or in failing to provide him with equal pay for equal work in terms of section 6(1) of the Employment Equity Act[1] (EEA). PRASA was ordered to pay compensation to Mr Hoyo in the form of a monetary award for non-patrimonial loss as a solatium for insult, humiliation, indignity or hurt suffered, to be quantified in due course, with costs.

[2] At the outset of this matter, PRASA sought condonation for its 47-day delay in filing its power of attorney and 24-day delay in filing its heads of argument. The power of attorney was filed late due to a delay in obtaining the requisite authority to grant it and the late filing of the heads of argument was due to an omission on the part of its attorneys. Although Mr Hoyo opposed both applications, the late filing of both documents is condoned having regard to all relevant considerations, including the reasons for and extent of the delay and the potential prejudice which would be suffered if condonation were not granted.

Background

[3] Mr Hoyo was employed by PRASA in 1999. In 2012, he was appointed as Production Manager of its Mainline Passenger Services division stationed at Culemborg in the Western Cape. He claimed that shortly after his appointment he was asked to act in the position of Maintenance Operations Manager, for which he had not been paid an acting allowance. On 21 July 2016, he lodged a grievance with PRASA in which he sought payment of such allowance and took issue with the fact that he earned a salary which was less than that earned by two of his subordinates who, compared to him, performed lesser roles with reduced responsibilities. PRASA disputed that Mr Hoyo was appointed to act in the Maintenance Operations position, claiming that the structure was changed which led to role changes when it was decided to standardise positions in the rolling stock department in line with those in Metrorail, a division of PRASA. At the grievance meeting held, Mr Hoyo was informed that if he forwarded his job profile to his line manager, Mr Mahloboqwane, a job evaluation would be undertaken to determine the grading of his position, with it agreed that PRASA would thereafter implement the outcome of such evaluation. Mr

[1] Act 55 of 1998, as amended.

Hoyo did not forward his job profile to his line manager. Instead, he elected to persist with the unfair discrimination dispute he had referred to the Commission for Conciliation Mediation and Arbitration (CCMA) prior to the grievance meeting. In his unfair discrimination dispute, Mr Hoyo claimed to have been discriminated against on the basis of race and/or in not receiving equal pay for work of equal value. After conciliation was unsuccessful, he referred an unfair discrimination claim to the Labour Court for adjudication.

[4] In the pre-trial minute concluded by the parties prior to the trial, it was agreed that Mr Hoyo's two subordinates, Mr Scholtz and Mr Weyers, earned more than him. The issues to be determined by the Court were recorded to be whether:

4.1 Mr Hoyo was entitled to an acting allowance and if so, the amount to which he was entitled;

4.2 Mr Hoyo was entitled to any amount on a higher salary scale than that occupied by him and if so, what amount;

4.3 PRASA unfairly discriminated against Mr Hoyo on the grounds of race and/or equal pay for equal work; and

4.4 Mr Hoyo was entitled to the damages and compensation claimed.

Judgment of the Labour Court

[5] The Labour Court made no finding whether Mr Hoyo had acted in any position, or whether he was entitled to payment of an acting allowance or remuneration at a higher salary scale. With no cross-appeal filed, these issues do not form part of the subject matter of this appeal. The appeal therefore lies against the Labour Court's finding that PRASA unfairly discriminated against Mr Hoyo on the grounds of race and/or equal pay for equal work.

[6] Mr Hoyo's pleaded case before the Court was that he was unfairly discriminated against on the grounds of race and/or equal pay for equal work in that he earned less than two of his colleagues employed at the same level, both of whom were not African, but who had responsibilities and accountabilities reduced from his own; and earned less than two subordinates, Mr Scholtz and Mr Weyers, both of whom were not African, who were transferred from Transnet to PRASA in 2009. The

only comparator relied upon at the trial by Mr Hoyo was that of his two subordinates. The matter was therefore determined on that basis. In doing so, it noted that the onus rested on PRASA to prove that the differentiation between the salary of Mr Hoyo and the two subordinates did not amount to discrimination.

[7] The Labour Court rejected PRASA's contention that the pay disparities between Mr Hoyo and his subordinates were not based on race. This was so in that none of the individuals cited in the remuneration schedule put up in evidence by PRASA, nor its human resources personnel, testified to confirm that pay rates were based on age, education or as a result of a transfer to PRASA as opposed to race. The Court found it unnecessary for Mr Hoyo to plead the historical facts regarding the apartheid era during which time his two subordinates were employed and how this led to their preferential treatment since they benefited "*from the advantages enjoyed by white labour during the 1980s*", which was found to continue on their transfer to PRASA. The Court noted that PRASA had not taken the steps required of it in terms of section 27(2) of the EEA to progressively reduce income differentials, with Mr Hoyo's two subordinates being the "*beneficiaries of collective bargaining*". The Court therefore concluded that PRASA had not proved that unfair discrimination did not take place or that the discrimination was rational or otherwise justifiable, with Mr Hoyo, as an African man, found to have been hurt by the fact that PRASA had not attempted to redress the injustices of the past.

[8] The Labour Court noted that Mr Hoyo's claim was limited to his function at Culemborg relative to others employed there and found that his dignity had been impaired in that he managed two junior employees who were earning more than he was, while he carried the burden of responsibilities for the operation of the Culemborg depot. It recognised that it was not the Court's function to evaluate posts in PRASA's structure retrospectively or prospectively and that certain of the remedies involving patrimonial loss sought by Mr Hoyo could not therefore be granted. Instead, compensation for non-patrimonial loss as a solatium for insult, humiliation, indignity or hurt suffered was found to be justified, with the determination of the quantum of such compensation postponed to a later date.

Grounds of appeal

[9] On appeal, PRASA takes issue with each of the Court's orders. It contends that in finding unfair discrimination on the basis of race, reliance was placed on the comparator of two subordinate employees when this did not accord with the legal principles applicable to determining such claims. In addition, the Court failed to have regard to the undisputed evidence relating to the benchmarking and transfer of employees from Transnet to it which occurred long after the apartheid era and did not only benefit white employees. Mr Hoyo's failure to plead the facts pertaining to the preferential effect of apartheid meant that the issue was dealt with in broad terms by the Court, with no evidence advanced which showed what preferential treatment the two subordinates received. In addition, the disregard of the schedule put up by PRASA led to the Court failing to consider material evidence which supported PRASA's defence of the claim. Mr Hoyo opposed the appeal.

Discussion

[10] Section 6 (1) of the EEA bars direct or indirect unfair discrimination against an employee in any employment policy or practice on one or more grounds, including race. Where unfair discrimination is alleged on a ground listed in section 6(1), the employer must prove that discrimination did not take place, or that it was rational and not unfair, or otherwise justifiable.[2] Section 6(4), introduced into the EEA in 2013, provides that:

> '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.'

[11] A pay discrimination claim requires proof that the difference in pay between employees who perform the same work or work of equal value is as a result of a specific listed ground for differentiation which is prohibited by law. Evidence of a

[2] Section 11(1) of the EEA states:

> '(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.'

comparator must take the form of at least one other employee who performs that same work or work of equal value.

[12] Applying section 11, this required of PRASA to prove that the alleged discrimination did not take place, was rational and not unfair, or was otherwise justifiable. The evidence of PRASA was that a number of employees, including the two subordinates upon whom Mr Hoyo relied as comparators, were transferred to it from Transnet. This transfer followed a scarce skills salary benchmarking exercise undertaken from 2007 which led, in some cases, to significant increases in salary. Following the transfer of these employees, they continued to receive further salary increases given to employees within their bargaining unit, with no cap on their remuneration. There was therefore no dispute that following the benchmarking process and this transfer, clear salary differentials arose evident in the different pay levels of Mr Hoyo and his two subordinates, both of whom had been employed during the apartheid era.

[13] However, for the Labour Court to find that these pay differentials amounted to discrimination on the listed ground of race, with unfairness then presumed,[3] required objective evidence that this was so. The fact that Mr Hoyo's subordinates were employed during the apartheid era and benefited from the benchmarking process did not prove differentiation on the grounds of race. This was so in that clear evidence existed, which was placed before the Court in PRASA's remuneration schedule, that employees of all races were employed by Transnet, over an extended period of time, who had benefited from salary increases effected following the same benchmarking process and who, on transfer, retained the benefit of such increased salaries. It was material and of direct relevance that, as was apparent from the same remuneration schedule, it was not only white employees who were transferred to PRASA following the benchmarking process. Yet, in its treatment of this evidence, the Court erred in ignoring the fact that this objective evidence clearly illustrated that the pay disparities which arose were neither discriminatory nor founded on considerations of race.

[3] See: *Harksen v Lane NO and Others* [1997] ZACC 12; (1998) 1 SA 300 (CC) at para 53.

[14] A further difficulty with Mr Hoyo's claim concerned his reliance on his two subordinates as comparators to support his claim. This was when there was no evidence, or even a suggestion, that the work performed by the two subordinates was equal to or of equal value to that of Mr Hoyo.

[15] Clause 4 of the Employment Equity Regulations[4] (Regulations) defines "*work of equal value*" as work which –

> '(1) is the same as the work of another employee of the same employer, if their work is identical or interchangeable;
>
> (2) is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;
>
> (3) is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value...'.

[16] Regulations 5 and 6 detail the criteria to be used in determining whether work is of "equal value". Regulation 6 states that:

> '(1) In considering whether work is of equal value, the relevant jobs must be objectively assessed taking into account the following criteria:
>
> (*a*) the responsibility demanded of the work, including responsibility for people, finances and material;
>
> (*b*) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
>
> (*c*) physical, mental and emotional effort required to perform the work; and
>
> (*d*) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.'

[17] There was no evidence before the Labour Court that the work undertaken by Mr Hoyo was the same, identical or interchangeable with that of his two

[4] GNR 595 of 1 August 2014: Employment Equity Regulations, 2014

subordinates, nor that it was substantially the same or sufficiently similar. It could also not reasonably be concluded from the evidence that Mr Hoyo was performing the same job as his two subordinates, nor that his job was of the same value as their work in a different job. In fact, Mr Hoyo's evidence was expressly to the contrary – that he was employed in a role senior to them. The subordinates' positions were not accorded the same value and there was no indication that the responsibilities of their work, the skills, qualifications, and experience required to perform that work, the physical, mental and emotional effort required to perform the work or the conditions under which it was performed were the same as that undertaken by Mr Hoyo. It followed that for purposes of his pay discrimination claim, Mr Hoyo failed to show that the comparators on which he relied provided work that was equal to or of equal value to that performed by him; nor did he show that the pay differential which existed amounted to discrimination on the ground of race. In *Mdunjeni-Ncula v MEC, Department of Health and Another*[5], this Court found that the comparators relied upon by the appellant did not provide the requisite evidence to show that any differentiation in salary between the appellant and any of the three comparators relied upon was based on discrimination sourced on the ground of gender or sex. Similarly in this matter, the comparators relied upon did not show that the pay differential which existed between Mr Hoyo and the two comparators raised by him constituted discrimination on the ground of race.

[18] Mr Hoyo was bound by the parameters of the case he had chosen to plead and litigate.[6] While the evidence showed clearly that disproportionate income differentials exist, which impact directly on Mr Hoyo, his case was one of unfair discrimination under section 6(1) read with section 6(4). The income differential between him and his subordinates did not relate to the same work or work that was interchangeable or sufficiently similar and it was not shown that any such pay differential amounted to discrimination on the grounds of race. It follows that no discrimination related to the entitlement to receive equal pay for equal work or work

[5] [2021] ZALAC 29; (2021) 42 ILJ 2393 (LAC) at para 20.
[6] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC) at para 68; *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) at para 14; *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC) at para 114.

of equal value or on grounds of race was shown to exist and that in finding differently, the Labour Court erred.

[19] It follows that the appeal must succeed and the orders of the Labour Court set aside. There is no reason in law or fairness why an order of costs should be made in the matter.

[20] Despite such conclusion, it bears emphasis that PRASA remains obliged in terms of section 27(2) to take measures to progressively reduce income differentials, subject to such guidance as may be given by the Minister.[7] It is encouraged to do so without delay.

[21] Furthermore, we note it to be unfortunate that the grievance raised by Mr Hoyo was not resolved in the manner proposed by PRASA given the statutory encouragement that labour disputes be resolved speedily and without delay. Mr Hoyo, for reasons that are not apparent, failed to forward his job profile to his line manager to enable his job to be evaluated, although PRASA had undertaken to be bound by the outcome of such evaluation. Despite his apparent unwillingness to engage in this process, we can see there to be no reason why the parties cannot resume such efforts to seek a resolution to the matter.

[22] In the result, the following order is made:

Order

1. The late filing of the appellant's power of attorney and heads of argument is condoned.

[7] Section 27 of the EEA provides that:

'(1) Every designated employer, when reporting in terms of section 21(1), must submit a statement, as prescribed, to the Employment Conditions Commission established by section 59 of the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational level of that employer's workforce.

(2) Where disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in section 6(4), are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to such guidance as may be given by the Minister as contemplated in subsection (4)…'.

2. The appeal succeeds, with the judgment of the Labour Court set aside and substituted as follows:

"1. The applicant's claim is dismissed with no order as to costs."

SAVAGE ADJP

Mlambo JA and Davis AJA agree.

APPEARANCES:

FOR THE APPELLANT:	Mr G Cassells
	Maserumule Attorneys
FOR THE RESPONDENT:	Mr Z Parker
	Instructed by Parker Attorneys