

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO:

CA15/00

In the matter between:

DAVID FRED MIAS

APPELLANT

and

MINISTER OF JUSTICE

FIRST

RESPONDENT

PUBLIC SERVICE COMMISSION

SECOND RESPONDENT

**MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION**

THIRD RESPONDENT

**PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

**FOURTH
RESPONDENT**

JUDGMENT

COMRIE A.J.A:

1. The appellant is a practising attorney. Prior to the events which gave rise to this appeal, he practised for several years in Port Elizabeth for his own account, concentrating on labour law.

2. During 1997 he saw an advertisement in a Sunday newspaper inviting applications for the post of State Attorney at inter alia Port Elizabeth. The tone of the advertisement emphasised transformation in the public service, which led the appellant to believe that, being a man of colour, his application might be well received. He applied for the post at Port Elizabeth and in due course he was interviewed. At that interview there was no discussion of relocation or re-settlement benefits; this was because the appellant was based there.

- 3 The appellant was not offered the post at Port Elizabeth. It went instead to a Mr Crozier who was on the staff of the State Attorney's office in Kwa Zulu - Natal. Some months later, on 2 April 1998, the appellant received a telephone call during which he was offered the post of State Attorney at Cape Town. He stated in evidence that he was later told that his appointment to the Cape Town office would, in the light of his colour, be in accordance with the policy of transformation, which was desired to be visible near Parliament. The appellant accepted the offer on the turn and his appointment was later confirmed in writing. There was no discussion at that stage of relocation benefits. Neither the appellant, nor the person who conveyed the offer, raised the subject.

4. On 6 July 1998 the appellant took up his new post in Cape Town. By then he had already enquired about the costs of re-settling himself and his family in Cape Town, and correspondence had passed on this topic. The standpoint adopted by the Department of Justice was that in terms of the public service regulations (as they were then), the appellant was only entitled to the limited benefits (the chapter F.5 benefits) conferred on a new appointee to the public service. These were substantially less generous than the chapter F.4 benefits payable to existing public servants on transfer, which

Crozier received.

5. At a subsequent point the second respondent (the Public Service Commission) asserted that the public service legislation was not applicable at all, and that the appellant's position was governed by the State Attorney Act 56 of 1957. That was clearly wrong because s 2 (2) of that statute expressly provides that the creation, grading and classification of all posts on the establishment of the State Attorney's office, and any branch thereof, and the remuneration and the conditions of service, including retiring benefits, of all persons occupying such posts, shall be governed by the public service laws. This was common cause in the Court below.
6. In respect of his move to Cape Town the appellant received the F.5 benefits payable to a new appointee to the public service.
7. In August 1998, while he was still the State Attorney, the appellant launched the present proceedings in the Labour Court, Cape Town. He initially cited the Minister of Justice, but later the other respondents (viz. The Public Service Commission, the Minister of Public Service and Administration, and the President) were joined. The first, second and third respondents opposed the application. The President abided the decision of the Court.
8. In essence the case advanced by the appellant in his statement of case was that the differentiation between the F.4 benefits (transfer of existing employees) and the F.5 benefits (new appointees to the public service) constituted a residual unfair labour practice as contemplated by Part B, items 2(1)(a) or (b), of schedule 7 to the Labour Relations Act 66 of 1995. The schedule has to be read in conjunction with s 212 (3) of the Act which provides that:

“(3) The transitional arrangements in Schedule 7 must be read and applied as substantive provisions of this Act.”

It may be noted that item 2(1)(a) has since been repealed, with effect from 9 August 1999, by s 64 of the Employment Equity Act 55 of 1998 which contains provisions similar, but not identical to the repealed item. The present appeal must, however, be decided according to the law as it stood when the appellant was appointed and as it still stood when he instituted the proceedings.

9. The relief initially sought by the appellant was :

“An order compelling the [First] Respondent to make payment to the Applicant of full re-settlement expenditure in terms of paragraph F 4.1 to F4. 10 referred to in Chapter F of the Public Service Regulations 1994.”

In reality, therefore, what the appellant claimed was payment of the difference between the F.4 benefits and the F.5 benefits. By way of amendment the appellant refined the item 2(1)(a) issue to include unfair discrimination in the specific circumstances of this case. He also added a prayer for “compensation in such sum as is determined to be fair and reasonable”.

10. The details of the F.4 and F.5 benefits respectively are set out in the judgment of **Lallie AJ** in the court a quo. It will serve no purpose to repeat them here in full. It suffices to say that the differences are marked and, as observed earlier, that the F.4 benefits are considerably more generous than the F.5 benefits. An existing employee, such as Crozier, who is transferred from one city to another, stands a reasonable prospect under the F.4 regime of recouping all or most of the costs and expenses likely to be associated with such a transfer. On the other hand a new appointee, such as the appellant, depending on his or her personal

circumstances, may well be substantially out of pocket under the F.5 regime if forced to relocate in order to take up the appointment. One of the F.4 benefits, much debated in the Court below, is the cost of interim accommodation while the transferee seeks permanent accommodation; this is not included in the F.5 benefits.

11. This is a convenient stage to set forth the provisions of items 2(1) (a) and (b) of the seventh schedule as they stood at the relevant time:

“Residual unfair labour practices

(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving-

1. the unfair discrimination, either directly or indirectly, against an employee 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;
- b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;”

The item further provides that for the purpose of sub - item (1)(a) “employee” includes an applicant for employment.

12. It may be recalled that the concept of an unfair labour practice originated in the previous Labour Relations Act but was discarded in the present statute. It appears that

Parliament intended to enact further legislation such as the Employment Equity Act, hence the provision of transitional arrangements

13. After hearing evidence **Lallie AJ** held that the foregoing differentiation in re-settlement benefits did not constitute unfair discrimination on an arbitrary ground as envisaged by item 2(1) (a) above. With regard to the alternative contention, under item 2 (1) (b) above, the Court declined to decide the question on the ground of want of jurisdiction. The Commission for Conciliation, Mediation and Arbitration (the CCMA), it was held, was the appropriate forum to determine such a dispute. The claim was accordingly dismissed with costs.

14. The appellant appeals with leave granted by the Court a quo.

15. In addition to the documentation, the evidence before the Court below comprised the testimony of the appellant and of Mr van Pletzen, who is a senior employee of the Department of Public Service and Administration. Among the salient points to emerge from the oral evidence were the following. By the time the case came to trial in November 1999, the appellant had tendered his resignation and was due to leave office at the end of that month. He conceded that when he was offered the Cape Town post, and before accepting it, he could and should have enquired about relocation benefits. On the other hand, no such information was volunteered to him at the time, and subsequently, before taking up his appointment, he experienced considerable difficulty in ascertaining what the applicable benefits were. A recurring theme in the appellant's evidence was his belief that chapter F, with its built in differentiation, was a scheme devised by the bureaucratic "old guard" or "white old guard" in Pretoria to obstruct transformation in, and affirmative action appointments to the public service; and that the scheme had a racial objective. Most transferees, he reasoned, would be white

whereas most appointee would be black, hence

the difference in benefits adverse to the latter group. It was pointed out to the appellant that the 1994 regulations had been replaced by a new set of regulations, the result of collective bargaining, in which the re-settlement benefits remained substantially as before. The appellant tried to argue his way out of this, but eventually conceded the point. It also appeared that regulations to similar effect had existed for many years, at least since 1957.

16. It emerged that the third respondent had from time to time allowed a number of deviations from the prescripts of chapter F, mainly (but not exclusively) in respect of interim accommodation for new appointees.

It became a matter of concern that individual government departments were promising such benefits without first obtaining the third respondent's approval.

A cautionary circular was issued. Be that as it may, no request

for deviation in the appellant's case was made by the first respondent to the third respondent. Mr van Pletzen opined that had such request been submitted for interim accommodation expenses prior to the appellant tendering his resignation, it would have stood a good chance of approval. His department defended the case, however, for other reasons : the appellant was attacking the legality of the regulations, and was claiming much more financial relief than just interim accommodation.

17. The rationale for the regulatory differentiation was debated with both witnesses at length. Various alternatives were canvassed with the appellant in cross-examination. The thrust of the point was this: that the distinction drawn in the regulations between transferees and new appointees was one of a range of possible reasonable solutions. The appellant adhered to his view that the differentiation was at least arbitrary.

18. Mr van Pletzen explained how chapter F was applied by his department in

practice. He drew attention to the opening words in para F. 1;

“Purpose

To compensate a person who, in the interest of the State and at State expense is transferred or appointed.....for the reasonable expenditure actually and necessarily incurred as a result thereof.” (Emphasis supplied).

In the Department’s view there were four categories of public servants for present purposes. The first was an existing employee who, for his or her own personal reasons, wished to move from one town or city to another. That would not be regarded as being in the interest of the State, and such an employee would not qualify for re-settlement benefits. The second category was an existing employee who was required or requested by his superior to relocate; this would be treated as being in the interest of the State. So too the third category : an existing employee (such as Crozier) who applied for, and was granted, promotion but to a new centre. Fourthly, new appointees also satisfied the requirement of State interest. The second and third categories were entitled to F.4 benefits, the fourth category to F.5 benefits.

19. In view of the line of argument adopted by the appellant on appeal, it is

unnecessary to dwell on the justification advanced by Mr Van Pletzen for the regulatory differentiation. Briefly, it falls under several heads, the first of which is choice. Subject to a fair procedure, an existing public servant can be transferred against his or her will, even to rural areas. It is fair to recompense such an employee more or less fully for the costs of transfer. Generous relocation benefits also help to avoid resignations. A potential new appointee has a choice, however : if the destination is unacceptable, or the relocation benefits too meagre, he or she can decline the appointment. Secondly, cost. The public service has over a million employees and a budget which, though vast, is not unlimited. If new appointees who relocate, are to be compensated on the F.4 scale, the cost to the State will be

significant. This will impact adversely on service delivery in other respects. Thirdly, on the administration of the regulations since 1994, Mr. van Pletzen stated that transformation of the public service was well advanced and that the differentiation had not, in his view, impeded this process. Fourthly, service delivery by public servants in rural areas, especially by those with experience, was an important part of the State

policy. In his view the F.4 regime advanced this policy. Finally, as regards deviations from the regulations, this should be kept to a minimum, otherwise an unmanageable precedent will be set.

20. Although the issues, and the evidence thereon overlap, I shall consider the matter in three parts : (i) the item 2 (1) (a) issue; (ii) the item 2 (1)(b) issue; and (iii) costs. The appellant's heads of argument were prepared by counsel who appeared for him at the trial. The appellant, however, argued the appeal in person. In what follows I shall limit myself in large measure to the contentions which were advanced on appeal.

Item 2 (1)(a)

21. At the outset of his address the appellant made it plain to us that he no longer attacked the validity of the regulation under review; he confined himself to the contention that the regulation constituted unfair discrimination "in administrative practice". I have set forth the provisions of item 2 (1)(a) in paragraph 11 above. It bears a close resemblance to s. 8 of the interim constitution and to s. 9 of the final constitution. It was not in dispute that the settled constitutional jurisprudence on unfair discrimination is applicable to the item. In short: Is there a differentiation? If so, is it discriminatory? If so, is it unfair either directly, on one or more of the specified grounds, or indirectly (which affects the burden of proof). **Harksen v Lane NO and Others 1998 (1) SA 300(CC)** from para. [44]. In the light of the stance adopted by the appellant, it is unnecessary to recapitulate the principles in greater detail or to cite the subsequent constitutional and

labour case law.

22.The appellant referred us to an article by **Anton Fagan : Dignity and**

Unfair Discrimination: A Value Misplaced and a Right Misunderstood, SA Journal of Human Rights (1998) vol 14 at 220. The article is critical of the Constitutional Court's emphasis on personal dignity, and the impairment thereof, in the unfair discrimination analysis. I do not think this criticism takes the matter much further in the present appeal, for two reasons. First, because dignity is not the sole criterion, as appears from the judgments which the learned author discusses, and as also appears from that Court's judgment in **Larbi-Odam and Others v Member of the Executive Council for Education (North - West Province) and Another 1998 (1) SA 745(CC).** Second, because the appellant's contention on appeal, as will appear, rests on race or social origin, which are classic (and specified) instances of human dignity impairment.

23.I proceed to summarise the appellant's argument on appeal. He submitted

that while the language of the relevant regulation may be "facially neutral", its application in administrative practice constituted an "employment policy sullied with discrimination" by the respondents. The basis of the discrimination, he submitted, was race or social origin, both of which are grounds specified in item 2(1)(a). The appellant referred to his evidence at the trial (which he described as "direct and clear") to the effect that most of the appointees at the public service were black while most transferees were white. He had stated in evidence his belief that the differentiation in re-settlement benefits was not accidental; by implication, this extended to the retention from 1994 onwards of substantially the same differences as had previously existed. His view was that the "white old guard" in Pretoria had deliberately persisted in the different re-settlement benefits in order to discourage and frustrate transformation. While not expressly stated in argument, I understand the appellant's contention to comprehend an alternative : that whatever the intent, the impact of the regulation on black people has in practice

been unfairly discriminatory. The appellant submitted that his evidence had established a prima facie case on this score which had not been rebutted by the respondents in the documentation or through the evidence of Mr van Pletzen.

24. In answer to questions by the Court, the appellant conceded that he could not complain if new whites appointees were treated in the same way under the regulation as new black appointees. He conceded too that had he been transferred from Cape Town to say Pretoria, after his initial appointment, he would probably have received the more generous F.4 benefits. The appellant submitted further that it was a forced interpretation of the regulation to treat Crozier's move to Port Elizabeth as a transfer: Crozier had sought the promotion, and had not been transferred at the behest of the State to that city or to some less enviable destination. The inference, it was submitted, was that Crozier's promotion was treated as a transfer under the regulation because he is white. In this regard, however, the appellant conceded that there was no evidence of departmental practice before 1994, and hence no evidence of a changed practice since 1994.

25. It is appropriate at this stage to review how the appellant adapted his case from time to time. The appellant's statement of case contained not a hint of alleged racial discrimination or discrimination based on social origin. The same is true of the correspondence which preceded the institution of the proceedings and of the pre-trial agendas and minute. The first and only reference which I can find to it is at the end of the pre-trial letter dated 5 February 1999 where the appellant wrote ambivalently:

“ I wish to emphasise that my complaint is not that I have any entitlement in common law but I do take exception to being discriminated against by legislation that seems to be intended to favour old civil servants and which is being utilised to stymie or nullify transformation of the civil service, whether for reasons racial or otherwise”.

Nevertheless, the appellant was permitted without objection to give evidence at the trial, summarised earlier, about the racial objective. This formed a significant, and perhaps the most significant part of his trial case on the item 2(1)(a) issue. Now, on appeal, the appellant has once again shifted the emphasis, this time to administrative practice albeit with a racial or similar connotation .

26. I do not say that the appellant is not entitled to rely on administrative practice. Indeed, those very words appear in para 5.11 of his statement of case. But a consequence of the foregoing shifts, in my opinion, is that the appellant failed to adduce appropriate evidence in support of his contention on appeal. The appellant no longer claims that the 1994 regulations were enacted with a racial objective and with intent to stultify transformation. He now accepts that the differentiation, which has been in existence for many years, may in principle be unobjectionable . He was not prepared to argue the contrary on appeal, presumably in the light of Mr. van Pletzen's evidence. His case on appeal, in my analysis, is that the regulatory differentiation, unobjectionable in itself, has since 1994 been manipulated by the "white old guard" in Pretoria on racial or similar grounds and with intent to stultify transformation. The appellant adduced virtually no evidence on this score. There was no evidence that the regulation was applied to him as a new appointee because he was black. There was no evidence that new white appointees were in some way favoured over blacks with regard to relocation benefits. Lastly, there was no evidence that the previous regulations were applied in a materially different way before 1994 when, on the appellant's evidence, most new appointees were white. The appellant did suggest that Crozier was improperly favoured, but again there was no evidence that had Crozier been black, he would only have received F.5 benefits. In fact even in argument the appellant would not go so far.
27. Furthermore, the appellant's administrative practice contention was not seriously explored with Mr. van Pletzen in cross-examination, perhaps because there were so

little to explore. It will also be recalled that Mr . van Pletzen stated that transformation was well advanced and the differentiation in benefits had not, in his view, impeded that process. This part of his evidence was not seriously challenged. It accordingly seems to me that the appellant failed to make out any case, even a prima facie case, in evidence to support or prove the contention to which he has confined himself on appeal.

28.I should add, for completeness, that nothing turns on the extension of “employee” under this item to include an applicant for employment. The appellant was an applicant for employment at least in respect of the Port Elizabeth post. But he become an employee (in Cape Town). The evidence did not begin to distinguish: between applicants for positions in the public service who were successful and those who were not; or between applicants who were deterred from applying for positions, or from accepting them, by reason of the different re - settlement benefits. I would therefore dismiss the appeal on the item 2(1)(a) ground.

Item 2(1)(b)

29.The provisions of this item are set forth at para.11 above. The question to be answered is whether there was unfair conduct relating to the provision of benefits. This item, as the appellant recognised, is particular rather than general. It refers to the treatment of an individual employee or individual employees, in this case “relating to the provision of benefits”. The facts founding this complaint are: that Crozier had allegedly been unduly favoured; that the appellant was not informed of the F.5 or F.4 re-settlement benefits before he accepted the appointment (though he could have asked); that after acceptance he encountered real difficulty in ascertaining his entitlement according to regulation; that the Public Service Commission (the second respondent) misconstrued his position in the public service; and that the Director - General or the Minister of Justice failed to submit a deviation request to the second or the third respondent. In this last regard there is the evidence of Mr. van Pletzen that had such a request been submitted timeously, it would probably

have been granted in respect of interim accommodation worth, on the appellant's evidence, R 7500.

30. As I have recounted, the Court a quo declined, on jurisdictional grounds, to entertain or decide the claim under this item. When the appellant was appointed, the relevant portions of schedule 7 read:

“3(4) If the dispute remains unresolved

(a) any party to the dispute, if the dispute is about an act or omission referred to in item 2 (1) (a), may refer the dispute to the Labour Court for adjudication;

(b) any party to the dispute, if the dispute is about an act or omission referred to in item (2)(1)(b), (c) or (d), may request that the dispute be resolved through arbitration.

4(1) The Labour Court has the power to determine any dispute that has been referred to it in terms of item 3 on terms it deems reasonable, including, but not limited to, the ordering of reinstatement or compensation.

2)The arbitrator has the power to determine any dispute that has been referred to it in terms of item 3 on reasonable terms.”

31. It is apparent that notwithstanding the overlapping facts, the item 2 (1) (b) dispute should have gone to arbitration. However, s. 158(2) of the Labour Relations Act provides that:

“If at any stage after a dispute has been referred to the Labour Court, it

becomes apparent that the dispute ought to have been referred to arbitration, the Court may-

- (a) stay the proceedings and refer the dispute to arbitration; or
- (b) with the consent of the parties and if it expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make”.

32. **Lallie AJ** held that the Courts lacked jurisdiction to entertain the alternative claim, and that the CCMA was the appropriate forum to determine whether the respondents had committed unfair conduct relating to the provision of benefits to the appellant in terms of item 2(1)(b). It does not appear from the judgment whether she was referred to s.158 (2) or took it into account. The judgment granting leave to appeal takes this aspect no further.

33. A lack of jurisdiction in respect of the item 2(1)(b) dispute was not pleaded. There appears to have been no objection to the jurisdiction on the part of the respondents at any stage. There is much to be said for the view, therefore, that the respondents by their conduct tacitly consented to the jurisdiction of the Labour Court. See **Reactor Clothing(Pty)Ltd v Robertson and Others** [1998] 3 BLLR 315 (LC) per **ZondoJ** (as he then was). That is, however, not the end of the matter. **Lallie AJ** brought in no express finding on expedience. There was no application for her to make a ruling in terms of s. 158 (2). In the absence of such a ruling, she could not assume jurisdiction.

34. Inferring consent, and allowing for the overlapping evidence, it may at first blush appear expedient for the Court a quo to have decided the item 2(1)(b) issue as well. There are, however, some difficulties in the way of this

course. In contrast to the **Reactor case**, supra, the trial Court would have sat in two capacities at the same time : both as Court and as arbitrator.

Its decision on the first item was appealable (with leave) while a decision on the merits of the second item was not. On appeal it is open to this Court to correct the decision on the first item but, save on review, not the second.

Depending on the reasoning of the Court a quo , and on this Court's view of the merits, this could lead to inconsistent findings or conclusions, which would be undesirable. Furthermore, we do not have the benefit of the trial Court's reasoning and conclusions on the merits of the second item. We may, as a Court of appeal, interfere with the trial Court's decision not to exercise jurisdiction, but what then?. Absent a review, and there is none, we cannot in our appellate capacity simply substitute our view on the merits of item 2(1)(b), whether favourable to the appellant or not. The most we could do would be to remit the item 2(1)(b) issue to the tribunal below for a decision on the merits, which may or may not prompt review proceedings. In such event it would, I think, be inadvisable for this Court to dispose of the appeal on item 2 (1) (a) while leaving item 2 (1)(b) hanging potentially in the air. If there is to be a review, which we cannot predict either way, then appeal and review should be heard together.

35. The alternative course, in terms of s 158(2)(a), was for the Court a quo to have stayed the proceedings in respect of item 2(1)(b) and to have referred that dispute to arbitration. This it omitted to do. There is no appeal in this respect. I did not understand the appellant to express any preferences, or indeed enthusiasm, for either of the two courses which I have outlined.

36. It follows that the appeal with regard to this item must fail.

Costs

37. The trial Court dismissed the appellant's case with costs. There is regrettably

a dispute about what happened in that Court. According to the appellant's heads of argument, and endorsed by the appellant in argument Mr Kennedy, counsel for the first to the third respondents, after taking instructions, informed Lallie AJ: "that any and all claims to costs of the proceedings in the Court a quo were not being sought". This does not accord with the recollection of the respondents' representatives which according to Mr Kennedy is; "that it was indicated during argument merely that the Respondents accepted that costs were a matter in the discretion of the Court and that the Respondents were not vigorously pressing for them".

38. The notice of application for leave to appeal mentioned as its first ground that Lallie AJ erred: "In dismissing the application with costs, when First to Third respondents expressly abandoned any claim for costs during final arguments". This ground of appeal drew no comment in the very brief judgment granting leave. It is not possible for this Court on appeal to resolve this dispute of fact in the appellant's favour. The result is that the appellant's argument, based on an abandonment or waiver of costs, cannot be sustained and that the Court a quo retained its discretion in this connection. Inasmuch as the appellant achieved no success on the merits, I am unable to conclude that the trial Court exercised that discretion un-judicially.

39. In the result the appeal is dismissed with costs.

R.G. Comrie
Acting Judge of Appeal

I agree

RMM Zondo
Judge President

I agree

K. van Dijkhorst
Acting Judge of Appeal

For the Appellant:

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Date of Argument:

24 May 2001

Date of Judgment: