

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no: JA 78/05

In the matter between:

TAFIBRA SA (PTY) LTD

Appellant

AND

CEPPAWAWU

First Respondent

SANDILE NKOSI & 12 OTHERS

**Second and further
Respondents**

Judgment

TLALETSI AJA

Introduction

- [1] On 19 March 2004 the first respondent, acting on behalf of the second to further respondents, declared a dispute of unfair discrimination based on race and colour against the appellant and referred it to the Commission for Conciliation Mediation and Arbitration ("CCMA") for conciliation. The referral was made in terms of sec 10(6)(a) of the

Employment Equity Act 55 of 1998 (as amended) ("the EEA"). ON 04 May 2004 the dispute was conciliated and remained unresolved. The respondents filed their statement of claim in which they alleged that of the five process controllers who were employed by the respondent during the month of March 2003, those who were black received lower starting salaries than the new white employees. On 26 July 2004 the respondents served a Notice of Amendment of the statement of claim. The effect of the amendment was to allege that the pay differences between the black and white process controllers who were appointed in March 2003, within a period of 9 days, constituted unfair discrimination based on race and colour or union membership. According to the respondents the period of 9 days was calculated from 01 March to 10 March 2003. In the pre-trial minutes of the meeting held on 01 September 2004 the parties recorded that the issue as to whether the salary differentials amongst new recruits who were employed between 10 March 2003 and June 2003 and other process controllers (already employed) amounted to unfair discrimination based on race, colour or union membership was in dispute between the parties.

- [2] Pursuant to the trial, Ngcamu AJ, who presided over the trial, found that the respondents had not proved a case of discrimination on the basis of race or colour but that they had proved discrimination based on union membership.

- [3] For the sake of convenience, the second and further respondents will henceforth be referred to herein as the employees.

Factual Background

- [4] The appellant operates a particle chip-board manufacturing plant at Panbult. Panbult is situated in a remote area between Ermelo and Piet Retief. The plant is 60 Kilometres from Ermelo. The process of manufacturing this product is rather highly technical. It is a fully water-driven process which is done through a computerised system. Process controllers operate from a central point and are responsible for, and operate, the computerised system so as to ensure that a quality product is produced. Process controllers control the entire manufacturing system.
- [5] The plant is a continuous operation. It operates 24 hours a day and seven days a week. The process controllers were divided into shifts. When recruiting the first group of process controllers, the appellant looked for individuals with experience as well as individuals who had some form of tertiary qualification. The latter were believed to be people who would be able to assess the information, think on their feet, grow with the organisation and be able to be trained in the way the appellant wanted to operate. Those who had experience were perceived to be able to prevent and solve problems quickly based on their experience in the 'process driven' environment.

- [6] It is common cause that during 1999 the appellant recruited few people who were employed by a competitor in the locality. Most of the recruits came from outside areas such as Nelspruit, Tzaneen and Pretoria. The appellant managed to appoint eleven employees of whom six were African, three white and two of Indian origin. Most of these recruits were sent overseas for intensive training in the process of manufacturing particle chip-board.
- [7] When the plant was started the appellant established two different starting salary levels for process controllers based on experience and qualifications. Process controllers with no tertiary qualifications but extensive experience or had tertiary qualification and adequate experience would be at a higher salary level than process controllers who had tertiary experience but no experience at all or with no tertiary qualifications and little experience would be paid at a lower salary level. According to the appellant it did not matter from what industry the person gained experience, as long as they worked in that environment. Process controllers in the first level earned R5200-00 and those in the second level earned R4500-00. Because of the grading system, salaries remained unequal amongst process controllers, notwithstanding annual increases. This situation had existed since the inception of the appellant's business in 1999.
- [8] More process controllers were employed as the years went by. By 01 January 2003, four different salary levels existed

amongst process controllers. They were graded at their respective salary levels according to their length of service and experience in a process driven environment as well as their qualifications. As at January 2003 the only process controller who was at salary level one was J Rhooode, a coloured man and non-union member who later resigned on 31 January 2003. With the exception of Mr T. Shongwe who was appointed on 01 March 2004 at level 4, and Messrs Madonsela, Mavundla, Sibeko, and T Shongwe (being 4 of the second to further respondents) who were appointed on 01 March 2003 at level 4, the eight remaining second to further respondents, were respectively employed at salary levels 2 and 3. P. Smook, a white process controller who was a union member was employed at level 2 at the time. He was dismissed from the appellant's employ on 10 September 2004. He is however not one of the respondents.

- [9] During 2000, the first respondent demanded to be accorded organisational rights by appellant. This led to the conclusion of an interim recognition agreement between the appellant and first respondent. The first respondent was recognised as a bargaining agent of all its *bona fide* members within several job categories, including, process controllers. This agreement applied also to the appellant's other plants at George and White River. Not all process controllers at the Panbult plant joined the union. Those who did not join the union fell outside the scope of the bargaining unit.

[10] The practice at the appellant was to have salary negotiations between the first respondent and the appellant during the month of July every year. July became the month in which union members received salary increases. Those employees falling outside the bargaining unit received their salary increment during January each year.

[11] It is not disputed that over the years preceding February 2003, the appellant had experienced high staff turnover amongst process controllers. According to Mr Johannes Marthinus Fourie ("Fourie"), the Human Resources Manager at the appellant since May 2001, the experienced process controllers left the appellant's employment due to factors such as lack of employment benefits offered by the appellant, the remoteness of Panbult plant and lack of social activities in the surrounding towns. These problems made it difficult for the appellant to retain younger individuals who had not relocated with their families to the area.

[12] Of the appellant's complement of 12 process controllers as at March 2003, four of the twelve had no experience. They were Madonsela, Mavundla, Sibeko and L. Shongwe. Two of the twelve had no tertiary qualifications but had little experience. These two were Motha and Ngwenya. Four had adequate experience of between 2 and 5 years. They were Mathekga, Nkosi, Letsosa and Xaba. Only two had extensive experience of more than 5 years. They were Dlamini and Smook.

- [13] By the end of February 2003, there were only eight process controllers left in the appellant's employment. This number was insufficient for the team required for a plant that ran on a continuous basis. As at 01 March 2003 at least 4 black trainees had become qualified through the process of "internal-on-the-job-training". The appellant still ran short of four more process controller on its 'task force' and had no further candidates suitable for internal promotion.
- [14] Despite advertising the vacant positions in the local and surrounding areas, the appellant was unable to attract suitably qualified and experienced candidates to enhance productivity and efficiency. For these reasons the appellant embarked on a recruitment drive. It advertised the vacant positions within the Vaal Triangle. After conducting the interviews in the area, the appellant identified three candidates who, according to Fourie, were extensively experienced. These were Nel, Roberts and Jordaan. Because of their extensive prior experience as qualified process controllers in a process-driven environment, they were all appointed on salary level one. They were all white males. Nel was appointed on 10 March 2003, Roberts on 17 March 2003 and Jordaan on 01 May 2003. They did not join the first respondent.
- [15] The three new recruits were each offered a starting salary of R6400-00. They accepted the offer and relocated with their immediate families to the surrounding towns. As at 01 March 2003, the highest paid process controllers at Panbult were

Dlamini, Mathekga, Xaba and Smook (the first three African and the last one Coloured) and were each on level two earning R5767-60. There was no employee who was on level one. This has been the situation since the resignation of Rhoode on 31 January 2003. To explain why the new recruits were offered higher salaries than normal entry salary for the level in which they were appointed, Fourie testified that the salary that was being paid to Dlamini, Mathekga, Xaba and Smook (all of whom were not on level one), was not attractive enough to persuade the new recruits to relocate to the local area surrounding Panbult plant and to accept employment at the appellant. The pay package offered to them was, therefore, increased in order to attract them to take up employment with the appellant for economic reasons. To arrive at the figure offered, Fourie testified that they took the current highest salary payable and added to it 11% thereof which was an anticipated annual increase to be agreed upon with the union during July negotiations. They further anticipated that during July 2003 any difference would then be 'equalised' with the high level earners in that category.

[16] On 16 June 2003, another white process controller, namely J Potgieter was appointed to replace Roberts who resigned only one month after his appointment in March 2003. Potgieter was appointed in level one at a monthly salary of R6400-00. An investigation which was conducted after this dispute had been referred to the Labour Court and during preparation for trial revealed that Potgieter was appointed at

the wrong salary level as he did not have the required level of experience and tertiary qualification. In explaining the discrepancy Fourie testified that line management merely asked the Human Resources Officer to effect the appointment of Potgieter without either highlighting his level or his salary. It seems that as he was replacing Roberts, there was an assumption that he would be at the same level at which Roberts had been and get the same salary.

[17] It is common cause that during July 2003 annual salary negotiations took place as expected. The first respondent tabled a demand for a wage increase of 15%. The evidence by Fourie was to the effect that the appellant's management had approached the negotiations on the basis that the union would not be prepared to agree on an increase that would be lower than 11% and, for that reason, they had been prepared to reach agreement with the union for 11% increase. However, it was ultimately agreed upon 9% and not 11% as was anticipated by the management of the appellant. In addition to the 9% salary increase, a settlement bonus equal to 12% of the annual salary was also agreed upon. This effectively meant that for that year the union members received an increase of 10%. However, as from July 2003 the monthly salaries of union members were therefore only increased by 9%.

[18] The appointment of the three new white recruits resulted in pay differences among process controllers at Panbult plant. It is common cause that the difference in salaries *per se* was

not an unusual situation at the appellant. As non-union members were individually assessed on merit for increment and whilst union members were given the increases that the union had bargained for on their behalf, union and non-union members did not always receive the same percentage of a salary increase. There were also salary differences within non-union members themselves. The evidence tendered on behalf of the appellant which was not disputed by the respondents revealed the following factual historical situation about salary increases. During January 2001 non-union members received 7% increment whereas union members were, in addition to what was given to non-union employees, given 3.5%. This meant that union members got a salary increase of 10.5%; during the year 2002 non-union members received 7% increase and wage negotiations with the union settled at 8.5% for the union members. For the year 2004, non-union employees received 6% plus a further 1.5% increase effective 01 January 2005. What had caused the disparity in salaries for the year 2003 among process controllers was, therefore, the high starting salary given to new recruits, who happened to be classified as white, and the negotiated salary increment of 9% for union members.

- [19] The evidence tendered by the appellant to justify why the new recruits were offered high starting salary is that of economic/commercial reasons that had arisen as a result of the workplace and operational requirements of the appellant, the state of the employment market preceding their appointment and the locality of the appellant's business. As

pointed out earlier on, the appellant's evidence was that it needed four experienced process controllers. It had already exhausted the internal pool of those who could be trained. Furthermore, there were no process controllers left within the area surrounding Panbult. Having identified the three candidates from the Vaal Triangle, the appellant resolved to increase the pay package applicable to process controllers to motivate them to relocate with their immediate families to the Panbult area with the ultimate goal of retaining their skills and enhancing production. The appellant's evidence was that the differentiation in salaries had nothing to do with race or union membership but pure economic/commercial operational requirements prevailing at the plant at the time. Fourie testified further that the three new white employees were also appointed with a condition that they would not receive any salary increment for that year.

[20] As regards the disparity between the 9% and 11% increases, Fourie's evidence was that although they anticipated that the salary negotiation would lead to an 11% agreement, they had managed to settle at 9% plus bonus and that the union members received what they bargained for. This, according to Fourie, had nothing to do with discrimination based on union membership.

[21] Mr Baloyi Mweza, the union official who was employed by the first respondent, testified that he had no knowledge of the operations at the appellant. He also had no knowledge of the experience of the white appointees. His evidence related to

his participation in the salary negotiations which is common cause. The rest of his evidence is what he was told by his union members which did not take the matter anywhere. It was not admissible and should not have been admitted. The only evidence tendered to support the discrimination claim was that of Samuel Sibeko ("Sibeko"), Sandile Nkosi ("Nkosi") and Fraser Mathekga ("Mathekga"), all of whom are some of the respondents herein. The relevant part of their evidence can be summarised hereunder.

- [22] Sibeko testified that he was employed at Panbult plant during 1999 as a press operator. He started training as a process controller in 2001 and was appointed process controller on 01 March 2003 at level four after being evaluated. His starting salary was R5153-00 per month. He compared himself to Potgieter who was appointed after him at a starting salary of R6400-00 without having any experience and qualifications. He also said that his period of training for 24 months as process controller was too long as Potgieter did not go through that lengthy training. Sibeko conceded that people who already had experience and higher qualifications were supposed to be paid higher salaries irrespective of their race. He testified that the discrimination complaint was lodged with the respondent during May 2003. He, however, only raised his grievance thereafter when he discovered that Potgieter was earning more than him. He personally had no complaint against Nel, Roberts or Jordaan.

[23] Nkosi testified that he was employed at the appellant on 17 January 2000. He held a National Diploma in chemical engineering and had no relevant experience. He was appointed on level three. He believed that he was supposed to have been appointed at level one. He said that he was discriminated against when he compared himself to Potgieter. He testified that he had to train Nel who was one of the newly appointed employees. It was put to him under cross-examination that it was not really training but orientation for Nel—who was already a qualified process controller—on the specific operations peculiar to the appellant's plant. He conceded that he had no problem if a person with relevant qualifications and experience was appointed at a higher level than him irrespective of his race. He further conceded that, because of the salary structure at the appellant, there had been periods in the past when blacks had earned more than non-union members. Nkosi testified further that he also resided at Ermelo and was travelling daily with Nel to Panbult. Nkosi conceded further that an experienced person from outside had to go through a process of acquainting himself, with the process at Panbult in order to function "individually" as a process controller.

[24] Mathekga testified that he had a National Diploma in chemical engineering. He had previously worked at Impala Refineries and had later moved to Springs. He said that when he was appointed at the appellant, his qualification and 18 months experience was taken into account even though it related to a different industry. He attended training in Europe for three

months for him to acquire the right skills for his work. He also testified that he did not know of the existence of levels and gradings at the appellant but he was aware that there were process controllers who earned more than he did.

Proceedings in the Labour Court

[25] The Labour Court rejected the justification advanced on behalf of the appellant that it needed to attract suitably qualified and experienced process controllers and to retain them. The Labour Court reasoned that the appellant's justification assumed that the black process controllers did not require higher salaries for their retention. The court remarked that the new white recruits came from the same area where the others came from. This reasoning did not take into account the fact that the starting salary was used to induce new recruits to accept appointment and be retained at the appellant's plant. With regard to the 11% increment, the Labour Court reasoned that it was common cause that union members received the same or higher salaries than employees who were non-union members and that it was only in July 2003 that the salaries were not "levelled". The court held that the appellant's failure to adjust the salaries by 11% could not be justified on the reasons provided on behalf of the appellant. With regard to the position of Potgieter, the Labour Court accepted the explanation on behalf of the appellant that his appointment on level one was a mistake which was only discovered during the preparation

of the case for trial and that such an explanation was given in good faith.

[26] The Labour Court, in conclusion, held that the three new recruits, Nel, Jordaan and Roberts, qualified to be appointed on salary level one on the basis of their qualifications and experience and was unable to find any fault on the appellant giving the new recruit 11% more in anticipation that the salaries would be “levelled” during the salary negotiations. The Court however issued a declaratory order to the effect that the differentiation in salaries amongst process controllers constituted unfair discrimination based on union membership and also ordered that their salaries be adjusted by an amount equal to 2% representing the difference between the 11% and 9% the two groups received respectively, to be calculated from July 2003 to the date of the order.

The appeal

[27] The appellant’s appeal lies against that part of the judgment in terms of which the Labour Court declared that the differentiation in salaries amongst the process controllers constituted unfair discrimination based on union membership and the orders flowing therefrom. The cross-appeal by the respondents is against that part of the judgment wherein the *court a quo* found that cross-appellants (*Applicants a quo*) failed to prove that there was racial discrimination. The appellant sought and obtained leave from the Labour Court

to appeal against that part of the order that is not in its favour.

[28] The respondent's claim is that the disparity in salaries amounts to unfair discrimination in terms of section 6(1) of the EEA. Section 6(1) of the EEA provides that:

"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, ethnicity or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth"

In terms of sec 5 of the EEA every employer is enjoined to take steps to promote equal opportunity in the work-place by eliminating unfair discrimination in any employment policy or practice. Section 1 defines employment policy or practice as including, *inter alia*, recruitment procedures, advertising, selection criteria, appointment and appointment process, etc.

[29]. The facts of this case make the discussion of the test laid down by **Goldstone J** in **Harksen v Lane NO and Others** 1998 (1) SA 300 (CC) unnecessary in dealing with the parties' dispute. The dispute is more factual and is based on common cause facts.

[30] I will firstly refer to the pleadings in order to establish the real dispute that was referred for conciliation. This is necessary because the respondents tendered evidence at the

Labour Court which was not foreshadowed in their claim as pleaded. This conduct had the effect of obscuring the real issues that were to be determined.

[31] In the statement of claim, the respondents stated the following at paragraph 6 thereof:

"6.1 The respondent appointed 5 (five) process controllers in the same month, precisely within a period of 9 (nine) days. Two of them are black and they are employed at a salary which is R1206-25 less than their white associates. The first Applicant submits that this is unfair discrimination based on race and colour."

On the 27 July 2004, the respondents filed an amendment of paragraph 6.1 of the statement of claim by adding the words "or union membership". This amendment had the effect of extending the grounds of discrimination to include union membership.

[32] It is common cause that before the above amendment was effected, the appellant served and filed pre-trial questions. This was on 21 July 2004. In the pre-trial questions the appellant required the respondents to, *inter alia*, identify the three white employees allegedly employed as process controllers on 10 March 2003, and to specify the dates applicable to the 9 (nine) days referred to in paragraph 6.2. In reply, the respondents named G.Nel, W. Jordaan and J. Potgieter as the three white employees. The period of 9 (nine) days was identified as between 01 March 2003 and 10

March 2003. Of note is the fact that Potgieter was not yet employed during this period as he was only appointed on 1 June 2003 to replace Roberts who was appointed on 17 March 2003 and resigned a month later.

[33] During the 5th and the 7th October 2002, the parties signed a pre-trial Minute. In the minutes the parties recorded one of the facts in dispute to be "*that the salary differentials amongst the new recruits who were employed between 10 March 2003 and June 2003 and other process controllers amounts to unfair discrimination based on race, colour or union membership.*" The parties further recorded that one of the issues to be decided was "*whether the salary differentials between the white process controllers, being the new recruits who were employed between 10 March and June 2003 and other Process Controllers, amounts to unfair discrimination based on race, colour or union membership.*"

[34] The evidence presented revealed that in the past union and non-union members received different pay increases. This aspect was conceded by the respondents during trial. The salary increases were based on different processes that were followed. The process was to negotiate with the union for the salary increases for its members and increases for non-union members were based on merit. Furthermore, factors such as qualifications and experience contributed to the salary differences. There is no evidence to suggest that the policy was used to disadvantage the respondents. Although there may have been an attempt by Nkosi to suggest that he

trained Nel to do the work of a process controller, it can be accepted that there was no basis to suggest that the new white recruits did not deserve to be placed on level one. It is common cause that the black process controllers were on level two and none of them was on level one. It was not the respondents' case that the appellant had unfairly failed to place the black process controllers on level one whilst the white process controllers were placed on level one. Therefore, the situation is that for all intents and purposes this is a case where new white recruits were placed on a higher level and the process controllers who had been in the employ of the appellant were on lower levels. That being the case, it is not surprising that level one employees were paid higher salaries than those on lower levels. That means that, subject to what I will say about the case of Potgieter below, for all intents and purposes the conduct of the employer to pay new recruits higher salaries than others cannot be found to have been unfair in any one of the grounds provided in sec 6(4) of the EEA.

[35] With regard to the claim by the respondents that they did not receive the same salary increases pursuant to the wage negotiations in July 2003 as the aggregate increases that had been awarded to all employees outside the bargaining unit in January 2003, it must be accepted that what the union members got was a result of a collective bargaining. The respondents cannot be heard to deviate from what they have bargained for. The respondents only discovered much later that they had bargained for less than what was paid to non-

union members. Furthermore, this claim is not part of the dispute that was referred for conciliation.

[36] I have referred above to the fact that the employees also complained that Potgieter, one of the white process controllers, was paid a higher salary than they were paid despite the fact that he did not have better qualifications or longer experience than them. The appellant's response to this complaint was two-fold. First, it submitted that comparing what Potgieter was paid to justify the employees' complaint fell outside the dispute that was referred to the CCMA for conciliation and could, therefore, not be relied upon by the employees in support of their claim. Second, the appellant explained that the rate at which Potgieter was paid was a result of a mistake on its part. The appellant pointed out that the mistake was that it placed Potgieter on a higher rank than he should have been placed. The appellant admitted in effect that Potgieter should not have been receiving the higher salary that the employees complain they, too, should have been getting but he should have been on a lower rank and receiving a lower salary.

[37] With regard to the appellant's first answer, the position is that when, the employees and the union referred their dispute to the CCMA for conciliation, they complained that they, being black process controllers, were paid, a lower salary rate than the rate at which the appellant paid white process controllers who were employed during March 2003. It is common cause that Potgieter was not employed during

that period. It was only during the union's preparation for trial in the Court *a quo* that they sought to rely on Potgieter to justify their complaint. It seems to me that the appellant's first answer to the union's reliance upon Potgieter's salary has merit. The dispute that the respondents referred to the CCMA for conciliation was not about whether or not the appellant's conduct in paying black process controllers a different and lower salary than white process controllers constituted unfair discrimination but it was whether or not the appellant's conduct in paying the black process controllers employed at a certain period at a lower rate than the rate at which it was paying white process controllers which had been employed during a certain and specific period constituted unfair discrimination. Since Potgieter fell outside that category of process controllers, his salary rate could not be relied upon to support the complaint that was referred to the CCMA for conciliation and later to the Labour Court for adjudication.

- [38] Despite the finding I have made above with regard to the respondents' reliance upon Potgieter's salary rate to support their claim, I am of the view that, if the appellant's explanation for him being paid at a higher salary rate is a genuine and true explanation, the appellant should correct the mistake. One way of doing that would be to secure his consent to being put on the rank on which he should have been put in the first place which will obviously mean a reduction in salary and arrange for a repayment in one way or another of the undeserved portion of his salary that had

been paid to him over the relevant period. If he does not co-operate, the appellant can consider whether his refusal does not mean that consideration should be given to dismissing him for operational requirements, after a consultation process contemplated in sec 189 of the Labour Relations Act, 1995 (Act 66 of 1995) if such consultation process fails to produce an agreement between the parties. **(see: Fry's Metals (PTY) LTD v National Union of Metalworkers of SA & others** (2003) 24 ILJ 133 (LAC) at 147A–148I: [2003] 2 BLLR 140 at 151F–153D)

[39] Should the appellant fail to deal satisfactorily and decisively with the Potgieter issue, it may well find that the respondents may begin to reject the appellant's explanation that Potgieter being paid at a higher salary rate than the second and further respondents was a genuine mistake and the consequences may not be worth risking.

[40] In my view the appeal should succeed and the cross-appeal should fail.

[41] What remains is the issue of costs. I am of the view that the requirements of the law and fairness dictate that no order should be made in this matter as to costs.

[42] In the result, it is ordered as follows:

- a. The appeal is upheld.
- b. The decision of the Labour Court is set aside.

- c. The cross-appeal is dismissed.
- d. There is no order as to costs.

Tlaletsi AJA

I agree.

Zondo JP

I agree

Waglay JA

For the Appellant: Mr A Maier

Instructed by: Lapin Attorneys

For the Respondent: Mr WR Mokhare

Instructed by: Sihali Molefe Inc

Date of judgment: 31/07/08

