



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA10/2016

In the matter between:

MINISTER OF CORRECTIONAL SERVICES

First Appellant

NATIONAL COMMISSIONER,

CORRECTIONAL SERVICES

Second Appellant

REGIONAL COMMISSIONER CORRECTIONAL

SERVICES (WESTERN CAPE)

Third Appellant

and

ZAMEKA AGATHA DUMA

Respondent

Heard: 11 May 2017

Delivered: 23 June 2017

Summary: Employee claiming unfair discrimination based on geographical area in the grading process of her position – Held that:

Employee required to show that the employer's conduct was unfair and amounted to a differentiation on geographical ground and that the practice was irrational and impaired her dignity - employee required, at the very least, to show that the nature and volume of work which she performed in her position was

similar to that of legal officers holding the same position in the four provinces who occupied a higher grade level and thus that the ground of differentiation was indeed geographical location - no concrete evidence other than inferences sought to be drawn by employee to indicate that the basis for this differentiation was geography - employee failing to discharge the burden of proof in that the inference that she seeks to draw from the stated case is not the most readily apparent and acceptable inference from a number of possible inferences. Appeal upheld with costs – Labour Court’s judgment set aside.

Coram: Tlaletsi AJP, Davis JA and Phatshoane AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This case concerns unfair discrimination and its determination in terms of s6 of the Employment Equity Act 55 of 1998 (“EEA”).
- [2] This dispute was brought before the court *a quo* in terms of a stated case in terms of which respondent claimed that she was discriminated against on the grounds of “her geographical location”. Respondent was successful in the court *a quo* which held that she had suffered from unfair discrimination and ordered the appellants to pay an amount equivalent to the difference between the remuneration she received from August 2009 to the date of the court order on 02 February 2016. The amount of the remuneration was defined as that which she would have been received during that period, “had she been graded on level 9 as at the date of her translation in terms of the Occupational Specific Dispensation (OSD) as of 1 July 2007”. The court *a quo* further ordered that within one calendar month from the date of the court order, the appellants were to adjust the monthly remuneration paid to respondent to align it with the current remuneration

entitlement of an employee with her job description, namely on a level 9 post prior to translation in terms of the OSD.

- [3] It is against this order that appellants have approached this Court, with the leave of the court *a quo*.

The material facts

- [4] As indicated, the case came before the court *a quo* as a stated case. Accordingly, the facts upon which the judgment of the court *a quo* was predicted are common cause. The facts, as set out in the stated case, can be summarised thus: respondent was employed as custodial officer in the Department of Correctional Services, Western Cape ("the department") at salary level 3 on 8 September 2000. Subsequently she completed a BJuris degree which made her eligible to be appointed as a legal administration officer.
- [5] On 1 August 2006, respondent was duly appointed as a legal administration officer, being the equivalent to a senior correctional officer at the Voorberg Management Area in Western Cape Province, having applied for the position which was advertised and filled at salary level 8.
- [6] On 07 February 2008, an agreement was reached that the General Public Service Sectorial Bargaining Council ("GPSSBC") to implement retrospectively PSCBC Resolution 1 of 2007 in respect of the development and implementation of the applicable OSD from 1 July 2007. The Minister of Public Service and Administration issued a determination on 29 April 2008 in which he stated that "grading of jobs is centrally determined in terms of the OSD and the Minister's determination and departments may not deviate in this regard. Therefore (re) grading of jobs by departments by means of the prescribed job evaluation system is not permissible".
- [7] On 16 September 2009, respondent, together with two other senior correctional officers, launched a collective grievance claiming that they should have been appointed on salary level 9. The grievance could not be resolved and respondent

and the other two officials referred an unfair labour practice dispute to the GPSSBC.

[8] The Commissioner, who was duly appointed, ruled that the GPSSBC lacked jurisdiction, in that this dispute did not fall within the purview of s186 (2)(a) of the Labour Relations Act, 66 of 1995, ("LRA") as it dealt with unfair conduct by the employer relating to the promotion, demotion or the provision of benefits to an employee. The respondent then referred the dispute on 1 June 2012 to the Commission for Conciliation Mediation and Arbitration (CCMA), which was subsequently referred to the Labour Court on 18 August 2012.

[9] The essence of the dispute between the parties is captured in the stated case thus:

'Duma concedes that the grading of her job was regulated by the Occupational Specific Dispensation (OSD) which abolished the previous salary levels with effect 1 July 2007.

However, she is not seeking to be placed at level 9 or 10. Rather, she seeks an order that she ought to have been placed at level 10, alternatively level 9, and translated through the various levels or grades accordingly.

There is no dispute that Duma was correctly translated onto the new dispensation after the introduction of the OSD. There is also no dispute that she would have translated onto a higher level if she had been on a higher level at the time the OSD came into effect.

Duma claims that she was discriminated against by virtue of the fact that employees with similar job descriptions in other provinces were at Assistant Director salary level 9. The mere fact of their being in different locations (geographic location being the ground of discrimination) is arbitrary and affects the applicant's dignity on a comparably serious manner to the grounds listed in the Employment Equity Act 55 of 1998 ('the EEA'). She was thus discriminated against and claims that the discrimination was unfair.

Duma concedes that she bears the onus to prove both the alleged discrimination and its alleged unfairness.

The respondents deny that the manner in which Duma was treated was motivated by discrimination on arbitrary grounds i.e. it denies that it discriminated against Duma.'

The judgment of the court *a quo*

[10] In finding for the respondent, Rabkin-Naicker J held that, although respondent's claim was based on an unspecified ground of discrimination, it behoved the appellant to put up a case as to why the respondent did not suffer unfair discrimination; that is it was required to justify the differentiation so alleged. Expressed differently, if respondent had been employed in another province, she would have held a position at level 9 in terms of the OSD. In dealing with the evidence presented, the learned judge held:

'There appears to be little more than a bald denial by the respondents that unfair discrimination has taken place. It is recorded by the respondents in the stated case that: "The respondents deny that the manner in which Duma was treated was motivated by discrimination on arbitrary grounds. i.e. it denies that it discriminated against Duma." Nor is the issue of the purpose of the differentiation between the Western Cape posts and the posts in other provinces dealt with. It would appear that the respondents, in their defence of the matter, are more concerned with the remedy the applicant seeks and whether it is competent for the court to grant that relief.

On the other hand, the submissions on Duma's behalf that it must be accepted that the discrimination against her was unfair are compelling. These include that:

1. She was treated arbitrarily on a ground that impacted on her dignity;
2. The respondents have put up nothing to show that it was necessary to differentiate between Managers: Legal Services in the Western Cape differently from their counterparts in other provinces. There is no apparent purpose for the distinction in treatment;

3. The applicant has been prejudiced financially over a number of years given that the effect of the discrimination was that she was not remunerated at the correct levels;
4. Any distinction between employees based solely on the area of the country in which they work is, given our history, anathema to the society envisaged by the Constitution.
5. The EEA is premised on amongst others giving effect to the right to equality and the eradication of discrimination.

I therefore accept that Duma has met the onus of proving that the discrimination was unfair.'

It is this finding and its underlying reasoning that is assailed by appellants before this Court.

The applicable law

[11] In order to evaluate the dispute as presented by the parties to this Court, it is necessary to consider the relevant law. Section 6(1) of the EEA provides that no person may unfairly discriminate, directly or indirectly, against an employee in an employment policy or practice on one of a number of its specified grounds as set out in the section, which include "on any other arbitrary ground". Turning to s6(2) of the EEA, it is not unfair discrimination to take affirmative action measures consistent with the purposes of EEA or to distinguish, exclude or prefer any person on the basis of an inherent requirement for a job. Section 11(1) provides that, if unfair discrimination is alleged on a ground listed in s6(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 not unfair or is otherwise justifiable.

Section 11(2), provides that if unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that

- (a) the conduct complained of is not rational;
- (b) the conduct complained of amounts to discrimination; and
- (c) the discrimination is unfair.

It is the latter section which clearly is central to the dispute between the parties in the present case.

[12] In *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others*¹ the court said “discrimination is unfair if it is reprehensible in terms of the society’s prevailing norms. Whether society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational”².

[13] This *dictum* was approved of in *SA Airways (Pty) Ltd v Janse van Vuuren and Another* (2014) 35 ILJ 2774 (LAC) at para 41. To determine whether the ground alleged constitutes unfair discrimination, recourse must also be had to the *dictum* of Ngcobo J (as he then was) in *Hoffmann v SA Airways (Hoffmann)*:³

‘At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant consideration in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to

¹ (1998) ILJ 285 (LC).

² At 295.

³ 2001 (1) SA 1 (CC).

which the rights or interest of the victim of the discrimination have been affected and whether the discrimination has impaired the human dignity of the victim.’⁴

- [14] It follows therefore that, in this case, respondent was required to show that the conduct complained of clearly amounted to a differentiation on geographical grounds and that it was unfair, on the basis of principles set out in the *dictum* in *Hoffmann, supra*; hence the practice was not rational and impaired her dignity.

Respondent's case

- [15] The case put up by respondent, who bore the burden to prove that the conduct of which she alleged fell within the scope of s6(1) EEA, amounted to the following:

1. She was treated arbitrarily on a ground that impacted significantly on her dignity in that to use a person's geographical location as the basis for a pay discrimination was prejudicial, inherently arbitrary and reproduced a sad history of this country which had distinguished between people based on geographical location. Further, it failed to recognise that employees do not always have the capacity to choose where they wish to live but are compelled by circumstances to live in a particular location; hence the pernicious character of discrimination by way of evidence which showed clear differentiation on the grounds of geographical location.
2. The appellants had placed nothing before the court *a quo* to show that it was necessary to treat respondent in the alleged manner or that they were justified in treating respondent differently from her counterparts in other provinces. There was, in other words, no argument to gainsay that this differentiation had not prejudiced her financially over a number of years.

⁴ At para 27.

Appellants' case

- [16] According to appellants, respondent was appointed Manager: Legal Service: Voorberg Management Area Western Cape Region with a salary notch of R 122, 841.00 per annum (level 8) with effect from 1 August 2006. Appellants contended that the effect of PSCBC Resolution 1 of 2007, which provided for the implementation of OSD for qualified legal professionals with effect from 1 July 2007, cannot be interpreted to have transformed the appointment of respondent from level 8 to level 10 or even level 9. The fact that the legal service managers in four other provinces, namely Limpopo, Mpumalanga, North West and KwaZulu, are characterised as level 9 employees did not mean that it automatically could be concluded, without more, that it was unfair for respondent to be employed at level 8.
- [17] Appellants contended further that, while it might be correct that legal services managers in the Department would perform the same kind of work no matter where they are, the volume of work so performed may differ from region to region. The geographical location of the post was, in the view of appellants, an improper finding upon which to justify a conclusion that discrimination as contemplated in s 6 EEA had taken place.
- [18] As from the implementation of OSD, regulations have been set out which provided in detail the work that was required by employees at various levels in the Department and the requirements which were demanded in order to be appointed at a particular level. Appellants contended that the geographical location could serve as a basis to categorise the level differently by taking into consideration the size of the correctional facility, the number of inmates, the costs of living in the area concerned and the attractiveness of the area itself. Furthermore, there were at least four other provinces, in addition to the Western Cape, where respondent's post had been graded as a level 8.
- [19] The relevant objectives of the OSD of July 2007 were captured as follows:

'The grading of the jobs is centrally determined in terms of the OSD and the Minister's determination, and departments may not deviate in this regard. Therefore, the (re)grading of jobs by departments by means of the prescribed job evaluation system are not permissible.'

The OSD had, in the view of appellants, set out comprehensively the basis by which the grading of jobs would take place. The objectives and the set of criteria included in the OSD were never placed in dispute. Hence, appellants contended there was no further evidence which was required of them to rebut the inferences sought to be drawn by respondent; that is criteria other than geographical location could plausibly explain the basis of respondent's grading.

Evaluation

[20] As was set out in the formal grievance form submitted by respondent and two others on 16 September 2009, "it is unfair that some regions LAD's are in ASD level while their job descriptions are the same benchmarking should be done for equality." The question for determination is whether, absent any further evidence provided by appellants, it can be concluded that the act of being graded on a different level to their counterparts in four provinces, is without more, sufficient to justify discrimination on the grounds of geographical location which then falls within the ambit of s 6 EEA.

[21] Two decades ago in *Louw v Golden Arrow Bus Services (Pty) Ltd*⁵ Landman J (as he then was) wrote:

'Discrimination on a particular "ground" means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries

⁵ (2000) 21 ILJ 188 (LC).

constitutes direct discrimination, he must prove that his salary is less than Mr Beneke's salary because of his race.'⁶

Hence, a claimant in an equal pay claim must establish that the work done by a person who can be reliably classified as a comparator is the same or similar work. In a claim for work of equal value, it behoves a claimant to establish that the tasks performed by the comparator and the claimant are of equal value, having regard to the required degree of skill, physical and mental effort, responsibility and other factors. If one examines the text of the OSD, it is clear that care was taken to provide for the scenario that, where a particular legal officer for example, performs certain tasks which require a particular amount of time, another officer occupying the same position who has a more demanding set of work pressures may be shown justifiably to be paid more.

[22] Agreed that respondent is able to show a comparator of "Manager: legal Services" and that legal service managers in four provinces are categorised at level 9. However, absolutely no evidence as to the nature of the work undertaken by the legal service managers in these provinces and why in other provinces they are not categorised at level 9 employees was available to the Court. Respondent was required to establish a link between the alleged unfair differentiation; that is a difference in remuneration for what she considered to be the same work or work of equal value, and her geographical location. See *Mangena and others v Fila South Africa (Pty) Ltd and others* (2010) 31 ILJ 662 (LAC) (*Mangena*).

[23] The question with which the court grappled in *Mangena, supra*, comes back to haunt this case, namely was there an adequate factual foundation to sustain the claim that respondent was on a salary notch which was unjustified because of her geographical location. It is this factual foundation which permits a court to examine whether the complainant suffered an assault to her dignity and whether her rights or interests have been unfairly affected.

⁶ At 197.

- [24] The shadow of these principles looms large in the present dispute precisely because it was fought out on the basis of a stated case. It may well be, given the notorious inability of our legal system to expedite trials so that they are reasonably affordable for litigants such as the respondent, that respondent had little option but to litigate on the basis of a stated case. But the difficulty with a stated case in general and the facts of this case in particular is that in an EEA based case, a burden of proof rests upon a claimant such as respondent. She was required, at the very least, to show that the nature and volume of work which she performed in her position was similar to that of legal officers holding the same position in the four provinces who occupied a higher grade level and thus that the ground of differentiation (which was not a specified ground) was indeed geographical location.
- [25] There is no concrete evidence other than inferences sought to be drawn by respondent to indicate that the basis for this differentiation was geography. In other words, absent an inference which must be the only reasonable one to be drawn from the facts which emerged from this stated case, there is no evidential basis by which respondent sought to discharge the initial *onus*.
- [26] In my view, it cannot be concluded that respondent's posting was attributable to geographical location and hence formed the basis for differentiation which then fell within the scope of s6 EEA. My reason is the following: On the basis of the stated case, respondent cannot discharge the burden of proof which rests on her, in that the inference that she seeks to draw from the stated case and hence rely upon to justify her claim is not the most readily apparent and acceptable inference from a number of possible inferences that might be drawn as to why a manager in the Western Cape is employed at a level 8 and a legal manager in another province is at a level 9. Differentiation of work load is as plausible a reason as is geographical location. Hence inferential reasoning alone cannot justify respondent's case.
- [27] For all of these reasons therefore the following is ordered:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court *a quo* of 2 February 2016 is set aside and replaced with the following order:

The appeal is dismissed with costs.

Davis JA

Tlaetsi AJP and Phatshoane concur in the judgment of Davis JA

APPEARANCES:

FOR THE APPELLANTS: Nazir Cassim SC

Instructed by State Attorney (Paul Pio)

FOR THE RESPONDENT: CS BOSCH

Instructed by Bradley Conradie Attorneys