



REPUBLIC OF SOUTH AFRICA

Not Reportable

Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Case no: D644/08

In the matter between:

PERTH DALAIS

Applicant

and

TELKOM S.A

Respondent

Heard: 24 February 2011

Delivered: 22 November 2011

Summary: Application in terms of Section 10(6)(a) of Act 55 of 1998. Respondent establishing that discrimination on gender basis fair in that it accorded with the approved Employment Equity Plan. Application dismissed

JUDGMENT

GUSH J

[1.] This matter concerns an application filed by the applicant in terms of Section 10(6)(a) of the Employment Equity Act.(The Act)¹

[2.] In his statement of case, the applicant, who is an employee of the respondent, averred that he had applied for an advertised position and had been unfairly discriminated against on the grounds of his gender by the respondent in that the respondent had not shortlisted nor interviewed him for the post (and accordingly was not appointed). The respondent had only considered female applicants for the position and advised the applicant 'in an endeavour to meet the company's targets for employment equity preference was given to female applicants'.

[3.] The applicant sought an order that he be granted a 'protected promotion to a S6 post which is equivalent to and has the same terms and conditions as the M6 post the applicant applied for'; alternatively compensation.

[4.] In addition, the applicant applied for condonation for the late filing of his statement of claim. The applicant recorded in his application for condonation that the dispute arose on 21 November 2007. He referred the dispute to the CCMA² on 6 February 2008. The matter was conciliated on 7 March 2008 and a certificate was issued recording that the matter remained unresolved. The statement of claim was filed on 17 November 2008 and the application for condonation was filed on 21 December 2010. The respondent opposed the applicant's application for condonation.

[5.] The parties submitted that the issue of condonation would be determined primarily on a consideration of the applicant's prospects of success and they indicated that they had agreed to proceed by way of a stated case. In the

¹ Act No. 55 of 1998.

² Commission for Conciliation, Mediation and Arbitration.

circumstances, the matter proceeded with the parties addressing both the merits of the matter and the question of condonation.

[6.] Having agreed to proceed by way of stated case, the parties recorded that they intended to rely on the minutes of the pre-trial conference and the common trial bundle.

[7.] The relevant facts which were recorded as being common cause in the pre-trial minute and during argument were as follows:

- a. In July 2006, the applicant had applied for and was offered by the respondent, a position of branch manager in Mthatha, a position the applicant elected not to accept;
- b. On 27 August 2007, the respondent advertised two positions for branch managers in the Durban area. The posts were, as was the Mthatha post, level S6/M6 posts;
- c. The applicant applied for these positions but was not shortlisted and according was neither interviewed nor appointed to either post by the respondent;
- d. When the applicant enquired as to why he had not been shortlisted he was advised that 'in an endeavour to meet the company's targets for employment Equity, preference was given to female applicants.'
- e. As at August 2007, the respondent had achieved and exceeded its employment equity targets in respect of female representation at S6/M6 post level within the consumer markets division but had not at that time achieved its employment equity targets as set out in its approved employment equity plan in respect of female representation at S6/M6 level nationally.

- f. That the S6/M6 level, for the purposes of the respondent's employment equity plan, constituted an occupational level as opposed to an occupational category.

[8.] As regards the *onus*, the parties agreed that the applicant having alleged discrimination, the respondent bore the *onus* of proving that the discrimination was fair.

[9.] It was further agreed that in the event that the respondent failed to prove that the discrimination was fair then in order to succeed with his claim for a protective promotion, the applicant bore the *onus* of proving that not only would he have been shortlisted and interviewed but that he would have been appointed if the respondent had done so. If the applicant failed to discharge the *onus* of establishing that he would have been appointed he would be required to prove that he was entitled to be awarded compensation for the unfair discrimination confined to the fact that he had not been considered for shortlisting.

[10.] Simply put, the issue in dispute in respect of the *onus* referred to in paragraph 8 above, in light of parties having agreed that the respondent had not met its overall gender target in the category employment level M6/S6 but had met its target in the consumer markets division was:

- a. Did the respondent's approved employment equity plan which stipulated national workforce targets for female employees in the employment level M6/S6 provide that these targets should be measured and applied by its performance against its workforce in all divisions or should the respondent have measured and applied by its performance in respect of its workforce individually in each of the respondent's divisions in the employment level M6/S6; and
- b. Consequently was the respondent accordingly entitled to fairly exclude the applicant from the shortlisting (and therefore from the interview and possible appointment) on the strength of its

employment equity plan, which showed it to be underrepresented in respect of female employees in respect of its national workforce in the employment level M6/S6.

[11.] The second issue to be decided was: if the exclusion of the applicant from the shortlisting and interviewing process was unfair whether, if he had been shortlisted and interviewed, the applicant would have been appointed to one of the two positions. The *onus* referred to in paragraph 9 above applied to this issue.

[12.] The following additional facts which are relevant to the issues referred to above emerged during argument.viz:

- a. In response to the advertisement, the respondent received 226 applications of which 135 met the minimum criteria. 52 of the 135 were female of which 13 were shortlisted.
- b. Whilst the successful candidates both fell within the definition of a designated group in the category “women”, the applicant and the successful candidates also fell within the definition of a designated group in the category “black people”³.
- c. The respondent is a national organisation operating within the Republic of South Africa. The respondent's approved employment equity plan identified the designated group representivity levels and targets (including and particularly gender targets) by occupational level across the organisation as a whole. The plan did not divide these levels or targets either by division or geographically.

[13.] Section 6 of the Act provides:

‘Prohibition of unfair discrimination

³ Section 1 Act No. 55 of 1998.

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including ... gender...

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or ...'

[14.] In so far as the plan identifies occupational levels as opposed to occupational categories, particularly as regards gender, for the organisation as a whole and records profile percentages and targets in each level, it makes logical sense not to apply the targets individually by distinguishing between the respondent's operating divisions and/or geographically.

[15.] Save for an averment made by the applicant that in the consumer markets division, in which the two vacancies fell, the S6/M6 tasks were mostly administrative and office bound and that in the network centre and operations divisions the tasks were mainly technical and performed in the field, neither party produced any evidence to show that it was necessary or desirable to distinguish the targets on a gender basis per different division. In fact, the applicant's averment that females are inherently more suited to perform administrative and office bound tasks as opposed to technical tasks performed in the field is in itself unjustified and discriminatory.

[16.] The applicant also argued, with reference to performance management plans, which were included in the trial bundle, that these plans required managers to obtain or reach the employment equity targets in their respective divisions and that therefore these plans should be interpreted to form part of the respondent's employment equity plan. The applicant, in making this submission, relied on clauses in the introduction to the plan which read:

'... senior management and executives will assume ownership of the implementation of our employment equity program and its concomitant sub programmes. This ownership will be reflected through our performance management system which will, effective from

1 April 2007, include employment equity in the performance contracts as a performance deliverable for managerial staff up to the group executive officer'⁴;

and

'the elements of our performance management system have been revised to ensure that line managers are individually held accountable for delivery on employment equity. This approach will ensure that employment equity is viewed as business imperative as well.'⁵

[17.] I am not persuaded, in light of the provisions of the Act, that these references to the responsibility of management to implement the respondent's employment equity plan in their various divisions nor the fact that this responsibility is included in the divisional managers' performance contracts serves to qualify the approved employment equity plan. In the absence of the respondent's plan specifying individual targets for the different divisions, it remains the responsibility of the respondent to apply its approved plan which does not set targets per division.

[18.] Section 20 of the Act specifically requires:

'(1) A designated employer [to] prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.

(2) An employment equity plan prepared in terms of subsection (1) must state-

(a) the objectives to be achieved for each year of the plan; ...

(c) where underrepresentation of people from designated groups has been identified by the analysis, **the numerical goals to achieve the equitable representation of suitably qualified people from designated groups** within each **occupational** category and **level in the workforce**, the timetable within which this is to be achieved, and the strategies intended to achieve those goals; ...

⁴ Common trial bundle page 13.

⁵ Common trial bundle page 31.

(f) **the procedures that will be used to monitor and evaluate the implementation of the plan** and whether reasonable progress is being made towards implementing employment equity;

(h) **the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan;**' (my emphasis)

[19.] The extracts from the respondent's employment equity plan referred to in paragraph 16 above constitute nothing more than compliance with section 20 (2) (f) and (h) of the Act. The contents of the performance contracts with the relevant managers do not form part of the approved plan.

[20.] Likewise, as the respondent has identified in its employment equity plan the underrepresentation of people from designated groups and the numerical goals or targets required to achieve the equitable representation within each occupational level in its **entire** workforce nationally, this amounts to nothing less than compliance with section 20 (2)(c) of the Act.

[21.] The applicant averred further that the respondent's failure to specifically state in the advertisement the fact that the position was specifically reserved for female applicants that this amounted to unfair discrimination. In this regard there was no evidence to suggest that the applicant was unaware of the contents of the respondent's employment equity plan or the respondent's Staffing (recruitment and selection) Policy (both of which formed part of the trial bundle). The Staffing policy clearly provides that 'the respondent is an equal opportunity employer' and that 'Preference shall be given to employees from historically disadvantaged groups, namely, Africans, Coloureds, Indians, women and persons with disabilities, also referred to as Employment Equity candidates' and 'the inherent job requirements as contained in the job description, should be the criteria for including and excluding candidates on the shortlist, taking cognizance of the EE requirements'.⁶

⁶ Trial Bundle Page 4 and 5.

[22.] The mere fact that the advertisement does not state that the position is reserved for females only does not render the discrimination *per se* unfair. The respondent argued that it was not a policy requirement to include in the advertisement that the posts were earmarked for females. The respondent further submitted that the post had not been earmarked at the time of advertising for female candidates only and that in accordance with its staffing policy the respondent took into account the “EE requirements” in shortlisting only females when the shortlisting process took place. This averment was not challenged. I am not persuaded in the circumstances therefore that by not specifying that the post was to be filled only by females that it rendered the discrimination unfair.

[23.] I am accordingly satisfied that the respondent’s actions in excluding the applicant from the shortlisting process, which resulted in him not being called for an interview on the grounds that only females were considered, constituted discrimination but that the discrimination fell within the provisions of section 6(2)(a) of the Act and as such does constitute unfair discrimination. I accordingly find that the respondent has succeeded in proving that the discrimination was fair.

[24.] Whilst it is therefore not necessary to consider whether the applicant had established that he would have been appointed to the position had he been interviewed, I am of the view that even had the respondent failed to establish prove that the discrimination was fair, the applicant did not manage to establish that if he had been interviewed he would have been appointed.

[25.] It was argued by the respondent that in the event it was found that the respondent had not unfairly discriminated against the applicant the applicant’s application for condonation should be refused in that the applicant would have no prospects of success.

[26.] As regards the degree of lateness o, the respondent in opposing the applicant’s application for condonation argued that the time limit prescribed by

section 136(1) of the Labour Relations Act⁷ applied viz. that the referral should be made within 90 days. The applicant relying on the decision in *Siegelaar v Minister of Safety and Security*⁸ argued that the referral should be made within a reasonable time. In this matter, the Honourable Judge Murphy held:

I am persuaded that s 136(1) might be of application to referrals made under s 10(6) (b) of the EEA, meaning that referrals to consensual arbitration at the instance of the CCMA would have to be done within 90 days of the commissioner issuing a certificate, failing which an application for condonation would be necessary and would succeed only in the event of good cause shown. However, I doubt the subsection can apply in respect of referrals to the Labour Court in terms of s 10(6)(a). Section 136 deals with the appointment of a commissioner as an arbitrator and does not deal with adjudication of disputes by the Labour Court. Besides, there is no other provision in part C or D of chapter VII of the Labour Relations Act which imposes any time-limit within which disputes must be referred for adjudication to the Labour Court once conciliation has failed and the commissioner has issued a certificate of outcome in terms of s 135(5)(a). It would seem naturally to follow in accordance with common-law principles that if the dispute remains unresolved after conciliation any party wishing to refer the dispute to the Labour Court should do so within a reasonable time. This then raises the question of what amounts to a reasonable time within the context of the EEA.⁹

[27.] The court in *Siegelaar* however went on to hold that:

Hence, although s 136(1) of the Labour Relations Act has no direct application, the 90-day period is certainly a contextual yardstick against which to measure the issue of delay when no time-limit has been specifically enacted.¹⁰

[28.] It is in the circumstances necessary in such matters to assess the applicant's degree of lateness against this "yardstick" The applicant's referral was 165 days late. Whilst the applicant argued that this was not an inordinate

⁷ Act No. 55 of 1995

⁸ (2005) 26 ILJ 133 (LC).

⁹ *Siegelaar v Minister of Safety and Security* at page 139 para 24.

¹⁰ *Siegelaar v Minister of Safety and Security* at page 144 para 37.

delay, it is bearing in mind the “yardstick”, a substantial delay and in the particular circumstances of this matter a delay which should not be condoned.

[29.] Therefore, in light of my finding that the respondent has established that the discrimination was fair and bearing in mind the lateness of the referral, the applicant’s application for condonation must be dismissed.

[30.] As far as costs are concerned and particularly as the applicant is still employed by the respondent and that the respondent was represented by an employee, it is not in the interests of fairness to award costs against the applicant.

[31.] I therefore make the following order:

The applicant’s application to condone the late referral of his statement of claim is dismissed with no order as to costs.

D H GUSH
Judge

APPEARANCES

APPLICANT:

Mr B Mgaga: Knight Turner Attorneys

RESPONDENT:

Mr A P Berry: Respondent's Employee