REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH ARICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 220/2011

In the matter between:

LEBOGANG MOKWELE AND 2 OTHERS **Applicants**

and

THE COURIER FREIGHT GROUP **Respondent**

Heard: **23 July 2013**

Delivered: **20 March 2014**

Summary: **The Applicants seek an order that the Respondent pays them a profit share bonus for the 2008/2009 financial year. The claim is based on the grounds that the South African Post Office (SAPO) paid the Speed Services employees such a bonus and that they were unfairly discriminated against by not treating them similarly. The Applicants are employed by the Respondent, a wholly owned subsidiary of SAPO, and were paid, in addition to their basic salaries, on a commission basis. The Speed Services employees were entitled to bonuses because Speed Services is a division of SAPO, not a subsidiary. The payment of an *ex gratia* amount to Speed Services staff was discretionary and it did not entitle the Respondent's staff (the Applicants) to the same. The Speed**

Services staff were employees of SAPO whereas the Applicants were employees of a subsidiary. The discrimination in paying the *ex gratia* amount to Speed Services staff only was not an unfair discrimination against the Applicants. Objective reasons existed why they were discriminated upon and these were not listed grounds of discrimination in terms of the Employment Equity Act or some attribute or characteristics attaching to the Applicants which renders the differentiation pejorative or in such a way which impairs their fundamental dignity.

JUDGMENT

MALINDI, AJ

<u>Introduction</u>

[1] The Applicants claim payment from the Respondent, the Courier and Freight Group, of profit share bonus for the year 2007/2008 (the bonus). The claim is based on the allegation that the South African Post Office, which is the holding company and is a 100% shareholder in the Respondent as its subsidiary, paid the bonus to all other employees in the category of sales personnel except the Applicants and that the actions of the Respondent amount to unfair discrimination against the Applicants.

[2] The Respondent denies that the payment of the bonus to other employees, to the exclusion of the Applicants, amounted to discrimination.

[3] The court has to determine whether there was any unfair discrimination by the Respondent in excluding the Applicants from payment of the bonus as aforesaid.

<u>Background facts</u>

[4] It is common cause that the Applicants were employees of the Respondent and formed part of the sales staff of the Respondent. The Respondent is a wholly owned subsidiary of the South African Post Office Limited (“SAPO”).

[5] In terms of the Respondent’s standard contract of employment for sales staff and employees’ remuneration is an all-inclusive total cost to company (TCT) remuneration package that is inclusive “of all company contributions such as provident fund, medical aid, motor vehicle allowance, car insurance, fuel and maintenance allowance, cellphone allowance and annual bonus.” In respect of the annual bonus it is provided as follows:

> ‘Your bonus forms part of your total cost to company remuneration package and will be paid out to you on a monthly basis. However employees can select to structure their package in such a way that the 13th cheque, which is equivalent to 6,5% of their total cost to company, is paid out in December.’

[6] The First Applicant’s contract of employment dated July 2009 is identical to the standard contract of employment.

[7] The Respondent has adopted guidelines for the payment of commission for sales staff in the form of a commission structure and commission policy. The commission policy states as follows:-

> ‘The commission policy, as proposed in the framework, is designed to remunerate and reward staff for above budget revenue performance a goal that is in line with the strategic intent of the SAPO group to become a “performance driven organisation”. To ensure that CFG generates profitable revenue, the policy will encourage staff to grow the revenue based at acceptable, profitable and agreed margin.’

[8] It states further that:

> ‘Commission, by virtue of rewarding individual performance based on profit margin sharing, precludes sales staff from annual company bonus incentives or payments of any kind.’

[9] At the arbitration hearing, the Applicants submitted that they had received profit sharing bonuses previously but that the Respondent had failed to pay them their bonuses for the 2008/2009 financial year. The Respondent contended that the Applicants had already received commission and as a result were not entitled to the payment of the bonuses. It had submitted further that an *ex-gratia* payment to all staff of the Respondent had been made for

the 2006/2007 financial year and again in 2007/2008 financial year but excluding sales representatives of the Respondent. One of the reasons why the sales staff of the Respondent were excluded was the fact that the Respondent experienced heavy losses for the period of 2004 to 2008 and that, as opposed to the rest of the Respondent's employees, the sales staff enjoyed higher salaries and the added benefit of earning commission.

The evidence

[10] The Applicants led the evidence of Werner Pienaar, whose evidence was essentially that although the Applicants' contracts of employment did not provide for profit sharing bonuses, the SAPO's conduct in paying an *ex-gratia* payment to all of the Group's employees except the Respondent's employees was unjustified and constituted unfair discrimination. He testified that the unfair discrimination arose out of the SAPO's decision to extend the *ex-gratia* payment to staff of Speed Services, a division of the SAPO, who performed the same service as the Respondent's sales representatives.

[11] Pienaar testified further that although he cannot recall, the profit sharing bonuses had been paid in previous financial years. They had definitely been paid for the 2007/2008 financial year. In the 2009/2010 financial year, the Respondent's employees had been informed that they would receive the bonus, which was deposited into their accounts but was immediately withdrawn.

[12] The Respondent led the evidence of Nhlanhla Clement Dube, the Respondent's General Manager: Sales and Marketing. His evidence was to the effect that although the Respondent is a subsidiary of the SAPO, it is a separate legal entity with its own board of directors and subcommittees. He testified that Speed Services is a division of the SAPO and was therefore subject to the controls and management by the SAPO. It is part of SAPO and is not a separate legal entity. Its employees are employed by the SAPO.

[13] He testified that the terms and conditions of employment for the Respondent's employees are different from those of Speed Services.

[14] Employment contracts for the SAPO and its divisions provide for a basic salary and other general terms and conditions of employment as contained in the SAPO's Human Resources Policy Manual. Their contracts do not provide for payment of a commission, except, as testified by Pienaar and Dube, when a Speed Services person or employee sells CFG's products and services.

Analysis

[15] It is not necessary to analyse the evidence extensively or to repeat it herein in view of the simple premise upon which this claim has been brought. Mr Louw, for the Applicants, submitted that it is not the Applicants' case that they were entitled as of a right to be paid profit share bonuses but that their case is based simply on the grounds that the SAPO has no justification to pay all other employees the bonus in the form of an *ex-gratia* payment to the exclusion of the Applicants who are sales representatives of the Respondent. He submitted that the fact that SAPO paid the *ex-gratia* payment on the basis that it had made a profit, the payment ought to have been extended to the Respondent's employees even though the Respondent as a subsidiary had shown profit losses for the period 2004 to 2008.

[16] On the other hand, Mr Boda, for the Respondent submits that the exclusion of the Applicants from the *ex-gratia* payment was based on objective grounds which do not amount to an unfair discrimination as defined. These are, *inter alia*, that the Respondent had suffered profit losses between 2004 and 2008, in particular the substantial loss in 2009; the Respondent's staff earn commissions which put them in a substantially better economic position whereas Speed Services staff do not earn commission on deliveries; and that no bonus was paid and that the payment was *ex-gratia* as a concession because the Respondent was showing signs of improvement in its operating profit performance.

[17] The Respondent submitted further that if allegations of unfair discriminations are made against SAPO, from whom the *ex-gratia* payments were made, the Applicants ought to have joined the SAPO.

Evaluation

[18] In view of the Applicants' submission that they do not contend that they are entitled to the profit sharing bonus as a right but on the basis only that the Respondent's conduct constitutes unfair discrimination against them because the bonus was paid to other SAPO employees except the Respondent's employees, I do not have to go into greater analysis an evaluation of the oral and documentary evidence referred to.

[19] The Applicants do not state, neither in their statement of case, the pre-trial conference minute nor in oral argument the basis of the allegation of unfair discrimination except that the Respondent's employees were excluded from a payment that was extended to other employees.

[20] On the other hand, the Respondent contends that the Applicants have failed to establish a ground for discrimination under the Employment Equity Act because the discrimination they contend for is not a listed or analogous ground of discrimination. Reference is made to the well-known decision of the Constitutional Court in *Harksen vs Lane N.O. and Others*[1] which requires that even where a differentiation which amounts to discrimination has been established, it has to be established, as a second requirement, that the discrimination amounts to unfair discrimination.

[21] Where a litigant does not rely on a listed ground such as racism or sexual orientation, the analogous ground must be on the basis of some attribute or characteristics attaching to the litigant which renders the differentiation pejorative or that they were treated differently in such a way which impairs their fundamental dignity.[2]

[22] The Respondent has submitted and tendered evidence to the effect that the Applicants were discriminated against on grounds that do not amount to unfair discrimination. As stated above, those grounds are, *inter alia*, that the comparison between the Respondent's employees and those of Speed

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[1] [1997] 11 BCLR 1489 (CC).

[2] *Mothoa v Minister of Safety and Security* (2007) 9 BLLR 879 (LC at para 17: *Ntai and Others v SA Breweries Ltd* (2001) 22 *ILJ* 214 (LC) at para 73

Services, a division of SAPO, is inappropriate. The two groups of employees are employed by different employers, one of whom, the SAPO, is not joined to these proceedings and are employed on different terms and conditions. Critically, the Respondent's employees were excluded from the profit share bonus because the Respondent had made a substantial loss during the relevant periods. The Respondent and SAPO had deemed it appropriate to exclude the Applicants because of this and that the Applicants stood in a better economic position compared to other employees because they earned a commission which on average was incomparable to the amounts distributed as *ex-gratia* payments.

[23] These grounds for excluding the Applicants are objective and cannot be characterised as unfair discrimination unless the Applicants succeed in establishing discrimination within the accepted legal definition of the concept.[3]

[24] Accordingly, I find that the applicants have failed to establish a cause of action based on unfair discrimination in this case.

<u>Costs</u>

[25] The Respondent has sought a cost order. The Applicants did not address the Court on the issue of costs. However, as some or most of the Applicants still work for the Respondent, I am inclined not to issue a cost order in this matter.

<u>Conclusion</u>

[26] Accordingly, I make the following order.

1. The claim is dismissed.
2. There is no order as to costs.

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Malindi, AJ

Acting Judge of the Labour Court

[3] *Ntai and Others* at para 73.

Appearances:

For the Applicants: Mr Louw (Attorney)

Instructed by: Goldberg Attorneys

For Respondent: Advocate F.A. Boda

Instructed by: Routlege Modise (practising as Eversheds)