



**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not Reportable

Case no: JS 744/16

SOUTH AFRICAN MUNICIPAL WORKERS' UNION

First Applicant

MASEKELA NAKENG

Second Applicant

MATSOBANE KGOMO

Third Applicant

ELSIE NGOVENI

Fourth Applicant

SINDISWA GUMBI

Fifth Applicant

and

PIKITUP JOHANNESBURG (SOC) LTD

Respondent

Heard on: 3 February 2017

Delivered: 7 February 2017

JUDGMENT

VAN NIEKERK J

[1] This is an application to strike out, alternatively, to dismiss a statement of claim filed by the respondents in the present application. For convenience, I refer to the parties as they are cited in the referral.

- [2] In the statement of claim, the individual applicants allege that they have been the subject of unfair discrimination by the respondent. The nature of the claim is one for equal pay for similar or work of equal value, and the nature of the discrimination reached is that based on an arbitrary ground. The arbitrator ground is not identified, nor do the individual applicants assert any basis on which the arbitrary ground on which they rely shares any common characteristics with the specific grounds listed in s 6 (1) of the Employment Equity Act.
- [3] The statement of claim was filed on 5 September 2016. The respondent delivered a notice of exception on 21 September 2016 and afforded the applicants, as it was required to do, 10 days within which to remove the cause of complaint. Having received no response from the applicants, on 11 October 2016, the respondent filed the exception to the statement of claim. On 26 October 2016, days before the application was set down for hearing, the applicants delivered a notice of intention to amend the statement of case. On the same date, the respondent objected to that amendment on the grounds that the statement of case remained excipiable. On 28 October 2016, this court made an order, by consent, that the exception be upheld and that the applicants be granted leave to amend their statement of claim within 10 days. The order provides further that in the event that the applicants fail to amend their statement of claim, the referral shall be considered to be dismissed with costs.
- [4] On 9 November 2016, the applicants delivered a notice of intention to amend, the content of which was identical to that of the first amendment filed prior to the hearing. On 9 November 2016 the respondent objected to the notice of intention to amend on the basis that it did not remove the defect of which it had complained, and asserted that the statement of claim remained excipiable. The applicants have taken no further steps since then to file any application for leave to amend, or to address the defect of which the respondent complains. On 25 November 2016, the respondent filed the present application.
- [5] In its original form, the statement of case, as I have indicated, seeks to refer an equal pay claim for adjudication. Paragraph 26 of the statement of case states the following:

The difference in remuneration and increments paid by the respondent to the applicants and Ms Sebata constitutes a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on an arbitrary ground in that there is no justifiable reason for the difference.

- [5] The statement of claim alleges that respondent's conduct amounts to an act of unfair discrimination. The statement does not identify the arbitrary ground that is alleged, nor is there any assertion to the effect that the arbitrator ground identified by the applicants shares any characteristics with any specified ground listed in section 6 (1). The amendment to paragraph 26 seeks to add the following words to the end of the existing paragraph 26:

...in the remuneration and increments paid to Mrs Sebata who was employed by the respondent subsequent to the employment of the second to fifth applicant and without better qualification or skills than the second to fifth applicant, thereby displaying an unjustified bias by the respondent towards Ms Sebata.

As I have indicated, the second amendment delivered on 8 November 2016 is cast in identical terms. On 11 2016, the applicant filed a notice of objection to the notice of intention to amend. On 25 November 2016, the present application to strike out was filed.

- [6] The relevant legal principles are clear – a mere differentiation does not necessarily constitute an act of discrimination. Discrimination occurs when the differentiation has as its basis one of the specified listed grounds referred to in s6, all an unspecified or analogies ground, or an arbitrary ground, referred to in the section. The pleading in a claim such as the present and must necessarily establish the differentiation and the basis on which the claim is made, in other words, a link between the differentiation and a specified an unspecified ground. Where reliance is placed on the latter, it is not sufficient to contend that the policy or practice complained of is arbitrary. The case must necessarily be made is analogous to a specified ground and based upon or shares a common trend with a specified ground and in particular, that it exhibits attributes or

characteristics which have the potential to impair the fundamental dignity of the applicants as human beings (see *Ntai v South African Breweries Ltd* [2001] 2 BLLR 186 (LC). See also *Mangena v Fila South Africa (Pty) Ltd* [2009] 12 BLLR 1224 (LC)).

- [7] In other words, a litigant claiming unfair discrimination on an unidentified, arbitrary ground must clearly identify the ground relied upon and secondly, shares characteristics with those specified grounds listed in s 6 (1). The applicants have done neither in the statement of case in the terms it was filed. They did not identify the arbiter ground on which they rely, let alone that this ground shares characteristics with the specified grounds. Nor does the proposed amendment address the objection raised by the respondent. The amendment does not identify the ground on which the alleged discrimination is funded, nor does it do any more than contained that the respondent has displayed and 'unjustified bias'. This does no more than describe respondent's conduct; it does not establish or sit out the ground on which the conduct is allegedly based. The specified grounds listed in s 6 all relate to aspects of the complainant in a discrimination suit, they do not relate to the conduct of the party leached to be engaging in discrimination. Even if one were to accept that unjustified bias amounts to a ground of discrimination, the respondents fail to suggest how this is akin to any of the specified grounds.
- [8] None of the above principles all conclusions were seriously disputed by the applicant's representative. The applicants claim, in essence, is that the respondent is not entitled to have the statement of claim struck out or dismissed at this stage.
- [9] The Rules of this court do not make any specific reference to the circumstances in which a claim may be dismissed or a statement of case the subject of a motion to strike out. This Court has followed the practice established by the Uniform Rules, in terms of which a party is required to file an application for leave to amend where a notice of amendment is the subject of an objection.
- [10] It would seem to me that the equitable order in the circumstances, rather than close the door the court to the applicants at this point, is to require the applicants, in the face of an objection to the notice of intention to amend filed

on 8 November 2016, to file an application for leave to amend the statement of case. I appreciate that there may be a significant degree of overlap between the issues raised in the present application and those raised in any application to amend. However, the nature of the proceedings is different and the relevant factors to which the court would necessarily have to give consideration are different. Finally, in relation to costs, it seems to me for the purposes of the discretion afforded the court in terms of s 162 that the cost of the present application or to be reserved.

For the above reasons, make the following order:

1. The respondents in the application to strike out a granted leave to file an application to amend their statement of case.
2. The application to amend must be filed within 14 calendar days of the date of this order, failing which the applicant is granted leave to re-enrol the application to strike out/dismiss on the same papers, supplemented as necessary.
3. The costs of the application to strike out on reserved

Van Niekerk J

Judge of the Labour Court

APPEARANCES

APPLICANTS: Adv E Masombuka, Instructed by MGM Attorneys

RESPONDENT: Adv C Orr, instructed by Bowman Gilfillan Inc.