



**THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG
JUDGMENT**

Not Reportable

Case no: JS 286/15

In the matter between:

MALOPE KESETSE MATTHEWS

Applicant

And

CREST CHEMICALS (PTY) LTD

Respondent

Heard on: 16 February 2017

Delivered: 20 February 2017

JUDGMENT

VAN NIEKERK J

[1] When this matter was called in the trial roll on 16 February 2014, it was agreed that the court will determine a number of points in *limine* raised by the respondent.

[2] The applicant claims some R18 million by way of an equal pay claim, brought under s 6 of the Employment Equity Act (EEA). At the time he referred the claim to the CCMA, he had retired from the respondent's employ. The papers

disclose that the claim was referred late (i.e. outside of the time limit prescribed by s10 of the EEA), but that the CCMA condoned the late referral of the dispute. A certificate of outcome was issued on 5 March 2015 reflecting that as at that date, the dispute concerning alleged unfair discrimination referred for conciliation on 6 February 2015 remained unresolved.

- [3] The applicant retired on 30 May 2014, after having been employed for some 42 years. The applicant's statement of case is not a model of clarity. The comparators identified by the applicant appear to be managers engaged at the level at which the applicant was employed from mid-1998. Further, the EEA came into force only on 9 August 1999, and any equal pay claim brought under the statute could only have been competent from that date. That notwithstanding, the applicant appears to have quantified his claim on the basis of an income differential that he contends existed between him and his comparators as at the date of his retirement, extrapolated over the 42 years of his employment.
- [4] The points in *limine* relate first to the applicant's status as an employee as defined under the EEA and secondly, to the application of the Prescription Act. In relation to the first point, the respondent contends that at the time he initiated his claim, the applicant was not an employee as defined by the EEA and that the court accordingly has no jurisdiction to entertain his claim.
- [5] The definition of employee contained in the EEA is similar to that contained in the Labour Relations Act. The definition expressly excludes independent contractors, and refers to persons who work for another person or for the state and who receives, or who is entitled to receive, any remuneration or any other person who in any manner assists in the carrying on conducting the business of an employer. It may well be that in a literal sense, a person whose employment is terminated on account of retirement is not a person who continues to work and who receives or remains entitled to receive remuneration.

- [6] A literal interpretation of the definition, is contended for by the respondent, is at variance with an interpretation that promotes constitutional values and in particular, the right to equality in employment and the right to fair labour practices (see, for example *Wyeth SA (Pty) Ltd v Mangele* [2003] 7 BLLR 734 (LAC)). It is not in dispute that the applicant was an employee during the period to which his equal pay claim relates. The fact that he was no longer an employee at the time the claim was referred, in my view, is not fatal. What matters is that he was employed by the respondent for the period during which he contends that other employees, similarly situated, were paid a premium solely on account of their race. The provisions of s 10 of the EEA sustain this view. What that section provides is that a party to dispute concerning chapter 6 may refer the dispute within six months after the act or omission that allegedly constitutes unfair discrimination. As I understand the applicant's claim, it is one that contemplates an act of ongoing discrimination that terminated only on the date of his retirement. I fail to appreciate on what basis the definition of 'employee' in the EEA precludes him from referring a claim in which he exercises the right under s6, provided of course that the claim is made within the applicable time limit or any late referral is condoned.
- [7] In regard to the point concerning the application of the Prescription Act, the applicant contends that he became aware of his rights only after his retirement. This is a factual issue which in my view, is best determined at trial.
- [8] For the above reasons therefore, the first of the respondents points in *limine* stands to be dismissed; the second is to be determined at a later stage.
- [9] I cannot ignore, for present purposes, the quantification of the applicant's claim. This ought properly to have been the subject of an exception but in the absence of an exception or other point in *limine* and in an effort to avoid what may well lead to a postponement of the trial on this basis, it seems to me that the applicant ought properly to quantify his claim and file an amended statement of claim reflecting that quantification. I did not understand Mr Kubayi, who appeared for the applicant, to dispute the need to effect an amendment in these circumstances. It seems fair to me to permit him period of 14 days within which to file an amended statement of case.

I make the following order.

1. The respondent's point in *limine* to the effect that the court has no jurisdiction since the applicant is not an employee as defined by the EEA is dismissed.
2. The respondent's point in *limine* regarding the application of the Prescription Act is to be determined by the trial court.
3. The applicant is ordered to file an amended statement of claim within 14 days of the date of this order.

Van Niekerk J

Judge of the Labour Court

APPEARANCES

APPLICANT: Mr Noveni Kubayi, Noveni Eddy Kubayi Incorporated

RESPONDENT: Mr David Woodhouse, Tabacks Inc