



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C1012/2015

In the matter between:

S NDUDULA & 17 OTHERS

APPLICANT

and

METRORAIL – PRASA (WESTERN CAPE)

RESPONDENT

Heard: 28 February 2017

Delivered: 30 March 2017

Summary: Employment Equity Act 55 of 1998 – section 6(1) – interpretation of phrase “... or any other arbitrary ground” – new grounds or analogous or unlisted grounds

Unfair Discrimination – wages – error in remuneration of newly appointed employees – error corrected – whether unfair discrimination

Discrimination – listed and analogous grounds – relevant for burden of proof – need to plead ground for unfair discrimination “... on any other arbitrary ground”

JUDGMENT

COETZEE AJ

Introduction

- [1] The applicants are all section managers employed by the respondent.
- [2] The parties exchanged pleadings in the form of a statement of case and a statement of defence; agreed to and submitted a pre-trial minute followed by an agreed statement of the relevant facts.
- [3] The facts therefore were not in dispute.

The background

- [4] The respondent with effect from 1 January 2014 promoted and appointed two more employees as section managers. The applicants were aggrieved because these two newly appointed section managers were appointed on a higher salary or scale of remuneration than that of the applicants.
- [5] The applicants lodged three group grievances on 1 December 2014, 9 December 2014 and 27 January 2015. The grievances were not resolved and the applicants referred the matter to the CCMA on 5 August 2015.
- [6] The respondent on 17 August 2015 by letter informed the two section managers that their salaries had been reviewed and that they had been appointed at an incorrect scale (the correction). They were further informed that their salaries were to be reduced to the correct scale effective from 1 September 2015.
- [7] The parties further agreed as follows:
 - “This correction was implemented on the basis that the amount by which they had been overpaid would not be recovered from them, which decision was based on the fact

that a precedent had been set when, in similar circumstances, employees, with the assistance of legal advisers negotiated a settlement on such basis with the respondent.”

[8] The applicants pleaded their discrimination case as follows:

“The Individual Applicants are performing the same work as the two newly appointed Section Managers and despite having longer years’ of service, they are being paid substantially less than the newly appointed section managers. The individual Applicants have been and are being discriminated against regarding the different terms and conditions of employment for a reason unknown to them. Whatever the reason are (sic) as may be advanced by the Respondent, the different treatment of employees who performs (sic) the same work and there being no other justifiable reasons for such differentiation amounts to an act of direct discrimination or alternatively to indirect discrimination. Newly appointed employees are enjoying more substantial terms and conditions of employment for no other reason (s) than that they are newly employed employees.”¹

[9] The applicants formulated the relief they sought as based on their cause of action as follows:

“The individual Applicants are seeking an order that the Respondent must remunerate them and provide to them the same terms and conditions of employment as the two newly appointed Section Managers retrospective to January 2014, as well as an order that all Section Managers must be remunerated on the same basis. Alternatively the individual Applicants are seeking an order that they be paid the difference in remuneration for the same period that the two newly appointed Section Managers were paid such a higher remuneration package. In the alternative, the individual

¹ Para 13 of the statement of case.

Applicants are seeking compensation in an amount to be determined by the Court for having been discriminated against. The individual Applicants also seek an order that the Respondent must pay the individual applicant's legal costs.”²

- [10] During oral argument the applicants limited the relief they seek to payment of a lump sum as compensation to each of them. They pursued with their claim for a cost order in their favour.
- [11] The respondent admitted that it appointed the two section managers at a higher salary scale. The respondent denied that the facts and circumstances pleaded by the applicants, amount to unfair discrimination as contemplated by the Employment Equity Act.³
- [12] The respondent's defence became evident in the pre-trial conference. The pre-trial conference minute records that the applicants were advised that a mistake had been made in the salary scale at which the two section managers were appointed. The pre-trial minute contains no reference to the correction.
- [13] According to the applicants they were advised of the correction only during January 2017. They submit that this should be taken into account for purposes of a cost order. Having been advised of the correction only shortly before the hearing, they resolved to pursue relief only in the form of compensation, coupled with a cost order.
- [14] Having regard to the pleadings and the agreed facts, it is common cause between the parties that the two section managers were appointed by mistake on the higher scale and that approximately 20 months later with effect from 1 September 2015 the error had been corrected and the remuneration paid to them adjusted downwards.

² Para 15 of the statement of case.

³ 55 of 1998 (as amended). (EEA).

- [15] The factual position that is common cause between the parties, thus is that two section managers were appointed, in error, on a higher scale than that enjoyed by the applicants; the error was corrected with effect from 1 September 2015 and the additional remuneration that the two received while on the higher scale was not refunded to the respondent by them because of an earlier precedent that the respondent felt to be binding on it.

The cause of action

- [16] The applicants did not in their statement of case or in oral argument rely on any listed ground in section 6(1) of the EEA.
- [17] The applicants also did not plead or argue reliance on any ground analogous to the listed grounds.
- [18] They submitted that their case falls squarely within the ambit of section 6(1) of the EEA and more particularly on “...or on any other arbitrary ground”.
- [19] Their case is that because reliance is placed on this part of section 6, it is not necessary to specify a specific ground as the conduct of the respondent inherently constituted arbitrariness. If the case for the applicants is understood correctly the alternative argument advanced on their behalf is that they have in fact identified and pleaded the ground for discrimination upon which they rely and that ground is that the conduct of the respondent was arbitrary.

The EEA

- [20] It is necessary to examine the provisions of the EEA dealing with the prohibition against direct or indirect unfair discrimination before dealing with the submissions of the parties in more detail. The following are the relevant provisions of the EEA:
- 1.1. Section 6(1) of the EEA provides as follows:

“No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnical social origin, colour, sexual orientation, age, disability, religion, HIV status, conscious, belief, political opinion, culture, language, birth or on any other arbitrary ground.⁴” (Emphasis added.)

1.2. The grounds listed in section 6(1) are referred to as the “listed grounds”.

1.3. The newly enacted section 6(4) added the following provision to section 6:

“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 any one or more of the grounds listed in subsection (1), is unfair discrimination.”

1.4. The onus to prove discrimination generally is dealt with in section 11 that provides as follows:

“(1) If unfair discrimination is alleged on a ground listed in section 6(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 and not unfair, or is otherwise justifiable.

⁴ The highlighted portion (own emphasis) was added by the Employment Equity Amendment Act 47 of 2013 (GN 37238 NN 16, 17 August 2014) which came into force on 1 August 2014 by means of Employment Equity Amendment Act, 2013: Commencement, GN 37871 NN 50, 25 July 2014.

- (2) 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.” (Emphasis added.)

[21] As regards onus, the applicants rightly conceded that the onus rests with them having regard to section 11(2) to prove the existence of the alleged discrimination and that such discrimination is unfair.

[22] It is significant that the amendment to section 6(1) upon which the applicants rely was only introduced during August 2014 while the offensive appointment had already occurred during April 2014.

[23] The respondent, however, did not place in dispute the application of the amended section 6(1) or section 6(4). Both parties argued their cases on the basis that the amended section 6(1) applied.

[24] It is not necessary to make a finding in this regard (whether the amendment had retrospective effect) and for purposes of this judgment it is assumed that the amended section applied from August 2014 for the duration of the period during which the two newly appointed section managers enjoyed the higher income.

The submissions of the applicants

[25] The applicants argue that there was differentiation and such wage differentiation was arbitrary and simply because it was arbitrary it constituted unfair discrimination.

[26] They argue that it was not necessary to plead any specific arbitrary ground. During oral argument the submission was made, that as pleaded, the ground was identified and formulated with sufficient

clarity. The applicants' argument in its heads of argument is captured as follows:

"It is respectfully submitted that the Respondent's behaviour in allowing newly appointed employees, *albeit* due to a promotion from train drivers to Section Managers, constitutes wage discrimination on an arbitrary ground. This is especially so given the manner in which the Respondent dealt with the grievances and the inadequate outcomes to the grievances"

- [27] In support of this submission the applicants further submit that before the amendment that introduced "... *or on any other arbitrary ground*" (and at the same time introduced section 6(4)), the legal position in any event was that unfair discrimination could occur in respect of a listed ground or any ground analogous to the listed grounds. For that reason, there was no need to introduce the addition to section 6(1) catering for a ground analogous to the listed grounds. That was already catered for and covered by the section. The purpose could only have been to add a further category of grounds or introduce something new as grounds upon which an employer could unfairly discriminate against an employee.

- [28] Their submission, therefore, is that after the amendment there are three categories of grounds constituting unfair discrimination. Those categories are discrimination: on a listed ground; on a ground analogous to a listed ground; and thirdly on any other arbitrary ground.

- [29] The applicants submit that similarly it was not necessary merely to add section 6(4) to restate the legal position pertaining to claims of wage discrimination.

- [30] They submit that prior to the amendment it had been possible to rely upon unfair wage discrimination on a listed ground or any ground analogous to the listed grounds. The amendment of these two

subsections could only have been to introduce a new ground or grounds upon which employees could rely for a claim that the employer unfairly discriminated against them.

[31] For that reason it was necessary to introduce section 6(4) with a reference to section 6(1) so as to include the reference to *any other arbitrary ground* to broaden the scope of direct or indirect wage discrimination.

[32] The applicants for their legal argument rely on part of the judgment in *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others*⁵ where reference is made to a discussion by Du Toit:⁶

“The reintroduction of the prohibition of discrimination on ‘arbitrary’ grounds cannot be understood as merely reiterating the existence of unlisted grounds, which would render it redundant. To avoid redundancy, ‘arbitrary’ must add something to the meaning of ‘unfair discrimination’. Giving it the meaning ascribed to it by Landman J in *Kadiaka*⁷ – that is, ‘capricious’ or for no good reason – would broaden the scope of the prohibition of discrimination from grounds that undermine human dignity to include grounds that are merely irrational without confining it to the latter.”

[33] Notably, the applicants did not believe or plead that the respondent acted “capriciously” or for “no good reason”.

[34] The Court in *Kadiaka* referred to the view of Du Toit without adopting the argument. This view is not part of the reasoning for the finding in *Pioneer Foods*.

⁵ *Pioneer Foods Pty Ltd v Workers Against Regression and Others* [2016] 9 BLLR 942 (LC); (2016) 37 ILJ 2872 (LC) at para 60. (*Pioneer Foods*)

⁶ Du Toit et al, *Labour Relations Law: A Comprehensive Guide* 6 ed (LexisNexis, Durban 2015) at 683.

⁷ *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC) at para 43. (*Kadiaka*)

- [35] The applicants further rely upon the Court's reference in *Pioneer Foods* to the other authorities mentioned in the *Pioneer Foods* decision. They are analysed below to the extent that they are relevant.

The case for the respondent

- [36] The respondent submits that section 6(4) provides unambiguously that it is only a differentiation that is directly or indirectly based on any one or more of the grounds listed in section 6(1) that is considered to be unfair discrimination in terms of that particular section.

- [37] Inherent in this argument is the contention that section 6(1) has two components; firstly, unfair discrimination on the basis of listed grounds, and, a second part that refers to other grounds. The argument goes that—

“... any one or more of the grounds listed in subsection (1) refers to *grounds*, that is the listed grounds and unlisted grounds only in so far as they are analogous to the listed grounds as incorporated by “... *any other arbitrary ground*”. The argument is that “... *any other arbitrary ground*” is not in itself a ground but refers to any unlisted grounds analogous to the listed grounds.”

- [38] The respondent further submits that the question is straightforward and it is: have the applicants pleaded reliance, directly or indirectly, on one or more of the grounds listed in section 6(1)? The respondent submits that clearly they did not plead any of the specific grounds mentioned in section 6(1) or a ground analogous to the listed grounds and have to rely on the reference to “... *any other arbitrary ground*” as the actual ground for discrimination.

- [39] The respondent submits that in this case the alleged differentiation must be linked to a listed ground or analogous ground and that it is required of the applicants to plead and identify such ground.

- [40] Once the applicants rely upon an arbitrary ground which is not a listed ground but an analogous one (or an arbitrary one in the third category – which it does not concede exists) it is still incumbent upon the applicants to state and plead the “*arbitrary*” ground. “*Arbitrary ground*” still requires the ground alleged to be arbitrary to be formulated and pleaded. “*Arbitrary*” in itself is not a ground.
- [41] The crux of the respondent’s argument is that “... *any other arbitrary ground*” is nothing more than clarifying the legal position as it was prior to the introduction of the amendment.
- [42] According to the respondent an arbitrary ground is nothing more and nothing less than a ground analogous to a listed ground in respect whereof applicants must comply with section 11(2) by proving that the conduct complained of “*is not rational*”; and that it “*amounts to discrimination*”; and that the discrimination is “*unfair*”.
- [43] In response to this argument, applicants in oral argument conceded that if it is the case that it must be pleaded then the error on the part of the respondent constitutes such a ground that is arbitrary. That, however, according to the respondent, is not how and what the applicants pleaded. They did not plead that “*error*” constitutes an arbitrary ground as contemplated in section 6(1).
- [44] The respondent, amongst others, relies upon *National Union of Metalworkers of SA and Others v Gabriels Pty Ltd*⁸ for the submission that applicants have not in their statement of case identified the ground upon which they rely and that as a result of this failure alone their case should fail:

“Where the differential treatment is not based on a listed ground, it is not sufficient merely to allege that the employment policy or practice in question is arbitrary; the

⁸ (2002) 23 ILJ 2088 (LC) at paras 18-9. (*Gabriels*)

complainant must allege and prove that the policy and practice is based on an analogous ground to the listed ground.

What is therefore required, is that a complainant must clearly identify the grounds relied upon and illustrated it shares the common trend of listed grounds, namely that “it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparable manner.”

[45] It is pointed out in *Gabriels* that a failure to link an alleged differentiation to any of the section 6(1) listed or analogous grounds, is likely to result in incorrectly equating mere differentiation with unfair discrimination.⁹ The submission is that even if a third category had been created the principle still applied that the ground itself had to be pleaded.

[46] The respondent further submits that the following passages from *Gabriels* can be applied almost *verbatim* to this matter:

“It is clear from the above, and on a reading of the applicants’ statement of case, as amplified, that the applicants have not described the differential treatment in question to any ground analogous to the listed grounds in section 6(1) of the EEA. The applicants have failed to allege that the reason for the differentiation is some characteristic that impacts upon the human dignity. They do no more than an attempt to describe the difference in pay as being “disproportional, irrational, arbitrary and capricious”, and “arbitrary, capricious and irrational actions/practices of the respondent”.

The applicants have, accordingly, failed to make the minimum sufficient allegations to sustain a claim of unfair

⁹ Id at para 14.

discrimination, or direct unfair discrimination, within the meaning of section 6(1) of the EEA.”¹⁰

- [47] The respondent would be correct in its submission if the addition to section 6(1) has not created a third category of grounds disassociated from the listed grounds and those analogous to the listed grounds. If no such third category had been created, then the above dictum would apply.

Analysis: An interpretation of the EEA

- [48] The parties rely upon an interpretation of section 6(1) and section 6(4) for their submissions. They have not relied upon any direct authority, and I could not find any either, on whether the reference to *an arbitrary ground* in section 6(1) is a reference to a new category of grounds over and above the listed grounds and the grounds analogous to the listed grounds.
- [49] It is necessary first to deal with the approach to the interpretation of a statute before an attempt is made to actually interpret section 6(1) and section 6(4).

The approach to interpretation

- [50] The modern day approach to interpretation was restated by the Supreme Court of Appeal (the SCA) in *Natal Joint Municipal Pension Fund v Endumeni Municipality* as follows:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the

¹⁰ Id at paras 22-3.

language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or un-businesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what he regards as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties rather than the one they in fact made. The “inevitable point of departure is the language of the provision itself” read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”¹¹ (Emphasis added.)

[51] In *Bothma-Batho Transport (Edms) v S Bothma & Seun (Edms) Bpk*¹² with reference to the traditional “golden rule” approach to interpretation,¹³ the SCA held:

“That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document

¹¹ 2012 (4) SA 593 (SCA) at para 18.

¹² 2014 (2) SA 494 (SCA) at para 12.

¹³ Espoused in *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A).

came into being. The formal distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is “essentially one unitary exercise”. Accordingly it is no longer helpful to refer to the earlier approach.” (Footnotes omitted and emphasis added.)

Interpreting section 6 having regard to the language of the EEA and that of the specific provision

- [52] The phrase “*or any other arbitrary ground*” lends itself, read in isolation, to the two possible interpretations accorded thereto by the parties. It is conceivable that this phrase may mean that “*any other arbitrary ground*” is limited to a ground analogous to the listed grounds only. It is also conceivable that it creates a new category of grounds as contended for by the applicants.
- [53] The amended and more comprehensive section 11 of the EEA now distinguishes between listed and arbitrary grounds in respect of the burden of proof. Notably it does not distinguish between listed grounds, grounds analogous to the listed grounds and in addition to any other arbitrary ground.
- [54] This distinction between a listed ground and an arbitrary ground points to the legislature dealing with only two categories of grounds. The first category is the listed grounds. All other grounds recognised in law are for purposes of this section arbitrary in nature. Those are the grounds analogous to the listed grounds as contemplated in *Harksen v Lane NO & Others*.¹⁴ Otherwise one would have expected the drafters of the statute to make provision for the burden of proof in respect of three categories of grounds.

Having regard to the statutory context of section 6

¹⁴ 1997 (11) BCLR 1489 (CC). (*Harksen*)

[55] Section 6(1) of the EEA prior to the amendment loosely mirrored section 9(3) of the Constitution. It is necessary to quote section 9 of the Constitution in full:

“Equality

- 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (three). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

[56] The Labour Court in *Gabriels* commented as follows on the similarity between the provisions of the Constitution and section 6 of the EEA:

“Because of the similarity between section 6(1) of the EEA and section 9(3) of the Constitution, guidance can be sought from the decisions handed down by the Constitutional Court in determining when differentiation which is not based on any of the grounds listed in section 6(1), will amount to discrimination.”¹⁵

¹⁵ *Gabriels* above n 8 at para 8.

[57] A further reason why regard may be had to the judgments dealing with the Constitution is the provision in section 3 of the EEA stating that:

“This act must be interpreted—

- (a) in compliance with the Constitution;
- (b) so as to give effect to its purpose.”

[58] At the same time the Constitution states that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.¹⁶

[59] The Court in *Gabriels*,¹⁷ with approval, quoted the following test from *Harksen*¹⁸ where the Constitutional Court established a two pronged test for determining whether differentiation between people or categories of people amounted to unfair discrimination:

- “(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there has been discrimination will depend upon whether, objectively, the grounds are based on attributes and characteristics which have the ability to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- (ii) If the differentiation amounts to “discrimination” does it amount to “unfair discrimination”? If it has been found to be on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily

¹⁶ See section 39(2) of the Constitution.

¹⁷ *Gabriels* above n 8 at para 9.

¹⁸ *Harksen* above n 14 at para 45.

on the impact of the discrimination on the complainant and others in his situation.”

[60] The Court went on to say that it is clear from the *Harksen* decision that the discrimination in the constitutional sense, takes on a pejorative meaning, which must be established by any complainant relying on an unspecified ground.¹⁹

[61] The following passage in gives content to the kind of ground that will have to be linked to the differential treatment by the complainant, in order to succeed in establishing that the discrimination has taken place:

“What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds, attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8 (2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.”²⁰

[62] There is yet a further reason why section 6 of the EEA should be interpreted against the backdrop and in the context of the Constitution.

¹⁹ *Garbriels* above n 8 at para 10.

²⁰ *Harksen* above n 14 at para 49.

The EEA is the legislation contemplated in section 9 of the Constitution. It gives effect to section 9.

- [63] The interpretation of section 9 of the Constitution by the Constitutional Court and other courts throw light on not only section 9 but also on the interpretation of section 6 of the EEA.
- [64] Section 9(1) deals with all differentiations. Sections 9(3) and 9(4) deal with a specific form of differentiation, namely unfair discrimination. In this way, two forms of differentiation are distinguished, namely, as formulated in *Prinsloo v Van der Linde*:²¹

“The idea of differentiation (to employ a neutral descriptive term) seems to lie at the heart of equality jurisprudence in general and of the section 8 right or rights in particular. Taking as comprehensive a view as possible of the way equality is treated in section 8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination.”

- [65] The reference to section 8 is to the interim Constitution which was the equivalent of section 9 of the Constitution now regulating equality.
- [66] The distinction between differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination is not a distinction between two completely separate things. It simply is a distinction between a component of a general category of differentiation and the rest of the general category. Differentiation that does not amount to unfair discrimination constitutes a residual and not a distinctive category.²²

²¹ 1997 6 BCLR 759 (CC), 1997 (3) SA 1012 (CC) at para 23. (*Prinsloo*)

²² See Rautenbach and Fourie. “*The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act*” 2016 TSAR 110 at 111.

[67] The Constitutional Court in interpreting the equality provision elaborated that unfair discrimination is mere differentiation with the addition “*of a further element*”.²³ The “*further element*” involves the impact of the differentiation. Mere differentiation has less serious consequences than unfair discrimination as a form of differentiation and thus different tests must be applied to determine whether the differentiation is justifiable in order to give effect to the principle that the “*more substantial the inroad to fundamental rights, the more persuasive the grounds of justification must be*”.²⁴

[68] Nobody may unfairly discriminate against anyone else on one or more of the grounds listed in section 9(3). In this context, logically the word “*grounds*” refers to the distinguishing features on the basis of which a distinction or differentiation is made. In section 9(3) the word “*grounds*” does not refer to the reasons or purposes of a differentiation but the distinguishing features on the basis of which the differentiation is made.

[69] Also in the absence of a definition in the Constitution of “*unfair discrimination*” the Constitutional Court held that unfair discrimination is differentiation that violates human dignity or differentiation with similar serious consequences. In *Prinsloo* the Court held that:

“Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well.”²⁵

²³ *Prinsloo* above n 21 at para 24.

²⁴ *S v Bhulwana, S v Gwadiiso* 1996 (1) SA 388 (CC) at para 18.

²⁵ *Prinsloo* above n 21 at para 33. Again, the reference to section 8(2) in the judgment is a reference to the equality provision which appears in the Constitution as section 9.

[70] In *Harksen*²⁶ the Court in dealing with the listed and unlisted grounds in more detail said the following:

“It is also unnecessary for purposes of the present case, save that I would caution against any narrow definition of these terms. What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases, they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.”

[71] It needs to be said that it is obvious that the Constitution merely creates a presumption of unfair discrimination when the differentiation is based on a listed ground.

[72] “A discriminator can rebut the presumption by proving that in the particular case, the differentiation has not had the effect of impairing human dignity or a similar effect.²⁷ In the case of unlisted grounds the complainant must prove both that differentiation on the unlisted ground (a) has the potential to impair human dignity or has a similar

²⁶ *Harksen* above no 14 at para 49.

²⁷ *Rautenbach and Fourie* above n 22 at 113.

adverse effect²⁸ which the Constitutional Court then in *Harksen* calls “*discrimination*” and must further (b) prove that it indeed had such consequences which would then constitute “*unfair discrimination*”.²⁹

- [73] The crux of the test for unfair discrimination is the impairment of human dignity or an adverse effect in a comparably similar manner, not the classification of the ground as listed or unlisted as is evident

²⁸ Id at para 46.

²⁹ Id at para 51-2 where the Court held that—

“In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair;
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving “precision and elaboration” to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop. In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.

If the discrimination is held to be unfair then the provision in question will be in violation of section 8(2).” (Footnotes omitted.)

from the quotation from *Harksen*.³⁰ The constitutional distinction between listed and unlisted grounds affects only the burden of proof and nothing else.³¹ Differentiation on both a listed and analogous ground amounts to unfair discrimination only if the differentiation has indeed affected human dignity or has had an adverse effect in a similar serious consequence.³²

- [74] This means that the test for unfair discrimination is the same for differentiation on both listed and unlisted grounds. That being the case unfair discrimination on listed and unlisted grounds, respectively, are not different forms of unfair discrimination. The Constitution does not render differentiation on a listed ground automatically unfair.
- [75] Rautenbach and Fourie correctly point out that section 9(5) of the Constitution clearly implies that the presumption that a differentiation on a listed ground as unfair discrimination may be rebutted and in the case of differentiation on an analogous ground, once established by the victim, may similarly be rebutted or may be shown as not unfair.³³
- [76] The conclusion to this reasoning is that unfair discrimination may occur on a listed or unlisted ground. The common factor is that the differentiation must affect human dignity or must have a similar serious consequence. The distinction between listed grounds and analogous grounds is one that finds application only with regard to the burden of proof, both in the Constitution and in section 6.
- [77] A further principle is that all differentiations (including unfair discrimination) may not be “*arbitrary*” in the sense that they do not serve a legitimate purpose as contemplated in *Prinsloo*:³⁴

³⁰ Rautenbach and Fourie above n 22 at 113.

³¹ *Id.*

³² *Id.*

³³ Rautenbach and Fourie above n 22 at 113.

³⁴ *Prinsloo* above no 21 at para 25.

“It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as “mere differentiation”. In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest “naked preferences” that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state.” (Emphasis added and footnotes omitted.)

[78] In this context “*rationality*” relates not to the wisdom or reasonableness of the average employer or the soundness of differentiations in general but to the relation between the differentiation and the legitimate purpose. This basic requirement of rationality means also that arbitrariness is and must be common to unfair discrimination. Unfair discrimination on the other hand may be permissible if it is not arbitrary and has a legitimate purpose. Such a legitimate purpose does not immediately spring to mind. Such a legitimate purpose can possibly be the case when the purpose of the differentiation involves the protection of the human dignity of others or the protection of other rights, the limitation of which automatically involves the disparagement of human dignity.

[79] The Constitutional Court also in *Mhlongo v S; Nkosi v S*³⁵ emphasised that any differentiation (and not only unfair discrimination) must be evaluated in terms of section 9(1) to ensure that it is rational, that is, it cannot be arbitrary:

“The differentiation must be evaluated in terms of s 9(1) of the Constitution. This Court has held that a distinction made in the law will contravene s 9(1) if it is irrational. The purpose of this is to ensure that the state functions in a rational manner, in order to enhance the coherence and integrity of the law.

³⁵ [2015] ZACC 19; 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC).

This is essential to the rule of law — the fundamental premise of the constitutional state.

It must be ascertained whether the differentiation complained of is rationally connected to the achievement of a legitimate government purpose, as opposed to being arbitrary or capricious.”³⁶ (Footnotes omitted.)

- [80] The inescapable conclusion is that the Constitution requires that any and all differentiation may not be arbitrary but must be rationally connected to a legitimate purpose. In the case of differentiation that constitutes unfair discrimination the underlying basis is that it is arbitrary and in addition it impacts upon human dignity (and has no legitimate purpose).

Or any other arbitrary ground

- [81] Parliament's reasons for adding this phrase to section 6(1) are not clear. This section, prior to its amendment, listed the grounds as being included — meaning that it was not a closed list. The same argument is valid in respect of section 9(3) of the Constitution where the word “*including*” is used to indicate that the listed grounds are not a closed list.
- [82] The courts in the majority of cases in which section 6(1) was applied dealt with listed grounds. There are however various matters that served before courts on unlisted grounds such as citizenship,³⁷ HIV status,³⁸ medical condition³⁹ and others.
- [83] Where the courts considered claims based on unlisted grounds, they referred thereto as unlisted or analogous grounds. Since the word

³⁶ Id at paras 34-5.

³⁷ *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC).

³⁸ *Hoffman v SAA* 2000 11 BCLR 1211 (CC).

³⁹ *Imatu v City of Cape Town* 2005 11 BLLR 1084 (LC).

“including” in both section 6(1) of the EEA and section 9(3) of the Constitution have been interpreted to cover unlisted grounds, it wasn’t necessary to pass the amendment to clarify that discrimination is not only permitted on the grounds listed in section 6(1) but also on any other arbitrary ground. The explanatory memorandum provided this reasoning, that section 6(1) does not only cover unlisted grounds but also other arbitrary grounds, as one reason for the introduction of *“any other arbitrary ground”*.

[84] The second reason proffered in the explanatory memorandum is to bring section 6(1) in line with the formulation in section 187(1)(f) of the Labour Relations Act.⁴⁰ This section provides that a dismissal is automatically unfair:

“ . . . if the reason for the dismissal is—

. . .

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”

[85] The amended section 6(1) is not, as far as its formal formulation is concerned, identical with section 187(1)(f) as the latter section employs a general description followed by examples of what the general description of *“arbitrary grounds”* includes in contrast to the amended section 6 that sets the various listed grounds and added *“or on any other arbitrary ground”* as an incidence of the general description.

⁴⁰ Act 66 of 1995 as amended. (LRA)

- [86] The contention of Du Toit⁴¹ seems correct that because the courts have held that the test for an arbitrary ground which is not listed in section 187(1)(f) is the same as the test for an analogous ground in section 9(3) of the Constitution, “arbitrary ground” in section 187(1)(f) must be considered to have the same meaning as an unlisted ground in section 9(3) of the Constitution and in section 6 of the EEA before its amendment.
- [87] When the amended section 6(1) is interpreted contextually with the amended section 11(2), “arbitrary ground” in the phrase “on any other arbitrary ground” refers to an unlisted ground. The Labour Appeal Court in considering an alleged automatically unfair dismissal based on section 187(1)(f) in *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*⁴² held that “arbitrary ground” in section 187(1)(f) must be considered to have the same meaning as an unlisted ground in section 9(3) of the Constitution and in section 6 of the EEA before its amendment:

“It is not strictly necessary to decide whether the concept of “disability” as set out as a ground in section 187(1)(f) describes the condition suffered by respondent. The uncontested evidence of the respondent supported by a letter from his psychiatrist does support such a conclusion in that he had suffered from depression. The description of depression is also set out in his statement of case. Depression is a form of mental illness (see *Diagnostic and Statistical Manual of Mental Disorders IV*). But, even were his condition not to be considered a form of disability as set out in section 187(1)(f), unquestionably the discrimination suffered by respondent as a result of his “mental health problem” had, in the words of Stein AJ, “the potential to impair the fundamental dignity of that person as a human being or to affect him in a comparably serious manner.”

⁴¹ Du Toit “Protection against unfair discrimination: Cleaning up the Act?” (2014) 35 ILJ 2623.

⁴² [2009] 12 BLLR 1181 (LAC).

Expressed differently, the question can be posed thus: did the conduct of the appellant impair the dignity of the respondent; that is, did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human dignity of respondent? See for the source of this approach, *Harksen v Lane NO* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC).

In my view, the question must be answered affirmatively. The conduct of appellant clearly constituted an egregious attack on the dignity of respondent and accordingly falls within the grounds set out in section 187(1)(f) of the Act.”⁴³

- [88] When Parliament intended to bring section 187(1)(f) of the LRA and section 11 of the EEA in line, it must have done so having regard to the interpretation of section 187(1)(f) in *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*⁴⁴.
- [89] The applicants have, as pointed out earlier, submitted that the insertion of this phrase in section 6(1) introduced a new approach and that there are now three sets of grounds upon which unfair discrimination can take place. This interpretation is favoured by Du Toit.⁴⁵ This approach is not favoured by Le Roux.⁴⁶
- [90] Du Toit argues that in order to promote the purpose of the EEA to eliminate unfair discrimination and to avoid redundancy, “*arbitrary*” in

⁴³ Id at paras 24-6.

⁴⁴ 2009 12 BLLR 1181 (LAC)

⁴⁵ Du Toit above n 41.

⁴⁶ Le Roux “The Employment Equity Act: New amendments set problems and posers” (2014) 24 *Contemporary Labour Law* 1.

the amended section 6 “*must add something to the meaning of “unfair discrimination”*”.⁴⁷

- [91] He argues that, therefore , the amended section 6(1) should be read to place “*an additional remedy at workers’ disposal*.”⁴⁸ He submits that the meaning to be attached to “*arbitrary*” is the meaning which the Labour Court ascribed to “*arbitrary*” in *Kadiaka*⁴⁹ where it stated that an arbitrary ground is a ground which is “*capricious or proceeding merely from will and not based on reason or principle*”. This, in his view, “*would broaden the scope of the prohibition of unfair discrimination from grounds that undermine human dignity to grounds that are merely irrational*”⁵⁰
- [92] In evaluating this proposition, it must be kept in mind that the word “*ground*” is used in section 9 of the Constitution as a synonym for a “*differentiating criterion*”. A complainant in equality litigation must be able to indicate on which ground the differentiation took place regardless of whether the ground is listed or unlisted. This is also the case with differentiation on an arbitrary ground.⁵¹
- [93] Thus, contrary to what Du Toit argues, an “*arbitrary*” ground can only be described as any differentiating criterion (ground) which forms the basis of a differentiation which is not rationally linked to a legitimate purpose.
- [94] The statement in *Kadiaka* that an “*arbitrary ground*” is a ground which is “*capricious or proceeding merely from will and is not based on reason or principle*” does not describe or identify a ground of differentiation in the sense of a distinguishing feature, characteristic or

⁴⁷ Du Toit above n 41 at 2627.

⁴⁸ Id at 2628.

⁴⁹ *Kadiaka* above n 7 at para 42.

⁵⁰ Du Toit above n 41 at 2627.

⁵¹ *Ntai v SA Breweries* 2001 ILJ 472 (LC).

circumstance on which a differentiation is based. The statement merely describes the absence of a legitimate (rational) purpose for the differentiation, or if there is such a purpose, the fact that the differentiation is not capable of contributing anything towards the achievement of the legitimate purpose.

[95] The full extract from what Landman J in *Kadiaka* said is:⁵²

“What then are arbitrary grounds? An arbitrary ground is a ground which is capricious or proceeding merely from the will and not based on reason or principle. See *L Baxter Administrative Law* at 521-2 relying on *Beckingham v Boksburg Licensing Court 1931 TPD 280* at 282).

In my view, without attempting to be exhaustive, unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless. But even if there is a reason, the discrimination may be arbitrary if the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job-seeker and is not morally offensive. The discrimination must be balanced against societal values, particularly (as emphasised repeatedly by the Constitutional Court) the dignity of the complainant and a society based on equality and the absence of discrimination.” (Emphasis added.)

[96] Rautenbach and Fourie⁵³ commented on the dictum of Landman J as follows:

“However, taking into account that Landman J said all this within the context of unfair discrimination, because labour legislation refers only to unfair discrimination, nothing that he said really deviates from the constitutional framework for the application of the right to equality. He repeated the framework

⁵² *Kadiaka* above n 7 at paras 43-4.

⁵³ Above n 22 at 121.

in broad terms: all differentiations *including, in this instance, alleged cases of unfair discrimination*, must be rationally related to a legitimate purpose; even if a rational relationship exists, in instances where a differentiation causes a violation of human dignity (unfair discrimination) stricter requirements in terms of the factors referred to in the general limitation must be met before it can be said that the differentiation is justified.” (Emphasis in original.)

- [97] Rautenbach’s comment with respect, correctly places Landman J’s finding in perspective within the constitutional framework.

- [98] If in following *Kadiaka*, the insertion of “*or any other arbitrary ground*” simply means that differentiation in labour relations that allegedly constitutes unfair discrimination on any listed or unlisted ground is impermissible if it does not serve a legitimate purpose, regardless of whether the disparagement of human dignity or a similar consequence is involved, then no new form of unfair discrimination has been created that has not existed all along in terms of the provisions of section 9(1) of the Constitution.

- [99] Thus the only purpose which the phrase “*arbitrary ground*” in section 187(1)(f) of the LRA and section 6 of the EEA could serve is to mean that differentiation in labour law constitutes unfair discrimination on any listed or unlisted ground if it does not serve a legitimate purpose (that would serve as justification).

- [100] The fact that section 11(1) distinguishes only between alleged unfair discrimination on a “*ground listed in section 6(1)*” and “*alleged discrimination on an arbitrary ground*” and no provision is made for a third category of unfair discrimination also points to the conclusion that it is most unlikely that Parliament intended to create three categories of unfair discrimination in section 6 without then also mentioning it in section 11.

[101] All of this leads to the conclusion that the purpose of adding “*or any other arbitrary ground*” to section 6 was not to create a third category of unfair discrimination as contended for by the applicants in this matter.

[102] The purpose of the legislator by inserting “*or any other arbitrary ground*” serves no other purpose than being synonymous with “*one or more ground*” or being synonymous with “*unlisted grounds*”.

[103] The contention of Le Roux⁵⁴ that because the courts have held that the test for an arbitrary ground which is not listed in section 187(1)(f) is the same as a test for an analogous ground in section 9(3) of the Constitution, “*arbitrary ground*” in section 187(1)(f) must be considered to have the same meaning as an unlisted ground in section 9(3) of the Constitution and in section 6 of the EEA before its amendment, makes sense. When the amended section 6(1) is interpreted contextually with the amended section 11(2), “*arbitrary ground*” in the phrase “*on any other arbitrary ground*” refers to an unlisted ground also called unspecified grounds or grounds analogous to the listed grounds.

[104] In the approach to an interpretation of a statute, regard must also be had to what material the producer of the amendment knew when it affected the amendment.

[105] The applicants within this context argued that Parliament knew about the decisions such as *Harksen* and consequently would not have introduced the amendment unless it wished to change the existing law.

[106] In the same vein it is safe to assume that Parliament also knew of the decisions interpreting the equality clause in the Constitution and

⁵⁴ Le Roux above n 45.

linking the interpretation of the equality clause 2 with the interpretation of section 6 of the EEA.

[107] Parliament would have known that *arbitrary* in the equality clause and in section 6 of the EEA affects all sorts and forms of differentiation and that unfair discrimination as a form of differentiation requires the added requirement that it affects human dignity. The purpose of the amendment therefore was to bring the EEA in line with the legal position as it pertains to the constitutional context of the EEA.

[108] When applying the principles underlying the interpretation of a statute, it leads to the conclusion that Parliament did not purport to introduce a third category of grounds upon which an employee could challenge the conduct of an employer. The effect of the amendment simply is that discrimination on any arbitrary ground affecting human dignity constitutes unfair discrimination. In the event of the listed grounds discrimination is presumed and any other arbitrary ground that affects human dignity requires that the complainant must define the ground and has the burden of proof.

The applicant's case

[109] The applicants failed to plead or rely upon a listed or any other arbitrary ground. They did not plead any ground upon which the employer allegedly discriminated against them.

[110] To the extent that they in oral argument relied upon “*error*” as an unlisted ground or a ground analogous to the listed grounds they have failed to plead such a ground.

[111] The applicants are not excused from having to plead the arbitrary ground upon which they relied, whether listed or unlisted or on their version a third category of grounds.

[112] It is in any event difficult to understand how an error as such that is subsequently corrected or rectified, and thereby extinguished, can constitute such a ground.

[113] The case of the applicants as pleaded cannot succeed.

[114] The applicants argued in favour of a cost order. Their main contention was that the respondent only late during January 2017 informed them of the fact that the error had been corrected. For that reason, they would be entitled to a cost order.

[115] It is clear that the information about the correction of the error did not deter the applicants from pursuing their case. The only effect it had on the applicants was in respect of the relief that they pursued.

[116] This case turned upon an interpretation of the amended provisions of the EEA. There is no direct binding authority on the interpretation of the changes to section 6 and section 11 of the EEA.

[117] In view of the fact that this case turned on an interpretation of the law and having regard to the other relevant considerations it is just and equitable that no cost order is made.

Order

[118] I make the following order:

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

Coetzee AJ
Acting judge of the Labour Court

Appearances

For the Applicants:	C de Kock
Instructed by:	Carelse Kahn Attorneys
For the Respondent:	C Joubert SC and D Nyathi
Instructed by:	Werksmans Attorneys