



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS 876/16

In the matter between:

**UNITED NATIONAL TRANSPORT UNION OBO
MEMBERS**

Applicant

And

BOMBELA OPERATING COMPANY (PTY) LTD

Respondent

Heard: 12 May 2017
Delivered: 8 February 2018

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

- [1] The applicant, United National Transport Union (UNTU) seeks leave to amend its statement of claim that was filed on 4 November 2016. The respondent, Bombela opposed the application on grounds that the proposed amendments renders the pleadings exceptible since they do not disclose a cause of action and/ or are vague and embarrassing.

Background:

- [2] UNTU brought a claim on behalf of its members in terms of the provisions of sections 6(1) and 6(4) of the Employment Equity Act (EEA).¹ In its statement of claim, it alleged that its members, who are employed by Bombela, were being unfairly discriminated against on the basis that they were not appropriately remunerated for equal work. The essence of the allegation is that Bombela has contravened the principle of 'equal pay for equal work'.
- [3] Bombela on 18 November 2016, filed a notice calling upon UNTU to remove the cause of action and to accordingly amend the statement of claim. The exception to UNTU's statement was raised on the basis that;
- a) It lacked averments to sustain a cause of action and/ or did not disclose a cause of action in terms of the provisions section 6(1)² of the EEA and;
 - b) It was vague and embarrassing in that UNTU alleged to act on behalf of its members, but had failed to identify these members and/ or failed to cite them in the pleadings.
- [4] Bombela's exception was enrolled for hearing and came before LaGrange J on 10 February 2017. The parties presented a draft order, which was in turn made an order of court. The terms thereof are as follows:

¹ Act 55 of 1998, as amended

² Section 6: **Prohibition of unfair discrimination.—**

- (1) 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, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.
- (2) It is not unfair discrimination to—
 - (a) take affirmative action measures consistent with the purpose of this Act; or
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.
- (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).
- (4) 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.
- (5) ...

1. The claimant will file an amendment to its statement of claim dated 3 November 2016 on or before 24 February 2017;
2. In the event that the claimant fails to amend its statement of claim by 24 February 2017, the exception is upheld and the claim is dismissed.
3. The claimant tenders the excipient's costs up to 8 February 2017;
4. The costs of the appearance of 10 February 2017 are on the unopposed scale;

[5] On 24 February 2017, UNTU filed its notice of intention to amend the statement of claim. Bombela contended that the amendments essentially had the effect of removing the original statement of claim and replacing it with a "new" one.

[6] On 3 March 2017, Bombela filed its notice of objection to UNTU's notice of intention to amend. The objection was that the "new" statement of claim still failed to establish a cause of action in terms of sections 6(1) and 6(4) of the EEA. Bombela contended that the statement of claim merely referred to an arbitrary ground of discrimination, but failed to identify the alleged arbitrary ground or the grounds upon which it sought to rely.

[7] On 10 March 2016, UNTU filed a notice seeking an amendment in accordance with its notice of intention to amend.

Submissions by parties:

[8] UNTU contends that its claim is premised on the following;

- 8.1. Bombela employs security personnel at various Gautrain Stations and trains. The security personnel are divided into two categories, namely the Station Security Manager and the Assistant Security Manger.
- 8.2. The difference between the two positions is in respect of the inherent job requirements of the positions. A Station Security Manager is required to have at least 10 years' previous working experience in

the Police Service at a rank of Warrant Officer or above and/or at least 15 years' experience in the Security Industry. On the other hand the Assistant Station Security Manager is required to have at least five (5) years' previous working experience in the Police Service at a rank of Sergeant or above and/or at least seven (7) years' experience in the security industry.

- 8.3. UNTU contends that security personnel are employed centrally and are stationed on an *ad-hoc* and/ or rotational basis at different Gautrain stations. It further alleges that Station Security Managers who perform the same work do not receive equal remuneration. Similarly, Assistant Station Security Managers who perform the same work do not receive equal remuneration.
- 8.4. In the result, the discrepancies in the remuneration are arbitrary and amount to unfair discrimination under the EEA.
- 8.5. UNTU further contends that the provisions of section 6(4) of the EEA contemplate a difference in the 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 based on any of the grounds listed above is unfair discrimination.
- 8.6. It is conceded that the payment of different remuneration for equal work does not automatically constitute unfair discrimination. However, if the motive for doing so amounted to direct or indirect discrimination on any listed or arbitrary ground, it constituted [unfair] discrimination.
- 8.7. UNTU contends that the amendments as filed on 24 February 2017 met the legal requirements as they outline the necessary material facts to sustain a cause of action for [unfair] discrimination on arbitrary grounds as contemplated by the EEA. The amendments did so, in the following manner:

- 8.7.1. They record that Bombela employed two categories of security personnel, being Station Security Managers and Assistant Station Security Managers.
- 8.7.2. They outline the factual basis for providing that the work performed by both Station Security Managers and Assistant Station Security Managers was relatively the same. This is with reference to their job description, the educational requirements for both positions and the minimum previous work experience.
- 8.7.3. They further lay the factual basis for contending that Bombela did not remunerate all Station Security Managers and Assistant Station Security Managers equally. This was achieved through comparing payslips of listed Station Security Managers and Assistant Station Security Managers.
- 8.7.4. They demonstrate the factual basis for proving that the differentiation in the remuneration is unfair and arbitrary. These contentions were fortified by the fact that;
- a) all Station Security Managers performed the same work;
 - b) all Assistant Station Security Managers performed the same work;
 - c) the differentiation in remuneration was not as a result of the respective employees' seniority, length of service, qualification and/ or abilities and/ or competence and/ or experience;
 - d) the unequal treatment could not be justified in respect of Bombela's operational or commercial needs;

- e) the unequal treatment was arbitrary, capricious and without purpose or justification and appeared to be based on Bombela's whim, and;
- f) the unequal treatment undermined the inherent work of employees and was demeaning.

8.8. UNTU further contends that there was no basis for Bombela to oppose the proposed amendments as they lay the factual basis for the claim, of arbitrary discrimination in terms of the provisions of section 6(1) and 6(4) of the EEA.

8.9. UNTU disputed that the amendments were vague and embarrassing, as Bombela knew what case it has to meet. It was therefore for Bombela to demonstrate that the unequal treatment of Station Security Managers and Assistant Station Security Managers was justified, not capricious and informed by legitimate commercial needs.

[9] Bombela contends that although as a general rule, amendments are to be granted, it was however accepted that an amendment, which would render the relevant pleading exceptible, cannot lead to a decision on the real issues and should not be granted³. It further contends that no purpose would be served by granting an amendment in the knowledge that an exception can be raised against the amendment. The basis for its argument in this regard is as follows:

9.1. UNTU alleged that the purported discrepancy in the remuneration of the security personnel was unfair discrimination on an arbitrary ground with the meaning of the provisions of section 6(1) of the EEA, because it was based on the whim of the employer. That assertion however was not sufficient to found a cause of action in terms of the EEA.

³ In reference to *Cross v Ferriera* 1950 (3) SA 250 (C); *RM vande Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C)

- 9.2. Our courts have found that an arbitrary act by an employer does not amount to discrimination on an arbitrary ground. A litigant is required to set out specific grounds on which the alleged discrimination is based, and further outline the basis that this ground shares common characteristics with the listed grounds.

Evaluation:

- [10] An exception is a legal objection intended to address a defect inherent in the other party's pleadings. The Labour Court Rules do not specifically provide for exceptions. Exceptions can however be raised under Rule 11 of the Labour Court Rules read with rule 23 of the Uniform Rules of the High Court⁴.
- [11] Two categories of exceptions are generally recognized, namely, where the pleading is vague and embarrassing, and where the pleading lacks averments which are necessary to sustain an action or defence⁵. Where a party raises an objection to pleadings, it is entitled to take an exception to have the action or defence dismissed even before the merits of the matter are ventilated in a trial⁶. This approach is aligned to the basic principle that particulars of claim should be phrased such that a defendant may reasonably and fairly be required to plead thereto. The premise being that pleadings must be lucid, logical and in an intelligible form⁷.
- [12] In *Harmse v City of Cape Town*⁸, it was specifically stated that the Rules of this Court do not require an elaborate exposition of all facts in their full and

⁴ Which provides:

"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of sub-rule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception"

⁵ *De Klerk v Cape Union Mart International (Pty) Ltd* (2012) 33 ILJ 2887 (LC) at para 19.

⁶ *Davidson & Ors v Wingprop (Pty) Ltd* [2010] 4 BLLR 396 (LC) para [25].

⁷ See *Trope v South African Reserve Bank* 1992 (3) SA 208 (T)

⁸ (2003) 24 ILJ 1130 (LC); [2003] 6 BLLR 557 (LC) paras [6] – [10], where it was held that;

complex detail, as that was the role of evidence, whether oral or documentary. Furthermore, for the purposes of a trial, there is the preliminary step of the pre-trial conference, which provides an occasion for the detail or texture of the factual dispute to begin to take shape.

[13] In essence, exceptions should not be raised at the spur of the moment for the purposes of merely frustrating a claim. They are permissible in *inter alia*, circumstances where upon a consideration of the proper context of the pleadings, the defects complained of are such that they are incapable of resolution at a pre-trial.

[14] UNTU's claim is premised on the provisions of Sections 6(1) of the Employment Equity Act, which provides that no person may unfairly

"[6] The statement of claim serves a dual purpose. The one purpose is to bring a respondent before the court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the respondent of the material facts and the legal issues arising from those facts upon which applicant will rely to succeed in its claims.

[7] The material facts and the legal issues must be sufficiently detailed to enable the respondent to respond, that is, that the respondent must be informed of the nature or essence of the dispute with sufficient factual and legal particularity so that it knows what it is that the applicant is relying upon to succeed in its claim.

[8] The Rules of this Court do not require an elaborate exposition of all facts in their full and complex detail – that ordinarily is the role of evidence, whether oral or documentary. There is a clear distinction between the role played by evidence and that played by pleadings – the pleadings simply give the architecture, the detail and the texture of the factual dispute are provided at the trial. The pre-trial conference provides an occasion for the detail or texture of the factual dispute to begin to take shape. In terms of rule 6(4)(b) the parties in the pre-trial conference must attempt to reach consensus on facts that are common cause, facts that are in dispute, the issues that the court is required to decide and the precise relief claimed.

[9] Accordingly the rules of this Court anticipate that the relief claimed might not have been precisely pleaded in the statement of claim filed. The Rules of this Court further anticipate that the factual matters at issue will be dealt with more fully and precisely in the pre-trial conference. The rules therefore anticipate that the parties at the pre-trial conference will have dealt in much more detail not only with the factual matters but also the legal issues. The statement of claim and response thereto foreshadows this activity but is not a substitute for it. It is for this reason that the rule on pre-trial conferences provides for reaching consensus on the issues that the court is required to decide.

[10] When an exception is raised against a statement of claim, this Court must consider, having regard to what I have said above, whether the matter presents a question to be decided which, at this stage, will dispose of the case in whole or in part. If not, then this Court must consider whether there is any embarrassment that is real and that cannot be met by making amendments or providing of particulars at the pre-trial conference stage."

discriminate, directly or indirectly, against an employee in an employment policy or practice on one of a number of its specified grounds as set out in that section, which include “on any other arbitrary ground”. It further relied on the provisions of provisions of section 6 (4) of the EEA in substantiation of its claim.

- [15] In contending that the amendments sought should be accepted, UNTU relied on the principles stated in *Duma v Minister of Correctional Services and Others*⁹ for the proposition that since the facts of this case were not dissimilar, the test was whether Bombela had put up a case as to why the employees did not suffer unfair discrimination, and that it was up to it to justify the differentiation so alleged.
- [16] Bombela nonetheless insisted that even though UNTU has pleaded differential treatment, it has not identified any attribute to indicate the grounds of discrimination alleged, and that the facts in *Duma* were distinguishable in that the ground of discrimination, *i.e.*, geographical location, was identified or stated in that matter.
- [17] In *Aarons v University of Stellenbosch*¹⁰ it was held that an applicant before the court must do more than just allege discrimination on arbitrary grounds. In addition, an applicant must allege more than merely differentiation in respect of the treatment meted out by the employer or attributable to the employer. To this end, it must allege that the reason for the different treatment is based on an analogous ground that adversely affects some characteristic that impacts upon her human dignity, failing which the claim would be excepiable as no cause of action would have been disclosed.
- [18] As to what was expected of the claimant to plead in such cases was summarised by Van Niekerk J in *SAMWU & Others v PIKITUP*¹¹ in the following terms;

⁹ (2016) 37 ILJ 1135 (LC); [2016] 6 BLLR 601 (LC)

¹⁰ (2003) 24 ILJ 1123 (LC)

¹¹ Case no: JS 744/16 (Delivered: 7 February 2017) at para 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” (Authorities omitted)

- [19] The burden of proof in equal pay claims rests upon a claimant to at the very least, show that the nature and volume of work which she/he performed in her/her position was similar to that of comparators holding the same position. In *Minister of Correctional Services and Others v Duma*¹² the Labour Appeal Court (per Davis JA) reiterated the test as follows;

“Hence, a claimant in an equal pay claim must establish that the work done by a person who can be reliably classified as a comparator is the same or similar work. In a claim for work for equal value, it behoves a claimant to establish that the tasks performed by the comparator and the claimant are of equal value, having regard to the required degree of skill, physical and mental effort, responsibility and other factors...”¹³

- [20] The issue is whether in this case, UNTU has identified the arbitrary ground of the alleged discrimination in its pleadings, or made any assertion to the effect that the arbitrary ground identified by it shared any characteristics with any specified ground listed in section 6 (1), or at worst, met the test set out in *Minister of Correctional Services and Others v Duma*.

- [21] In this case, even though Bombela contended that the amended statement of case effectively replaced the old one, that argument was not seriously

¹² (CA10/2016) [2017] ZALAC 78 (23 June 2017)

¹³ At para 21

pursued, and I have no reason to believe that the amended statement of claim is 'new' in the sense that it raises a new cause of action. The relevant content of the first statement of case spanned to about three pages in a total of five pages, and Bombela was clearly correct in excepting to it. The second (amended) statement of claim is more detailed, and in my view, I fail to appreciate what was expected of UNTU to do with a view of correcting the defects pointed out in the exception. To this end, there is no substance to the contention that the amended statement of claim is a 'new statement'.

- [22] The amended statement elaborates on the distinction and similarities with the two categories of Station Security Managers; and comparison and figures in respect of the pay disparities between members of both categories. An allegation is made that the unequal treatment of the two categories constitutes unfair and arbitrary discrimination on about twelve listed grounds, and how the impugned conduct violated the principle of 'equal pay/equal work', and the provisions of section 6 (1) and 6 (4) of the EEA read with the Code of Good Practice on Equal Pay/remuneration for work of equal value.
- [23] In my view, UNTU in its amended statement of claim has sufficiently identified the arbitrary grounds on which it relies, and which shares characteristics with the specified grounds. The proposed amendments sufficiently addresses the objections raised by Bombela, and have identified the grounds on which the alleged discrimination is founded. The material facts and the legal issues raised in the amended statement are in my view, sufficiently detailed to enable Bombela to respond. It cannot therefore be said even from a cursory glance of the amended statement of claim, that Bombela does not have a grasp of the nature or essence of the dispute for it to know what it is that UNTU is relying upon to succeed in its claim.
- [24] To the extent that Bombela holds the view that it still does not know what the arbitrary ground/s relied upon are, little purpose would be served by affording UNTU a further opportunity to file more amendments, particularly since this would simply delay the finalisation of the matter. Furthermore, these are issues that can be dealt with in particular detail in the course of a pre-trial conference.

[25] I have had regard to considerations of law and fairness and do not deem it warranted to make any cost order.

Order:

[26] In the premises, the following order is made:

1. The application for leave to amend the Applicant's statement of case is granted.
2. The exceptions raised by the Respondent in respect of the Applicant's amended statement of case are dismissed.
3. The Respondent is directed to file and serve an answering statement to the Applicant's amended statement of case within 30 (Thirty) days from the date of handing down of this judgment.
4. There is no order as to costs

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv. K Millard

Instructed by:

Fluxmans Incorporated

For the Third Respondent:

Adv. C Orr

Instructed by:

Bowman Gilfillan Incorporated

LABOUR COURT