



Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J 2680/16

In the matter between:

**SASOL CHEMICAL OPERATIONS
(PTY) LTD**

Appellant

and

CCMA

First Respondent

**COMMISSIONER SOLLY MASHEGO
N.O.**

Second Respondent

CEPPWAWU

Third Respondent

OBO TUMELO MOKOENA

Heard: 2 August 2018

Delivered: 29 August 2018

Summary: Appeal – unfair discrimination – Employment Equity Act ss 6(1), 6(4), 10(8) and 11 – Labour Court Rule 9. Alleged unfair discrimination on grounds of race. Employee not discharging evidentiary burden to link difference in remuneration to race. Appeal upheld.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an appeal from an arbitration award of the CCMA¹ that the applicant, Sasol, had unfairly discriminated against its employee, Mr Tumelo Mokoena², on the grounds of race.

[2] The employee initially referred a dispute to the National Bargaining Council for the Chemical Industry in which he described his dispute as follows :

“The worker was appointed for Grade 1 in the contract of employment or appointment but the company paid him the remuneration of Grade 2.”

[3] The dispute was transferred to the the CCMA. Conciliation having failed, the employee, assisted by his trade union, requested arbitration in terms of s 186 (2)(a) of the Labour Relations Act.³ He described the dispute as follows:

“The worker was given the contract of employment but when he get the salary was lower than of what he has signed for in the contract of employment.”

He described the decision he would like the commissioner to make as follows:

“We want the correction of remuneration to be line of what the contract is giving him as Grade 1 salary not Grade 2 salary.”

[4] The employee made no mention of discrimination based on race or any other ground. Yet the arbitrator⁴ considered it to be a dispute about equal pay for work of equal value -- apparently in terms of s 6(4) of the Employment Equity Act⁵ -- culminating in a claim of unfair discrimination based on race. He found that Sasol had unfairly discriminated against the employee and ordered it to pay him compensation and to adjust his salary

¹ The Commission for Conciliation, Mediation and Arbitration (the first respondent).

² The third respondent, represented by his trade union, CEPPEWU.

³ Act 66 of 1995 (LRA).

⁴ Mr Solly Mashego, the second respondent.

⁵ Act 55 of 1998 (EEA).

“to be the same as that of his white colleague”. Sasol appeals against that award in terms of Rule 9 of this Court’s rules.

Background facts

- [5] Sasol advertised a post for a logistics operator. It employed the employee, Mr Mokoena, and a Mr Sarel de Lange at the same time. Mokoena is black and De Lange is white. Both were employed from outside. They were both appointed in a position as “process controller” but De Lange was appointed at a higher salary. Sasol’s witnesses explained at the arbitration that De Lange had more experience relevant to the position and that he was therefore employed at a higher salary within the same salary band. Mokoena referred a dispute to the CCMA as described above, without mentioning De Lange or either employee’s race.

The award

- [6] The Commissioner started off his analysis of the evidence and arguments before him as follows:

“Two male employees, one white and the other black, commenced employment at the same time but they were earning different salary amounts. The black earning about R 2721, 00 below his white counterpart. This disparity, according to the applicant, is a conclusive proof proving that there is some differentiation between himself and his white counterpart. I am convinced that the applicant has shown that he has been discriminated and the discrimination is based on race.”

- [7] The arbitrator found that the two employees perform the same duties. He further found:

“It is also not a justifiable reason to discriminate on the basis that the applicant was recruited from a labour broker as compared to his white colleague who was coming from Arcelor Mittal which is not a labour broker. I find this ground to be totally unacceptable and encroaching in people’s dignity, the people I referred to those persons employed by labour brokers.”

- [8] The arbitrator accepted that Mokoena had three years of experience whereas De Lange had 7 to 8 years of experience. However, he found that

there was no justification for the differentiation in salary between the two. He then concludes:

“In the absence of justified reason for paying the white employee far above the black applicant, I therefore come to the conclusion that the conduct complained of amounts to unfair discrimination and the applicant was able to show that he is unfairly discriminated on the ground of race. There is no rationality on paying the white employee a salary which is above the applicant’s salary.”

[9] Finally, the arbitrator made the following award:

- “1. The applicant is unfairly discriminated against.
2. The respondent (Sasol Chemical Operations (Pty) Ltd) is ordered to adjust the applicant’s salary to be the same as that of his white colleague.
3. The respondent is further ordered to pay the applicant (Tumelo Mokoena) compensation being the equivalent of the difference between his salary and that of his white colleague which is what he would have received from the 1st August 2014 to date of this award.
4. The CCMA is directed to set down the matter for the calculation of the precise amount of compensation awarded in paragraph 3 above.”

Evaluation / Analysis

[10] The appeal in terms of s 10(8) of the EEA rests on two grounds:

10.1 Mr *Itkin* argued that the employee failed to discharge the evidentiary burden in section 11 of the EEA of establishing a *prima facie* case of discrimination based on race so as to trigger an onus on Sasol’s part to establish a defence in terms of the section.

10.2 The second ground of appeal relates to the Commissioner’s interventionist approach in the arbitration which, Mr *Itkin* argued, was not even-handed and gave rise to a reasonable apprehension of bias.

[11] I will deal with each ground in turn.

The employee’s evidentiary burden in the test for unfair discrimination

[12] Section 6 of the EEA provides:

“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.

...

(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.”

[13] Section 11 then deals with the burden of proof:

(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.”

[14] Mr *Itkin* submitted that a key question in this appeal is whether a bare contention by an employee that he has been racially discriminated against – without more – is sufficient to constitute an allegation of racial discrimination as contemplated in section 11 and thus trigger the employer’s onus to establish a defence in terms of subsections (a) or (b), or whether there is an evidentiary burden on the employee to at least put up a *prima facie* case of discrimination.

[15] He referred in this regard to the commentary on s 11 of the EEA in *Labour Law through the Cases*.⁶

“No definitive meaning has thus far been given to the words ‘alleged’ and ‘allegation’, used to describe the evidentiary burden placed on the applicant in bringing a claim of unfair discrimination. An unsupported allegation of unfair discrimination clearly cannot succeed. Even if the burden of proving

⁶ Du Toit et al, *Labour Law through the Cases* (LexisNexis, Issue 21, 2018) at EEA-37 s.v. “alleged” (footnotes excluded).

fairness rest on the employer, it has been held that an employee should provide sufficient evidence in support of her/his claim 'to cast doubt on' the employer's explanation or 'to show that there is a more likely reason than that of the employer'.

[16] This summary is consistent with the jurisprudence both before and after the amendment of section 11 which took effect in August 2014.

[17] In *Janda v First National Bank*⁷ -- a case dealing with an alleged automatically unfair dismissal in terms of s 187(1)(f) of the LRA⁸ – the court held:

'As stated earlier, there is a single issue with the burden on the employer. This essential point is obscured if one speaks of "the employee must prove" or a "shifting" of the onus or a duty "to establish a *prima facie* case that the reason for the dismissal was an automatically unfair one" (For example Dupper et al *Essential Employment Discrimination Law* at page 130). The evidentiary burden placed upon an employee creates the need for there to be sufficient evidence to cast doubt on the reason for the dismissal put forward by the employer or, to put it differently, to show that there is a more likely reason than that of the employer. A failure to present such evidence creates the risk of the employee losing his or her case. The essential question however remains, after the court has heard all the evidence, whether the employer upon whom the onus rests of proving the issue, has discharged it. (*Zeffertt (supra)* at page 132 to 134.)"

[18] And in *Kroukam v SA Airlink (Pty) Ltd*⁹ Davis JA held:

"In my view, section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal."

[19] More recently, after the amendment of s 11, the court held in *Sethole & others v Dr Kenneth Kaunda District Municipality*:¹⁰

⁷ [2006] 12 BLLR 1156 (LC) par [18].

⁸ Labour Relations Act 66 of 1995.

⁹ [2005] 12 BLLR 1172 (LAC) par [28].

"I then expressed my concerns to Mr Vuza about the fact that the discrimination case of the applicants was not properly pleaded or identified, despite the supplementary pre-trial. I enquired from Mr Vuza if he could indicate to me what exactly the unlisted arbitrary ground was that the applicants would rely on in establishing their claim, especially in the context of the judgment in *Harksen v Lane NO and Others*¹¹. I was informed by Mr Vuza that he could not provide me with a definitive answer, but that the ground relied on would become 'apparent' during evidence. As unsatisfactory as such a mystery ground of discrimination may be to the proper conducting of a discrimination case, I nonetheless allowed Mr Vuza to continue to lead the evidence of his first witness so as to establish where all of this could possibly be going.

One of the applicants, Mirriam Sethole ('Sethole') was then called to testify. I will deal fully with her evidence later in this judgment. Suffice it to say, after Sethole had been cross examined and concluded her evidence, it was still not apparent to me what the unlisted arbitrary ground was that the applicants were relying upon. In short, the mystery ground of discrimination did not come to the fore in the evidence. I pointed out to Mr Vuza that I remained concerned that even after the conclusion of the testimony of Sethole, the applicants, even on a *prima facie* basis, had made out no case of discrimination. I then adjourned the proceedings to 26 June 2017, so as to afford the applicants an opportunity to consider their options and whether they in fact should proceed with the case."

...

"[15] In terms of the *dictum* in *Gordon Lloyd* referred to above, I thus need to consider if the applicants have produced sufficient evidence to at least, on their own case, reasonably establish the *prima facie* existence of discrimination on an unlisted arbitrary ground. Therefore, considering the case as pleaded and the evidence of the two witnesses for the applicants together with the documentary evidence, did the applicants do enough to even substantiate the claim in the absence of anything presented by the respondent? In *Motaung v Wits University (School of Education)*¹² the Court said the following in this respect:

¹⁰ [2018] 1 BLLR 74 (LC) paras [8] – [9] and [15].

¹¹ 1998 (1) SA 300 (CC).

¹² (2014) 35 ILJ 1329 (LC) at para 13.

‘In view of the nature of the applicant's claim, it has to be established whether the applicant has adduced sufficient evidence supporting the facts required to back up her claim, and upon which this court might give judgment against the respondent. ...’

...

“[25] ... [E]ven if Section 11 of the EEA after its amendment is considered, there is a clear distinction, where it comes to the issue of who bears the onus, between a case of discrimination based on one of the listed grounds in Section 6(1) of the EEA, and a case based on any other unlisted arbitrary ground. In the case of a claim of discrimination based on a listed ground, an allegation of such kind of discrimination by a complainant suffices, and the onus is then on the respondent party to prove it does not exist. But in the case of a discrimination claim based on any other unlisted arbitrary ground, the onus is on the complainant to prove that discrimination based on that ground exists. Considering that the applicants’ claim is squarely based on such an unlisted arbitrary ground, they would in any event bear the onus to prove the existence of discrimination, in terms of Section 11(2) of the EEA, as it stands after amendment.”

[20] In the case before me, the allegation of discrimination is based on a listed ground, i.e. race. But is a mere allegation enough? I think not. It seems to me that the position in terms of the amended section 11 must be that set out by the learned authors in *Labour Relations Law: A Comprehensive Guide*.¹³

“Section 11(1), like its predecessor, states that the respondent employer must disprove the unfair discrimination ‘alleged’ by an employee in order to avoid liability. The term ‘alleged’ has not been consistently interpreted by the courts. It must be presumed to mean something less than making out a *prima facie* case, as would be required in the ordinary course with the burden of proof is not reversed. However, the weight of authority indicates that it means more than an unsupported contention or mere accusation. At the very least, as in the case of automatically unfair dismissal, it is suggested that the employee must produce ‘sufficient evidence to cast doubt on the reason’ put forward by the employer for its action; that is to

¹³ Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (6ed 2015) at 696 (footnotes omitted). (Published after the amendment to s 11).

say, If the employee succeeds in discharging this evidential burden, '[i]t then behoves the employer to prove the contrary'."

- [21] In this case, though, the arbitrator started off on the wrong premise. Right at the start of the arbitration, while explaining the process to the parties, he addressed the employee as follows:

"Sir, what will happen is you will have to start and tell us that you have been discriminated, once you told us you have been discriminated the employer will have to justify... [Indistinct] justified as discrimination there is no discrimination or there is discrimination."

- [22] The arbitrator thus proceeded from the premise that a mere allegation was enough. This presumption permeated the rest of his reasoning. He failed to have regard to the fact that the employee did not, in his evidence, establish any link between the difference in pay and his race.

- [23] Right at the start of Mokoena's evidence in chief, without his representative having asked any questions, the Commissioner asked him:

"Ja, you can tell us why you feel that you have been discriminated, why you say it is job of equal value but you are not paid the same salary as the other one?"

Mokoena replied:

"As I stated earlier that I was employed in 2012 together with Mr Sarel de Lange. So on the day in question we were working on rail loading. We did the same job. I was employed as a process controlling [sic] grade 1 as Mr De Lange was also appointed as a processor controller grade 1. When we got employed when I saw my contract I saw that it stated that I would be earning 8000 Rand and there was a difference between my contract and Mr de Lange. Mr de Lange's contract was going to earn more than what I was going to earn."

- [24] Mokoena did not ascribe the differentiation to race. Throughout his testimony, he complained about the difference in salary, but did not describe it to race. He proved differentiation, but not discrimination. It is only when the commissioner prompted him to bring race into the picture, that he did so:

"Commissioner: so it is based on race?"

Mr Mokoena: Yes.

Commissioner: Mr de Lange is white, he is a white male?

Mr Mokoena: He is a white male.”

[25] Under cross-examination, Sasol’s representative [Ms Lebasa] tried to elicit from Mokoena the reason for his allegation of discrimination. He failed to mention race.

“Ms Lebasa: So now if you do not know what his terms of employment are, how do you know that you are being discriminated against because now if you are having to contracts sitting here, same one and the same thing and then maybe we could talk something but you do not know what his contract is saying.

Mr Mokoena: The first thing I will say is we are doing the same job but the money is different. And we were employed the same time for the same position different salary that is the reason I referred the matter. All I want from the company is to prove to me why is the same person that is doing the same job as me same grade and same appointment date and why is he earning more than myself.

...

Ms Lebasa: You did not... [Indistinct] because he is white?

Mr Mokoena: Because he is white?

Ms Lebasa: Yes.

Mr Mokoena: no, I never said that.”

[26] After Ms Lebasa had explained to the employee at length that the reason for the differentiation was de Lange’s experience, he did not complain about discrimination based on race. Again, though, the Commissioner placed his own gloss on the evidence and pre-empted the outcome:

“Commissioner: Let me just cut short things to simplify for the parties. Look there is discrimination in this, the applicant is saying that the discrimination is unfair.

...

Now we have already established that there is discrimination at the discrimination is based on race.

...

Because the two persons have been employed at the same time doing the same work, then the employer has to justify as to why it says that the discrimination is not unfair.”

[27] Even after that intervention by the Commissioner, Mokoena did not allege that he was discriminated against based on race, nor did it provide evidence of any necklace between his and De Lange’s race and the difference in pay. The high water mark of his complaint was the following:

“I feel I was discriminated because Sasol has hired me for the very same position and if the first look at my CV they should not take me at all that is why I feel I was discriminated.”

[28] Even during re-examination, the employee’s representative, Mr Seloane, failed to elicit an allegation of discrimination based on race from Mr Mokoena:

“Mr Seloane: Now the question is why when they are supposed to pay you you start differently?

Mr Mokoena: I do not know why they paid me differently that is why I’m saying there is discrimination myself and Sarel.”

[29] The employee simply failed to present ‘evidence which is sufficient to raise a credible possibility’ that unfair discrimination based on race had taken place. The Commissioner’s finding to the contrary is based on the wrong premise and is not connected to the evidence before him. It cannot stand on appeal. His conduct was akin to that of the Commissioner in *Bester*¹⁴, where the Constitutional Court found that the LAC (and thus the Commissioner his finding was upheld by the LAC) had misdirected itself by upholding a case not advanced by the employee. The Constitutional Court set the award aside. It commented:

‘The Labour Appeal Court unfortunately misdirected itself by finding in favour of Mr Bester, on the basis of an unarticulated defence not supported by the evidence. It was never Mr Bester’s defence that he used the words “swart man” as a descriptor or that he did not mean to “demean” any

¹⁴ *Rustenburg Platinum Mine v SAEWA obo Bester and Others* (2018) 39 ILJ 1503 (CC); 2018 (8) BCLR 951 (CC); [2018] 8 BLLR 735 (CC) par [46] – [47].

person. He denied using the words and conceded that if he had done so, it could be a dismissible offence. There was no evidence in the record justifying a finding for Mr Bester on the basis that the Labour Appeal Court did.

In applying the test, namely, whether a reasonable, objective and informed person would, on the correct facts perceive it to be racist or derogatory, the Labour Appeal Court made a fundamental error, like the commissioner, as it failed to identify the correct facts and relied on evidence that had not been placed before it. The Labour Appeal Court erred by relying on a defence which was not raised by Mr Bester.’

- [30] Similarly, in this case, the Commissioner based his conclusion on an unarticulated complaint. It cannot be sustained and must be overturned on appeal.

The Commissioner’s interventionist approach: a reasonable apprehension of bias?

- [31] Despite the fact that the employee was represented by a trade union representative, the Commissioner took over his evidence in chief and led him throughout, in the process articulating his complaint and putting words in his mouth. As Mr *Itkin* pointed out in his argument, the Commissioner did not do the same with Sasol’s witnesses.

- [32] Even though an arbitration process is conducted with less formality than a trial in a court of law, the Commissioner has strayed beyond the boundaries articulated by the SCA in *Take and Save Trading*.¹⁵

“The question is whether the trial judge’s questioning of [the litigant] strayed outside of these guidelines at all and if so, could reasonably create the appearance, not at some passing stage in the course of the trial but in making and overall assessment, that his approach to the defence evidence was not objective and impartial.”

- [33] The conduct of the Commissioner is open to the same criticism levelled by the LAC against Commissioner Bella Goldman in *Satani*.¹⁶

¹⁵ *Take and Save Trading cc & Ors v Standard bank of SA Ltd* 2004 (4) SA 1 (SCA), citing *S v Rall* 1982 (1) SA 828 (A) with approval.

“It is accepted that commissioners are not expected to merely sit back and allow the parties to present their cases and not guide them to the real issues that are to be determined. There will be instances where intervention on the part of the commissioner would be necessary, whether an adversarial or inquisitorial has been adopted. However, commissioners must guard against an intervention that is likely to suggest bias or a perception of bias in favour of a particular party to the dispute. He/she must refrain from assisting a party to the detriment of the other, cross-examining witnesses by inter alia, challenging the consistency of a witness, expressing doubt about the credibility and reliability of a witness; putting leading questions to witnesses; answering questions for witnesses; showing disrespect to the parties’ representatives; not allowing representatives to present their cases without undue interference; doubting the capacity of a party’s chosen representative to represent a party and appearing to be an expert who knows everything and evincing a mind not open to persuasion. The list is not exhaustive.”

[34] It also harks back to the comments by Lagrange J in *Raswiswi*¹⁷

‘This line of questioning directed by the commissioner continues in the same vein, with the applicant’s union representative scarcely getting a word in. Apart from the fact that the applicant’s representative had only asked one question before the arbitrator launched into his own line of cross-examination, it is clear that the character of his questions to the applicant was very different to the character of the questions he asked the company witnesses. The entire thrust of his questioning was not aimed at elucidating or clarifying the applicant’s defence, but at challenging it. Moreover, the arbitrator’s questions to the applicant did not follow naturally from an incomplete line of cross-examination initiated by the employer: the arbitrator took the initiative by directly attacking the applicant’s defence, while he was still giving evidence in chief.’

[35] And in *Innovation Maven (Pty) Ltd*¹⁸ the following observation was made by Van Niekerk J:

¹⁶ *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) par [17] (my underlining).

¹⁷ *Raswiswi v CCMA and Others* (2011) 32 ILJ 2186 (LC) par [18], cited with approval in *Satani*.

¹⁸ (2016) 37 ILJ 465 (LC) par [17].

‘In the present instance, in my view, and after a careful perusal of the record, the commissioner’s conduct was such that she overstepped the mark. It is difficult to convey the magnitude of the extent to which the commissioner actively engaged in the proceedings, but read as a whole, the transcribed record reflects that the commissioner failed to respect the roles of the parties’ respective representatives and assumed to herself the role of leading evidence and conducting cross-examination.’

[36] The same considerations apply in this case. The Commissioner prejudged the issue and led the employee to bolster that premise, putting words in his mouth and creating a perception of bias in the sense of an adjudicator that had already formed a view on the merits. That is a further reason why the award must be set aside on appeal.

Conclusion

[37] The appeal must succeed on both of the grounds set out above.

[38] The Court has had the full transcript of proceedings before it. On the evidence, the employee has not passed the hurdle in s 11(1) of the EEA to discharge the evidential burden relating to discrimination on the ground of race. The award must be set aside and replaced with an award that Sasol did not unfairly discriminate against Mr Mokoena.

[39] With regard to costs, I take into account that there is an ongoing relationship between CEPPWAWU (the nominal third respondent) and Sasol, and that Mr Mokoena is also still employed by Sasol. And Mr Mokoena had an award in his favour that he and his trade union had to defend, not unreasonably. In law and fairness, I do not consider a costs award to be appropriate.

Order

[40] I therefore make the following order:

40.1 The appeal is upheld.

40.2 The unfair discrimination dispute that the employee, Mr Mokoena, referred to the CCMA under case no CHEM 587-14/15 is dismissed.

40.3 The award of 17 November 2016 is replaced with one that the employer, Sasol Chemical Operations (Pty) Ltd, did not unfairly discriminate against the employee, Mr Tumelo Mokoena.

40.4 There is no order as to costs.

Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

Riaz Itkin

Instructed by Johanette Rheeder Inc.

THIRD RESPONDENT:

Yanga Ndamase of Majang Inc.