IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 1032/12

In the matter between:

PAUL MARABA AND 2 OTHERS **Applicants**

And

TSHWANE UNIVERSITY OF TECHNOLOGY **Respondent**

Heard: 19 to 21 November 2018

Judgment: 23 August 2019

JUDGMENT

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MABASO, AJ

Introduction

[1] In an attempt to mend the scars of apartheid, which had *inter alia*, excluded promoting staff equity, an Act of parliament was passed to merge three tertiary institutions namely Pretoria Technikon, Technikon Northern Gauteng based in Soshanguve and Technikon North-West based in Ga-Rankuwa. Both the latter were based in the townships and dominated by Black people.

[2] As a result of the previous dispensation in the higher education system, some employees within the three former institutions were earning more than others despite doing the same job, especially in the nursing departments. In its attempt to correct this disparity, the respondent appointed Mr Jim Steer (Mr Steer) of Deloitte and Touché to conduct an evaluation and make recommendations. Mr Steer made the recommendation that the salaries of those employees of all these former institutions who were earning more than others should be capped (meaning that they should not receive salary increases in their respective notches until there is parity). The respondent's management and the trade unions (NEHAWU and NETUWA) accepted the recommendations and agreed that the salaries of high earners were to be capped (the Agreement).

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[3] According to the respondent's only witness, Ms M Van Heerden, the purpose of capping was:

> "so that other people that was on an equal base that they grow into and catch up with the person that has is earning a higher salary so that they at ***some stage***[1] catch up and become equal to salaries and then that is why this person is capped so that they do not get increase*".*

In a way, this purpose was on par with the preamble of the Employment Equity Act[2] (EEA) which recognizes that there are disparities in the employment and

[1] Court underlining and bolding.
[2] Act 55 of 1998.

income sphere and calls for the elimination of unfair discrimination in employment and ensures that the implementation of employment equity addresses the effects of discrimination.

[4] Shortly after the Agreement, there were salary increase negotiations between the respondent and labour. Amazingly, the unions used the capping issue in order to agree to a percentage increase proposed by the respondent, as a spin-off. As a result, the respondent scrapped the capping, meaning that those who were due for notch increments were to continue to get increases, which means that there was no plan in place to correct salary disparities which existed. This Court was advised by Ms Van Heerden that "*it was a mistake to lift the capping*". Can this mistake lead to unfair discrimination based on social origin and/or race? This is the question that is answered in this judgment.

[6] The applicants, Mr Paul Maraba (Mr Maraba), Ms Lydia Khwinana (Ms Khwinana), and Ms Matilda Legwale (Ms Legwale), at the time of instituting this claim were employed by the respondent as Professional Nurse Practioners. The applicants instituted a claim in terms of section 10 of the EEA against the respondent. This application is opposed by the respondent, which is represented by Advocate Gerber, whereas the applicants are unrepresented.

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Preliminary point

[7] Advocate Gerber submitted that the first applicant signed the statement of case and therefore the other two applicants are not properly before this Court as according to him, the other applicants must co-sign the same statement of case. This point cannot stand, in that the affidavits by both Ms Khwinana and Ms Legwale are in support of the same statement of case signed by Mr Maraba, therefore, not physically attaching signatures to the statement of case cannot be a ground for drawing an inference that they are not before this Court. Under the circumstances, the point that the further applicants are not before this Court is dismissed.

Relevant pleadings and evidence

[8] In December 2012, the applicants delivered a statement of case, wherein they claim unfair discrimination. The relief sought, in paragraph 9 of the statement of case, was that *"the applicants' salary scales moved to scale 8 from 9 accordingly with other practitioners doing work of comparable worth".* The respondent moved for an application for an exception and to strike out paragraphs 7 and 8 of the statement of case. The matter was set down for hearing on 7 August 2013 and this Court held that the statement of case was vague and embarrassing in that it failed to disclose the basis on which the applicants alleged that they were discriminated against. The Court proceeded to strike out paragraphs 7 and 8 of the statement of case. The applicants were given an opportunity to amend their statement of case.

[9] At some stage, the applicants brought an application for joinder which was set down for hearing on November 2014, and later they withdrew that application.

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[10] On 5 September 2013, the applicants delivered an application to amend the statement of case, and that application was set down on 26 November 2013 where the Court struck out the amended statement of case. The applicants were given an opportunity to re-file the amendment to the statement of case within 14 days from 26 November 2013. The matter was set down for hearing for 4 February 2016 however it was removed from the roll, and the Registrar was directed to afford the matter preference and costs were reserved. On 20 February 2017, the matter came before this Court again, and on this date, the referral was dismissed with costs as the applicants did not appear. This latter order was rescinded on 25 April 2017, and the Registrar was directed to re-enroll the matter.

[11] As paragraphs 7 and 8 of the statement of case were struck out, as stated hereinabove, the applicants proceeded to deliver an amended statement of case wherein paragraph 7 states that the respondent unfairly treats them as a result of

the merger of Pretoria Technikon, Technikon Northern Gauteng and the Technikon North-West. In that,

"7.4 Pretoria Technicon was formerly a white institution catering mostly for affluent few whilst the other two, namely Technikon North-West and Technikon Northern Gauteng **were under-resourced** and **catering only for the indigent black students**."

...

7.6 **The resources by definition should include human as well material**. **This did not happen with the nursing staff (a human resource)**.

7.7 **The nursing staff from previously well resourced and advantaged Pretoria Technikon remained higher on salaries scale and benefits than the nurses from historically disadvantaged institutions thereby perpetuating historical and apartheid divide**."

7.8 ***This matter was brought to the attention of the University management by the union NUTESA as ADS 19 October 2006, and the University management responded by promising those salary differentials would be harmonised immediately after the process of the match in place is completed. This process was completed in 2007, and the issue of harmonisation of salaries from the previous advantaged institutions compared to previously disadvantaged institutions is still persistent up to this day***. This shows the utter disregard for the laws of this country inclusive of the respondent on policy guidelines on employment equity and anti-discrimination laws.

7.9 The designated group suffered discrimination and exclusion almost uniformly by the respondent's perpetuation of historical discrimination and disadvantage simply **due to their social origin**."[3]

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[3] Court underlining and bolding.

[12] During the opening statement, Mr Maraba stated that their case is based on social origin and their point of reference was that one Ms Sarina Kloppers was previously employed by the *"formerly white, purely white institution and the respondent maintained the benefits and privileges of this comparator compared to the applicants"*.

[13] As the applicants alleged discrimination relating to race and/or social origin, the respondent then has the onus of proof. Section 11 (2) of the EEA provides that when a party has alleged that the dispute relates to discrimination on listed ground, then the other party bears the onus of proof, as the section provides that: 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.

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[14] It is common cause between the parties that, prior to the merger of these three institutions, salary levels were different. There was capping in that those employees who were on a higher level scale prior to the merger would not get a salary increase until there is some parity. However, they were to continue to earn more than others.

[15] The respondent's witness, Ms Maria Van Heerden (Ms Van Heerden), is employed as a Director in the Human Resources Department of the respondent. The respondent was established as a result of the Act of parliament promulgated by the Department of Education in terms of the Higher Education Act[4].

[16] Part of the instruction from the Department of Education was that employees should be incorporated and integrated into a new structure. That employees would not lose their jobs, and that this should be done through consultation with all stakeholders, where an agreement had to be reached in respect of the newly designated structure. Extensive consultation with all stakeholders was done, and

[4] Act 101 of 1997.

a plan was invented, and timelines in respect of the implementation were agreed upon.

[17] The evaluations were done by Mr Steer, and he sent his report to Ms Van Heerden. One of the jobs evaluations that were conducted was that of the Professional Nurse, which was post level 9. As a result of the new structure, those who were earning more in their previous positions, had their salaries capped, as none of the salaries were changed. This evidence indicates that those who were earning more would continue to earn more, and those who were earning less: were to continue earning less as there would be adjustments in their salaries when notches were to be annually adjusted.

[18] Ms Van Heerden further stated that irrespective of the position that an employee occupied at a previous institution, for instance, before the merger if an employee was a nurse at Soshanguve, Ga-Rankuwa or Pretoria they were placed on the post of the Professional Nurse which is level 9.

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[19] Ms Van Heerden confirmed that all the applicants were placed at post level 9, the second applicant was to be placed at Soshanguve, the third applicant placed at Ga-Rankuwa, and the first applicant at Garankuwa campus. Mrs Kloppers (the comparator) is based in Pretoria. She was at level 8, which was a higher position before the merger, however, as the new structure did not have a level 8, she had to be demoted to level 9 without her salary being changed as it was an agreement with organised labour that they would not lower any person's salary, but that it had to be capped.

[20] She confirmed that at the time of the merger, on 19 November 2008, every person that was employed by the three previous institutions received placement letters confirming their new positions. For example, Ms Kwinana was placed as a Professional Nurse post level 9, and she was placed at Soshanguve. In respect of Ms Legwale, the date of appointment was 19 May 2010 and she was appointed as a Professional Nurse at post level 9 based at the Ga-Rankuwa campus. Mr Maraba was also appointed for the position in post level 9.

[21] Mrs Kloppers, prior to the merger, was on post level 8 based in Pretoria. Because level 8 was a higher position after the merger, she was issued with a letter dated 19 November 2008 advising that she was placed in the Professional Nurse post level 9, however, because in her previous position she was earning more and she was advised that her salary was to be capped. Ms Van Heerden further testified that following the consultation with the parties involved "*[they] had an agreement with organised labour that will not lower anybody's salary [they] had to cap the salary. That was the agreement*"

[22] Mrs Kloppers was not the only employee whose salary was capped. This witness further gave the example of one Mr Basini who before the merger was based at the Soshanguve campus, his salary was also capped, and is also a black person like the applicants. She explained that before the merger, Mr Basini was at post level 6, and when he was placed in the post level 9, he kept his salary. However, Mr Basini is not employed as a Professional Nurse, like the applicants and Mrs Kloopers, but as a Co-ordinator.

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[23] Ms Van Heerden stated that as a result of the formation of the respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) office in Pretoria was inundated with cases from the respondent, from those whose salaries were capped, which resulted in the CCMA appointing a senior commissioner, Commissioner A P Venter, to assist and the primary purpose was to deal with these cases from the respondent. Commissioner Venter made recommendations, in a form of an advisory award, to the Council and the Executive Management of the respondent to uplift the capping. NEHAWU and NTEU represented the aggrieved employees. Commissioner Venter's recommendation about the uncapping would be implemented on 1 April 2011, with no back pay.

[24] The respondent's Executive Management Committee, which was headed by acting Vice-Chancellor: Professor John Molefe, implemented this recommendation. Now, this meant that those whose salaries were capped were going to get the notches and increases as normal as they did previously and that *"at some stage catch up and become equal to salaries"* purpose was not going to apply anymore.

[25] At this juncture, it is essential to note that the respondent acknowledges that there is a salary differentiation which emanates from *"the mistake"*.

[26] The respondent in its heads of argument submitted that the idea of the capping is a good human resource practice, as a result of this exercise numerous grievances were lodged with the CCMA which amounted to labour unrest. It further submitted that the capping of salaries was a good business decision given the situation that the respondent found itself in at the time, which resulted in instability to the respondent and was *"for the benefit of all"*. It further submitted that as a result of the labour unrest within the respondent, the uncapping had to be done. Moreover, according to the respondent, this was an exceptional circumstance justifying the deviation from the principle that all people in the same post should earn the same salary and therefore, it is not discriminatory.

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Legal principle and application thereof

[27] It is necessary at this juncture, to reiterate that the applicants' claim is based on the position of Professional Nurse as they allege that they are not earning the same salary with the comparator and aver that this is as a result of social origin which is a listed ground in terms of section 6 (1) of the EEA, which provides that,

> "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. "

[28] The EEA defines employment policy or practice thus*:*

> "includes, but is not limited to—
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> (a) recruitment procedures, advertising and selection criteria;
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> (b) appointments and the appointment process;
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> (c) job classification and grading;
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> (d) **remuneration, employment benefits and terms and conditions of employment**;
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> (e) job assignments;
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> (f) the working environment and facilities;
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> (g) training and development;
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> (h) performance evaluation systems;
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> (i) promotion;
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> (j) transfer;
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> (k) demotion;
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> (l) disciplinary measures other than dismissal; and
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> (m) dismissal."

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[29] *Langa* CJ, writing for the majority, in *City Council of Pretoria v Walker* 1998 (2) SA 363; 1998 (3) BCLR 257 held that:

> "This Court has consistently held that differentiation on one of the specified grounds referred to in section 8(2) gives rise to a presumption of unfair discrimination. The presumption which flows from section 8(4) applies to **all differentiation on such grounds**".[5]

[5] Grounds of the then section 8(2) of the Constitution are the same as the ones in section 6(1) of the EEA.

[30] *Moseneke* DCJ, in *South African Police Service v Solidarity obo Barnard*[6], reiterated that:

> "remedial measures must be implemented in a way that advances the position of people who have suffered discrimination."

[31] The Constitutional Court[7] ,by *Langa DP* writing for the majority, in an unfair discrimination dispute signposted thus,

> "Courts should however always be astutely to distinguish between genuine attempts to promote and protect equality on the other hand action is calculated to protect pockets of privilege enterprise which amounts to the perpetuation of inequality and this advantage to others on the other hand
>
> And
>
> The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8 (2) evinces a concern for the consequences rather than the form of conduct."[8]

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[32] It must be emphasized that the applicants are alleging unfair discriminatory grounds which are specified, as contained in section 6 (1) of the EEA as they contend that they were being discriminated against based on their social origin because Ms Kloppers was from a well-resourced institution, the then Pretoria Technikon as they are from previously less disadvantaged institutions which formed the respondent. Further, the applicants are explicitly concerned with the particular position, which is of a Professional Nurse. As stated above, the minute unfair discrimination is alleged based on a specified ground and the employer who is being accused of discrimination has the onus to proof that either no discrimination took place, and/ or such discrimination is justified.

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[6] 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) at para 32.
[7] Fn 5 above.
[8] See also Kristin Henchard in her book titled Minority Protection in Post-Apartheid South Africa.

[33] *In casu*, the respondent submits that there was differentiation and that such differentiation is justified because it is intended to maintain labour unrest because of the complaints that were coming from those employees whose salaries were capped and this uncapping process was used by the unions in order to reach salary negotiations which were on the table at that time.

[34] If one were to accept, as argued by the respondent, that the decision to uncap salaries of those who were earning more should be classified as "*exceptional circumstances"* and that it was for the benefits "for all", this triggers a question of whether those who were earning more *"are those people who have suffered discrimination"*. The answer to this question is no. Therefore, the action that was taken by both the unions and the respondent, which was implemented by the latter, cannot be classified as a justifiable ground of discrimination. Under those circumstances, the respondent unfairly discriminated against the applicants based on remuneration as a result of their social origin because their former institutions were previously based in the historically disadvantaged institutions which were under- resourced, as the respondent failed to present a justifiable ground for its conduct. The respondent's action amounts to *"perpetuation of inequality and this advantage to others on the other hand*". However, I conclude that discrimination based on race is not founded under the circumstances and the facts of this case.

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[35] In respect of the relief, the respondent's representative argued that recourse is not a prayer in the statement of claim, and this argument is also recorded in the pre-trial minute that was filed in this Court on 4 February 2016. I reject this argument taking into account that on paragraph 9 of the statement of case, and the second pre-trial minute, there is a clear recourse sought by the applicants. In the pre-trial minutes, the applicants do not seek compensation but also seek payment of a difference between the sum they have not earned and the salary earned by Mrs Kloppers, *pro-rata* to their starting dates and placed on the same scale. As parties recorded in the second pre-trial minute, I conclude that there is

a relief asked for in this matter. Also, the affidavits of both Ms Khwinana and Ms Legwale the relief sought is clear.

[36] Further, this Court has remedial powers in terms of section 50 (2) of the EEA to make any appropriate order that is just and equitable including payment of damages by the employer to the employee concerned, payment of compensation, ordering such to take steps to prevent unfair discrimination or similar practice.

[37] Since there is no definition of what is "just and equitable" in the EEA, I propose to use the Constitutional Court judgment which indicates that a presiding officer has a broad and flexible discretion as it was held in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*[9] that,

> "[211] The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution. In *Hoërskool Ermelo* Moseneke DCJ declared:
>
> "A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is

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[9] 2018 (3) BCLR 259 (CC).

> valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution."

[38] In respect of the relief, below, I have taken into account *inter alia* that two of the applicants are no longer employed by the respondent, that the respondent was perpetuating a discriminatory conduct, which goes against the principle of eliminating unfair discrimination in employment, that the respondent has not presented a valid justifiable ground for such discrimination, therefore its conduct failed to mend the scars of apartheid in respect of Professional Nurse Practitioners.

[40] I, therefore, make the following order:

<u>Order</u>

1. The respondent's conduct of paying the applicants less remuneration than Ms Kloppers was earning from 01 April 2011 to date constitutes unfair discrimination based on social origin.
2. The respondent is ordered to retrospectively increase the salaries of the applicants to be the same as that earned by Ms Kloppers since 01 April 2011.
3. The salaries of those applicants who are no longer employed by the respondent must be retrospectively increased from 01 April 2011 to the date of the termination of the employment with the respondents.
4. The respondent must pay the abovementioned retrospective increases to the applicants within 30 days of this order .
5. In the event there is any dispute about the quantification of the retrospective increases any party may refer that dispute to this Court for determination.
6. There is no orders as to costs.

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S. Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: In person

For the Respondent: Advocate Gerber

Instructed by: Clarida Kugel Attorneys

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