

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: PS29/17

In the matter between:

NCEBAKAZI FRANCES QALASHE

Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR
THE DEPARTMENT OF HEALTH, EASTERN CAPE**

Respondent

Heard: 21 October 2019

Delivered: 22 October 2019

**JUDGMENT: PRELIMINARY POINTS AND AN APPLICATION FOR A
POSTPONEMENT**

TLHOTLHALEMAJE, J

- [1] In her statement of claim filed and delivered on 26 July 2017, the applicant alleged that she was being unfairly discriminated against as defined in section 6(4) of the Employment Equity Act,¹ as she performed the same or substantially the same work or work of equal value, but was remunerated unequally on an arbitrary ground. She seeks an order that she be remunerated equal to the difference between the remuneration received and what she would have received had she been remunerated on level 10 from her date of employment, or in the alternative, an order of compensation.
- [2] The applicant was employed with effect from 25 April 2008 as Assistant Director, Administration at Tafalofefe Hospital. The letter of appointment in this regards indicated that the position she was appointed into was at Level 9. The applicant in May 2011 requested a transfer to Fort Gray Hospital, and was transferred accordingly, and had resumed her duties on 3 May 2011. The

¹ Act 55 of 1998

respondent recorded her transfer to the position of Assistant Director; Hospital & Patient Admin, Level 9.

- [3] The basis of the applicant's alleged discrimination is that after her appointment, she became aware that her counterparts in other hospitals were employed in the same positions and with similar job descriptions, but were remunerated at level 10, whilst she remained remunerated at level 9. She further contends that the post that she occupied was advertised at remuneration level 10.
- [4] In substantiation of her case, the applicant's contentions are that her initial appointment in April 2008 was at level 9 as an Assistant/Deputy director: Administration, which was in the vacant position of Middle Manager: Administration, at level 10. This was so in that when the previous incumbent of the post, a Ms Mtintsilana left, the post was subsequently advertised at level 10. Furthermore, her comparator was a Mr Tshepo Solani, who was appointed to the post of Middle Manager, Admin at level 10 at the Aliwal North Hospital in October 2009.
- [5] The respondent in its response to the statement of claim denied that the applicant was discriminated against. Its statement of response was served and delivered out of time, and it had sought condonation in that regard by way of a substantial application.
- [6] Having had regard to the degree of lateness and the explanation proffered in that regard, and further having had regard to the interests of justice, I see no reason why the late filing of the response to the statement of claim ought not to be condoned.
- [7] In the response to the statement of claim, the respondent contends that the applicant's transfer was a straight one since Fort Gray Hospital had a vacant funded post at the level that the applicant was transferred to as per her request, which was also a transfer at the same level 9 that the applicant used to occupy whilst at Tafalofefe Hospital. The applicant further contends that a straight or horizontal transfer which the applicant requested to Fort Gray

Hospital would not have been approved had the post she was to be transferred to been at salary level 10.

- [8] The respondent further submitted that to the extent that it may be found that the applicant had indeed initiated her own transfer to a post with a higher salary level, in any event, the provisions of Chapter IV, section 14(6)(b) of the Public Service Act² are such that an employee who is transferred to a higher salary post shall not by mere reason of that transfer, be entitled to a higher salary.
- [9] The respondent denied that the applicant was discriminated against or that she performed the same or substantially the same work or work of equal value by being remunerated unequally on arbitrary grounds, and that her claim was frivolous and vexatious. This was so in that the applicant was never appointed as 'Assistant/Deputy Director in any vacant Middle Manager: Admin post when she commenced her employment, and was simply appointed as Assistant/Deputy: Admin at salary level 9, as confirmed in her letter of appointment.
- [10] The parties completed a pre-trial minute on 20 December 2018. At clause (xi) of the minutes, the parties indicated that no preliminary points would be raised at that stage. The matter having been set down for trial on 21 October 2019, the respondent on 15 October 2019, filed and served its substantive heads of argument, in which it raised preliminary points to the effect that the applicant's statement of case was defective on the basis that;
- 10.1 She had failed to plead a specific ground listed or unlisted upon which she alleges that the differentiation or discrimination against her took place, and,
- 10.2 She had failed to plead any other specified or clearly stated arbitrary ground upon which, she alleges that the differentiation against her took place, and,
- 10.3 She could not have been lawfully appointed to the post of Assistant Director: Admin in the vacant post of Middle Manager: Admin, as no

² Act 103 of 1994

post of Middle Manager: Admin existed at Tafalofele Hospital at the time of her appointment

- [11] To the extent that the above preliminary points are raised, it is trite that in line with the authorities referred to below, the Court would in any event have *mero muto*, raised similar concerns as raised by the respondent, to the extent that the applicant based her case of unfair discrimination on arbitrary grounds.
- [12] In *Aarons v University of Stellenbosch*³ 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, the applicant 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.
- [13] In line with the approach, a litigant claiming unfair discrimination on an unidentified, arbitrary ground must clearly identify the ground relied upon and demonstrate that the ground relied upon shares characteristics with those specified grounds listed in section 6 (1) of the EEA. That much was reinforced in *SAMWU v Pikitup Johannesburg (SOC) Ltd*⁴ where Van Niekerk J stated the following;

“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, or an unspecified or analogous ground, or an arbitrary ground, referred to in the section. The pleading in a claim such as the present 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 or an unspecified ground. Where reliance is placed on the

³ (2003) 24 ILJ 1123 (LC)

⁴ [2017] ZALCJHB 183 (LC) at para [6]; See also *Matjhabeng Municipality v Mothupi NO and Others* (2011) 32 ILJ 2154 (LC) at para 40 where it was held:

‘... a litigant who founds a cause of action on unfair discrimination based on an unlisted ground bears the onus to establish the discrimination and to prove that such discrimination is unfair.’

latter, it is not sufficient to contend that the policy or practice complained of is arbitrary. The case must necessarily be made [that it] 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 (see *Ntai v South African Breweries Ltd* [2001] 2 BLLR 186 (LC)).”

- [14] The respondent’s contentions are essentially that the applicant’s case that she was unfairly discriminated against on arbitrary grounds was unsustainable, as she had not stated a specific ground upon which she alleged the differentiation or discrimination.
- [15] In response to the respondent’s preliminary points, it was submitted on behalf of the applicant that on a proper reading of the respondent’s heads of argument, the respondent essentially seeks to raise an exception to the applicant’s statement of case, and that the procedure followed in that regard was incorrect, as the provisions of Rule 11 of the Rules of this Court would have been appropriate.
- [16] The submissions made on behalf of the applicant are not without merit. Rule 11 of the Rules of this Court deals with interlocutory applications provide that such applications or other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and any other applications for directions that may be sought from the Court must be brought on notice, supported by affidavit⁵. Rule 11 of the Rules of this

⁵ Rule 11: **Interlocutory applications and procedures not specifically provided for in other rules:**

- (1) The following applications must be brought on notice, supported by affidavit:
 - (a) Interlocutory applications;
 - (b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and
 - (c) any other applications for directions that may be sought from the court.
- (2) The requirement in subrule (1) that affidavits must be filed does not apply to applications that deal only with procedural aspects.
- (3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.
- (4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.

Court finds reinforcement in Clause 10.3 of the Practice Manual of this Court,⁶ which provides that all preliminary points raised in a statement of claim and any response to a statement of claim (including but not limited to applications for condonation of the late referral of a statement of claim or the late filing of any statement of response, special pleas and exceptions) will be set down for hearing on an interlocutory basis.

- [17] It was submitted on behalf of the respondent that the provisions of the Practice manual are not binding. It is acknowledged that Clause 2.2 of the manual provides that it seeks to obtain uniformity amongst judges in respect of practice rulings, and that Judges are not bound by practice directives, as the manual is not intended to limit judicial discretion. However, the contention that the provisions of the manual are not binding on the parties cannot be correct in the light of what was stated by the Labour Appeal Court in *Samuels v Old Mutual Bank*⁷, to the effect that these provisions are binding, even though the Labour Court's discretion in interpreting and applying them

⁶ Clause 10.3: **Interlocutory applications: points in limine, exceptions and special pleas that do not require the hearing of oral evidence.**

10.3.1 Except for those matters that are the subject of case management (where the judge concerned will issue directions on how interlocutory matters are to be dealt with), all preliminary points raised in a statement of claim and any response to a statement of claim (including but not limited to applications for condonation of the late referral of a statement of claim or the late filing of any statement of response, special pleas and exceptions) will be set down for hearing on an interlocutory basis.

10.3.2 Once the preliminary point is ripe for determination, any of the parties may index and paginate the court file and request that the matter be enrolled for hearing without delay. Filing of heads of argument is not a prerequisite for making this request, though the registrar may, if directed to do so by a judge, call upon the parties to file their heads of argument before allocating the matter for hearing.

10.3.3 Despite the provisions of this paragraph, any interlocutory application that is not opposed or in which any order by consent is sought may be dealt with by a judge in chambers.

⁷ [2017] 7 BLLR 681 (LAC); (2017) 38 ILJ 1790 (LAC) at paragraphs [14] to [15], where it was held; "The consolidated practice manual which came into operation on 2 April 2013 constitutes a series of directives issued by the Judge President over a period of time. Its purpose is, *inter alia*, to provide access to justice by all those whom the Labour Court serves; promote uniformity and/or consistency in practice and procedure and set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court. Its objective is to improve the quality of the court's service to the public, and promote the statutory imperative of expeditious dispute resolution."

And,

"The practice manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the Rules, the Labour Relations Act as well as various decisions of the courts on the matters addressed in the practice manual and the Rules. Its provisions therefore, are binding. The Labour Court's discretion in interpreting and applying the provisions of the practice manual remains intact, depending on the facts and circumstances of a particular matter before the court.

remained intact, depending on the facts and circumstances of a particular matter before the court.

- [18] The message from the above LAC decision is simple, *i.e.*, Judges ordinarily enjoy a discretion when it comes to the application of the provisions of the manual. Parties however do not have the luxury of that discretion, as the whole purpose of the manual, which is to promote access to justice by all those whom the Labour Court serves, to promote consistency in practice and procedure, and to set guidelines on the standards of conduct expected of those who practise in the Labour Court would be defeated, if the parties were to comply with its provisions as and when it suited them.
- [19] There is no doubt, as correctly conceded on behalf of the applicant, that the preliminary points raised by the respondent have merit. From the statement of claim as is, and in something akin to the facts in *Naidoo and Others v Parliament of the Republic of South Africa*,⁸ the applicant did nothing more than to describe the difference in pay as arbitrary. However, in the light of the principles flowing from *Samuels v Old Mutual Bank*, it is taken into account that even though the respondent was within its rights to raise the preliminary points, and irrespective of the merits of those points, the fact remains that the manner with which they were raised is not in compliance with the provisions of Rule 11 of the Rules of this Court, read together with Clause 10.3 of the Practice Manual.
- [20] Even if the Court were to exercise its discretion in the light of the non-compliance with the manner with which the preliminary points were raised, such a discretion in favour of disposing of the preliminary points in their form would not do justice to the applicant, as it would deprive her of having her case properly determined, irrespective of the merits of her claim.
- [21] It follows that the preliminary points as raised by the respondent in their form cannot be considered at this stage of the proceedings, meaning that these ought to be brought before the Court in a manner prescribed. This also means that applicant's application for a postponement ought to be granted to afford her an opportunity to properly consider these preliminary points once they are

⁸ ZALCCT 38; [2019] 3 BLLR 291 (LC); (2019) 40 ILJ 864 (LC)

properly brought before the Court. It is therefore not even necessary to dwell into the submissions made for and against the application for a postponement.

[22] In the light of the above conclusions, it follows that any orders in regards to costs should be considered at the hearing of those preliminary points as shall be enrolled in the opposed motion roll.

[23] Accordingly, the following order is made;

Order:

1. The trial proceedings are postponed *sine die*.
2. The late filing of the respondent's statement of response is condoned.
3. The respondent is granted leave to file and serve an application in respect of the preliminary points it wishes to raise, and to do so as prescribed by the provisions of Rule 11 of the Rules of this Court, read together with Clause 10.3 of the Practice Manual of this Court.
4. The above application must be filed and delivered within 14 days from the date of this order.
5. The applicant shall file an answer to the application mentioned in (2) above within seven days from the date of service.
6. The respondent may, if it so desires, file a replying affidavit within 7 days from the date of receipt of the answering affidavit.
7. Once the pleadings are closed in respect of this interlocutory application, the respondent may approach the Office of the Registrar to enrol the matter on the opposed motion roll on an expedited basis.
8. The wasted costs occasioned by today's proceedings shall be determined at the hearing of the interlocutory application.

Edwin Tlhotlhallemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: L Voultsos, instructed by Bate Chubb & Dicson Inc

For the Respondent: S Phoshere, instructed by the Office of the State Attorney,
Port Elizabeth

LABOUR COURT