



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C449/2023

In the matter between:

DILSHAAD BEGUM PARKER

Plaintiff

and

**SA CORPORATE REAL ESTATE FUND
MANAGERS (PTY) LTD**

Defendant

Heard: 13 August 2025

Delivered: 18 August 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 18 August 2025.

JUDGMENT

DE KOCK, AJIntroduction

[1] This matter came before the court as an application for leave to amend the plaintiff's statement of claim by the substitution in its entirety with a proposed amended statement of claim. The defendant opposed the application on the ground that, if the application is granted, the proposed amended statement of claim would lack averments necessary to sustain a course of action and would be vague and embarrassing. If the amendment was to be allowed, it would render the statement of claim excipiable.

Background

[2] The plaintiff referred a dispute to the Labour Court in terms of section 6 (3) of the Employment Equity Act (EEA).¹ The dispute was referred within the prescribed period. The defendant previously delivered an application for exception regarding the statement of claim, which application was dismissed by the court. The details of the application and the reasons why the application failed are not relevant to this application save to state that the court found that the statement of claim did disclose a cause of action.

[3] The plaintiff, following the court's order, approached another firm of attorneys who advised the plaintiff that the statement of claim needs to be amended, and the plaintiff delivered a notice of intention to amend. The defendant delivered a notice of objection. The plaintiff approached this court with the application for leave to amend the statement of claim.

Notice of objection

[4] The defendant objected to the plaintiff's notice of intention to amend on the following grounds:

¹ Act 55 of 1998, as amended

- a. In terms of section 6(3) of the EEA, 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)”*.
- b. In paragraph 6.4 of the plaintiff’s proposed amended statement of claim the plaintiff alleges that she *“had been discriminated against in the form of harassment on an arbitrary ground ...”*.
- c. The plaintiff has failed to identify, in the amended statement of claim, any arbitrary ground (namely, a ground analogous to the prohibited grounds listed in section 6(1) of the EEA) on which she was allegedly harassed, as required.
- d. Accordingly, the amended statement of claim lacks averments necessary to sustain a cause of action and/or is vague and embarrassing and if the amendment is allowed the statement of claim will be rendered excipiable.

Evaluation

[5] The plaintiff relies on paragraph 6.4 of the proposed amended statement of claim containing a cause of action. Paragraph 6.4 reads as follows:

“The Applicant had been discriminated against in the form of harassment on an arbitrary ground based on her well intentioned and ‘bona fide’ criticisms and the assertion of her constitutional rights to fair labour practices.”

[6] The question that this court must ask and answer in this application, in essence, is whether paragraph 6.4 lacks averments necessary to sustain a cause of action. There is no dispute that a statement of claim must disclose a cause of action failing which the statement of claim will be excipiable. It is, however, the plaintiff’s case that the broader principles regarding amendments are trite with the primary objective being a proper ventilation of the dispute between the parties.

[7] The plaintiff’s case, as per the proposed statement of claim, is that she has been harassed. Harassment on its own, however, does not amount to discrimination as provided for in section 6(3) of the EEA. A plaintiff is required to link the acts of

harassment to either a listed or unlisted ground for such harassment to become discrimination. The parties are *ad idem* in this regard and this court does not have to address such a requirement for purposes of this judgment. Where a claim is based on harassment, but an employee is unable to link such harassment to a listed or unlisted ground in the statement of claim, the statement of claim will be excipiable.

[8] The plaintiff does not link her claim of harassment of any listed ground but on an arbitrary ground. The court is therefore required to address the meaning of “an arbitrary ground”, and whether an arbitrary ground includes the ground pleaded, i.e., the well intentioned and “*bona fide*” criticisms and the assertion of the plaintiff’s constitutional rights to fair labour practices.

[9] Section 6(3) of the EEA provides that:

“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).”

[10] The grounds listed in subsection 6(1) are the following:

“...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 any other arbitrary ground.”

[11] In *Naidoo and others v Parliament of the Republic of South Africa*² the Labour Appeal Court (LAC) was called upon to decide the meaning ascribed to the term “*any other arbitrary ground*” in section 6(1). The LAC rejected the invitation to adopt a broad approach to this term. Instead, the LAC followed what it termed the “*seminal decision on the interpretation of statutory provisions listing grounds of unlawful discrimination*”.³

² (CA4/2019) [2020] ZALAC 38; (2020) 41 ILJ 1931 (LAC); [2020] 10 BLLR 1009 (LAC) (7 May 2020)(

³ *Ibid para 15*

[12] In *Harksen v Lane NO and others*⁴ the Constitutional Court (CC) pointed out that section 8(2) of the Interim Constitution contemplated two categories of discrimination⁵:

“Section 8(2) contemplates two categories of discrimination. The first is differentiation on one (or more) of the fourteen grounds specified in the subsection (a ‘specified ground’). The second is differentiation on a ground not specified in subsection (2) but analogous to such ground ...”

[13] Citing *Prinsloo v Van der Linde*⁶ the CC endorsed the following meaning of discrimination on an unlisted ground:

“... Given the history of this country we are of the view that ‘discrimination’ has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attracting to them...”

[14] Accordingly, the court concluded:

“There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.”

[15] The court found it unnecessary to attempt to define, in precise terms, the ambit of the unlisted grounds. Suffice it to say that, just as is the case with the listed grounds, unlisted grounds should have certain attributes in common⁷:

“... What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalize and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean person in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some

⁴ (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) (7 October 1997)

⁵ *Ibid* at para 46

⁶ [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC), cited in *Harksen* at para 46

⁷ *Ibid* at para 49

cases, they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features....”

[16] The court then sets out its classic two-stage analysis for identifying unfair discrimination, and formulated the test for discrimination on an unlisted ground as follows:

“Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparable serious manner.”⁸

[17] The LAC in *Naidoo*⁹ rejected the broad interpretation of section 6(1) of the EEA. The term “any other arbitrary ground” was not to be read to entail “*the addition of a fresh class of grounds that is amorphous and is knowable simply by the external manifestation of capriciousness.*”¹⁰ The court held that, to adopt this “radical” idea would:

“... make s 6(1) a font of a remedy for grievances with virtually no limits. But the EEA is not intended to be a catch all or a panacea. Indeed, the EEA is the instrument of section 9 of the Constitution and therefore its mission is to give teeth to that Constitutional guarantee within the scope of the terms expressed in that section. Section 9 is not an all-encompassing injunction, rather its purpose is to give recognition to the value of our humanity and provide a remedy for aggression against us on the grounds of our intimate attributes, whether inherent or adopted. In other words, section 9 has a specific and concrete focus,

⁸ *Ibid* para 53(b)

⁹ *Supra* at fn 2

¹⁰ *Ibid* at para 24

*intelligible within the context of the historical experience of South Africa's legacy of oppression...*¹¹

[18] Applying these legal principles to the application before this court to amend the statement of claim and considering the opposition that allowing such amendment would render the statement of claim excipiable, this court finds that the proposed amended statement of claim does not disclose a cause of action in terms of section 6(3) of the EEA. The court finds it surprising that the plaintiff, after successfully opposing an application for exception previously, has approached the court with an application to amend the statement of claim and in the process seeking leave to amend the statement of claim and to rely on a cause of action that does not fall within the parameters of section 6(3) read with section 6(1) of the EEA.

[19] In a nutshell, the plaintiff's arbitrary ground relied on is based on her "*well intentioned and 'bona fide' criticisms and the assertion of her constitutional rights to fair labour practices*". This "*arbitrary ground*" is not an arbitrary ground envisaged in section 6(1), nor is it analogous to one of the listed grounds. The "*cause of action*" relied on is not based on the unequal treatment of people based on attributes and characteristics attracting to them. It refers to the plaintiff being harassed because of her well-intentioned and *bona fide* criticisms and the assertion of her constitutional rights to fair labour practices.

[20] If this court was to find that this is an arbitrary ground, which the court is unable to do given the case law referred to above, it would open the floodgates of disputes referred to this court in terms of section 6(3) of the EEA. If an employee is issued a final written warning for committing an act of misconduct, and the employee openly criticises the issuing of the final written warning, which leads to allegations of harassment, does it mean that the employee can now claim discrimination because the criticisms have been done in the assertion of their constitutional rights to fair labour practices. Surely this cannot be regarded as an arbitrary ground envisaged by section 6(1) of the EEA. This

¹¹ *Ibid* at para 25

has nothing to do with the plaintiff's attributes and/or characteristics. The plaintiff has the right to challenge the final written warning as an unfair labour practice dispute in asserting their rights to fair labour practices. In this case, the plaintiff has the right to challenge the defendant's alleged failures with regard mentorship and development as an unfair labour practice. Instead, the plaintiff chose to criticise the defendant in asserting her rights to fair labour practices and, when allegedly harassed, claim discrimination because she asserted her constitutional right to fair labour practices. As stated already, this assertion of her constitutional rights has nothing to do with her attributes or characteristics envisaged to be protected in terms of the EEA. There are other avenues available to the plaintiff to assert her constitutional rights, as provided for *inter alia* in the Labour Relations Act.¹²

[21] Mr. Williams was asked by this court whether he could refer the court to any case law where the "cause of action" relied on in the proposed amended statement of case was held to constitute an arbitrary ground, or as a ground analogous to the listed grounds. It is not surprising that he was unable to do so, as the so-called cause of action relied on cannot be regarded as discrimination in terms of section 6(3) read with section 6(1) of the EEA.

[22] The court must therefore refuse the application for amendment of the statement of claim and upheld the objection that allowing the said application will make the amended statement of claim excipiable on the basis that it does not contain a cause of action in terms of section 6(3) of the EEA. The plaintiff has delivered a statement of claim, which already survived an application for exception, and the defendant delivered a statement of response. The plaintiff is entitled to pursue the dispute based on the statement of claim already delivered, and if she decides to do so, the plaintiff must pursue the dispute by ensuring that a pre-trial conference be convened, and that pre-trial minutes are delivered.

Costs

¹² Act 66 of 1995, as amended

[23] Both parties agreed that costs should follow the result. This court can see no reason therefore why the plaintiff should not be ordered to pay the defendant's costs in successfully opposing the application for amendment of the statement of claim.

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

Order

1. The application for amendment of the statement of claim is dismissed.
2. The parties must convene a pre-trial conference and provide this court with a signed pre-trial minute within 15 days of the date of this order.
3. The plaintiff is ordered to pay the defendant's costs in this application, including the costs of counsel.

C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Plaintiff: N Williams
Instructed by: Smit Hendricks Attorneys Inc.
For the First Respondent: G Lesley SC
Instructed by: Norton Rose Fullbright SA Inc.