



- (1) Reportable: No
(2) Of interest to other Judges: No

Signature

16 April 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C173/2024

In the matter between:

CLINT LINKS

Applicant

and

THE SOUTH AFRICAN POLICE SERVICES

Respondent

Heard: 14-16 April 2026

Delivered: 16 April 2026

Summary: An alleged unfair discrimination claim relating to pay differentials, relying on the unlisted ground of 'exploitation'. Respondent applied for absolution at the end of the applicant's case. Application granted.

JUDGMENT

GANDIDZE, J

Introduction

- [1] The applicant, Mr Clint Links, approached this court with a claim in terms of section 6 (1) and (4) of the Employment Equity Act¹ (EEA), alleging that his employer, the respondent, the South African Police Services, was discriminating against him based on the principle of equal pay for equal work or work of equal value.
- [2] He claims that, as a Legal Administrative Officer (LAO) in Legal Services, he is subject to different terms and conditions of employment, earning less than his colleagues despite performing the same functions and duties as his comparators. He referred to three comparators. The first is a colleague named Tyatyeka, who was allowed to jump from salary level 5 to salary level 7. The second and third comparators are Captain Samuels and Captain Oliver, both employed as LAOs at salary level 8. Reference was also made to Captain Groenewald, yet another comparator, but he had since left SAPS.
- [3] It is the applicant's case that his work is identical to that of his comparators, without distinction, yet his annual salary is approximately R142 000 less than theirs. Therefore, if he is successful in his claim, he seeks an order that he be paid the difference between what he has earned and what has been paid to his comparators since 2021. When the claim was filed in 2024, that amount was just over R400 000.
- [4] At the time of filing his claim with this Court in 2024, the applicant was employed at salary level 7. However, towards the end of 2025, he applied for an LAO post at salary level 7 and was successful. The appointment took effect in February 2026.
- [5] The applicant also alleged indirect discrimination, contending that the respondent's policy prohibiting skipping grades or salary levels kept him on a lower salary level.

The trial proceedings

- [6] The applicant testified in support of his claim, and he did not call any witnesses. After his cross-examination and re-examination, the respondent

¹ Act 55 of 1998, as amended.

indicated that it would apply for absolution from the instance. That application was opposed, and after hearing arguments, this is the judgment and the reasons for judgment.

- [7] In the view that I take of the matter, it is unnecessary to set out the applicant's evidence. I will first address the applicable legal principles in discrimination matters, then apply them to the facts.

Discrimination legal principles and the applicant's case

- [8] Section 6 (1) and (4) of the EEA provides as follows:

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.
- (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

- [9] It is therefore apparent that, read together, both subsections require an applicant alleging discrimination to rely either on a listed ground or on an arbitrary ground. In this case, the applicant alleged that he was discriminated against on an arbitrary ground. The arbitrary ground relied upon is 'exploitation', and the allegation is that his skills, experience and qualifications are being undervalued because his comparators earn more than he does. He also states that the discrimination has impaired his dignity.

- [10] The question to be answered is whether the alleged arbitrary ground of exploitation qualifies as such under the law.

- [11] In the seminal case of *Harksen v Lane NO & others*², the court clarified that an arbitrary ground is an unspecified ground, but one analogous to the grounds listed in section 8 of the Interim Constitution, which applied at the time the judgment was handed down. The current Constitution³ lists these grounds in section 9(3). The same grounds are listed in section 6(1) of the EEA; the only difference being that section 6(1) refers to an arbitrary ground, which the Constitution does not.
- [12] The court found that whether an arbitrary ground qualifies depends on whether it is based on attributes or characteristics that have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner. Therefore, the ground must relate to the attributes or characteristics of a person.
- [13] In *Naidoo & Others v Parliament of the Republic of SA*⁴ (*Naidoo and Others*), which Ms Foster, for the respondent, relied upon, the court stated that section 6(1) of the EEA is not a remedy for grievances without limits or a catch-all, or a panacea. Like section 9 of the Constitution, it provides a remedy on the grounds of intimate attributes, whether inherent or adopted. It stated that the ground must be similar to the listed grounds. The court also agreed with the view expressed by *Garbers and Le Roux*⁵ that anti-discrimination law cannot be used to solve all labour market ills.
- [14] In *Naidoo & Others*, the applicants relied, *inter alia*, on nepotism as an arbitrary ground. The court rejected this argument, reasoning as follows:

[30] ...To be neglected because of nepotism implies no characteristic of a person so victimised nor does it invoke any pejorative perspective of such person, whether inherent or adopted.'

² 1998 (1) SA 300 (CC).

³ Constitution of the Republic of SA 1996.

⁴ (2020) 41 ILJ 1931 (LAC).

⁵ Christoph Garbers & Pieter le Roux 'Employment Discrimination into the Future' 2018 (2) *Stell LR* 237-69 at 249.

[15] The court further held that, if nepotism had been applied, the conduct, however wrongful, would not have constituted unfair discrimination within the meaning of s 6(1) of the EEA.

[16] In *Tshazibane v Montego Pet Nutrition & Others*⁶ (*Montego Pet Nutrition*), this court, per Kroon AJ, added its voice to the test for what is required when an applicant alleges discrimination on an arbitrary ground, as follows:

[5] To summarise, where reliance is placed on an arbitrary ground a complainant in an unfair discrimination claim is required to establish that he has been the object of unequal treatment based on attributes and characteristics he either possesses or with which he is associated and which have the potential to sully or diminish his intrinsic humanity and that of others in his situation...'

[17] The attributes and characteristics referred to must be those of an applicant or those with whom he is associated. In that matter, the court found that a claim of victimisation, on its own, without specifying the ground relied upon, does not suffice.

Application of the law to the facts

[18] The ground of discrimination relied upon, as clarified during the trial, is exploitation. The court records this because a reading of the applicant's statement of case, together with the pre-trial minute, left the court with the impression that the applicant's case was also that he was discriminated against on an arbitrary ground related to equal pay for equal work. Be that as it may, the court has dealt with the matter on the basis that the pleaded and relied upon ground of discrimination is 'exploitation'.

[19] Applying the test for what constitutes an arbitrary ground, there can be legal manoeuvring that can be relied upon to argue that exploitation is an attribute or characteristic that makes the applicant who he is, and that it impaired his human dignity in a comparable manner to a listed ground. Instead,

⁶ (2022) 43 ILJ 2610 (LC).

exploitation is a term that describes the respondent's conduct, as the applicant sees it. That is not a ground analogous to those listed in section 6(1). Without an arbitrary ground that is related to attributes or characteristics of a person, the applicant's case cannot go beyond this stage of the proceedings.

- [20] In *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*⁷, the court set out the test in an application for absolution from the instance as follows:

[79] An order for absolution from the instance is an appropriate order to make at the end of the plaintiff's case where a court, applying its mind reasonably to the evidence, could not or might not find for the plaintiff. The underlying reason is that it is ordinarily in the interests of justice to bring the litigation to an end in such circumstances. A determination of what is in the interests of justice necessarily involves the exercise of a discretion.'

- [21] A court exercises discretion whether to grant absolution from the instance after considering the evidence led, and whether, based on that evidence, it could or might find in favour of a plaintiff. In exercising that discretion, the court considers whether it is in the interests of justice to allow the matter to proceed, or whether the litigation must be ended at that stage because, applying its mind to the material before it, the court could not or might not find in favour of the plaintiff.

- [22] In explaining the test in applications for absolution from the instance, in *Gordon Lloyd Page & Associates v Rivera and Another*⁸ (*Gordon Lloyd Page*), the court stated this:

[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G - H in these terms:

'... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff

⁷ 2001 (4) SA 938 (CC) at para 26 and 79.

⁸ 2001 (1) SA 88 (SCA).

establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.

This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff... The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly, but when the occasion arises, a court should order it in the interests of justice.

[23] In the present case, I am of the view that without specifying an arbitrary ground similar to those listed in section 6(1) of the EEA, this matter should not even have reached the trial stage. An exception to the applicant's statement of case in terms of Rule 14 of the Rules Regulating the Conduct of the Proceedings of the Labour Court⁹ (Labour Court Rules), ought to have been raised, and that issue needed to be argued first. No amount of evidence would have cured the fact that the ground of discrimination relied upon does not qualify as a ground for discrimination.

[24] That approach is in line with what the court stated in *Association of Mineworkers & Construction Union on Behalf of Members v Aberdare Cables (Pty) Ltd & Others*¹⁰ (*Aberdare Cables*), that:

[25] ...It is trite that an applicant alleging discrimination must set out explicitly and disclose in no uncertain terms what the ground for discrimination is. The ground of discrimination is to be disclosed, and it is not an issue to be 'confirmed' or 'established' by evidence, as the evidence must support the disclosed ground of discrimination for an applicant to succeed with a claim for discrimination.'

⁹ GN 4775, G. 50608 of 3 May 2024.

¹⁰ (2024) 45 ILJ 511 (LC).

- [25] In *Aberdare Cables*, the court found that the alleged unpleaded ground, namely, the date of commencement of employment, was not an attribute akin to an immutable human characteristic and did not constitute an arbitrary ground for discrimination.¹¹ That conclusion was unavoidable because the date of commencement of employment does not relate to any attribute or characteristic of a person.
- [26] In oral argument, Mr Parker, for the applicant, relied on the judgment of this court in *Mkalipi v Minister of Labour and Employment NO*¹² (*Mkalipi*) and submitted that the court found that it is sufficient for an applicant to allege that there is no justifiable operational and employment reason for the differential treatment. It is indeed correct that in *Mkalipi*, the court found that alleging that an employer had no justifiable operational and employment reason for the differential treatment constitutes a ground analogous to the listed grounds. The court went further and stated that the employee also alleged that the work he performed was more complex and demanding, and he had been a Chief Director for longer than the comparator.
- [27] Respectfully, I disagree that the employee in *Mkalipi* identified a recognisable arbitrary ground as contemplated by section 6(4) of the EEA. To say that there is no justifiable reason for the differential treatment, and to give reasons for the submission, does not identify a ground, let alone one analogous to the grounds listed in section 6(1) of the EEA. The so-called grounds have nothing to do with Mr Mkalipi's attributes or characteristics.
- [28] During the engagement with the Court, Mr Parker readily and correctly conceded that he was unable to identify the arbitrary ground relied upon in *Mkalipi*. This is correct, and it means that, in the absence of a 'ground', the exception raised by the employer in that matter in respect of the discrimination dispute ought to have been upheld on that basis.

¹¹ Compare *Minister of Correctional Services & Others v Duma* (2017) 38 ILJ 2487 (LAC), where the arbitrary ground relied upon was geographical location, but the court dismissed the appeal for other reasons than that geographical location did not constitute a recognisable arbitrary ground as contemplated in section 6.

¹² (JS257/2022) [2023] ZALCJHB 251 (25 August 2023).

[29] The further problem with *Mkalipi* is that, despite referring to the Labour Appeal Court's decision in *Naidoo and Others*, which held that the 'narrow compass' is the correct legal position, the court in *Mkalipi* chose to follow the 'broad compass'. I also noted that the court in *Mkalipi* referred to a debate that had been raging, that the dust had not yet settled, and that it was unlikely to settle in the near future. Respectfully, this court disagrees. The dust settled with *Naidoo and Others*. In line with the principle of *stare decisis*, *Mkalipi* ought to have followed *Naidoo and Others*. Stating that the judgment is binding on the court, but then not applying the settled legal principles to the facts before it, is, in my view, the wrong approach. It follows that the court's statement in *Mkalipi*, that '*...an allegation that the conduct complained of whatever it is, which is arbitrary in nature to the extent that it is based neither on any of the listed grounds or anything analogous to them, is an affront to her or his fundamental human dignity is sufficient*', is at odds with what *Naidoo and Others* found. At the risk of repetition, *Naidoo and Others* is binding on this court.

[30] This Court aligns itself with *Aberdare Cables*, which interpreted *Naidoo and Others* as having laid down the principle that:

[58] In short: it is not sufficient to simply allege differentiation or that the differentiation is arbitrary or that an employee's dignity has been impaired. An applicant must allege a specific ground of discrimination, must prove that the pleaded ground of discrimination is the basis for differentiation and that it is unfair. There is a distinction to be drawn between differentiation and discrimination and differentiation per se does not constitute discrimination on an arbitrary ground, which must be clearly identified and pleaded.'

[31] Mr Parker also submitted, with reference to an unidentified article by PAK Rouw that he had read, as I understood it, that there are listed grounds, unlisted analogous grounds, and arbitrary grounds. As no further details of the article were given, the court cannot take the issue any further, save for making the following observation. In *Naidoo and Others*, the court agreed with the views of *Garbers and Le Roux, inter alia*, that if a ground is not listed, it should meet the test for an unlisted ground, which is the potential to impair the

fundamental dignity of a person, and it must show a relationship with the listed ground. Mr Parker could not possibly have been referring to this article, as it does not support his submission. Therefore, there are only two categories. Either a party relies on a listed ground or an unlisted ground. In any event, the Court was not entirely clear about the submission, given that the applicant relied on an arbitrary ground, and it is established that the arbitrary ground must be analogous or similar to a listed ground.

[32] Mr Parker also submitted that in the statement of response, the respondent never pleaded that 'exploitation' is not an arbitrary ground recognised under section 6(1) of the EEA. Ms Foster conceded that the statement of response did not specifically plead that 'exploitation' does not qualify as an arbitrary ground, but that it pleaded that the respondent denied discriminating against the applicant or that any discrimination was unfair. She also submitted that the question of whether 'exploitation' is indeed an arbitrary ground is a legal issue that can be raised at the stage of applying for absolution from the instance.

[33] I agree with Ms Foster that the issue is indeed a legal one, but I also consider that it could have been raised as an exception, and that the application would have had to be determined before the evidence was led. The outcome of the exception could have been an order directing the applicant to amend the statement of case to plead a ground recognisable under section 6 of the EEA. Because no exception was filed, the court had to hear the applicant's evidence over two days, even though, at least to the court, it was obvious that the respondent would apply for absolution from the instance at the end of the applicant's evidence. Had the respondent filed an exception to the applicant's statement of case, this would have ensured better use of the court's limited resources.

[34] Ms Foster informed the court that she became involved in the matter at a very late stage. The explanation is reasonable, but the court is of the view that the issue could also have been raised as a preliminary issue at the commencement of the trial, as no amount of evidence would have cured the absence of a recognisable, arbitrary ground, which is the first hurdle for any applicant alleging discrimination under section 6 of the EEA.

[35] The above findings make it unnecessary to address the respondent's further submissions that, if there was discrimination, it was not unfair, rational and justifiable. In the absence of a pleaded, listed or recognisable arbitrary ground, that should be the end of the matter. Whether the alleged discrimination was direct or indirect also becomes academic if a recognisable ground is absent.

[36] In addition, because the alleged discrimination was on an arbitrary ground, the onus was on the applicant to identify a recognisable ground analogous to those listed in section 6(1). Unless a recognisable ground is pleaded, the onus does not shift to the respondent.

[37] The court is satisfied that this is a case in which absolution from the instance should be granted.

Costs

[38] Neither party made submissions on costs, so each party must pay its own costs.

[39] In the result, the following order is made:

Order

1. Absolution from the instance is granted.
2. There is no order as to costs.

T. Gandidze
Judge of the Labour Court of South Africa

Appearances:

For the Applicant
Instructed by

Mr Z Parker
Parker Attorneys

For the Respondent
Instructed by

Advocate Foster
The State Attorney