

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

[SITTING AS THE 'EQUALITY' COURT]

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: EC 10 / 2025

In the matter between:

SELMA BEHARI

Applicant

and

ESKOM HOLDINGS SOC LIMITED

Respondent

Summary: Jurisdiction - Matter Finally Determined - Settlement Agreement Concluded - Employment Equity Act - Equality Court - No Jurisdiction.

Coram: Wille, J

Heard: 18 March 2026

Delivered: 20 April 2026

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This vigorously opposed application was to determine the limited issue of jurisdiction regarding the applicant's complaints. In essence, the applicant contends that she was unfairly discriminated against on two grounds, namely: (a) because she was demoted in her employment space on the grounds of her mental disability, and (b) that the respondent used the Employment Equity Act (EEA) as a tool to systematically discriminate against her.¹

[2] Firstly, the applicant seeks specific relief, namely, to nullify and set aside a settlement agreement signed in full and final settlement of this matter when it was presented and determined before the CCMA.²

[3] Also, the applicant seeks reinstatement to her previous 'work-grade' and reinstatement of her salary (linked to this grade), as well as reimbursement for all other financial hardships she suffered due to her demotion. The applicant also filed complaints with the Human Rights Commission and the Commission for Gender Equality. The Human Rights Commission dismissed her complaint on the basis that her complaint was a labour-related employment matter. Similarly, the Commission for Gender Equality refused to entertain the applicant's complaint. Now the applicant seeks relief under the wide umbrella of the Promotion of Equality and Prevention of Unfair Discrimination Act.³

¹ The Employment Equity Act, 55 of 1988 ("EEA").

² Case Number WECT 9217 - 20.

³ Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ("PEPUD")

[4] The applicant seeks judicial review (or indeed an appeal), in connection with awards that did not go her way at the CCMA. The applicant also seeks an order from this court to set aside, as '*pro non scripto*' and of no force and effect, the negotiated settlement agreement she signed in connection with certain CCMA processes. Notably, the applicant did not pilot her case in the CCMA under the umbrella of unfair discrimination.⁴

[5] In addition, the applicant appears to contend that this court is obliged to interfere with the decisions by the Human Rights Commission and the Commission for Gender Equality not to entertain her complaints.⁵

THE LITIGATION HISTORY

THE REFERRAL TO THE CCMA (THE 'FIRST' COMPLAINT)

[6] In the referral complaint, the applicant describes the party with whom she is in dispute as her *employer*. She details her complaint as an '*Unfair Labour Practice*' and not as one of unfair discrimination. In the complaint referral form, the applicant records that she indeed signed and accepted her demotion and the salary associated with it.⁶

[7] She says in her complaint that the respondent did not make sufficient attempts to accommodate her because of her mental condition. Also, she says the environment she worked in became toxic and that she was micromanaged. In addition, the applicant says she was not happy with how her disciplinary hearing was conducted or with the final written warning issued to her. All these complaints are labour-related employment complaints. What is of significance is that after the employment-related investigations and processes had been completed (as far as the respondent was concerned), the respondent agreed to and signed a letter of acceptance regarding her transfer and her 'demotion' in connection with her salary ranking and scale.⁷

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION (HRC)

⁴ As set out on page 3 of the applicant's "Referral Form" to the CCMA.

⁵ The "HMR" and the "CGE".

⁶ In the annexure to page 3 of the Referral Form.

⁷ This was styled as a 'Transfer' and signed by the applicant on 21 June 2021.

[8] The applicant also filed a complaint with the HRC. In her complaint form, she raises issues regarding her alleged fitness for duty and the respondent's alleged investigation into her incapacity.⁸

[9] Further, she raises complaints connected to her disciplinary hearing, her demotion and the reduction of her salary. The applicant conceded in this complaint that she suffers from a borderline personality disorder.⁹

[10] The applicant avers that she was wrongfully subjected to an incapacity investigation, a performance enhancement investigation and a disciplinary hearing concurrently.¹⁰

[11] The SAHRC assessed the complaint by the applicant and determined the following:

*'...Please note that the Commission does not have jurisdiction over human rights violations (sic) and discrimination in the workplace. This falls within the jurisdiction of the CCMA. You state that you lost your CCMA case, but the Commission is not able to overturn a decision of the CCMA....'*¹¹

THE COMMISSION FOR GENDER EQUALITY (CGE)

[12] The applicant also filed a complaint with the CGE. The CGE's business is to exercise a broad mandate to promote respect for gender equality and protection. Also, the development and attainment of gender equality.¹²

[13] Furthermore, as I understand it, the CGE has the power to monitor, investigate, research, lobby, advise and report on issues concerning gender equality and is empowered to convene public hearings and litigate against the public and private sector entities where appropriate and necessary. The mandate and jurisdictional 'area' of the CGE is accordingly limited in scope.¹³

[14] In a recent letter from the CGE, they state the following:

⁸ These complaints go to the process followed by the respondent.

⁹ She was diagnosed in 2014.

¹⁰ All these processes are labour-related-employment complaints.

¹¹ With this, I agree.

¹² This mandate is specific and limited in scope.

¹³ Section 12 (4) (b), (c) of Gender Equality Act No, 39 of 1996.

‘...Legal Management has advised that, in terms of the Complaints Handling Procedures Manual applicable to investigations, the report was submitted to the Legal Committee and was subsequently referred to Plenary. Following the recommendation of Plenary, the Western Cape Legal Department will revert in due course...’¹⁴

THE ARBITRATION AWARD (THE ‘SECOND’ COMPLAINT)

[15] A major portion of the applicant’s complaint concerned her grievance that she was not short-listed for a position for which she had applied and had previously temporarily acted. Also, the applicant alleged that her toxic work environment caused her health to decline. Further, her complaint was that she was the victim of a crime and that, because of this, her health had deteriorated significantly.¹⁵

[16] It was common cause that the applicant was partially incapacitated. This was a permanent condition. The applicant did not dispute her medical condition or its effect on her work performance. She also conceded that her bipolar disorder rendered her unable to cope at times. In summary, the CCMA determined that the applicant was not subjected to any unfair labour practice.¹⁶

THE ARBITRATION AWARD (THE ‘THIRD’ COMPLAINT)

[17] The applicant filed a condonation application in relation to an alleged unfair labour practice complaint against the respondent. The basis of this complaint was that the applicant alleged the respondent’s ‘*incapacity investigation*’ was flawed. Also, she averred that the respondent lacked empathy and sympathy in respect of her mental health. The condonation application was made three years and eleven months late.¹⁷

[18] The condonation ruling highlighted that the applicant’s application was 1438 days late. In the final analysis, the ruling was that the applicant failed to provide justifiable reasons for the condonation application to be successful. Put another way, because of the

¹⁴ The complaint was lodged nearly two years ago.

¹⁵ The crime perpetrated on her did not occur at work and had nothing to do with her employment.

¹⁶ In accordance with the Award dated 23 September 2022.

¹⁷ There was an insufficient explanation for this inordinate delay.

insufficient explanation tendered for the delay, coupled with what appeared to be limited prospects of success, the applicant failed to demonstrate good cause, and her application for condonation was refused.¹⁸

CONSIDERATION

[19] The applicant's case involves alleged unfair discrimination against her. The issue in this case is whether any protection under this targeted legislation is triggered in these circumstances and thus engages this court's jurisdiction.¹⁹

[20] Put another way, the issue is whether this court's jurisdiction is engaged in cases where the complaints are, in essence, about alleged violations of rights in the context of an employer-employee relationship and in circumstances where the applicant has enjoyed several bites at the proverbial cherry.²⁰

[21] The applicant's complaints all stem from interactions with her employer. The applicant's complaints have their unfortunate genesis in the allegations that she suffered a horrific crime perpetrated against her, which led to a deterioration in her mental well-being and health.²¹

[22] The applicant avers that she did not voluntarily settle her complaints and grievances with the respondent. The applicant experienced frequent absences from work, which adversely affected her performance. She was placed on various assistance programmes and eventually subjected to an incapacity investigation. I mention this because she was represented during this time by her trade union.²²

¹⁸ Vide para 26 of the Condonation Ruling.

¹⁹ In terms of Act, 4 of 2000 ("PEPUD").

²⁰ The matter was previously dealt with in a number of other forums.

²¹ This incident had nothing to do with her employment with the respondent.

²² This was not materially challenged.

[23] This investigation concluded that the applicant suffered from a long-term psychiatric condition, partially limiting her ability to perform her essential employment functions. The respondent made concerted efforts to place her in a suitable position nationally.²³

[24] A mutual agreement was reached for the applicant's redeployment, and it is this mutual decision and redeployment (by agreement) that the applicant has challenged in various forums, culminating in a hearing before this court. The word jurisdiction has several meanings. It denotes the power or competence of a particular court to hear and determine an issue brought before it. It must be so that the inherent jurisdiction of the courts does not enable them to grant a remedy in a matter regulated by legislation where the intention of the legislature was that such a remedy should not be available. Thus, I must be mindful of our jurisprudence determining the jurisdiction of this specific court.²⁴

[25] The provisions of the targeted legislation that may apply are those dealing with discrimination (as defined), read together with certain constitutionally enshrined rights of general application. Discrimination is broadly defined as:

*'...any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly; (a) imposes burdens, obligations or disadvantages on; or (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds...'*²⁵

[26] This legislation must be purposively interpreted and read in a constitutional context. It seeks to give effect to the letter and spirit of all our constitutionally enshrined rights. These provide for every person's equal enjoyment of all rights and for the prohibition of unfair discrimination against any person. Further, these rights must be respected, protected, and promoted.²⁶

[27] Most significantly, the applicant does not allege that the prevailing legislation is *discriminatory*. This is important because a claim under the umbrella of *equality* should not

²³ A suitable T10 position could not be found for the applicant.

²⁴ Phillips v National Director of Public Prosecutions 2006 (1) SA 505 (CC) paras 47, 48 and 52.

²⁵ Section 1 (viii) of Act 4 of 2000.

²⁶ Sections 2 (b) (i) and 6 of Act 4 of 2000 read with section 7 (2) of the Constitution of the Republic of South Africa.

be instituted where an effective remedy exists at common law. Elaborating on this theme, the applicant unnecessarily delayed the initiation of condonation proceedings regarding her employer-employee-related dispute. I say this because no factual basis or foundation is set out in the applicant's papers for this court to now exercise its discretion concerning these inordinate delays to the benefit of the applicant in these proceedings. However, if no explanation is given for these delays, it must, as a matter of pure logic, count heavily against the applicant.²⁷

[28] The respondent seeks refuge in the complex legislation governing employees' rights. Further, they say that the applicant's complaints are more (and were more) than adequately protected by our existing legislation dealing with employer-employee matters. They also say that all these employer-employee procedures were properly followed.²⁸

[29] Thus, they say it matters not how this application has been dressed up, as this does not change the initial and only cause of action. As a matter of law, I must agree with the respondent's arguments in this connection. I also say this because it is trite that this species of equality relief may not be claimed where a clear and compelling alternative remedy was readily available to the applicant. I say this because the relief sought is in the form of a declaratory order. This is because of the possible consequences that may flow should the relief be granted. An application for a declarator requires a two-stage approach. The court must satisfy itself that an applicant is a person who has an existing, future, or contingent right or obligation. Then, if so, the court must decide whether the case is appropriate for exercising the discretion conferred upon it. In this context, our apex court has held that a hypothetical interest is an interest that is expressly claimed but is neither real nor genuine.²⁹

[30] A declaratory order is a discretionary remedy, and the discretion to grant a declaratory order should not be exercised where the question raised is academic, abstract, or hypothetical. Put another way, where the questions raised in a matter are wholly

²⁷ Hoexter and Penfold (Eds) *Administrative Law in South Africa*, (Third Edition, 2021) at page 735.

²⁸ With this, I agree.

²⁹ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 (3) BCLR 251 (CC) at para 51.

academic, a court should decline to grant a declaratory order. Indeed, there are rare cases where our courts have entertained applications, the effect of which may be moot. In these applications, the interests of justice have demanded that the matter be heard, notwithstanding that it is moot. Some of the factors that may determine the interests of justice include the following: (a) whether any order a court may make will have some practical effect either on the parties or on others; (b) the nature and extent of the practical effect that any possible order might have either on the parties or on others; (c) the importance of the issue; (d) the complexity of the issue; (e) the fullness or otherwise of the arguments advanced, and (f) if the decision would resolve disputes between different courts.³⁰

[31] I need more clarity on how a declarator would advance the matter or have any practical effect on the past litigation. I say this primarily because the academic nature of the relief sought by the declarator becomes apparent, considering the following: (a) any claim by the applicant against her employer has been finally determined, and (b) the applicant, by her own admission, is not in a sufficient condition to resume her previous work-related activities.³¹

[32] The common law and our existing legislation are powerful vindications of all the applicant's rights. This must be so because our constitution is primary, while its influence is *indirect*, perceived through its effects on legislation and the common law. Thus, in this case, the applicant's difficulty is that our labour laws are sufficiently protective of all her employer-employee related rights, and it would not be just and equitable (for the applicant's failures) to support an argument for the relief she seeks in the circumstances.³²

[33] This is so because our courts have repeatedly confirmed that constitutional interference (and constitutional relief) would be awarded only where existing law, including

³⁰ This matter has already been fully ventilated in various forums.

³¹ The application seems to me to be moot.

³² Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others 2023 (4) SA 325 (CC) at para 233.

the development of the common law, is inadequate to vindicate a violation of, or a threat to, a citizen's rights. It must be so that constitutional relief does not constitute an alternative means of appropriate relief where a claim in employment law could have more than adequately compensated the applicant and where that relief itself is an extraordinarily effective and powerful vindication of any constitutional rights that may be in question. Put another way, where an existing legal remedy exists, a claimant must first have recourse to that remedy. I say this because, in most cases, existing law is broad enough to provide all the appropriate remedies for a constitutional rights violation. An award for constitutional remedy is not available where there is no evidence to prove that such a remedy would serve as a significant deterrent against an individual or systemic repetition of the infringement in question.³³

[34] Most significantly, in support of the applicant's declaratory relief, she contends that she was violated in an employer-employee relationship. There is nothing systemic or discriminatory about her alleged claims. Also, her claims do not morph into facts. The respondents deny these allegations. The allegations made by the applicant are general and lack specificity.³⁴

[35] I say this because the papers before me needed to contain the facts supporting the conclusions the applicant desires the court to draw. Thus, it is difficult, if not impossible, to discern (let alone decide) from the material before me how the actions or omissions by the respondent amounted to discrimination and, thus, a trammelling of the applicant's constitutional rights. There was no evidence in the papers that even remotely demonstrated that there was any kind of systemic discrimination against the applicant.³⁵

[36] I must conduct an enquiry in the prescribed manner and determine whether unfair discrimination, hate speech, or harassment has occurred, as alleged. Further, I must

³³ This allegation is not borne out by the papers and is in any event disputed.

³⁴ The crux of the applicant's case is challenging to understand.

³⁵ These allegations were simply absent the papers.

remember that the court's character is that the proceedings are meant to be expeditious. The remedies are to be corrective, restorative, and deterrent.³⁶

[37] In addition, I must consider and be mindful of the existence of systemic discrimination and inequalities concerning race, gender, and disability in all spheres of life and the need to take measures to eliminate them from our society. These are all issues I must consider when determining jurisdiction. Also, I must be mindful of this targeted legislation's objects and guiding principles. Finally, I must adopt an approach focusing on substance rather than form.³⁷

[38] In addition, absent a direct challenge to this legislation, I must assume that this targeted legislation is not constitutionally inconsistent and claims must be decided within its margins. Thus, it is not legally permissible to treat this targeted legislation and the provisions in our constitution as interchangeable. They are not.³⁸

[39] For clarity, the relief claimed in the various parts of the application is not discrete, as it rests on a finding of alleged unfair discrimination concerning the same conduct. Most importantly, the applicant would be unlikely to prove a likelihood of recurrence of the alleged unfair discrimination to warrant the relief contended for. If the applicant cannot sustain a case against the respondent and seeks no consequential relief (other than through a judicial review or an appeal), it would be difficult to discern how an order from this court could assist the applicant's cause. I say this because this court is not obliged to declare the respondent's conduct (or lack thereof) constitutionally invalid (even if it was), as it may be appropriate and necessary to dispose of the question using subsidiary law.³⁹

³⁶ Section 21 (1) and section 4 (1) of Act, 4 of 2000.

³⁷ I must interpret the provisions of this legislation to give effect to the Constitution of the Republic of South Africa, 1996.

³⁸ September v Subramoney [2019] ZAEQC 4: [2019] 4 All SA 927 (WCC).

³⁹ J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997 (3) SA 514 (CC) at para 15.

[40] In this case, no parallel proceedings are pending in the high court. When the court determines a matter following the equality legislation (with no parallel proceedings pending), it cannot also sit as an ordinary high court.⁴⁰

[41] The applicant still needs to establish an evidential basis for her averments of discrimination. It must be so that allegations that lack specificity do not equate to establishing a *prima facie* case against the respondent. Thus, the alleged acts of unfair discrimination do not confer jurisdiction on this court.⁴¹

[42] Cases of this nature should not attract any orders regarding costs. Also, the matter was determined on the limited issue of jurisdiction. Emphasis must be placed on this application's constitutional character, as these proceedings essentially sought to vindicate fundamental rights in connection with the respondent's alleged unlawful actions. The following legal principles, found in our jurisprudence, apply to matters that truly have constitutional dimensions. The principles dictate whether a matter has a constitutional dimension when there is a genuine, non-frivolous challenge to the constitutionality of a law or state conduct.⁴²

[43] If so, it is appropriate that the state bear the costs if the challenge is good, but if not, the losing non-state litigant should be shielded from the costs and consequences of failure.⁴³

[44] Concerning costs, the court always retains the discretion to make an order that seems just and equitable, considering the position of the party against whom any such cost order is levied. Several factors must be considered when a cost award is issued in such circumstances. However, I am not satisfied that any cost order should be granted. In my view, a contextual approach must be adopted, and I did not regard the applicant's approach to this court as frivolous.⁴⁴

⁴⁰ *Manong and Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape and Another* 2009 (6) SA 589 (SCA).

⁴¹ As currently formulated with specificity.

⁴² I cannot say that this challenge was frivolous.

⁴³ *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).

⁴⁴ A holistic approach must be adopted with a view to assess the different positions adopted by the parties.

ORDER

[45] The following order is issued:

1. The application is dismissed.
2. There shall be no order as to costs.

E D WILLE
(CAPE TOWN)