



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

Signature

18 May 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: **C508/2024**

In the matter between:

PRESTON WARELEY

Applicant

and

AUDITOR GENERAL OF SOUTH AFRICA

Respondent

Heard: 3 November 2025

Delivered: 18 May 2026

Summary: An alleged unfair discrimination claim relating to pay differentials, relying on the ground of 'qualifications'. The ground relied upon does not constitute a recognised arbitrary ground under the EEA. More importantly, 'qualifications' is one of several factors justifying pay differentials.

JUDGMENT

GANDIDZE, J

Introduction

- [1] The plaintiff, Mr Preston Wareley (Wareley), filed an alleged unfair discrimination claim against his employer, the defendant, the Auditor General

of South Africa (AGSA), regarding his pay compared with that of another employee. AGSA pleaded to the claim, a pre-trial minute was concluded, and the matter was set down for hearing. A week before the set-down date, AGSA delivered an Amended Statement of Case, in which it pleaded that Wareley did not plead a ground of discrimination listed in section 6(1) of the Employment Equity Act¹ (EEA), that 'qualifications' is not a recognisable arbitrary ground for purposes of section 6 of the EEA, and therefore the Statement of Case did not disclose a cause of action. This was followed by correspondence to Wareley's attorneys stating that the legal issue of 'no cause of action' would have to be addressed first. Wareley's attorneys disagreed. At the commencement of the trial, in the absence of an agreement, AGSA raised the legal point which it contended was dispositive of the matter without having to hear evidence.

The respective parties address whether the point should be entertained

- [2] Mr Mpahlwa, for Wareley, addressed the court first. He objected to AGSA's conduct in raising a preliminary issue at the commencement of the trial. AGSA ought to have raised its point by way of an exception, as contemplated in Rule 14 of the Rules Regulating the Proceedings of the Labour Court² (Labour Court Rules). He also relied on Rule 19 of the Labour Court Rules, which he submitted sets out how points of law are dealt with. Accordingly, the submission went, because both these rules had not been followed, the court should not entertain AGSA's legal point.
- [3] He also submitted that the joint pre-trial minute records that there were no preliminary points, and that, being the case, AGSA was required to bring an application to vary the pre-trial minute, which has the status of a court order, because the matter was certified trial ready. The consequence was that AGSA was required to bring an application to vary it before it could raise its point.
- [4] In response, Mr Sangoni, for AGSA, submitted that the point was being raised to shorten the proceedings. He submitted that the joint pre-trial minute was

¹ Act No 55 of 1998, as amended.

² *Published:* GN 4775, G. 50608 of 3 May 2024. *Commencement:* 17 July 2024 - GN 5038, G. 50929 of 12 July 2024.

overtaken by the amended statement of response, in which the point sought to be argued was raised. He also submitted that Wareley's attorneys had been forewarned that the issue would be dealt with at the beginning of the trial, and that the response was 'conduct your case as you see fit', and that no instructions had been received to agree to the amendment of a pre-trial minute.

- [5] He submitted that Labour Court Rule 19 applied only to matters in which parties proceeded by way of a stated case, and was therefore inapplicable. As regards Rule 14, he submitted that a party can either raise an exception to a statement of case or file an amended statement of response that raises an issue which could have been raised by way of an exception, and that such an issue should be dealt with at the commencement of the trial. Neither Rule 14 nor Rule 19 is an obstacle to hearing the point of law. He also rejected the contention that the pre-trial minutes constitute a court order that can be varied only on application.
- [6] In reply, Mr Mpahlwa submitted that the court has discretion to hear the legal point.
- [7] Before addressing whether the legal point should be entertained, it is appropriate to refer to the relevant provisions of the EEA, 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.
- (2)
- (3)
- (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.'

Could the legal point be raised at the start of the trial?

- [8] The legal point raised by AGSA could have been raised by way of an exception in terms of Labour Court Rule 14.³ This did not happen. Instead, it was raised in the amended Statement of Response. In addition, Wareley's attorneys were informed, in writing, on two occasions that the point would be raised at the beginning of the trial. Therefore, Wareley was not ambushed on the day of the trial when the legal point was raised. Wareley's attorneys did not request more time to consider the point and, in fact, made their submissions on it.
- [9] Indeed, the pre-trial minute did not record that AGSA would raise a preliminary point at the commencement of the trial. This was because the preliminary point was raised in an Amended Statement of Response filed after the pre-trial minute. AGSA was not required to apply to the court for a variation of the pre-trial minute. The correct procedure would have been for the parties to file a supplementary minute to address the preliminary point raised in the Amended Statement of Response and agree that it would be argued first. The absence of a supplementary minute did not preclude AGSA from raising a legal point that could dispose of the matter.
- [10] A pre-trial minute is not a court order, and Mr Mpahlwa cited no case authority or rule of this Court to the effect that, on the facts, a variation of the pre-trial minute on application to this Court was required.
- [11] The Labour Court Rule 19, which was relied upon, provides as follows:
- '19. Special cases and adjudication on points of law**
- (1) The parties to a dispute may, after proceedings have been instituted, agree on a written statement of facts and/or law in the form of a special case to be adjudicated by the court. This must be done under oath so as to constitute evidence before court.'

³ See *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at para 10, which held that:

'Exceptions provide a useful mechanism 'to weed out cases without legal merit', as Harms JA said in *Telematrix*. The test on exception is whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts'.

[12] In this matter, the parties did not, under oath, agree to a written statement of facts and/or law in the form of a special case for adjudication. Accordingly, the rule does not apply to the legal point raised by AGSA.

[13] The overriding consideration is the speedy and effective resolution of a labour dispute. In the interests of justice, the legal point must be determined at the outset, as this could partially resolve the dispute, thereby saving the court's time and the parties' litigation costs.

Parties' submissions on the legal point

[14] It was submitted on behalf of AGSA that pay differentiation constitutes unfair discrimination only if it is based on one or more of the grounds listed in section 6(1) of the EEA. As the Statement of Case had not identified a listed ground, it did not disclose a justiciable cause of action under the EEA.

[15] The submission was that, to the extent that Wareley relied on differentiation based on qualifications, this was not a ground listed in section 6(1) of the EEA, and that ground was not analogous or comparable to a listed ground because it did not relate to attributes and characteristics that have the potential to impair fundamental human dignity in a comparable manner or to a similar serious consequence. The submission was that the attributes and characteristics referred to are those that an applicant cannot control. In this case, Wareley could control his qualifications, and for that reason, the ground was not recognisable for purposes of section 6 of the EEA. The submission was that 'any other arbitrary ground' must be accorded a narrow meaning, as per the decision in *Naidoo & Others v Parliament of the Republic of SA*⁴ (*Naidoo*), which held that nepotism, which was more egregious, does not qualify as an arbitrary ground.

[16] The submission was further that it is insufficient for an applicant to contend that the conduct was unjustifiable and irrational without identifying a ground justiciable under section 6 of the EEA, and that *Naidoo* clarified this point.

⁴ (2020) 41 ILJ 1931 (LAC).

[17] The submission further stated that, in terms of the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value⁵ (Code of Good Practice) and the Employment Equity Regulations⁶ (EEA Regulations), pay differentials based on qualifications were not discriminatory.

[18] In the further alternative, if the court found that 'qualifications' was a recognised unlisted ground under section 6 of the EEA, the discrimination claim would fall to be dismissed on the basis that the differentiation was neither discrimination nor unfair discrimination, because:

18.1 employees with a Chartered Accountant (CA) qualification are more highly valued and in greater demand than those with the Registered Government Auditors (RGA) qualification, and therefore must be paid on a higher scale to retain their services. s.

18.2 unlike the RGA qualification, the CA qualification is internationally recognised, IRBA-accredited, and recognised by all audit firms ms

[19] On behalf of Wareley, it was submitted that, because AGSA was raising an exception, the test, as per *H v Fetal Assessment Centre*⁷, was whether, on all pleaded facts, no cause of action was disclosed. He submitted that AGSA admitted most of the facts pleaded by Wareley, including that there was a salary disparity between what Wareley earned and what the comparator earned, that the dispute was referred to the CCMA, and that the differentiation

⁵ GG038837N 0006 GN 0448 150530 (Government Gazette, 1 June 2015), which states as follows:

7.3. Regulation 7 of the Employment Equity regulations lists a number of grounds which are commonly taken into account in determining pay /remuneration. Subject to what is stated below, it is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following factors –

7.3.2. the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job.

⁶ GN 6125 of 15 April 2025: Employment Equity Regulations 2025 (Government Gazette No 52515). Regulation 7(1)(b) states as follows:

7. Factors justifying differentiation in terms and conditions of employment

(1) If employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds:

(b) the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job.

⁷ Supra n 3.

impairs the claimant's dignity because he is not recognised.⁸ The submission was that the facts in *Naidoo* were distinguishable because the claimants relied on nepotism, whereas in this matter, Wareley relied on qualifications. Both candidates were trained internally and competed for the same position, and Wareley was successful. However, the comparator was appointed to a senior manager position nineteen months later. Reliance was placed on EEA Regulation 6 (which addresses assessing work of equal value) and EEA Regulation 7 (which addresses factors justifying differentiation in terms and conditions of employment).

[20] Reliance was also placed on *Pioneer Foods Pty Ltd v Workers against Regression*⁹ (*Pioneer Foods*), which found that length of service was not any arbitrary ground. As I understood it, the submission was that, in that matter, the employees did not plead a ground and, for the first time, relied on 'length of service' in the heads of argument. In the present case, Wareley's case was that his qualifications were not recognised, and that is the pleaded ground, which constitutes an arbitrary ground.

[21] In reply, AGSA submitted that Wareley's competency was not in issue, but that qualifications determine one's salary. *Pioneer Foods* did not support Wareley because the factors listed in EEA Regulation 7 (which include length of service) constitute a fair reason for pay differentials. Finally, the submission was that the throwaway line that conduct impairs one's dignity is insufficient, given what the court held in *Naidoo*.

Discussion

[22] Read together, sections 6(1) and (4) of the EEA require an applicant alleging discrimination to rely either on a listed ground or on an arbitrary ground. In this case, Wareley alleges that he was discriminated against on the arbitrary ground of 'qualifications'. The question is whether the alleged arbitrary ground of 'qualifications' qualifies as an arbitrary ground for the purposes of section 6 of the EEA.

⁸ This pleaded fact was denied.

⁹ (2016) 37 ILJ 2872 (LC).

- [23] The main obstacle for Wareley is that both the EEA Regulation 7 and the Code of Good Practice list 'qualifications' as one of the factors justifying differentiation in the terms and conditions of employment. That being the case, 'qualifications' cannot be a factor justifying pay differentials, yet at the same time constitute an arbitrary ground for pay differentials.
- [24] In the seminal case of *Harksen v Lane NO & others*¹⁰ (*Harksen*), 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 Constitution¹¹ lists these grounds in section 9(3). The same grounds are listed in section 6(1) of the EEA; the only difference is that section 6(1) refers to an arbitrary ground, which the Constitution does not.
- [25] The court in *Harksen* held 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 a person's attributes or characteristics.
- [26] In *Naidoo & Others v Parliament of the Republic of SA*¹² (*Naidoo*), which AGSA 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. The Court further stated that the ground must be similar to the listed grounds and agreed with the view expressed by *Garbers and Le Roux*¹³ that anti-discrimination law cannot be used to solve all labour market ills.
- [27] In *Naidoo*, the applicants relied, *inter alia*, on the ground of nepotism. The court rejected this argument, reasoning as follows:

¹⁰ 1998 (1) SA 300 (CC).

¹¹ Constitution of the Republic of SA 1996.

¹² (2020) 41 ILJ 1931 (LAC).

¹³ Christoph Garbers & Pieter le Roux 'Employment Discrimination into the Future' 2018 (2) *Stell LR* 237-69 at 249.

[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.'

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

[29] In *Tshazibane v Montego Pet Nutrition & Others*¹⁴ (*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...'

[30] The attributes and characteristics referred to must be those of an applicant or of those with whom he is associated. Qualifications do not relate to an attribute or characteristic of Wareley that has the potential to impair his dignity. As correctly pointed out on behalf of AGSA, Wareley can do something about his qualifications. More importantly, qualifications are accepted as a factor that justifies pay differentials.

[31] In *Association of Mineworkers & Construction Union on Behalf of Members v Aberdare Cables (Pty) Ltd & Others*¹⁵ (*Aberdare Cables*), the court held 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.'

¹⁴ (2022) 43 ILJ 2610 (LC).

¹⁵ (2024) 45 ILJ 511 (LC).

[32] As no amount of evidence could cure the defect in the Statement of Case, AGSA did not have to wait until evidence had been led and then apply for absolution from the instance as argued on Wareley's behalf.

[33] 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. *Aberdare Cables* interpreted *Naidoo* 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.'

[34] It is difficult to understand how *Pioneer Foods* assists Wareley's case.

[35] As the Statement of Case does not disclose a cause of action, that has to be the end of the matter for now. The court apologises for the delay in delivering the judgment.

Costs

[36] On Wareley's behalf, it was submitted that the AGSA should be ordered to pay costs because it pleaded to the Statement of Case on the merits and then raised the legal point seven months later.

[37] On behalf of the AGSA, it was submitted that, on the authority of *Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & Others*¹⁶, a consideration of the law and fairness justifies deviating from the general rule that costs do not follow the result in labour matters. This was because Wareley was legally represented, yet his attorneys ignored the

¹⁶ (2021) 42 ILJ 2371 (CC).

Amended Statement of Response, which made it clear that 'qualifications' is not a recognisable, arbitrary ground in terms of section 6 of the EEA. The legal point was again raised in the AGSA's Practice Note filed days before the trial, yet the claim was persisted with. The submission was that the claim was frivolous and vexatious and that costs should follow the result.

[38] A costs order against Wareley would be wholly unjust, given that he brought the claim on the basis of legal advice.

[39] Taking into account the requirements of law and fairness as contemplated in section 162 of the Labour Relations Act¹⁷, an appropriate order is that each party pays its own costs. Although the AGSA was successful on its legal point, it raised the issue for the first time in its amended Statement of Response, delivered a week before the trial. It also did not raise the legal point by way of exception, in which case the matter would have been placed on the motion court roll rather than the trial roll. As a result, the three days allocated for a trial were wasted.

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

Order

1. The Statement of Case does not disclose a cause of action.
2. Should he be so advised, the plaintiff is afforded an opportunity to deliver a Notice of Intention to Amend the Statement of Case within 10 court days of this order.
3. There is no order as to costs.

T. Gandidze
Judge of the Labour Court of South Africa

¹⁷ Act 66 of 1995, as amended.

Appearances:

For the Applicant:
Instructed by:

Mr Mpahlwa
Mpahlwa & Co Inc.

For the Respondent:
Instructed by:

Advocate F Sangoni
Majang & Associates Inc.

LABOUR COURT