



(1) Reportable: NO  
(2) Of interest to other Judges: NO

Signature

Date

## THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: JS629/14

In the matter between:

**RACHEL NKHWATSHIREMA**

Plaintiff

and

**TRANSNET FREIGHT RAIL**

Defendant

Heard: 25 May 2026

Delivered: 9 June 2026

Summary: Alleged unfair discrimination. Failure to establish any differentiation on an arbitrary basis. No unfair treatment which negatively impacted the plaintiff's dignity and right to equality. Claim dismissed.

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**JUDGMENT**

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## **DANIELS J**

### Introduction

[1] The plaintiff applied for a job with the defendant, but the application was unsuccessful. The plaintiff alleges that she was not appointed due to unfair discrimination, the precise nature of which was unspecified. At the start of the trial, the court enquired about the nature of the alleged discrimination. The plaintiff, aside from confirming that she did not rely on race or gender, could not clearly articulate the ground of discrimination. On the other hand, the defendant's representative stated that the defendant understood the plaintiff's case to be that she was unfairly discriminated against based on her qualifications.

### The facts

[2] The defendant commenced with the leading of evidence and called two witnesses, Ms. Mary Cecilia Lovinga ("Lovinga") and Mrs. Share Bhoonpershad ("Bhoonpershad"). Thereafter, the plaintiff testified on her own behalf. A summary of the material evidence is set out below.

2.1 During September 2013, the defendant advertised the position of horticultural assistant in Vryheid, KwaZulu-Natal. The plaintiff applied for the position. The advertisement indicated that job applicants were required to have a code B driver's license and that horticultural experience would be an advantage.

2.2 In the defendant's view, there were too few applicants, and it therefore decided to shortlist and interview them all. The plaintiff was interviewed for the position, together with two other applicants.

- 2.3 The interviewing panel consisted of three members, namely Ms Mangeni, Mr Roberts, and Bhoonpershad. The panel scored each of the three candidates. The applicant was found to be competent, but she scored lower than Ms. Sebatjane in three areas: effective oral communication, administrative skills, and problem-solving.
- 2.4 Following the interview, when the plaintiff did not hear from the panel, she contacted the defendant herself. She spoke with Ms. Mlangeni, Lovinga, and Bhoonpershad.
- 2.5 The plaintiff alleges that Bhoonpershad initially told her she would have “good news” for her soon and that she should monitor her email. As a result, the plaintiff alleges, she resigned from her employment at the time and prepared to relocate to Kwa-Zulu Natal. These conversations occurred between October 2013 and January 2014.
- 2.6 Finally, during February 2014, when the plaintiff telephoned Bhoonpershad, she was told that she had not been successful and the defendant had appointed the most competent individual, Ms Sebatjane. This telephonic conversation, which the plaintiff recorded (the “recorded conversation”), was played in court. Prior to the trial, the plaintiff discovered a transcript of the conversation (the “transcript”).
- 2.7 During the recorded conversation, the plaintiff stated that Bhoonpershad had promised to “come with good news (sic) end of February” which Bhoonpershad immediately denied. The plaintiff reminded Bhoonpershad that she held a bachelor’s degree in agriculture, and Bhoonpershad reminded her that the Vryheid position was not senior.
- 2.8 Thereafter, the plaintiff was telephoned by Ms. Helena Herman, the defendant’s employee, who asked the plaintiff whether she would be

interested in applying for a vacant position in Ermelo, to which the plaintiff replied that she was. In her evidence, the plaintiff, for the first time, alleged that Ms. Herman told her to report for duty in Ermelo. This version was not pleaded.

2.9 The plaintiff, aggrieved by the recruitment process and the outcome, complained to the defendant, who decided to investigate. The plaintiff also approached the Office of the Public Protector. Receiving no satisfaction, the plaintiff resolved to approach the court.

### Impression of the witnesses

[3] It is an opportune moment to comment on the witnesses.

[4] The defendant called two witnesses who, in many respects, corroborated each other, thus lending stability to that narrative. They both testified with candour and the essential elements of their version were not disturbed under cross-examination.

[5] Plaintiff critiqued Bhoonpershad's credibility on the basis that she initially denied the accuracy of the transcript but, when the recording was played, conceded it was correct. I do not accept the criticism. Giving evidence can be a stressful experience, and mistakes often occur under pressure. In any event, even if the witness testified falsely and did so deliberately (with which I do not agree), this does not warrant the conclusion that the witness is a liar in all things.<sup>1</sup> The question is always whether the witness can be said to be truthful in respect of the essential elements of his or her story.

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<sup>1</sup> SALJ "Credibility of witnesses" by HC. Nicholas at pp35 and 40

[6] By contrast, I found the plaintiff to be completely lacking in credibility. First, her testimony contradicted her pleadings in important respects. For instance, during the cross-examination of witnesses, the plaintiff suggested that the reason she was not appointed was her age. This was not the pleaded case, which the court was forced to remind the plaintiff of.<sup>2</sup> The plaintiff's conduct strongly suggested that her testimony was manufactured in the moment, to suit the circumstances. Second, throughout her testimony, the plaintiff was evasive, often refusing to make obvious concessions.

### Dispute of fact

[7] The only fact in dispute that could possibly be relevant is whether the defendant promised to appoint the plaintiff and then reneged on the promise.<sup>3</sup> The court, to reach a decision on disputed issues, must consider the credibility of the various factual witnesses, their reliability, and the probabilities. It is trite that the issue of credibility and probability is intertwined.<sup>4</sup> Of all the factors, consideration of the probabilities is most significant.

[8] On the probabilities, the defendant made no such promise to the plaintiff. First, the plaintiff alleges only that she was promised "good news." On its own, this is devoid of content. Second, in the real world, it is improbable that the defendant would make such a promise and then renege on the promise for no reason. In any event, the defendant consistently denied making any promise.

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<sup>2</sup> In *Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC) at para [28] the Constitutional Court quoted with approval the trite statement that: "It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."

<sup>3</sup> Although this relates to unfairness and would not prove unfair discrimination.

<sup>4</sup> *National Employer's General Insurance Co. Limited v Jagers* 1984 (4) SA 437 (E)

## The issues and analysis

[9] Regrettably, the plaintiff's pleadings do not clearly set out the basis of the alleged unfair discrimination. When pressed, the plaintiff could not clarify the issue. Defendant explained that the plaintiff alleges she was discriminated against based on qualifications. The defendant referred the court to paragraph [20] of the statement of claim: "*On or about 14 February 2014 the applicant then contacted Mrs Bhoonpershad and was advised that she had not been appointed as the applicant was overqualified for this particular position.*"

[10] Qualifications are not identified as a ground of discrimination in section 6(1) of the Employment Equity Act<sup>5</sup> (hereafter the "EEA"). Section 6(1) states:

"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."

(own emphasis)

[11] Given that qualifications are not an identified ground of discrimination, the plaintiff's case appears to be that she was unfairly discriminated against on an arbitrary ground (qualifications) as contemplated by section 6(1) of the EEA.

[12] Section 11(2) of the EEA provides that, where unfair discrimination is alleged on an arbitrary ground, the complainant must prove that the conduct is not rational, the conduct complained of amounts to discrimination, and the discrimination is unfair.

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<sup>5</sup> No. 55 of 1998 as amended

- [13] It can hardly be contentious that applicants are scrutinized for their ability to perform the job well. To achieve this, applicants must be suitably qualified and experienced.<sup>6</sup>
- [14] It is clear that the Legislature does not intend, through section 6(1) of the EEA, to comprehensively regulate hiring practices. An employer may legitimately scrutinize job applicants, using their performance in an interview, taking into consideration factors such as suitability and compatibility. It may also consider factors such as presentation, drive, loyalty, talent retention, and talent acquisition. In addition, it is no secret that employers are less inclined to appoint candidates who are overqualified for the position, given the possibility that the candidate will use the opportunity as a stepping stone.
- [15] In *Kadiaka v Amalgamated Beverage Industries*<sup>7</sup> Landman J (as he then was) held:

“What then are arbitrary grounds? An arbitrary ground is a ground which is capricious or proceeding merely from the will and not based on reason or principle. See *L Baxter Administrative Law* at 521-2 relying on *Beckingham v Boksburg Licensing Court* 1931 TPD 280 at 282). In my view, without attempting to be exhaustive, unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless. But even if there is a reason, the discrimination may be arbitrary if the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job-seeker and is not morally offensive. The discrimination must be balanced against societal values, *particularly* (as emphasised repeatedly by the Constitutional Court) *the dignity of the complainant* and a society based on equality and the absence of discrimination.” (own emphasis)

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<sup>6</sup> However, discrimination may still occur where the criteria (including qualifications or experience) for a job are set in such a manner as to arbitrarily exclude a particular group. See A Van Niekerk “Discrimination in selection and recruitment” *Contemporary Labour Law* Vol. 4 No. 10 (May 1995)

<sup>7</sup> [1998] JOL 4069 (LC)

- [16] In *Association of Mineworkers & Construction Union on behalf of Members v Aberdare Cables (Pty) Ltd & others*<sup>8</sup> Prinsloo J held:

“The EEA does not prohibit differentiation, it prohibits unfair discrimination . More specifically, s 6(1) of the EEA does not prohibit differentiation or arbitrariness, it prohibits unfair discrimination on an ‘arbitrary ground’. ‘Arbitrary ground’ as provided for in s 6(1), read in conjunction with s 11(2), makes it clear that the irrationality of differentiation per se will not win a discrimination case based on an arbitrary ground. The conduct complained of must amount to unfair discrimination in that it must cause an injury to human dignity. Irrationality does not win a case, the irrationality of discrimination does.”

(own emphasis)

- [17] In *Naidoo and others v Parliament of the Republic of South Africa*<sup>9</sup> the LAC held that, to establish an arbitrary ground, the plaintiff must prove that the ground is based on a personal attribute or characteristic, it has the potential to impact human dignity, and it causes or perpetuates a systemic disadvantage.

- [18] In this matter, the plaintiff alleges that she was not appointed because she was overqualified for the position, and this constituted unfair discrimination. She bore the onus of proving the discrimination and that it was unfair. To do so, she was required to prove, as a starting point, that the alleged basis for her non-appointment was irrational. This she could not do. Even if the defendant decided not to appoint her on the basis that she was overqualified, which was not proven, this would not have been irrational. On the evidence, the defendant did not appoint the plaintiff because she was not the best candidate. Accordingly, the plaintiff failed to show that the defendant discriminated against her on a basis that caused or could cause an injury to her dignity. The differentiation did not cause or perpetuate a systemic disadvantage.

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<sup>8</sup> (2024) 45 ILJ 511 (LC) at para [52]

<sup>9</sup> (2020) 41 ILJ 1931 (LAC)



### Costs

[19] It is trite that costs in this court do not follow the result and must be determined on the dual criteria of law and fairness. The plaintiff's case was weak, but I must take into consideration that she was unrepresented. Further, I must take into consideration that, although mistaken, the plaintiff genuinely believed that she was vindicating her right against unfair discrimination. In the circumstances, I do not believe that the plaintiff should be mulcted in costs.

### Conclusion

[20] The plaintiff's claim is dismissed. There is no order as to costs.

**RN Daniels**  
**Judge of the Labour Court of South Africa**

For the plaintiff:  
Self-represented

For the defendant:  
Adv K Mokotedi SC  
Instructed by Tomlinson Mnguni James Inc