IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C222/2004

In the matter between:

DUDLEY CUPIDO **Applicant**

and

GLAXOSMITHKLINE SOUTH AFRICA (PTY) LTD **Respondent**

JUDGMENT

MURPHY, AJ

1. The applicant has brought suit alleging that he has been the victim of racial discrimination in relation to his application for promotion. The respondent has raised four objections *in limine* to the pleadings filed by the applicant and seeks a ruling before proceeding further with the matter.

2. After a failed attempt at conciliation the CCMA issued a certificate of the outcome on 17 February 2004 confirming that the dispute remained unresolved at that date. In May 2004 the applicant filed a statement of claim with the Labour Court in terms of rule 6 on a pro-forma form 2 in which he purported to refer his dispute concerning discrimination for adjudication in terms of the provisions of the Employment Equity Act of 1998.

3. Under paragraph 7 of the statement under the heading: “Statement of the

facts that will be relied on to establish the applicant's claim" the applicant wrote as follows:

1. Recruitment and selection practices have been an issue at GSK Epping Cape Town for a long time.
2. The company's own assessment and evaluation process was not followed.
3. The position of HR Manager was not advertised externally.
4. I am suitably qualified for the post in terms of section 20(3) of EE Act.
5. Company failed to review all the factors in terms of section 20(3).
6. Company's understanding of operational requirements not same as LRA.
7. Company not meeting purpose of EE Act.
8. Company not implementing and interpreting EE Act correctly.
9. Company is indirectly unfairly discriminating against me as a black person.
10. Company is not following its own transformation policy and is not implementing affirmative action correctly.
11. The unfair conduct of the employer, relating to promotion.
12. Skills development is almost non-existent at the company, especially for senior positions.

4. In paragraph 8 of the statement of case under the heading: "The legal issues that arise from the above facts" the applicant stated as follows:

1. Company policy and practice.
2. Company policy and practice.
3. Company policy and practice.
4. Section 20(3)(4)(5) of Employment Equity Act.
5. Section 20(3) of Employment Equity Act.
6. Labour Relations Act section 213
7. Section 2 of Employment Equity Act.
8. Section 3(b) of Employment Equity Act.
9. Section 6(1) of Employment Equity Act.
10. Section 13(1)(2)(c)(d) and 15 of Employment Equity Act.
11. Schedule 7, Part B section 2 . 1(b) of LRA.
12. Section 2 Skills Development Act.

5. In paragraph 9 of the statement of case under the heading "relief sought"

the applicant wrote:

1. To create a position to gain the relevant experience.
2. To compensate me equal to 12 months remuneration for the position as HR Officer.
3. Legal costs, if applicable.
4. Appoint me to position of HR Officer.

6. On 31st May 2004 the respondent responded to the statement of case in terms of rule 6(3). In paragraph 4.1 of the response the respondent denied that paragraph 7 of the statement of case contained a clear and concise statement of material facts in chronological order as required in terms of rule 6. The respondent therefore denied that the applicant's allegations were sufficiently particular to enable it to reply thereto and reserved all its rights in that regard.

7. Despite the respondent's obvious difficulty in trying to deal with the vague and general allegations made by the applicant it nevertheless pleaded in relation to them, putting up a substantial defence of its recruitment and selection processes. It also furnished a copy of its employment equity plan and denied that it had discriminated against the applicant in its appointment of another person to the post of Human Resources Officer. In its view the applicant is not suitably qualified for the post having regard to his qualifications, skills, prior learning, experience and potential and further does not satisfy the inherent requirements of the job as contemplated in section 6(2)(b) of the Employment Equity Act. The successful appointee, an external candidate, was a coloured female who complied with the inherent requirements of the job, was basically better qualified than the applicant, a coloured male, and considering her race and gender equally advanced the employment equity profile of the respondent.

8. On 30 June 2004 the applicant purported to amend his statement of case

by handing an amended statement to the respondent's attorney at a pre-trial conference held on 30 June 2004. The respondent shortly thereafter filed a notice of objection to the applicant's amendment dated 7 July 2004.

9. The purported amendment seeks to expand on the original statement of case in some detail. The respondent objects to the amendment on the ground that the applicant failed to comply with the provisions of rule 28 of the High Court Rules, which it suggests ought to have been followed in accordance with provisions of rule 11 of the Labour Court Rules. In particular the applicant failed to serve a notice of intention to amend and to furnish the particulars of such amendment. He merely served a second statement of case in terms of rule 6. The notice does not state that unless written objection to the proposed amendment was made within 10 days of delivery of the notice the amendment would be effected in accordance with the provisions of rule 28(2). It is not apparent from the document served upon the respondent's attorneys whether the same substitutes the original statement of case initially served upon the respondent in its entirety or which portions of the initial statement of case are to be replaced or ignored.

10. Regarding the substance of the amendment, the respondent objects that the applicant is seeking to introduce a new cause of action in the form of a direct right to affirmative action. I shall return to this objection more fully later. Other provisions of the amendment were also challenged on the grounds of vagueness to which I shall also return later.

11. Subsequent to this the applicant filed an application dated 16 July 2004 to set down the matter for a pre-trial conference before a judge in chambers. This document runs into 12 pages of averments and annexures.

12. Thereafter on 20 August 2004 the applicant gave notice of intention to

apply to amend his statement of case in terms of rule 11 in various respects, but has not as yet set it down for hearing. This document is also lengthy.

13. From the pleadings as a whole it is apparent that the dispute is essentially one arising under Chapter II of the Employment Equity Act . The applicant alleges that he was discriminated against on the basis of race as a result of the failure by the company to promote him to the position of Human Resources Officer. To the extent that his various statements of case allege unfair labour practices in regard to promotion such can be disposed of at the outset. Section 191(5)(a)(v) of the Labour Relations Act provides that disputes regarding unfair conduct in relation to promotion must be arbitrated by the relevant bargaining council or the CCMA and hence the Labour Court has no jurisdiction to decide these matters. The only causes of action which are competent are those within the contemplation of the Employment Equity Act.

14. In his original statement of case dated 13 May 2004 the applicant alleged certain facts and legal issues that arise from the said facts upon which he will rely to prove his claim. The paragraphs in question are paragraphs 7.4, 7.5, 7.7, 7.8, 7.10, 8.4, 8.5, 8.7, 8.8 and 8.10. The said facts and legal issues relate to the alleged failure by the respondent to prepare and implement an employment equity plan as required by section 20 and 36 and as such amount to allegations of a dispute concerning chapter III of the Employment Equity Act. The respondent's objection on this score is that the applicant enjoys no right of access to the Labour Court in respect of disputes concerning chapter III and accordingly prays that the paragraphs in support thereof be struck out.

15. The respondent's objection is predicated upon the decision of Tip AJ in *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC), where the learned

judge held that chapter III is not directly enforceable by a single aggrieved individual. At 320B the learned observed:

> A comparison of these two chapters shows that there are indeed points of distinction that are significant for this case. The prohibition against unfair discrimination (in chapter II) is directly enforceable by a single aggrieved individual or by the members of an affected group. Whether or not there has been discrimination is a matter of law and the application of the law to the complained of facts. That is a matter for the decision of this court or an arbitrator and the content of the prohibition is not in any way the subject of consultation between employer and employees.
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> By contrast, the structure of chapter III is such that, by definition, it is intended to and can be brought into operation only within a collective environment. This is inherent in the nature of the duties of an employer outlined in s 13(2). Those are: consultation, analysis, preparation of an employment equity plan and reports to the director-general on progress and the implementation of the plan…..
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> The above survey of the provisions of chapter III displays very clearly that its essential nature is programmatic and systematic. Importantly, its methodology is uncompromisingly collective. This is evident from the Act. It is reflected also in the code of good practice issued in terms of section 54 of the EEA, para 7.2 of which sets out several objectives and guidelines in relation to the consultation process.

19. On this basis Tip, AJ held that there is not an individual right to affirmative action and that the enforcement of affirmative action was a matter for collective bargaining and regulation by the director-general. In the main, the failure to comply with the requirements of chapter III of the Employment Equity Act dealing with employment equity plans and affirmative action will be a compliance issue enforceable by the director general and not an unfair discrimination case enforceable by litigation at the hands of an aggrieved individual. On this score Tip, AJ disagreed with Waglay, J in *Harmse v City of Cape Town* (2003) 24 *ILJ* 1130 (LC). In that matter Waglay, J held:

> There is no doubt that an employer may not discriminate unfairly against an employee. This right not to be unfairly discriminated against is an integral part of the right to equality and a necessary condition of the inherent right to dignity in section 10 of the Constitution. This right not to be unfairly discriminated against is a right enjoyed by all employees whether or not they fall within any of the designated groups as identified in the Act. If an employer fails to promote the achievement of equality through taking affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within one of the designated groups not to be unfairly discriminated against. Similarly, if an employer discriminates against an employee in the non-designated group by preferring an employee from the designated group that is not suitably qualified as contemplated in section 20(3)-(5) of the Act, then the employer has violated the right of such an employee not to be discriminated against unfairly. In either case, the issue is whether the employer has violated the employee's right not to be discriminated against. To this extent affirmative action can found a basis for a cause of action.

20. Waglay, J went on to summarize his conclusion in the following terms:

> On an analysis of the Constitution and the Act, I am satisfied that the Act and specifically section 20(3)-(5) read with chapter II do indeed provide for a right to affirmative action. The exact scope or boundaries of such right is a matter that will have to be developed out of the facts of each case.

21. Tip, AJ rejected this conclusion arguing that Waglay, J had not sufficiently maintained the distinction between chapters II and III that the interpretation of the Act requires. In my respectful view the decision of Tip, AJ is to be preferred. Affirmative action measures that have not been applied by a designated employer give rise to an enforcement issue under chapter III at the instance of the Director General of Labour and not an unfair discrimination claim under chapter II. There is no sound basis upon which sub-sections 20(3)-(5) fall to be read together with the provisions of chapter II and likewise no basis upon which they can produce a directly enforceable right to affirmative action.

22. The facts and legal issues alleged by the applicant in his statement of case mainly relate to an alleged failure by the respondent to prepare an employment equity plan as required by sections 20 and 36. As such they do indeed amount to a dispute concerning chapter III of the Employment Equity Act, and on the basis of the line of reasoning in *Dudley* the respondent's objection is sound. The said paragraphs therefore fail to disclose a cause of action and fall to be struck out on that basis.

23. The respondent's second objection pertains to the applicant's first purported amendment of the statement of case handed to the respondent's attorney at the pre-trial conference on 30 June 2004. The basis of this objection is two-fold. Firstly, the respondent was denied an opportunity to object to the amendment and in the face of an objection no application was made to court for leave to substitute the original statement of case. Secondly, had the respondent been afforded such an opportunity to object to the amendment it would have objected thereto on similar grounds to those set forth in the first objection. Here again, the purported amendment contains numerous averments which amount to an allegation of a dispute concerning chapter III of the Employment Equity Act. However, as the applicant failed to follow proper procedure in relation to the amendment, it is unnecessary to deal with these allegations in any detail. Suffice it to say that the failure to follow correct procedure in relation to the amendment is sufficient to uphold the objection *in limine.*

24. The respondent's third objection has to do with the application to set the matter down for a pre-trial conference before a judge in chambers dated 16th July 2004. At the pre-trial conference on 30 June 2004 the respondent's attorney aborted the conference on the basis that a pre-trial conference should only be held after the close of pleadings.

Because it became apparent that the applicant intended to amend his statement of case, it was premature to hold the conference as the pleadings had not yet closed. This too is a valid objection as the applicant is still persisting with an application to amend his statement of case. Accordingly a pre-trial conference would indeed be premature.

25. Finally, the respondent also objects to the applicant's application to amend his statement of case in terms of rule 11 contained in the document titled "Filing Notice" dated 10 August 2004. This 24-page document is problematic in a number of respects. However, it can be disposed of exclusively with reference to paragraphs 2.1 and 2.2 of it. These read as follows:

2.1 Paragraph 7 and 8 of the initial statement of claim filed on 21 May 2004 which was replaced by amendments filed 30 June 2004 will be replaced in its entirety by this amended statement of claim in terms of paragraphs 7 and 8.

2.2 The entire statement of claim filed on 21 May 2004 will stay the same except for the amendments made in terms of paragraph 1 dated 9 June 2004 and paragraph 7 and 8 filed 20 August 2004.

26. The relief sought in paragraph 2.1 and 2.2 is inconsistent, vague and embarrassing or contradictory. First of all, paragraph 2.1 contains the erroneous statement that paragraph 7 and 8 of the initial statement of claim were replaced by amendments filed on 30 June 2004. The respondent denies this on the grounds that such was an invalid amendment. Moreover the wording of paragraph 2 is vague and embarrassing in that it is not apparent from it whether the applicant alleges that paragraph 7 and 8 of the initial statement of case are to be replaced in their entirety by the amended statement of case, or whether the initial statement which was replaced by amendments filed on 30 June 2004 is to be replaced in its entirety by this amended statement of claim. Paragraph 2.1 thereof contains a reference to "this amended

statement of claim" without identifying what document it refers to. The respondent will accordingly be unable to identify the document which fits the description of "this amended statement of claim". In addition, the meaning of paragraph 2.2 is not clear in that it contains a reference to "amendments made in terms of paragraph 1 dated 9 June 2004" which document has not been filed of record and is not in possession of the respondent. Furthermore, paragraph 2.1 and 2.2 are contradictory in that paragraph 2.1 contains the words that "the initial statement of claim filed on 21 May 2004 will be replaced in its entirety by this amended statement of claim" while paragraph 2.2 thereof contains the words that the "entire statement of claim filed on 11 May 2004 will stay the same" except for two amendments. It is not possible in one amendment to replace the statement of claim filed on 21 May 2004 in its entirety and at the same time for it to stay the same except for two amendments. The respondent accordingly is embarrassed as it is unable to determine what amendment the applicant seeks. Finally, it is not clear from the contents of paragraph 2.1 and 2.2 whether the applicant intends to persist with the allegations contained in paragraph 7.5; 7.12 and 8.5; 8.12 of his initial statement of claim dated 13 May 2004.

27. Accordingly the respondent makes the valid objection that it is unable to establish from the "Filing Notice" what allegations the applicant applies to amend, what allegations the applicant tends to retain and what allegations the applicant tends to rely on in support of his claim. And furthermore the application to amend contains allegations of fact and issues of law amounting to the allegation of a dispute concerning chapter III of the Employment Equity Act in respect of which the applicant does not enjoy the right of direct access to the Labour Court. Given the ensuing shambles it seems fair to strike out the entire pleading.

28. In argument Mr Crowe, who appeared on behalf of the respondent, was at pains to emphasize that the respondent has raised the objections not merely to be technical but in a genuine attempt to confine the issues for determination before the court to those to which the court is competent to adjudicate, namely a dispute relating to alleged unfair discrimination in terms of section 6(1) of the Employment Equity Act. That section proscribes unfair discrimination and provides a remedy against an employer who unfairly discriminates, 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, color, sex orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth. To the extent that the applicant contends that his failure to achieve promotion was based on racial discrimination he should be entitled to pursue relief under section 6. However, to permit the applicant to persist in advancing issues rightly categorized as a dispute under chapter III of the Employment Equity Act would not only prejudice the respondent but would inconvenience the court by requiring the consideration of evidence and legal argument irrelevant to issues competent for adjudication. These concerns apply equally to the original statement of case as they do to the purported amendments of the it, which as discussed are also objectionable on procedural grounds. Furthermore, a pre-trial conference would at this stage also be premature until such time as the applicant gets his pleadings properly in order.

29. At the hearing the respondent did not press the issue of costs. Nevertheless, the applicant needs to understand that the haphazard manner in which he has gone about pleading his case has caused his employer considerable inconvenience. Should he wish to proceed with

his allegations of unfair discrimination he would be well advised to obtain suitable advice on how to proceed and ensure that the proper formulation of his claim is accomplished in accordance with the rules and proper procedure. His failure to do so bears the risk of attracting an adverse costs order at some point in the future.

30. As I have indicated, all four of the respondent's objections are valid and in the premises, the following orders are made:

1. It was declared that the applicant enjoys no right of direct access to this court in respect of disputes concerning chapter III of the Employment Equity Act.

2. Paragraphs 7.4; 7.5; 7.7; 7.8; 7.10; 8.4; 8.5; 8.7; 8.8 and 8.10 of the applicant's statement of case dated 13 May 2004 are struck out.

3. The applicant's purported amendment of his statement of case in terms of the document titled "Statement of Claim (Rule 6)" handed to the respondent's attorney at the pre-trial conference on 30 June 2004 is declared a nullity and of no force and effect.

4. The applicant's application to set the matter down for a pre-trial conference before a judge in chambers is dismissed.

5. The applicant's application to amend his statement of case in terms of Rule 11 contained in the applicant's document entitled "Filing Notice" dated 2 August 2004 is dismissed.

6. There is no order as to costs.

MURPHY, AJ

Date of hearing: 22 March 2005

Date of Judgment: 18 April 2005

APPEARANCES:

Applicant appeared personally

Respondent's representative: Adv. M. Crowe instructed by D Dykman attorneys