IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO JS 343/05

In the matter between

MANGENA & OTHERS **Applicants**

And

FILA SOUTH AFRICA (PTY) LTD **1st Respondent**

FOOTWEAR TRADING CC
FOOTWEAR TRADING CO (PTY) LTD
FOOTWEAR TRADING (PTY) LTD **2nd Respondents**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This matter was referred to this Court for adjudication in terms of Rule 6. It has its genesis in a broad claim against the respondent in relation both to unfair discrimination in levels of remuneration and the respondent's conduct concerning a rival of the National Entitled Workers Union (NEWU, which represented the applicants in these proceedings), the South African Commercial, Catering and Allied Workers Union (SACCAWU).

[2] In a pre-trial minute signed in 2005, the parties identified the key issue in dispute as an equality claim under the Employment Equity Act (the EEA) and more particularly, whether the respondent had discriminated against the applicants in relation to their remuneration. Various applications excepting to the terms of the statement of claim and challenges to NEWU's right to represent certain of the applicants were heard during a protracted interlocutory phase. Despite these proceedings, the issues remained imprecisely stated. When the matter was eventually enrolled for trial and called before me, I requested the parties to endeavor to narrow the issues in dispute further, and to seek to reach agreement on certain matters relating to the applicants' claim. Ultimately, the parties identified the issues in dispute as these:

> "1. Whether Shabalala was discriminated against based on race and/or colour in comparison to Delia McMullin and/or NEWU membership /bashing.
>
> 2. Whether Chiya was discriminated against based on birth and/or family relations in comparison to Khaya Ngxongo and/or NEWU membership /bashing.
>
> 3. Whether, in so far as the allegation of NEWU membership/bashing is concerned, the respondent gave increases and/or promotions to those employees who went to SACCAWU and the comparators in this regard are William Kekana and Sipho Shozi".

[3] It will immediately be appreciated that this formulation of the issues is inelegantly presented, but it is a significantly improved attempt at an articulation of the issues in dispute, and it is ultimately the basis upon which the trial proceeded. The further pre-trial minute also reflects the parties' agreement that only two of the original applicants pursue their

claims, these being Shabalala and Chiya, represented by NEWU. Finally, at my urging, the parties prepared schedules in which common cause facts relating to the complainants and comparators, their job titles, their remuneration and the periods of their employment were recorded.

The application for absolution from the instance

[4] NEWU called Shabalala and Chiya as witnesses. After that, Mr. Maluleke, who appeared for the applicants, closed the applicants' case. The respondent then applied for absolution from the instance. I granted absolution in respect of the second and third elements of the applicants' claim (i.e. those claims reflected in paragraphs 2 and 3 of the further pre-trial minute recorded above), on the basis that the applicants had in respect of these claims not made out a case for the respondent to meet, nor disclosed a cause of action. In my ruling, I observed that in terms of the EEA, a claimant is obliged to establish the differentiation that forms the basis of the claim and to establish a link between that differentiation and one of the listed grounds in s 6 (1) of the Act, or an unlisted ground in circumstances where the claimant is able to show that the ground relied upon has the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner. In relation to the first element of the claim, after a review of Shabalala's evidence, I concluded that a sufficient evidentiary base had been established for the respondent to be called upon to place its version before the Court as to the existence of any differentiation and any justification for it. The respondent had relied on evidence, solicited in cross-examination, that other white employees (two sisters by the name of Fogolin) had also performed clerical functions at the relevant time and had been paid less than Shabalala. This was not disputed, but in my view, the submission that this fact *ipso facto* established that the respondent did not discriminate in relation to the remuneration paid to employees on account

of their race begged the question of any unfair discrimination as between Shabalala and his chosen comparator, McMullin. In relation to the second and third elements of the applicants' claim, I recorded that both the complainants and the chosen comparators were black men. The schedules prepared in respect of the second element of the claim disclosed that for the bulk of the period in which a comparison was drawn, the claimant (Chiya) and the comparator (Ngxongo) were engaged in different work. (Chiya was a puller/packer and general warehouse assistant, while Ngxongo was a sales assistant). Chiya's evidence was that the work performed by them was different. To the extent that the claim was one of equal pay for work of equal value, this had neither been pleaded nor established by Chiya's evidence. In any event, the explanation for the differential in remuneration between Chiya and Ngxongo was that Ngxongo's father had worked for the respondent for many years, and that on his death, Ngxongo had approached the owner of the business, Kotkin, who had agreed to increase Ngxongo's remuneration to assist the family. This, it was claimed by the applicants, constituted unfair discrimination on the grounds of birth and/or membership of NEWU. I expressed the view when making the ruling that Kotkin may have engaged in what might be described as an act of charity (possibly a benign form of favouritism) by assisting Ngxongo and his family, but he did not discriminate against Chiya on the grounds of his birth. Further, no evidence had been adduced to the effect that Kotkin's actions were motivated or influenced in any way by union membership. In relation to the third element of the applicants' claim, a generally stated allegation that incentives or advantages were offered to those of the respondent's employees who elected to join SACCAWU, the evidence proffered was a comparison of the remuneration paid to Sipho Shozi (who after leaving NEWU in December 1999 to join SACCAWU, rejoined NEWU in May 2004) and William Kekana, who left NEWU at the same time but remained a member of SACCAWU. In August 2004, three months

after rejoining NEWU, Shozi received a 21% increase in comparison to Kekana's increase of 10%. The following year, Kekana received an increase of 15%, while Shozi received an increase of 10%. In August 2006, Kekana received an increase of 24%, and Shozi received 15%. In August 2007, Kekana received an increase of 10% and Shozi's remuneration was increased by 21%. These figures (the only evidence proffered in support of a claim that the respondent was inducing employees by the awarding of increases to leave NEWU and join SACCAWU) demonstrate no link between membership of SACCAWU and any favourable treatment in so far as wage increases are concerned. In any event, I noted that the applicants' claims relate to the exercise of the rights of the freedom of association, and in particular the right of a trade union to carry out its activities and programmes without interference by an employer party. These rights are established and protected by Chapter II of the LRA; they are not equality issues. The right to equality under the EEA protects employees from disadvantage primarily on grounds that are broadly constitutive of human identity, grounds that were not placed in issue by the applicants in their agreed statement. In short, it was my view that the applicants had failed to adduce sufficient facts to constitute a case for the respondent to answer in respect of the second and third elements of their claim, and that the claims were in any event legally misconceived. For these reasons, I granted absolution from the instance in respect of those elements of the claim.

The applicable legal principles

[4] Before dealing with the evidence in relation to Shabalala's claim, I wish to address the relevant legal principles. Mr. Maluleke confirmed in argument that the claim against the respondent is what is referred to as an equal pay claim. He submitted that Shabalala and McMullin were employed by the respondent, that they did the same or similar work, and that McMullin

was paid a higher rate of remuneration on account of her race. In the alternative, Mr. Maluleke submitted that Shabalala and McMullin were engaged in work of equal value, and that Shabalala was paid less than McMullin on account of his race.

[5] The first question that arises is whether equal pay claims, and in particular claims for equal pay for work of equal value, are contemplated by the EEA. Unlike equality legislation in many other jurisdictions, the EEA does not specifically regulate equal pay claims. Section 6 of the Act prohibits unfair discrimination in any employment policy or practice, on any of the grounds listed in s 6 (1) or on any analogous ground, if an applicant is able to show that the ground is based on attributes or characteristics that have the potential to impair the fundamental human dignity of persons or to affect them in a comparably serious manner. (See *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at 325A). 'Employment policy or practice' is defined by s 1 of the EEA to include remuneration, employment benefits and terms and conditions of employment. To pay an employee less for performing the same or similar work on a listed or an analogous ground clearly constitutes less favourable treatment on a prohibited ground, and any claim for equal pay for work that is the same or similar falls to be determined in terms of the EEA. Similarly, although the EEA makes no specific mention of claims of equal pay for work of equal value, the terms of the prohibition against unfair discrimination established by s 6 are sufficiently broad to incorporate claims of this nature. In relation to claims where the differential that is asserted by the claimant is a difference in sex, the ILO Equal Remuneration Convention 1951 (No. 100) situates the comparison to be made at the level of the value of work, and obliges ratifying member states to give effect to the principle of equal remuneration for men and women workers for work of equal value. To this extent, this court is required to interpret the EEA in compliance with South

Africa's public international law obligations[1]. In the present instance, the differential asserted by the claimant is one of race rather than sex, but I see no reason why the principle of equal pay for work of equal value should not be extended beyond the listed ground of sex to other listed and analogous grounds and why, in principle, an equal value claim based on race should not be admitted. This would be consistent with the substantive conception of equality that the Constitution and the EEA adopt, and in particular, a recognition that since race historically played a role in the value attributed to particular jobs, a systemic approach to the elimination of what might often be structural inequality is necessary. Moreover, the principle that an equal value claim was competent under a general prohibition of unfair discrimination was recognised by this Court some years ago. In *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 *ILJ* 188 (LC), Landman J said the following:

> *"In other words, it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds, eg race or ethnic origin."* (at 196-F)

[6] Writing in *"Essential Employment Discrimination law"*, Landman suggests that to succeed in an equal pay claim, the claimant must establish that "the unequal pay is caused by the employer discriminating on impermissible grounds" (at 145). This suggests that a claimant in an equal pay claim must identify a comparator, and establish that the work done by the chosen comparator is the same or similar work (this calls for a comparison that is not over-fastidious in the sense that differences that

[1] Convention 100 was ratified by the government of South Africa in 2000; Convention 111 in 1997. Section 3 (d) of the EEA requires the Act to be interpreted in compliance with South Africa's international law obligations.

are infrequent or unimportant are ignored) or where the claim is for one of equal pay for work for equal value, the claimant must establish that the jobs of the comparator and claimant, while different, are of equal value having regard to the required degree of skill, physical and mental effort, responsibility and other relevant factors. Assuming that this is done, the claimant is required to establish a link between the differentiation (being the difference in remuneration for the same work or work of equal value) and a listed or analogous ground. If the causal link is established,[2] section 11 of the EEA requires the employer to show that the discrimination is not unfair, i.e. it is for the employer to justify the discrimination that exists.

[7] This Court has repeatedly made it clear that it is not sufficient for a claimant to point to a differential in remuneration and claim baldly that the difference may be ascribed to race. In *Louw v Golden Arrow* (supra) Landman J stated:

> *"Discrimination on a particular 'ground' means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less that Mr. Beneke's salary because of his race (sic)"* (at 197-B).

This formulation places a significant burden on an applicant in an equal pay claim. In *Ntai & others v South African Breweries Ltd* (2001) 22 *ILJ* 214 (LC), the Court acknowledged the difficulties facing a claimant in these circumstances and expressed the view that a claimant was required

[2] There is a debate on how strong that link should be - see Dupper and Garbers in *"Essential Employment Discrimination Law"* at p.36. I need not decide this issue in these proceedings.

only to establish a *prima facie* case of discrimination, calling on the alleged perpetrator then to justify its actions. But the Court reaffirmed that a mere allegation of discrimination will not suffice to establish a *prima facie* case (at 218F, referring to *Transport and General Workers Union & another v Bayete Security Holdings* (1999) 20 ILJ 1117 (LC)). For reasons that will become apparent, I need not pursue the question of onus any further in these proceedings. With that conceptual context, I turn to the evidence adduced by the parties in these proceedings.

The facts

[8] I do not intend to summarise or canvass all of the evidence led by the parties. The trial was unnecessarily protracted, but the factual issues that present themselves are relatively easily determined. The parties agreed that the period for which a comparison is to be drawn between the remuneration earned by Shabalala and McMullin for the purpose of this claim is June 2002 to March 2006, the period between the date of McMullin's re-employment by the respondent and Shabalala's demotion to the position of driver. (McMullin was initially employed by the company from 1996 to 1999. She was re-employed in June 2002. In March 2006, Shabalala as demoted to the position of a driver, a post he accepted under protest and in the face of what the respondent asserted to be the redundancy of his clerical position. Shabalala was later dismissed for misconduct, in March 2007). For the period June 2002 to January 2005 the parties agreed that the positions of both Shabalala and McMullin involved clerical functions, although the nature of the work they performed is disputed. The respondent avers that Shabalala was engaged in mechanical, repetitive administrative tasks, while McMullin was engaged in work that required a greater degree of skill, experience and decision-making ability. Shabalala denies this, and avers that he and McMullin did the same work. Further, the respondent alleges that from February 2005,

McMullin was appointed as an assistant brand manager and that she was engaged in that capacity for the balance of the period under review, a fact that is denied by Shabalala. The parties reached agreement on the remuneration paid to Shabalala and McMullin respectively during the relevant period, although they disagree on whether a travel allowance paid to McMullin should be brought into account. (Shabalala contends that McMullin's gross remuneration should be taken into account; the respondent contends that the allowance was effectively a reimbursement for travel costs incurred on company business).

The claim for equal pay for the same or similar work

[9] An essential element of a claim for equal pay for equal work is a factual foundation, to be laid by the claimant, that the work performed by the comparator is "equal". By this is not meant only that the work must be identical or interchangable - it is sufficient that the work is similar in nature where any differences are infrequent or of negligible significance in relation to the work as a whole.[3]

[10] Shabalala was initially employed by the respondent in February 1997 as a driver. In 1998 he was appointed to a position referred to as a "warehouse manager", in the respondent's warehouse. There is a dispute of fact as to precisely what Shabalala's responsibilities were when he worked in this capacity as well as the circumstances that caused him to be moved to the position of administrative clerk, but this is not material to the determination of this claim because the period of comparison is limited to the period from which Shabalala worked as administrative clerk.

[11] McMullin testified that she was approached by Kotkin to rejoin the company in 2002 to work on the sale or return (SOR) programme (in effect

[3] See Landman in *"Essential Employment Discrimination Law"* (supra) at 142, quoting Bolger and Kimber *Sex Discrimination Law* (2000).

a system of sale on consignment available to a number of the respondent's larger customers). She accepted the position on condition that she was not required to work on invoicing, an activity undertaken by her in her previous period of employment. McMullin explained that her responsibilities required her to do regular stock takes at the customer's premises, and to reconcile the accounts i.e. to ensure that the respondent was being paid within the agreed period for goods sold on consignment by the customer. McMullin testified further that in 2003, she took on the additional responsibility of distribution in relation to the Fila brand. This entailed receiving orders from sales representatives, scrutinizing the order, determining whether the customer concerned was a "priority" customer, checking the customer's credit record to determine whether goods should be supplied, checking available stock, if no stock on a specific item was available, liaising with the representative or the customer to determine whether the order should be partially filled or held over, producing the picking slip and sticker and forwarding completed documentation for invoicing. McMullin stated that she later undertook the same function for the Soviet brand. In November 2004, she testified that she underwent training with Michal Kotkin, with a view to her appointment as a brand manager. The training continued until January 2005, excluding the December shut down. In February 2005, McMullin testified that she assumed the duties of an assistant brand manager. This entailed working with a brand manager, and entailed a range of tasks associated with the management of a particular brand, including monitoring new developments, maintaining an awareness of fashion trends, administering buying budgets, budget control, taking purchase orders, submitting orders to suppliers, dealing with suppliers on a daily basis, and pricing the goods concerned.

[12] In his evidence in chief, Shabalala baldly asserted that he did the same work as McMullin, work that on his version, was limited to invoicing and to

producing packing slips and stickers. He conceded in cross-examination that he was aware that McMullin regularly left the respondent's premises in her own car but denied that this was to take stock at customer's premises, a function that he denied was undertaken by McMullin. Shabalala's evidence was speculative - he conceded that it was not possible for him to have watched and listened to McMullin at all times, and that he didn't know that she was being trained as an assistant brand manager. Shabalala could only say that these were assertions he was hearing for the first time - in other words, he could not, from his own knowledge, state what precisely it was that McMullin did, nor could he deny the broad functions undertaken by McMullin when these were put to him.

[13] Mr. Jossie Spiegel also gave evidence for the respondent. As the respondent's operations manager, he exercised what might be described as a broad supervisory role and was closely acquainted with the functions performed by both McMullin and Shabalala. Spiegel's evidence was given clearly and firmly, and he responded in the same fashion during his cross-examination. The upshot of Spiegel's evidence is that that there was no similarity whatsoever between the functions performed by Shabalala and McMullin. Shabalala was engaged in elementary, mechanical work, producing price stickers and carton stickers, and occasionally in the preparation of internal delivery notes, which were manually produced. Spiegel denied that Shabalala was ever engaged in invoicing. On the other hand, McMullin was engaged in the SOR function and later, as the activities of that function were reduced, in the distribution function of two relatively small brands, Diesel and Fila. Spiegel's account of the responsibilities attached to that function accorded with McMullin's later account of her activities. Similarly, Spiegel's evidence concerning McMullin's move to the position of assistant brand manager and the functions associated with that position correlated with McMullin's account.

In all material respects, Spiegel testified that not only was the work that McMullin performed non-mechanical (in the sense that it required the exercise of judgment and decision-making), McMullin was afforded the opportunity to advance on account of her willingness to accept new challenges. On the contrary, Shabalala performed the work he was given satisfactorily, but displayed no initiative or inclination to progress. Spiegel stated that he had tried to show Shabalala how to do the invoicing, but that he displayed little interest or enthusiasm, and preferred to remain in what was described as a "comfort zone".

[14] As I have noted, Spiegel's testimony was not called into question during cross-examination, and corroborates in all material respects the version given by McMullin of her own activities, and the evidence given by her of the activities undertaken by Shabalala. Shabalala could give no evidence as to precisely what functions were performed by McMullin and, in my view, had an inflated view of the nature of the work that he performed. I have no hesitation in concluding that the respondent's version of both the nature of the work undertaken by Shabalala and by McMullin is the more probable. Mr. Maluleke urged me to take what he submitted were material inconsistencies in the evidence by Kotkin, Spiegel and McMullin into account and to reject the respondent's version on that basis. While there were some discrepancies in the evidence of the respondent's witnesses (for example, as to precisely when and for how long McMullin underwent training with Michal Kotkin, when she worked what was referred to as "upstairs" and "downstairs", the fact that the description of employees' posts on pay slips did not always accord with work actually performed), these were, in my view, immaterial. Finally, Mr. Maluleke put great store on the qualifications earned by Shabalala. The undisputed evidence was that he obtained diplomas in basic computer functions (at the respondent's expense) and that he had attended a daylong training course at Edcon in the procedures that company required of suppliers. But the fact of these

qualifications (which were not disputed - Kotkin's evidence was that the advancement of employees was encouraged) does not establish or even imply that Shabalala did the work that he claimed to do, or that McMullin's activities were limited to those performed by him. In short, the applicants have failed to establish, even on a prima facie basis, that Shabalala and McMullin performed the same or similar work. The factual foundation that is necessary to sustain a claim of equal pay for equal work simply does not exist.

The alternative claim for equal pay for work of equal value

[15] The applicants have not pleaded a case of equal pay for work of equal value. Neither the muddled pleadings nor any of the pre-trial minutes filed in this matter make any reference to a claim of equal pay for work of equal value. Granting for present purposes that the framing of the issue in the further pre-trial minute filed on 13 August 2009 (that Shabalala was discriminated against on the grounds of race) is sufficiently broad to encompass an equal value claim, I wish to make two observations. The first is that it seems to me to be incongruous to claim equal pay for the same (in the sense of identical) work and to claim in the alternative, as the applicants effectively do, that should the court find that the work performed was different, then equal value should be attributed to the positions concerned. This strategy is comprehensible where there may be some doubt as to the nature and content of the jobs to be compared – in other words, if a claimant asserts that work done by a comparator is similar work in circumstances where the claimant is not entirely sure or where there is some doubt as to precisely what work the comparator performed, the basis for an alterative equal value claim can be appreciated. But in a matter such as the present, where Shabalala asserts that he performed the identical work to that performed by McMullin and then proceeds to ask the court to find, in the event that it is found that he performed different

work, that that different work is of equal value to the work performed by McMullin, borders on the disingenuous. However, that consideration and the absence of a pleaded case aside, there is simply no evidence before the Court to establish the relative value that should be accorded to the work that I have found was performed by Shabalala and McMullin respectively. Mr. Maluleke appeared to suggest in argument that this was a self-evident matter, and that the Court could take a view on the facts as to the relative value of the respective jobs. To the extent that this is a self evident matter, I would venture to say that the work in which Shabalala engaged was of significantly less value (in the sense of demands made on the incumbent, levels of responsibility, skill, etc) than the work in which McMullin was engaged. But this Court has no expertise in job grading or the allocation of relative value to particular occupations of functions. An applicant claiming equal pay for work of equal value must lay a proper factual foundation that would enable the Court to make an assessment, as best it can, on what value should be attributed to the work in question and the tasks associated with it. This factual foundation, as I have indicated above, might include factors such as skill, effort, responsibility and the like. In the present case, in the absence of sufficient evidence to establish even remotely that the work performed by Shabalala and McMullin was of equal value, the basis for the applicant's alternative claim is simply non-existent.

The casual link

[16] In view of my finding on the question whether Shabalala and McMullin performed the same work or work of equal value, it is not necessary for me to consider the existence of any causal link between the differential relied on by the applicants and the specified ground of race.

Costs

[17] Section 162 of the LRA confers discretion on this Court to make orders for costs based on the requirements of law and fairness. In *National Union of Mineworkers v Ergo* [1992] 4 All SA 78 (A), the Appellate Division considered similar wording in the 1956 Labour Relations Act and identified a number of factors relevant in relation to the Court's discretion. These include the conduct of the parties, the general rule that costs follows the result, and the impact that any costs order might have on a collective bargaining relationship. NEWU is not a party to these proceedings, and while it has an undisclosed number of members at the respondent's operation, there is no collective bargaining relationship between the parties. There is also a sub-text to these proceedings - the obvious rivalry between NEWU and SACCAWU, and the prospect that the real rather than apparent purpose of this litigation is to advance the interests of NEWU at the respondent's operations rather than to pursue a legitimate cause of action. I raised this with Mr Maluleke, who denied any such intention. The respondent made no submissions in this regard, and I intend to take that aspect of the enquiry no further. However, in my view, there is no cogent reason why the general rule should not be applied i.e. that costs should follow the result, at least in respect of the trial and preparation for it. I am aware that costs were reserved in respect of the various interlocutory applications that preceded the trial, but given the state of the file, I am not in a position to reach a judgment on what might accord with the requirements of the law and fairness in respect of those proceedings. I am equally not in a position to reach a judgment on the extent to which Shabalala and Chiya should be liable for the costs of the proceedings in the pre-trial phase, given that there were 18 applicants at the outset, the vast majority of whom have withdrawn.

I accordingly make the following order-

1. The claim of unfair discrimination referred by Mr. Philemon Shabalala is dismissed.
2. Mr. Philemon Shabalala and Mr. Headman Chiya are to pay the costs of these proceedings, jointly and severally, but limited to the costs of the trial (including the costs of preparing for trial) and except that Mr. Chiya's liability does not extend to proceedings conducted after the Court's ruling on the application for absolution from the instance.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of trial: 13 – 20 August 2009
Date of judgment: 28 August 2009

Appearances:

For the Applicant: Mr. Maluleke (Union Official)

For the Respondent: Adv Erasmus
Instructed by: Du Randt Du Toit Attorneys