REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 890/10

In the matter between:

NTOMBIKAYISE **Applicant**

ETHEL NOMBAKUSE

and

DEPARTMENT OF TRANSPORT AND PUBLIC WORKS: **Respondent**

WESTERN CAPE PROVINCIAL GOVERNMENT

Heard: **24-25 July 2012**

Delivered: **25 July 2012**

Summary: Discrimination – EEA ss 6, 10 and 11 – absolution from the instance.

JUDGMENT

STEENKAMP J

Introduction

1] The applicant applied for a post as Executive Manager: Provincial Public Works with the respondent. She was shortlisted and interviewed. The selection committee (aka the interviewing panel) recommended another candidate for appointment, placing the applicant second in the list of preferred candidates. The then MEC, Ms KA Mqulwana, intervened and recommended that the applicant be appointed. She reconvened the interviewing panel. They agreed with her recommendation and informed the provincial cabinet[1] of the applicant's appointment. The cabinet noted and concurred with the appointment.

2] Subsequently, the ANC-led provincial government was replaced by one led by the Democratic Alliance. Under the leadership of the DA MEC, Mr Robin Carlisle, the applicant was informed that the post would no longer be filled and would be re-advertised at a later stage.

3] The applicant submits that the respondent discriminated against her on one of the following grounds:

3.1 Political affiliation;

3.2 Race; or

3.3 Gender.

4] The applicant has grounded her claim in s 10 (read with ss 5, 6 and 9) of the Employment Equity Act[2] arising from the respondent's non-implementation of her appointment.

5] After the applicant had given evidence, she closed her case. The respondent applied for absolution from the instance.

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1 The Western Cape provincial government refers to its executive council as the "cabinet". It also, at times, refers to the Member of the Executive Council (MEC) as a "minister". I shall refer to "the MEC".

2 Act 55 of 1998 (the EEA).

Background facts

6] The applicant is employed as a sub-council / district manager by the City of Cape Town.

7] During November or December 2008, the applicant saw an advertisement in a newspaper for two positions in the Department of Transport and Public Works in the Western Cape (i.e. the respondent), viz Assistant Manager: Strategic Planning and Coordination; and Executive Manager: Provincial Public Works. She applied for, was shortlisted and interviewed for both positions. She was unsuccessful in the application for the former position. That does not concern the court in the present dispute. The relevant dispute concerns the latter position.

8] The interview took place in March 2009. The interviewing panel or selection committee comprised the Housing MEC, Mr W Jacobs; the head of department; Mr T Manyati; and a representative of the province's secretariat, Mr P Williams. They unanimously concluded that another candidate, Mr TC Mguli, was the preferred candidate for the post, having awarded him a score of 69,5% on the basis of a standardised set of criteria and questions. They awarded the applicant, Ms Nombakuse, a score of 67, 67%.

9] Subsequently, the then MEC of the respondent, Ms KA Mqulwana – who was the executive authority responsible for the appointment – reconvened the panel to inform them of her intervention and recommendation for the applicant to fill the post of Executive Manager: Provincial Public Works. It is common cause that Ms Mqulwana and the applicant are from the same clan and that Mqulwana recused herself from sitting on the interviewing panel.

10] The reasons given by the then MEC for her intervention were the following:

10.1 The applicant's performance in comparison to the recommended candidate is very close or "almost the same" in terms of percentages;

10.2 In terms of the Employment Equity Plan of the Department the priority for this post at this level is an African [*sic*] female; and

10.3 The SMS competency assessment reflects a better performance of "Advanced" in key strategic areas.

11] The reconvened interview panel agreed with the MEC's recommendation and the MEC informed the provincial cabinet of the applicant's appointment on 14 April 2009. The cabinet, in turn, resolved that it "notes and concurs with" the appointment on 15 April 2009. The appointment was subject to the conclusion of an appointment contract and a performance agreement. However, no such documentation was sent to the applicant and she was not informed of her apparent appointment.

12] On 20 April 2009 the candidate who had initially been recommended by the interviewing panel and who had received the highest score, Mr Mguli, lodged a grievance with the respondent. He alleged, inter alia, that the panel's recommendation had been disregarded.

13] On 13 May 2009, having heard nothing further, the applicant wrote to the respondent's Acting Executive Manager: Corporate Services, copying the head of department, Mr Manyathi. She referred to her two applications and stated:

> "I humble [*sic*] request to be furnished with the copy of the assessment report with the intention to consider recommendations made for developmental purposes and further utilise such constructive analysisin my present working environment, as well as the racial demographics of candidates which I competed with in both positions.
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> Furthermore I was invited to be interviewed for both positions and would appreciate it if the department could enlighten me with the outcome if any or progress in writing preferable within a period of fourteen (14) days from the date of this correspondence."

14] The respondent eventually informed the applicant that her application for the assistant executive manager post had been unsuccessful; but she received no written response regarding the executive manager post. In

telephone conversations between her and a Mr Martin, apparently an official in the respondent's human resources department, Martin informed her that the respondent "was still in the process of finalising" the filling of the post.

15] It was only six months after the provincial cabinet had apparently accepted her appointment, on 29 October 2009, that the applicant received any formal response. The Executive Manager: Corporate Services, Mr DW Jacobs, referred to her telephone conversations and said:

> "I can now formally indicate that MEC Carlisle, in his capacity as Executing Authority has decided on 26 October 2009 not to proceed with the filling of the post, and instructed that said post be readvertised with immediate effect. You are naturally free and encouraged to submit another application once said post is advertised."

16] The reference to "MEC Carlisle" is to the DA-appointed MEC, Robin Carlisle. His appointment followed the provincial elections of April 2009 when the DA wrested control of the province from the ANC.

17] It appears from a memorandum signed by Carlisle; Martin; Jacobs; and the then acting head of department, Mr J Fourie, that Carlisle had directed on 11 July 2009 already that the post not be filled "at this stage". The memorandum noted that, since the previous MEC had approved the applicant's appointment, "several concerns" had emerged; that a dispute concerning the appointment had been lodged (apparently referring to Mguli's grievance); and that the process had been identified as "severely flawed". The respondent then decided in October 2009 that the approval by the previous MEC regarding the appointment process of a number of posts, including that of Executive Manager: Provincial Public Works, be revoked and the posts be re-advertised. Carlisle accepted the recommendation on 26 October 2009.

18] It must be noted that this memorandum, as well as the documents emanating from the interview panel and the provincial cabinet, only came to the applicant's attention during the discovery process in these proceedings. When she asked for relevant documentation at the time, she

was met with the following rather curt and unhelpful response:

> "Unfortunately we are not able to provide you with any additional information such as the racial demographics of candidates as these will have to be acquired through utilising the Access to Information provisions. The information officer of the Department, Ms B Roberts can be contacted at ..."

19] The applicant duly lodged a request for information in terms of the Promotion of Access to Information Act[3]. Sadly, neither Ms Roberts nor any other official in the Western Cape provincial government appeared to share the principles of promoting access to information; as I have stated, the relevant information was only provided in the course of litigation some two years later.

20] On 10 May 2010 the applicant referred a dispute to the CCMA in terms of s 10 of the EEA. It remained unresolved and se referred a dispute to this court. She avers that she was an applicant for employment in terms of s 9 of the EEA; and that the respondent discriminated against her in terms of s 6 of the EEA on one or more of the following grounds:

20.1 Political affiliation: in that the applicant was appointed by the ANC cabinet prior to the general election at the end of April 2009 in which the ANC lost power in the provincial parliament in the Western Cape and was replaced by the DA, who have now caused applicant per MEC Carlisle of the DA not to take up her position (ie the applicant avers that both the political affiliation of the cabinet that appointed her to the position of Executive Manager: Provincial Public Works, and/or her personal (perceived) political affiliation gave rise to discrimination against her);

20.2 Gender: in that the applicant is a woman, in circumstances where she submitted that the provincial government, particularly post April 2009, discriminated against women in senior positions; and

20.3 Race: in that the applicant is a person from a designated group and

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3 Act 2 of 2000.

she submitted that the provincial government's record of retaining and appointing people from designated groups, particularly black women, is poor and indicates its bias against the applicant.

21] The applicant closed her case at the end of her evidence. The respondent applied for absolution from the instance.

Absolution from the instance: the applicable legal principles

The test for absolution

22] This court summarised the test for granting absolution from the instance by reference to the applicable authorities in *Mouton v Boy Burger (Edms) Bpk (1).*[4] In brief, it is whether there is evidence on which a court, applying its mind reasonably to the applicant's evidence, could or might find for her.[5] This implies that the applicant has to make out a *prima facie* case.[6]

23] In the case of an inference, the test at the end of the applicant's case is as follows: the court will refuse the application for absolution from the instance unless it is satisfied that no reasonable court could draw the inference for which the applicant contends. The court is not required to weigh up different possible inferences but merely to determine whether one of the reasonable inferences is in favour of the plaintiff.[7]

24] In cases where discrimination is alleged, the question of onus plays a significant role. In *Boy Burger* the claim was one of automatically unfair dismissal in terms of s 187(1) of the LRA[8]; in this case, the applicant claims unfair discrimination in terms of ss 6 and 10 of the EEA.

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4 (2011) 32 *ILJ* 2703 (LC).

5 See also *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403 (A) at 409 G; *Oosthuizen v Standard General Versekerings Maatskappy Bpk* 1981 (1) SA 1032 (A) at 1035 H-1036 A; *Minister of Safety and Security v Madisha and Others* (2009) 30 *ILJ* 591(LC); *Molele v SA Treno & another* (Labour Appeal Court JA34/2010, unreported, 28 June 2012) para [13].

6 *De Klerk v ABSA Bank Ltd & ors* 2003 (4) SA 315 (SCA) 323 A-G; *Gordon Lloyd Page & Associates v Rivera and ano* 2001 (1) SA 88 (SCA) 92 G-H.

7 Erasmus *Superior Court Practice* (service 39, 2012) B1-292 and authorities there cited.

8 Labour Relations Act 66 of 1995.

Discrimination in terms of the EEA

25] Section 6(1) of the EEA provides that:

> " 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 and birth."

26] In the present case, the applicant avers that the respondent directly discriminated against her on the grounds of race, gender and/or political affiliation. She further avers that "political affiliation" is analogous to the listed ground of "political opinion". I would agree. To borrow from Northern Irish jurisprudence, in *Gill v Northern Ireland Council for Ethnic Minorities*[9] the court commented:

> "It seems to us that the type of political opinion envisaged by the fair employment legislation is that which relates to one of the opposing ways of conducting the government of the state ... The object of the legislation is to prevent discrimination against a person which may stem from the association of that person with a political party, philosophy or ideology and which may predispose the discriminator against him."

27] The burden of proof in claims of this nature is codified in s 11 of the EEA:

> "Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair."

28] Is it enough for the applicant merely to allege discrimination, ie has the onus shifted to the respondent to prove that the alleged discrimination is fair? If so, it cannot succeed in its application for absolution for the instance; because, in that case, the court can only make a finding once the respondent has discharged the onus.

29] Our courts have consistently held that, in order for the applicant to shift the

9 2001 NIJB 299 at 311, quoted in Garbers, "The prohibition of discrimination in employment" in Malherbe & Sloth-Nielsen (eds), *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* (Juta 2012) p 30 fn 48.

burden of proof to the defendant to prove that the alleged discrimination was fair, the applicant must at least establish that there was discrimination on a listed (or analogous) ground.

30] The legal position was perhaps best explained by Murphy AJ[10] in *IMATU & another v City of Cape Town*[11]*:*

> "Moreover, section 11 of the EEA provides that whenever unfair discrimination is alleged, the employer against whom the allegation is made must establish that it is fair. This in effect creates a rebuttable presumption that once discrimination is shown to exist by the applicant it is assumed to be unfair and the employer must justify it (*Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) and *Hoffmann v South African Airways* 2000 (2) SA 628 (W)). Once discrimination has been established, the employer will have to prove that the discrimination was fair or have to justify the discrimination as justifiable under section 6(2)(b)...
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> The approach to unfair discrimination to be followed by our courts has been spelt out in *Harksen v Lane NO & others* 1998 (1) SA 300 (CC). Although the *Harksen* decision concerned a claim under section 9 of the Constitution (the equality clause), there is no reason why the same or a similar approach should not be followed under the EEA.
>
> The *Harksen* approach contains a specific methodology for determining discrimination cases. The first enquiry is whether the provision differentiates between people or categories of people. If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation of the guarantee of equality. Even if it does bear a rational connection, it might nevertheless amount to discrimination. The second leg of the enquiry asks whether the differentiation amounts to unfair discrimination. This requires a two-staged analysis. Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on

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10 As he then was.

11 [2005] 11 BLLR 1084 (LC) paras [79] – [81] (my emphasis).

attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounted to "discrimination", did it amount to "unfair discrimination"? If it is found to have been on a specified ground, unfairness will be presumed under the Bill of Rights by virtue of the provisions of section 9(5) of the Constitution, which transfers the onus to prove unfairness to the complainant who alleges discrimination on analogous grounds. As I read section 11 of the EEA, no similar transfer of onus arises under the EEA. In other words, whether the ground is specified or not the onus remains on the respondent throughout to prove fairness once discrimination is shown."

He continued at para [88]:

"I doubt whether the shift of the burden applies in the context of the EEA. The shift of the burden in constitutional cases is the result of the unambiguous language of section 9(5) of the Constitution which provides expressly that discrimination on one or more of the grounds listed in section 9(3) of the Constitution is unfair unless it is established that the discrimination is fair. No similar provision exists in the EEA. Nevertheless, it is still necessary to determine whether there has been differentiation on a ground specified in section 6(1) of the EEA."

31] In other words, the applicant must still establish that she was treated differently on the grounds of her political affiliation, gender or race. Thus, in the earlier case of *Woolworths (Pty) Ltd v Whitehead*[12], the Labour Appeal Court held that the employee was "unable to show that, but for her pregnancy, she would have been appointed to the position despite the appellant having another candidate who was better suited for the job than herself. The result of this is that, in my view, there is no causal connection between her not being appointed and her pregnancy."

32] As Christof Garbers[13] puts it:

"[E]ven if we move away from thought processes and focus on effect,

12 [2000] 6 BLLR 640 (LAC) para [24].

13 Garbers, "The prohibition of discrimination in employment" in Malherbe & Sloth-Nielsen (eds), *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* (Juta 2012) p 21. (Footnotes omitted).

discrimination as a legal concept still suffers from teh challenges of comparison, cause, causation and context. In legal terms – there still has to be differentiation which is linked to a ground of discrimination."

33] In the context of an equal pay claim, Van Niekerk J explained:[14]

"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 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, section 11 of the EEA requires the employer to show that the discrimination is not unfair, ie it is for the employer to justify the discrimination that exists.

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*[15]*, 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...'

This formulation places a significant burden on an applicant

14 *Mangena & others v Fila South Africa (Pty) Ltd & others* [2009] 12 BLLR 1224 (LC) para [6] – [7].

15 (2000) 21 *ILJ* 188 (LC).

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 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)".

34] Has the applicant shown that there is a *prima facie* case that the respondent has discriminated against her on the grounds of political affiliation, race or gender?

Evaluation / Analysis

35] In order to establish whether the applicant has crossed this hurdle – and thus, whether the burden of proof remains on the respondent to show that the discrimination is fair in terms of s 11 of the EEA – I shall consider each of the grounds that the applicant alleges to rely on in turn.

Political affiliation

36] The applicant's argument can be summarised as follows:

36.1 The ANC-aligned provincial cabinet, and specifically the then MEC, recommended and accepted her appointment.

36.2 The DA MEC, Carlisle, reversed the decision.

36.3 *Ergo*, the reason for her non-appointment was that she was aligned to the ANC.

37] This line of argument begs the question. The applicant has not provided any proof that the real reason for the respondent deciding not to fill the post was because it wanted to prevent her from filling the post because of her political opinion or affiliation. Nor has she relied on the appointment of a comparator who was appointed in her stead because of his or her affiliation with the DA.

38] The applicant's own evidence – which is the only evidence before court at this stage – is that she does not rely on any such comparator. Moreover, she conceded under cross-examination that the appointments of at least four other candidates into different positions were reversed at the same time; and that she had no idea of the political affiliation (or, indeed, the race or gender) of any of those candidates.

39] There is, quite simply, no evidence before this court that the reason why the initial recommendation of the previous MEC – and its acceptance by the ANC-led provincial cabinet – was overturned, was because of the applicant's political affiliation. There is, not surprisingly, no such documented evidence; but neither could the applicant provide any such evidence. The high water mark of her case is that she was the assistant branch secretary of the Gugulethu branch of the ANC. There is no evidence that the respondent was even aware of this fact; or, even if it was, that it played any role in its decision to reverse its earlier approval of her appointment. Neither is there any evidence that the post in question has been re-advertised or filled – much less by a DA-friendly incumbent.

40] The second leg to the applicant's "political affiliation" argument is that not her own political affiliation, but that of the previous cabinet and MEC – both of whom were clearly ANC appointees – led to a discriminatory decision by the new, DA-appointed MEC to revoke the earlier decision. This, she argued, is a reasonable inference. But the court can only find that a reasonable person could or might have drawn such an inference if the facts before it sustain such an inference. In the case before me, it is common cause that the ANC-appointed MEC recommended the applicant's appointment and that the DA-appointed MEC revoked it. But that on its own is not enough to reasonably lead to the inference that it was politically motivated. At least four other posts were also re-advertised. The decision to do so emanated not only from the new MEC, but on the recommendation of the departmental officials, ie the acting manager: "talent management"; the senior manager: human capital management; the executive manager: corporate services; and the acting head of department. There is no evidence before me of their political affiliation.

There is no evidence before this court that leads to the inference that the reason to re-advertise all of these positions was politically motivated.

Gender

41] Much the same considerations apply to this line of attack. The applicant is a woman. This does not axiomatically lead to an inference that the reason why the respondent reversed the decision to appoint her, is because she happens to be a woman. There is simply no causal link on the evidence before this court. Nor is there any evidence that the respondent generally discriminated against women in senior positions.

Race

42] The applicant is black. There is no evidence that this fact played any role whatsoever in the respondent's decision not to fill the post for which the previous MEC recommended her, or for which the interview panel initially recommended the highest scoring candidate, Mr Mguli (who is also black). The applicant led no evidence to back up her submission that the provincial government's record of retaining and appointing people from designated groups, particularly black women, is poor and indicates its bias against the applicant. She has not established that either race or gender was the reason – or even a reason -- for the respondent's decision not to fill the post.

Conclusion

43] The applicant has not shown that the respondent has discriminated against her on one or more of the grounds on which she relies. Hence, the need for the respondent to show that the discrimination was fair in terms of s 11 of the EEA does not arise. There is no evidence on which this court, applying its mind reasonably to the applicant's evidence, could or might find for her.

44] The application for absolution from the instance must therefore succeed.

Costs

45] The applicant created the impression of an honest witness who had the *bona fide* albeit misplaced perception that the respondent had discriminated against her. Perhaps it is simply a reality in our still divided society that a person who is strongly aligned to one political party immediately suspects that affiliation to play a role when a department of a provincial government whose political leadership is dominated by a different party, takes a decision that affects her adversely – even though, on the evidence before me, she has not been able to present facts that lead to a reasonable inference that this was indeed the case. Although teh applicant has been unsuccessful, I consider the fact that she is an individual who chose to assert her perceived rights under the EEA; and that the respondent is a state entity. In law and fairness, I do not consider an adverse costs order to be appropriate.

Order

46] Absolution from the instance is granted. There is no order as to costs.

Steenkamp J

APPLICANT:	W D Field of Bernadt Vukic & Potash.
RESPONDENT:	AC Oosthuizen SC (with him SC O'Brien)
	Instructed by the State Attorney.