THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

NOT REPORTABLE

Case no: C1078/15

In the matter between:

NATIONAL UNION OF MINE WORKERS **First Applicant**

MZUKISI MANDABA & 3 OTHERS **Second to Fifth Applicants**

and

ESKOM HOLDINGS SOC LTD **Respondent**

Heard: **6-9 March 2017**

Delivered: **21 April 2017**

JUDGMENT

RABKIN-NAICKER J

[1] This matter came to trial on the 6 March 2016. At the close of the applicant's case, the respondent applied for absolution from the instance.

[2] The legal issues arising from the material facts as recorded in the applicants' amended statement of case filed on the 4 March read as follows:

"LEGAL ISSUES

42. Section 6 of the Employment Equity Act No 55 of 1998 (as amended) ("the EEA") prohibits unfair discrimination.

43. As contemplated in section 6(4) of the EEA, there is a difference in terms and conditions of employment between (a) on the one hand second and third applicants and fourth and fifth applicants and the Senior Advisors. This despite the fact that all these employees perform identical, the same or substantially the same work.

44. There is no rational basis for the differentiation.

45. Accordingly the respondent is unfairly discriminating against fourth and fifth applicants by subjecting them to inferior and different terms and conditions of employment than the terms and conditions applicable to second and third applicants who are employed as Quality Assurance Advisors.

46. The respondent is also unfairly discriminating against second to fifth applicants by subjecting them to inferior and different terms and conditions of employment than the terms and conditions applicable to Senior Advisors Quality Assurance.

47. The discrimination is direct based on an arbitrary ground being TASK grading which is not a good and compelling reason to differentiate between the employees. The basis of the differentiation is not rational or objectively justifiable.

48. The respondent's conduct in subjecting the applicants to different and inferior terms and conditions of employment than those applicable to Senior Advisors' Quality Assurance who are doing work of equal value which is identical, the same or substantially the same is discriminatory, not rational, unjustifiable and unfair.

Alternatively

49. The difference in terms and conditions of employment is disproportionate to the difference (if any) in the jobs.

49A. The respondent has treated the applicants in an unfair and inconsistent manner as regards career progression compared to how it has treated the current G15 comparators."

[3] It is necessary to remind ourselves of certain salient provisions of the Employment Equity Act, 1998 as amended. Section 6 of the EEA reads as follows:

"6 Prohibition of unfair discrimination

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.

(5) The Minister, after consultation with the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4). (my emphasis)

[4] Section 11 of the EEA provides:

"11 Burden of proof

(1) If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-

(a) did not take place as alleged; or

(b) is rational and not unfair, or is otherwise justifiable.

(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-

(a) the conduct complained of is not rational;

(b) the conduct complained of amounts to discrimination; and

(c) the discrimination is unfair." (my emphasis)

[5] It is common cause that applicants' main claim in this matter was that of unfair discrimination on an arbitrary ground, and that ground was pleaded as the TASK system. The applicants did not testify about the nature or application of the TASK system or call an expert witness to testify as to its functions. In fact, in answer to the application for absolution, the applicants conceded that the TASK system is not an arbitrary ground and is in fact a perfectly acceptable tool for determining the value or worth of a job. They stated that they will seek the Court's leave to amend their papers.

[6] At the hearing of the application for absolution no application for amendment was before court. It was subsequently filed. I am therefore not concerned with same in this ruling.

[7] It was submitted that even should this court grant absolution in respect of Applicants' main claim, the alternative claim contained in Paragraph 49 of the

amended statement of claim has been prima facie established in evidence. That paragraph bears repeating:

"49. The difference in terms and conditions of employment is disproportionate to the difference (if any) in the jobs.

49A. The respondent has treated the applicants in an unfair and inconsistent manner as regards career progression compared to how it has treated the current G15 comparators."

[8] Applicants submit that even if absolution is granted on the grounds that the work is not the same, the alternative claim remains. Reference is made to the Regulations under the EEA in that a differentiation in terms and conditions of employment will be fair and rational if it is applied in a proportionate manner. These Regulations were published to prescribe the criteria and methodology for assessing work of equal value contemplated in section 6(4) of the Act.[1] In essence both the main claim and the alternative claim in the matter are founded on a cause of action in terms of section 6 of the EEA. A ground contemplated in section 6(1) of that Act, whether listed or arbitrary, has to be adduced.

[9] In **South African Local Authorities Pension Fund v Msunduzi Municipality**[2] the Supreme Court of Appeal re- stated the law on absolution as follows:

"The test for granting absolution from the instance at the end of a plaintiff's case is set out in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G – H where Miller AJA said:

'(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.'

[1] GN R595 in GG 37873 of 1 August 2014

[2] 2016 (4) SA 403 (SCA) at paras 31 and 32

In Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) SA 88 (SCA) ([2000] 4 All SA 241) Harms JA repeated the test set out in Claude Neon Lights and added (para 2):

'This [the passage quoted above] implies that a plaintiff has to make out a prima facie case — in the sense that there is evidence relating to all the elements of the claim — to survive absolution because without such evidence no court could find for the plaintiff . . . .' "

[10] In this matter, evidence led by the applicants at trial did not relate to a material and indispensable element of the claim of unfair discrimination i.e. the arbitrary ground, the TASK system, pleaded in terms of section 6(1) read with section 6(4) of the EEA.

[11] Given the above, it is not necessary for me to summarise the evidence led to show that the applicants did the same work or work of equal value as G15 employees. It was submitted by Ms Ralehoko on behalf of the applicants that the respondent should have raised the problem of the arbitrary ground *in limine* and it could have been argued at that point to avoid costs. This argument does not have merit. The applicants may have led evidence to show that the TASK system itself or the manner it had been implemented amounted to unfair discrimination. This they did not do. In these circumstances, the application for absolution must succeed. I make the following order:

Order

1. Absolution is granted against the applicants with costs.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicants: Cheadle Thompson & Haysom inc

Respondent: Cliffe Dekker Hofmeyr Inc

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