THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 582/17

REPORTABLE

OF INTEREST TO OTHER JUDGES

In the matter between:

THE GMAGARA LOCAL MUNICIPALITY **Applicant**

And

IMATU OBO : **Respondent**

A MZUZA

T D SEMAMAI

T H GAOTHAEWE

A VISSER

IN RE: **Applicant**

IMATU OBO:

A MZUZA

T D SEMAMAI

T H GAOTHAEWE

A VISSER

and

THE GAMAGARA LOCAL MUNICIPALITY **Respondent**

Heard: **26 February 2019**

Delivered: **4 March 2019**

Summary: Exception – alleged unfair discrimination on the ground of geographical location.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an exception taken by the Gamagara Local Municipality against the statement of claim filed by IMATU[1] on behalf of four of its members.[2] They claim unfair discrimination in terms of s 6(4) of the Employment Equity Act[3]

[1] The Independent Municipal and Allied Trade Union.

[2] Messrs A Muzaza, T D Semamai, T H Gaothaelwe, and A Visser.

[3] Act 55 of 1998 (the EEA).

on an arbitrary ground, namely geographical location. The Municipality claims that it does not disclose a cause of action.

Background facts and discrimination claim

[2] The four union members are all employed by the Municipality as electricians in Kathu in the Northern Cape. The Municipality also employs three electricians at Olifantshoek. The Olifantshoek electricians occupy a higher post level and earn more than their Kathu counterparts.

[3] IMATU has referred a dispute to this Court in terms of s 6(4) of the EEA, claiming unfair discrimination in that:

3.1 There is a material difference in terms and conditions of employment between the Kathu electricians and the Olifantshoek electricians;

3.2 they perform the same or substantially the same work; and

3.3 the Municipality's stated reason for the disparity is that there is a geographical difference between their working conditions; and the Olifantshoek electricians perform work of both a high and a low voltage nature, whereas their Kathu counterparts only do work of a low voltage nature.

[4] IMATU states that "these reasons are not only factually incorrect but are entirely arbitrary in that there is no difference of any significance – to such an extent that it justifies the disparity – between the work the Kathu electricians perform *vis-à-vis* the work the Olifantshoek electricians perform".

[5] IMATU claims that "there is thus no lawful and justifiable reason for the disparity, the proffered reasons are arbitrary, and the disparity amounts to direct or indirect discrimination in direct contravention of the provisions of s 6 of the Employment Equity Act"

The exception

[6] The Municipality has taken an exception on the basis that the statement of claim does not disclose a cause of action because the union "does not allege that the reason for the different treatment is based on one of the recognized grounds as stated in s 6(1) of the Employment Equity Act … or an analogous ground that adversely affects some characteristic that impacts on the human dignity of the individual employees".

Legal principles

[7] The Labour Court Rules do not expressly deal with exceptions. The Court imports the provisions of Uniform Rule 23 in terms of Rule 11 of the Labour Court Rules. In *Liquid Telecommunication (Pty) Ltd v Carmichael-Brown*[4] Van Niekerk J warned against the willy-nilly importation of the Uniform Rules of the High Court into the Labour Court rules. In the absence of any Labour Court rule dealing specifically with exceptions, it was noted, Rule 11(3) enables parties to have recourse to Rule 23 of the Uniform Rules. However, it was emphasised,

> "this court has never gone so far as to suggest that parties are obliged or entitled to conduct litigation in this court on the basis of the Uniform Rules. It is clear from the formulation of Labour Court Rule 11(3) that the Uniform Rules are not a form of default procedure in

[4] [2018] 8 BLLR 804 (LC) pars 11–14.

> this court …. Rule 11(3) is permissive, and provides that the court (not the parties and their representatives) may sanction the use of a procedure not contemplated by the Rules when this is appropriate. … It is not an invitation to practitioners to invoke the Uniform Rules and conduct litigation in this court on the basis that the Uniform Rules apply."

[8] Rule 11, the judgment continued, "is an appropriate basis on which to file an exception, and … Uniform Rule 23 is an appropriate guide as to when and how an exception should be filed. What I wish to emphasise is that this limited application of Rule 11 is not the gateway to the wholesale importation and application of the Uniform Rules, and thereby the creation of a parallel system of procedure in this court."

[9] The well-known test on exception is "… whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the Court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts".[5]

[10] The object of the pleading is to define the issues as to enable the other side to know what case it must meet. This only requires the applicant to set out the architecture of its claims. This is done by pleading the *facta probanda* and not the *facta probantia*.[6]

<u>Evaluation / Analysis</u>

[11] The starting point for the union's claim is s 6 of the EEA:

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[5] *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) par 10.

[6] *Simmadari v ABSA Bank Ltd* (2018) 39 *ILJ* 1819 (LC) par 35.

"**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.

...

(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."

[12] Section 11 then deals with the burden of proof:

"**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."

[13] The question of onus in terms of s 11 of the EEA is commented on in *Labour Law through the Cases*[7]:

> "No definitive meaning has thus far been given to the words 'alleged' and 'allegation', used to describe the evidentiary burden placed on the applicant in bringing a claim of unfair discrimination. An unsupported allegation of unfair discrimination clearly cannot succeed. Even if the burden of proving fairness rest on the employer, it has been held that an employee should provide sufficient evidence in support of her/his claim 'to cast doubt on' the employer's explanation or 'to show that there is a more likely reason than that of the employer".

[14] As this Court recently commented in *Sasol* [8] this summary is consistent with the jurisprudence both before and after the amendment of section 11 which took effect in August 2014. In *Janda v First National Bank* [9] -- a case dealing with an alleged automatically unfair dismissal in terms of s 187(1)(f) of the LRA – the court held:

> 'As stated earlier, there is a single issue with the burden on the employer. This essential point is obscured if one speaks of "the employee must prove" or a "shifting" of the onus or a duty "to establish a prima facie case that the reason for the dismissal was an automatically unfair one" (For example Dupper et al Essential Employment Discrimination Law at page 130). The evidentiary burden placed upon an employee creates the need for there to be sufficient evidence to cast doubt on the reason for the dismissal put forward by the employer or, to put it differently, to show that there is a

[7] Du Toit et al, *Labour Law through the Cases* (LexisNexis, Issue 21, 2018) at EEA-37 s.v. "alleged" (footnotes omitted).

[8] *Sasol Chemical Operations (Pty) Ltd v CCMA* [2019] 1 BLLR 91 (LC); (2019) 40 *ILJ* 436 (LC) esp paras [12] – [20].

[9] [2006] 12 BLLR 1156 (LC) par [18].

> more likely reason than that of the employer. A failure to present such evidence creates the risk of the employee losing his or her case. The essential question however remains, after the court has heard all the evidence, whether the employer upon whom the onus rests of proving the issue, has discharged it. (*Zeffertt* (supra) at page 132 to 134.)"

[15] And in *Kroukam v SA Airlink (Pty) Ltd* [10] Davis JA held:

> "In my view, section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal."

[16] More recently, after the amendment of s 11, the court held in *Sethole & others v Dr Kenneth Kaunda District Municipality* [11]:

> … [E]ven if Section 11 of the EEA after its amendment is considered, there is a clear distinction, where it comes to the issue of who bears the onus, between a case of discrimination based on one of the listed grounds in Section 6(1) of the EEA, and a case based on any other unlisted arbitrary ground. In the case of a claim of discrimination based on a listed ground, an allegation of such kind of discrimination by a complainant suffices, and the onus is then on the respondent party to prove it does not exist. But in the case of a discrimination claim based on any other unlisted arbitrary ground, the onus is on the complainant to prove that discrimination based on that ground exists.

[10] [2005] 12 BLLR 1172 (LAC) par [28].

[11] [2018] 11 BLLR 74 (LC) par [25].

Considering that the applicants' claim is squarely based on such an unlisted arbitrary ground, they would in any event bear the onus to prove the existence of discrimination, in terms of Section 11(2) of the EEA, as it stands after amendment."

[17] In *Sasol (supra)* this Court expressed the opinion that the position in terms of the amended section 11 must be that set out by the learned authors in *Labour Relations Law: A Comprehensive Guide*

[18] [12] :

> "Section 11(1), like its predecessor, states that the respondent employer must disprove the unfair discrimination 'alleged' by an employee in order to avoid liability. The term 'alleged' has not been consistently interpreted by the courts. It must be presumed to mean something less than making out a prima facie case, as would be required in the ordinary course when the burden of proof is not reversed. However, the weight of authority indicates that it means more than an unsupported contention or mere accusation. At the very least, as in the case of automatically unfair dismissal, it is suggested that the employee must produce 'sufficient evidence to cast doubt on the reason' put forward by the employer for its action; that is to say, If the employee succeeds in discharging this evidential burden, '[i]t then behoves the employer to prove the contrary'."

[19] What, then, must the Court consider to decide whether on all possible readings of the facts no cause of action may be made out? As stated before, it is for the excipient (the Municipality) to satisfy the Court that the conclusion of law for which the union contends cannot be supported on every interpretation that can be put upon the facts.

[12] Du Toit et al, Labour Relations Law: A Comprehensive Guide(6 ed 2015) at 696 (footnotes omitted). (Published after the amendments to s 11 of the EEA).

[20] The union says that the ground of discrimination on which it relies is that of "geographical location". Even though the union claims it is factually incorrect, that is the rationale for differentiation on which the Municipality relies. And recently, whilst overturning the judgment of the court *a quo* on appeal, the LAC in *Duma*[13] nevertheless accepted that the ground of differentiation on the basis of "geographical location" may form the basis of an unfair discrimination claim. Davis AJA noted :

> "Two decades ago in *Louw v Golden Arrow Bus Services (Pty) Ltd*, Landman J (as he then was) wrote:
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> '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, 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 than Mr Beneke's salary because of his race.'
>
> Hence, a claimant in an equal pay claim must establish that the work done by a person who can be reliably classified as a comparator is the same or similar work. In a claim for work for equal value, it behoves a claimant to establish that the tasks performed by the comparator and the claimant are of equal value, having regard to the required degree of skill, physical and mental effort, responsibility and other factors. If one examines the text of the OSD, it is clear that care was taken to provide for the scenario that, where a particular legal officer for example, performs certain tasks which require a particular amount of time, another officer occupying the same position who has a more demanding set of work pressures may be shown justifiably to be paid more.

[13] *Minister of Correctional Services v Duma* [2017] ZALAC 78, overturning (on the facts) the judgment in *Duma v Minister of Correctional Services* (2016) 37 *ILJ* 1135 (LC); [2016] 6 BLLR 601 (LC).

> …
>
> The question with which the court grappled in *Mangena , supra*, comes back to haunt this case, namely was there an adequate factual foundation to sustain the claim that respondent was on a salary notch which was unjustified because of her geographical location. It is this factual foundation which permits a court to examine whether the complainant suffered an assault to her dignity and whether her rights or interests have been unfairly affected.
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> The shadow of these principles looms large in the present dispute precisely because it was fought out on the basis of a stated case. It may well be, given the notorious inability of our legal system to expedite trials so that they are reasonably affordable for litigants such as the respondent, that respondent had little option but to litigate on the basis of a stated case. But the difficulty with a stated case in general and the facts of this case in particular is that in an EEA based case, a burden of proof rests upon a claimant such as respondent. She was required, at the very least, to show that the nature and volume of work which she performed in her position was similar to that of legal officers holding the same position in the four provinces who occupied a higher grade level and thus that the ground of differentiation (which was not a specified ground) was indeed geographical location."

[21] In the case before me, the union's evidence may still show at trial that the nature and volume of work that the Kathu electricians performed was similar to that of the Olifantsfontein electricians. The statement of claim does disclose a cause of action. It is not excipiable.

<u>Order</u>

The exception is dismissed. Costs of this application are to be costs in the cause of the trial.

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

EXCIPIANT (MUNICIPALITY):	Anton Roux Instructed by Peyper attorneys.
RESPONDENT (IMATU):	T du Preez Instructed by Kramer Weihmann & Joubert.