

**IN THE EQUALITY COURT HELD AT THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No EC15/2009

In the matter between

CHRISTOPHER ABRAHAMS

Complainant

AND

**VARICOR NINETEEN (PTY) LTD
t/a B P ATLANTIC**

Respondent

JUDGMENT HANDED DOWN THIS TUESDAY, 7 JUNE 2011

ZONDI J:

[1] On 22 June 2009 the complainant lodged a complaint with this Court against the respondent in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4, 2000 ('the Act').

[2] In the complaint referral the complainant alleges that BP Atlantic Share Trust ('the Trust') discriminated against him by forcing him to resell to it the shares he held in the Trust prior to his dismissal for an alleged misconduct by the respondent. To substantiate his claim, the complainant alleges that a certain white female employee, namely one Jennifer Mellish, who was a member of the Trust, was allowed to keep her shares in spite of the fact that she had voluntarily resigned from the respondent. The complainant further avers that in doing so the Trust discriminated against him on the basis of race. It is common cause that the complainant is a member of a previously disadvantaged group.

[3] The complainant approached this court seeking an order ordering a complete review of the Share Trust Scheme and the restoration of his membership in the Trust.

[4] The respondent defended the complaint referral and filed an answering affidavit deposed to by its director, Mr Ewald Esbach. In his affidavit Mr Esbach alleges that the Trust was created by the respondent to serve as a vehicle through which the respondent's employees can claim a stake in the respondent by buying shares through the Share Trust Scheme. Each employee of the respondent is entitled to purchase a certain number of shares in the respondent which on being issued are held by the Trust. The Trust administers the shares and loan account on behalf of the employees. The respondent admits that the complainant was one of its employees who held shares in the company before his dismissal on 10 June 2008 for misconduct.

[5] It is common cause that the complainant challenged the fairness of his dismissal in terms of the Labour Relations Act and that at the time of the referral of his complaint to this Court the matter relating to his unfair dismissal was still pending at the Labour Court ("the Labour Court matter").

[6] In terms of the Master's Certificate dated 31 December 2008, the trustees of the Trust are indicated as Melanie Angelique Aucamp, Willem Petrus Abrahams, Hanelie Vermeulen, Ewald Christoffel Esbach and Dawn Reyneke.

[7] On the dismissal of the complainant from the respondent's employ, the trustees acting in terms of clause 10 of the deed of trust, decided to re-purchase the shares held

by the complainant in the Trust and paid him a sum of R50 408,61 after deducting the loan which he had received from the respondent to finance the acquisition of shares.

[8] At the first directions hearing held in terms of the Act on 9 December 2009, the complainant pointed out that the Trust was not consistent in its application and interpretation of clause 10.1 of the deed of trust. He contended that the Trust's application of the provision of 10.1 of the deed of trust is racially based.

[9] At the directions hearing the complainant appeared in person and the respondent was represented by Mr de Villiers. The complainant and Mr de Villiers agreed that the hearing of the present matter be postponed pending the finalisation of the Labour Court matter as the determination of that matter in the complainant's favour would be dispositive of the present matter. It was pointed out by Mr de Villiers that if the complainant succeeded in his Labour Court matter he would get back his benefits flowing from the shares which were bought back by the Trust from him.

[10] I am now advised by the parties that the Labour Court matter was finalised on 24 November 2010 and in terms of the court order the respondent was inter alia ordered to re-instate the complainant. The shares which the complainant held immediately before his dismissal and which were repurchased by the Trust after his dismissal from the respondent's employ were re-allocated to him following the Labour Court judgment.

[11] At the hearing hereof Mr Hawthorn appeared on behalf of the complainant. He pointed out that on 24 February 2011 the complainant's attorneys of record wrote to the

respondent's attorneys of record suggesting that in the light of the Labour Court judgment, the present proceedings be withdrawn with each party paying its own costs. The respondent rejected the suggestion and demanded costs on the grounds that the complainant had made serious and unfounded allegations of racial discrimination against the respondent as well as its director Mr Esbach; and secondly that the complainant was advised at the directions hearing to join the Trust as a further respondent, but despite that advice, he failed to do so. Mr de Villiers pointed out that there was no basis at all for the complainant to drag the respondent to this court.

[12] In response thereto, Mr Hawthorn submitted that there is no reason to order the complainant, who acted in person, to pay the respondent's costs. He pointed out that the complainant being a lay person did not know the procedure and to order a complainant in an unfair discrimination claim to pay the respondent's costs would discourage other complainants of unfair discrimination from asserting their rights in terms of the Constitution.

[13] It is therefore clear that at this stage the only issue for the court to decide is whether the complainant should be ordered to pay the respondent's costs.

[14] In dealing with this issue I shall adopt the approach as set out in *Gamlan Investments (Pty) Ltd and Another v Trillion Cape (Pty) Ltd and Another*¹ which is to the effect where a disputed application is settled on the basis which disposes of the merits, but not costs, the court should not have to hear evidence to decide the disputed facts in

¹ 1996 (3) SA 692 (C) at 700G.

order to decide who is liable for costs, but it should with the material at its disposal, make a proper allocation as to costs.

[15] It is correct that the trustees who are entrusted with the administration of the Trust should have been cited as further respondents in this matter as it is the trustees who took a decision which the complainant alleges had the effect of unfairly discriminating against it. It is also correct that at the first and second directions hearings the complainant was informed of the need to join the trustees as further respondents in these proceedings but did not do so. The question is whether, despite the conclusion of the Labour Court matter in the complainant's favour and the complainant's intention to withdraw the present proceedings, the complainant's failure to join the trustees as further respondents should be visited with costs.

[16] It is correct that accusation of racial discrimination is a serious one and should not be lightly made without reasonable cause and that the Court will not hesitate to order the complainant to pay the respondent's costs should it find that the complaint referral was frivolous. In the present case, the complainant was not reckless in citing the BP Atlantic as a respondent. When he completed his complaint referral form he bona fide believed that BP Atlantic was one and the same legal entity as Atlantic Share Trust, having regard to the fact that the respondent's director Mr Esbach is one of the trustees of Atlantic Share Trust and he is the person to whom he initially addressed his complaint regarding the inadequacy of the money that was paid to him for his shares, as well as about unfair discrimination. It is the respondent, not the Trust which replied to the complainant's complaint.

[17] In the letter dated 14 July 2008 Mr Esbach of the respondent wrote to the complainant informing him how the amount he queried had been arrived at. The letter was written on the letterhead of the respondent. The respondent did not raise non-joinder or mis-joinder as an issue in the letter. It simply tried to address the complainant's concerns.

[18] In these circumstances the complainant, being a layperson did not act unreasonably in believing that BP Atlantic was one and the same legal entity as the Atlantic Share Trust. In the result I am not inclined to order the complainant to pay the respondent's costs.

[19] Justice and fairness would not require that the complainant be burdened with an order of costs. To order costs in these circumstances may have a chilling effect on litigants who might wish to raise constitutional issues. (*Barkhuizen v Napier*.²)

[20] In the result I order that the parties should bear their own costs.


D H ZONDI

² 2007 (5) SA 323 (CC).