

SOUTH AFRICA / JUDGMENT

Arnolds v South African National Biodiversity Institute (C213/2019) [2023] ZALCCT 67; [2024] 2 BLLR 130 (LC) (24 November 2023) [2023] ZALCCT 67

COURT

Labour Court Cape Town

BEFORE

Lallie

CASE / FILE NUMBER

C213/2019

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Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, CAPE TOWN****Not****Reportable****CASE****NO: C213/2019****In the matter between:**

JUDITH
LIZE ARNOLDS
Applicant
And
SOUTH
AFRICAN NATIONAL BIODIVERSITY INSTITUTE
Respondent

Heard:

2 & 3 May 2023

Reserved:

12 June 2023

Delivered: This

judgment was handed down electronically by circulation to the
Applicant's and Respondent's Legal Representatives
by

email, publication on the Labour Court website and release to SAFLII.

The date and time for handing - down is deemed to be 14h00
on 24

November 2023.

JUDGMENT

LALLIE, J

[1] Direct and indirect discrimination is proscribed by section 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which guarantees the right to equality. At the workplace the same conduct is prohibited by section 6 of the Employment Equity Act[1] (the EEA). Regardless of the existence of these two pieces of legislation, a number of employees experience different forms of

discrimination at work. The applicant, Doctor Arnolds, referred a dispute to this court seeking relief on the basis that she is being discriminated against on grounds of gender and race by the respondent. Her claim is opposed by the respondent on the basis that the conduct that forms the applicant's claim does not constituted discrimination.

[2] In the heads of argument filed on behalf of the respondent under the sub-heading 'Exception/Section 60 of the Employment Equity Act' it is submitted that the applicant's claim is excipiable because of her failure to comply the provisions of section 60 of the EEA. The exception is based on the applicant's failure to plead that she immediately reported the discrimination by co-employees and managers to the respondent, that the respondent was aware of the discrimination and failed to consult all the relevant parties or take the necessary steps to eliminate the discriminatory conduct. It was argued that the non-compliance justified the dismissal of the applicant's claim.

[3] The respondent's approach is misguided. Exceptions are governed by Rule 11 of the Labour Court Rules read with Rules 23 of the Uniform Rules. An exception is filed within the period allowed for the filing of a subsequent pleading. It is therefore raised before the commencement of the trial. An excipient is obliged to give its opponent an opportunity to respondent to the exception. It is therefore impermissible for the respondent to raise an exception in its heads of argument because it is extremely late. The timing of the exception has denied the applicant the opportunity to deal with it.

The argument can, in the premises, not stand.

[4] At the commencement of the trial Mr Kolowan for the applicant submitted that the grounds of discrimination the applicant would be relying on were race, marital status, gender and pregnancy. Mr Sing for the respondent objected on the grounds that the applicant was augmenting the grounds in her pleaded case. I afforded the applicant an opportunity to take a decision on how her case would be pursued. After an adjournment Mr Kilowan intimated that the applicant would pursue her case as pleaded. In her pleadings the applicant relied on race and gender. Her case will therefore be determined on how it has

been pleaded. In her statement of claim the applicant has referred to Mr Donaldson (Donaldson) the Chief Director of Research and Ms Zuziwe Nyareli (Nyareli) the applicant's immediate Supervisor as the "MAIN CAST OF CHARACTERS IN THIS STATEMENT OF CASE".

- [5] The applicant commenced her evidence by giving a detailed account of how she was ill-treated and her progress deliberately retarded by Dr Musil who she reported to earlier in her career. It was argued on behalf of the respondent that the applicant's evidence in respect of Dr Musil should be disregarded because it is not foreshadowed in her pleadings. The respondent relied on the following dictum[2]:

"[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."

- [6] The respondent's argument is correct. The applicant disclosed the names of the persons whose conduct her case is based on in the statement of claim. In addition, Rule 6(ii) requires an applicant to include in the statement of claim 'a clear and concise statement of the material facts, in chronological order, on which the party relies, which statement must be sufficiently particular to enable any opposing party to reply to the document'. The parameters of the applicant's case are drawn in her statement of claim which is silent on the role of Dr Musil and the period in which he played the alleged role. The absence of the particularity denied the respondent the opportunity to reply to it. It is therefore

impermissible for the applicant to rely on evidence which does not form part of her pleaded case.

- [7] In the statement of claim the applicant seeks, mainly, the following relief;

"54. The Applicant prays that the above Honourable Court shall:

- a. Declare that Respondent has unfairly discriminated against Applicant.
 - b. Directing Respondent to immediately cease all discriminatory practices whether past, present and future; and
 - c. Directing Respondent to implement its employment Equity Plan in a non-discriminatory manner as far as Applicant is concerned; and
 - d. Directing Respondent to take Applicant's second PhD into account for the purpose of her Career Ladder Portfolio assessment.
 - e. Respondent to pay Applicant the difference between the salary at which she was paid in Band 9 and the minimum of the salary in Band 12 with effect from 1 November 2018."
- [8] The applicant's claim of discrimination is based on 2 listed grounds, namely, race and gender. She therefore has to prove that she has been treated differently from other employees and a connection between the differentiation and the 2 grounds of

discrimination that forms the basis of her case[3]. The applicant must show that her race as a coloured person and her gender as a female are the reason for being treated differently from other employees. The applicant needs to establish prima facie proof that the differentiation is based on race and gender constitutes discrimination. After the applicant has established the

differentiation on grounds of race and gender, the respondent will be required, in terms of section 11 of the EEA, to prove, on a balance of probabilities that the discrimination either did not take place or that it is not unfair or it is justifiable. As the applicant's claim is also based on the respondent's policy it must also be established whether the policy differentiated between employees, whether the differentiation constitutes discrimination and if the discrimination was fair or justifiable[4].

- [9] The respondent is a statutory body whose main function is the management of biodiversity. It manages national botanical gardens and conducts a number of its own research projects. It also shares projects with domestic and international partners like universities and other organisations doing work in the area of biodiversity. The respondent employed the applicant as an Auxiliary Support Officer Grade 11 in 1996. She had a matric certificate and was studying towards her BSc through the University of South Africa (UNISA). On 1 October 2020 the applicant was promoted to the position of First Auxiliary Support Officer and her income was adjusted accordingly. She was further promoted in 2006 to the position of Senior Agricultural Scientist and remunerated at salary level 8. The applicant moved a rung higher and became a Principal Agricultural Scientist in August 2012. She was remunerated at salary level 9. The applicant obtained her MSc in 2008. In the same year she registered for a PhD at the Cape Peninsula University of Technology (CPUT). In 2010 the respondent afforded the applicant an opportunity to do PhD and she registered an additional one at North West University. In 2017 the applicant obtained both PhDs.
- [10] The applicant's case was that she saw people with lower qualifications and shorter service being appointed in more senior positions because they were classified as black while she was classified as coloured in the respondent's system. It is common cause that at the respondent an employee elects to be either a scientist or manager. The respondent's evidence that it was easier to progress for employees who took the science management route was not disputed. The progress managers make results in them earning more than scientists. The career ladder for scientists system (the career ladder) is a system used by the respondent to support the career development of its scientists. The system does not apply to managers.
- [11] The applicant did not prove that the decision that she should report to Mrs Zuziwe Nyareli (Nyareli) a black person was based on her race and gender. The reason is that the applicant and Nyareli followed different career routes. The applicant is a scientist and Nyareli, a manager. The applicant was one of the scientists who reported to Nyareli whose role was project and staff management. The applicant therefore reported to Nyareli because she is scientist and Nyareli was a project and staff manager. The applicant's higher qualifications

and longer service as well as her race and Nyareli's had nothing to do with the decision that the applicant should report to Nyareli. The differentiation in the upward mobility between the applicant and Nyareli is based on the different career path that each chose and not on their race or gender.

- [12] The applicant sought to rely on Donaldson's decision that the Jonaskop research project be discontinued. The Jonaskop project was started by professor Midgley (Midgley) who worked for the respondent and the applicant participated in it. It would have made a contribution to the applicant's assessment points in terms of the career ladder had she completed it. The applicant submitted that after Midgley left the respondent through Donaldson stopped the project thus blocking her career development. Donaldson denied and submitted that when Midgley, the leader of the project left, it became unclear how it would benefit the respondent. When the applicant asked to continue with the project Donaldson asked her to give him a proposal explaining why the project should not be stopped but the applicant never presented the proposal. It was submitted on behalf of the applicant that Donaldson asked whether the respondent was getting value from the project when the applicant asked for a vehicle and the fixing of the project's equipment. It was, however, not denied that the applicant did not submit a proposal proving that the respondent was getting value for its continuation. In the absence of the proof, the respondent's decision to discontinue funding a project it was receiving no value from appears justified. The discontinuation of the project based on the applicant's omission to present the submission did not constitute racial discrimination against her.
- [13] The applicant led no evidence in support of the relief that the respondent be directed to implement its Employment Equity Plan in a non-discriminatory manner when it applies to her. Without the evidence there is no basis for granting the relief.
- [14] The applicant also submitted that the respondent refused to pay for the delivery of equipment she needed which eventually got destroyed at the airport after 4 years of not being claimed. Nyareli conceded that she refused to authorize the purchase of equipment by the applicant. Her refusal was based on her insistence that the applicant should follow the procurement policy that was introduced by Donaldson after assuming his managerial position at the respondent. The applicant did not challenge Nyareli's evidence in that regard. The evidence is in conflict with the applicant's claim of discrimination. It supports the conclusion that the equipment the applicant needed for her project was not brought because of her refusal to follow the procurement procedure.
- [15] The applicant gave detailed evidence on the hardship she had to endure over a number of years at the respondent in her endeavours to become a scientist. She also painted a grim picture of how she was denied on opportunities to qualify for senior positions including opportunities she initiated on her own. The applicant, however, did not table objective facts which prove, *prima facie*, that she was discriminated against based on her race and gender. Although in her statement of claim she submitted that the respondent

discrimination against her through Nyereli under cross-examination she conceded that the problems she had with Nyareli were work related and not about race.

[16] The applicant's main complaint about the career ladder is in its interpretation. She submitted that the respondent should recognise both her PhDs in assessing her development because the career ladder does not specifically provide that only one PhD per employee should be considered. The respondent's version was that a purposive interpretation of the career ladder does not support the recognition of a second and further PhD. Dr Magee on behalf of the respondent testified that qualifications form part of the inputs used in the application of the career ladder system. A PhD like another qualification enables an employee to produce certain outputs. It certifies that an employee has reached a particular level of thinking. This means that after obtaining her first PhD the applicant reached a certain level of thinking which the respondent recognised. The second one did not elevate her level of thinking and she could therefore earn no more points on qualifications on the career ladder.

Although the applicant testified that she is the first employee at the respondent to obtain 2 PhDs, she did not testify that the

respondent's refusal to grant her points for her second PhD was based on her race or gender. The evidence tendered on behalf of the respondent that the applicant has not fulfilled other requirements including publications and leadership that will entitle her to be placed on a higher rung of the career ladder was not refuted. In explaining the obstacles preventing her from fulfilling the requirements the applicant omitted to link them to her gender and race.

[17] One of incidents the applicant relied on in proving her case relates to Donaldson refusing her permission to use one of the respondent's vehicles to go to Kirstenbosh gardens at 03h00 to perform her duties. The applicant testified that Donaldson was her last resort as the Chief Director because her supervisor had already declined her request on the basis that the respondent's policy did not allow employees to use its vehicles to travel between their homes and work. She added that Donaldson suggested that she could spend the night at the residence of a male technician at Kirstenbosh gardens or take a train. The applicant told him that his suggestions would expose her to the risk of rape she would not open his wife to. She added that Donaldson refused her the use of the vehicle because she is coloured and he did not want her at the respondent. She explained that she could be granted permission the same way it was granted for 4 vehicles to be used to attend a staff member's funeral in the Eastern Cape.

[18] Donaldson testified that he could not recall making the suggestions the applicant referred to. He stated that he asked the applicant to give him written motivation to be granted the permission which the applicant never brought. The applicant expressed the view that the respondent's policy did not require her to write a motivation when seeking permission for using its vehicles. As discretion was exercise in granting and refusing authority to use the respondent's vehicle, as a general principle the courts act cautiously and avoid interfering

with the exercise of discretion easily. It is the unreasonable exercise of the discretion that justified interference by this court. As the applicant did not refute the evidence that she did not make the submission for the discretion to be exercised in her favour. She did not prove that the manner in which the discretion was exercised discriminated against her.

[19] It is trite that an applicant relying on racial discrimination must do more than allege that he or she was discriminated against because he or she is a member of a particular race. I have taken into account the authorities the parties relied on. The most relevant for present purposes is Mbana (*supra*). The applicant did not demonstrate objectively the existence of differentiation based on race and gender. She conceded a number of times that she was not discriminated against based on race. She further conceded that there were factors other than race and gender that hamstrung her progress. It was her evidence that she is a Senior Scientist 1 since 2018. She expressed the view that she will move nowhere because her climate change unit has no money, no equipment and no leadership. She also attributed her inability to do her work on load shedding.

[20] The applicant did not establish her entitlement to the relief she sought. Her claim cannot succeed.

[21] Although the respondent sought a costs order against the applicant, it gave no reasons based on fairness justifying the order. Granting the costs order would be inappropriate.

[22] In the premises, the following order is made:

1. The applicant's claim is dismissed.
2. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate C.A Kilowan

Instructed by

NP Williams Attorneys

For the respondents: Advocate Z. Sing

Instructed by

Ismail & Daya Attorneys

[1] Act 55 of 1995.

[2] Minister of Safety and Security v Slabbert (668/2009) [2009] ZASCA 163;

[2010] 2 All SA 474 (SCA) (30 November 2009).

- [3] Mangena & Others v Fil a South Africa (Pty) Ltd and Others [2009] 12 BLLR 1224 (LC).
- [4] Mbana v Shepston and Wylie (2015) 36 ILJ 1805 (CC).
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Prepared on 12 October 2026 · Esheria