

SOUTH AFRICA / JUDGMENT

Hendricks v Transnet Second Defined Benefit Fund and Others, In re: Adendorf and Others v Transnet Second Defined Benefit Fund and Others (EC04/14 , EC08/14) [2015] ZAWCHC 195 (9 December 2015)

[2015] ZAWCHC 195

COURT

Western Cape High Court, Cape Town

BEFORE

Yekiso

CASE / FILE NUMBER

EC04/14 , EC08/14

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IN THE EQUALITY COURT
OF SOUTH AFRICA
(WESTERN CAPE DIVISION,
CAPE TOWN)

In the matter between:

CASE NO: EC04/14
DATE: 9 DECEMBER 2015
REPORTABLE
JACOBUS
HENDRICKS.....Complainant
And
SEM ADENDORF & 95
OTHERS.....Complainants
CASE NO: EC08/14
v
TRANSNET SECOND DEFINED BENEFIT
FUND.....1st
Respondent
TRANSPORT PENSION
FUND.....2nd
Respondent
TRANSNET
LIMITED.....3rd
Respondent
MINISTER OF PUBLIC
ENTERPRISES.....4th
Respondent
MINISTER OF

FINANCE.....	5th
Respondent	
PRESIDENT OF THE REPUBLIC OF	
SA.....	6th
Respondent	
METROPOLITAN RETIREMENT	
ADMINISTRATORS (PTY) LIMITED.....	7th
Respondent	
TRANSNET	
SUB-FUND.....	8th
Respondent	
SOUTH AFRICAN AIRWAYS	
SUB-FUND.....	9th
Respondent	
PASSENGER RAIL AGENCY OF SOUTH	
AFRICA SUB-FUND.....	10th
Respondent	
Coram: Yekiso J	
Dates of Hearing: 18 & 19 June	
2015, 17 September 2015	
Date of Judgment: 9 December 2015	

Summary:

Provisions of the Promotion of Equality & Prevention of Unfair Discrimination Act, 4 of 2000: It never was intended that the provisions thereof as also section 8 of the Interim Constitution and, later, section 9 of the Constitution of the Republic of South Africa be retrospective or retroactive. Causes of action that arose prior to the coming into operation of the Interim Constitution and the Constitution of the Republic of South Africa, 1996 fall outside the jurisdiction of the Equality Court established in terms of section 16 of the Equality Act.

JUDGMENT**YEKISO, J**

- [1] On 9 June 2014, Jacobus Hendricks instituted proceedings out of this court under case number EC04/2014 against the first respondent and nine other respondents. Shortly thereafter S E M Adendorf and 95 other complainants instituted separate proceedings in this court under case number EC08/2014, similarly against the first respondent and the same nine other respondents cited in the matter under case number EC04/2015.
- [2] The relief sought in both sets of proceedings is set out in the particulars of complaint of each one of the complainants. The relief sought relates to damages allegedly suffered arising from an alleged breach, by the third respondent, of each complainant's right not to be unfairly

discriminated against; that each complainant was unfairly and unlawfully deprived of full pension benefits or a severance package to which each one of them was entitled but for the discriminatory practice complained of; that each one of the complainants is entitled to pension benefits or a severance package equal to that offered to comparable “white”

employees of the third respondent; that each one of the complainants has been unjustifiably impoverished, subjected to undue hardship,

socially diminished, has suffered an impairment of their dignity, self-esteem and mental tranquillity in breach of their right to dignity in terms of both the common law and section 10 of the Constitution of the Republic of South Africa, 1996; each complaint

culminates in a claim for a globular amount of R500 000.00 which amount each one of the complainants alleges the third respondent is liable to compensate each one of them.

[3] At the directions meeting, held on 26 March 2015, and by agreement between the parties, Baartman J made an order that the complaints launched under case numbers EC04/2014 and EC08/2014 be consolidated; that the following points of law be determined separately and prior to any determination of the merits and quantum of the complaints, these being:

[3.1.] the jurisdiction of this court to adjudicate the complaints, including, if necessary, the question as to whether the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 applies retrospectively;

[3.2.] whether the complaints have since become prescribed;

[3.3.] the locus standi of the complainants; and

[3.4.] the question as to whether the complainants have disclosed a cause of action arising from the issues complained about.

[4] The matter was argued before me on 17 September 2015. After hearing argument I reserved judgment. In the paragraphs which follow, which are preceded by a brief factual background to the issues involved, is my judgment in the issues raised.

FACTUAL BACKGROUND

[5] The common denominator between all the complainants in both sets of the proceedings is that up until 1993 the complainants were previously employed by Transnet, the third respondent in these proceedings. At the time they were so employed they were members of Transnet Second Defined Benefit Fund, same being a pension fund established in terms of section 14B of the Transnet Pension Fund Act, 1990. The Transnet Second Defined Benefit Fund is a successor-in-title to the benefits fund established in terms of section 2 of the Railways & Harbours Pensions Act, 1971; and section 2 of the Railways and Harbours Pension Fund Non Whites Act,

1974. The latter pension fund was, in turn, succeeded by the Transport Pension Fund established in terms of section 2 of the Transnet Pension Fund Act, 1990.
- [6] The complainants' complaints are founded upon substantially the same issues, in that each one of them, during their term of employment with the third respondent, had been unfairly discriminated against on the basis of race or the colour of their skin. The basis of their complaint is that during or about 1993, upon taking early retirement from their employment with the third respondent, they became entitled to pension benefits or voluntary severance packages calculated on the basis of a formula which at the time used race as a determining factor.
- [7] The further basis of the complainants' complaint is that the pension benefits and voluntary severance packages paid out to the employees of the third respondent who were classified as "white" in terms of the apartheid era legislation, and whose employment category and length of service were comparable to those of the complainants amounted to, on average, 90% more than that offered to each complainant.
- [8] In the ultimate analysis the complainants seek damages from the third to sixth respondents, jointly and severally the one paying the other to be absolved, for payment of the difference between the amount of the pension benefits or voluntary severance packages that they were actually paid and the amount which they contend they should have received but for the unfair discrimination.

THE COMPLAINANTS' CAUSE OF ACTION

- [9] In both these sets of matters, which were consolidated by the order of Baartman J on 26 March 2015, all the complainants, except in the instance of Dirk Ambross and Abram Apies, whose claims appear to have arisen after 16 June 2003, the complainants allege that their claims arose during or about 1993. All those complainants, with the exception of Ambross and Apies, left the third respondent's employ during 1993. The complainants allege in their particulars of complaint that on leaving the third respondent's employ they each received a pension benefit or a voluntary severance package that was discriminatory based on race because it differed from what their white counterparts received. This allegation runs through all these matters except the two I have already referred to.
- [10] The basis of their claims is paraphrased in paragraphs 11, 14 and 15 of their particulars of complaint. This allegation, which is replicated in every one of these cases, except for the dates being different, reads as follows:
- "Up until his early retirement on or about 1993, the complainant had been in the employ of Transnet for a period of 32 years during which time the complainant was a member of the Transnet Pension Fund, and before that its predecessor-in-title."*
- [11] A further allegation which appears to constitute a further bases of the cause of action, contained in paragraph 14 of the particulars of complaint, reads as follows:

“Pension benefits and/or severance packages paid out to employees of Transnet who were classified white in terms of apartheid era legislation and whose employment category and length of service were substantially comparable to complainants, amounted to an average of 90% more than that offered to the complainants.”

- [12] The thread of the complaint runs through to paragraph 15 of the particulars of complaint which reads as follows:

“The aforesaid distinction drawn between the complainant and white employees of Transnet was irrational, unreasonable, unjustified and racist and can only be accounted for on the basis of it being unfair discrimination based on race or colour as envisaged by section 9(3) and 9(4) of the Constitution and thus unlawful.”

- [13] There is no evidence on the papers before me to suggest that the basis of the complainants’ complaint relate to ongoing pension payments. To me, it seems, all the complaints relate to a once-off payment which occurred in or about 1993 and which was discriminatory on the basis as pleaded by each complainant. A reference to section 9(3) and 9(4) in paragraph 15 of the particulars of complaint is a reference to the equality clause located in section 9 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) and the national legislation contemplated in subsection (4) thereof.

OPPOSITION TO THE RELIEF SOUGHT

- [14] The respondents oppose the relief sought by the complainants. This they do on the basis that the complainants’ causes of action, if any, arose during or about

1993. A reference to section 9(4) of the Constitution is a clear indication that all the complainants have brought their claims in terms of the Promotion of Equality & Prevention of Unfair Discrimination Act, 4 of 2000 (“the Equality Act”). The Equality Act is the national legislation contemplated in section 9(4) of the Constitution. The respondents contend that the Equality Act came into operation on 16 June 2003 and that there is no provision in that piece of legislation which makes its application retrospective to a date prior to 16 June 2003. In the absence of a provision in the Equality Act that provides for the retrospective application of the Equality Act, this court does not have the requisite jurisdiction

to adjudicate upon claims which arose prior to the enactment and the coming into operation of the Equality Act.

- [15] The relief sought is further opposed on the basis that the complainants have explicitly based their claims on the provisions of section 9 of the Constitution. That being so, the complainants have failed to establish any basis in law upon which their claims may be adjudicated by any court of competent jurisdiction in that they have failed to bring their claims either within the realms of the Constitution of the Republic of South Africa, 1993 (“the Interim Constitution”) or the Constitution of the Republic of South Africa, 1996. This is because, so it is contended on behalf of the respondents, the claims, in all instances, are alleged to have arisen in 1993. The Interim Constitution came into operation on 27 April

1994. The equality provisions in both the interim and the final Constitution, save those provisions that relate to land dispossession, are not retrospective in their application, so the contention goes.

- [16] With regards to retrospective application of any law it is trite that under the common law there is a presumption against retrospectivity. Based on this presumption it is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication. This principle was confirmed by the Constitutional Court in *S & Another v Acting Regional Magistrate, Boksburg, Venter & Another* 2012 (1) BCLR 5 (CC) at [16] where the Constitutional Court reaffirmed the presumption against retrospectivity unless a contrary intention is manifest, either expressly or by clear implication.
- [17] The basis of the complainants' complaint seems to be based on the alleged violation of their right to equality, in that the third respondent, in the determination of their pension benefit or severance package, unfairly discriminated against them on the basis of their race or colour of their skin. That conduct, so the complainants aver in their particulars of complaint, constitutes a violation of their right to equality as was provided for, initially, in section 8 of the Interim Constitution and, currently, in section 9 of the Constitution.
- [18] Section 8 of the Interim Constitution, which has since been repealed, provided as follows in sub-sections (1) and (2) under the heading "Equality":
- "(1) Every person shall have the right to equality before the law and to equal protection of the law.*
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."
- [19] The right not to be discriminated against was thus, initially, contained in section 8(2) of the Interim Constitution. Sub-section
- (1) thereof commenced with the words "Every person shall have the right". Section 8(2) commenced with the words "No person shall be unfairly discriminated against ...". Both these sub-sections did not speak of the past. They were clearly forward-looking provisions, in that they made provision for future conduct as opposed to addressing past conduct.
- [20] The only provision in the equality clause in the Interim Constitution which addressed past conduct was sub-section (3)(b). It provided as follows:
- "3(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123."*

The reason for inclusion of this clause in the Interim Constitution was obviously to address the land restitution projects in this country and to re-order ownership of land. The measure was clearly intended to render land distribution of the past, which otherwise was lawful, albeit immoral, to more acceptable land distribution patterns.

[21] The provisions of the equality clause in the final Constitution are very much similar to those of the Interim Constitution except that the equality clause in the final Constitution does not address the land redistribution question. This is understandable as the Land Restitution Act had already been enacted when the final Constitution was adopted by the Constitutional Assembly. But what is significant in the equality clause is section 9(4) which provides that national legislation must be enacted to prevent or prohibit unfair discrimination. This then brings us to the Equality Act.

THE EQUALITY ACT

[22] In response to the directive contained in section 9(4) of the Constitution, the National Assembly passed a law in the form of Promotion of Equality & Prevention of Unfair Discrimination Act, 4 of 2000 (“the Equality Act”). That piece of legislation was assented to on 2 February 2000 and came into operation on 16 June 2003. The head note preceding the preamble thereto reads as follows:

“To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996 so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.”

[23] The Equality Courts, and presiding officers presiding in the Equality courts, are established in terms of section 16 of the Equality Act. Section 16 of the Equality Act, under the heading “Equality courts and presiding officers”, provides as follows in sub-section (1)(a) and (b) thereof:

“(1) For the purposes of this Act, but subject to section 31-

- (a) every High Court is an equality court for the area of its jurisdiction;
- (b) any judge may, subject to sub-section (2), be designated in writing by the Judge-President as a presiding officer of the equality court of the area in respect of which he or she is a judge.”

[24] Thus, this court sits as an Equality court established in terms of section 16 of the Equality Act. It does not have inherent jurisdiction such as a High Court or any Superior Court would have. As the head note preceding the preamble, cited in paragraph

[22] of this judgment, clearly indicates, the legislation in terms of which the equality courts are established is to give effect to section 9, read with item 23(1) to the Constitution. Thus, its jurisdiction is to be found in the four corners of the Equality Act. It is thus, so to speak, a creature of that statute. Its jurisdiction is limited to causes of action which arose after the Equality Act came into operation unless it is clear, either expressly or by clear implication, that its jurisdiction extends to causes of action which arose prior to its establishment.

[25] There are several indicators in the Equality Act which tend to suggest that its application was not intended to be retrospective. Such indicators are evident in the definition section, in particular, the definition of the concept “discrimination”. Discrimination is defined as follows in the definition section:

“discrimination’ means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from, any person on or more of the prohibited grounds.”

[26] The underlined words are couched in the present tense which, in itself, is a pointer that the legislation is a forward-looking instrument. Thus, discrimination is couched in the present tense for a very good reason, the reason being that it is a forward-looking provision. There are several other indicators in the Equality Act which clearly indicate that its provisions were intended to be prospective, as opposed to being retrospective, as for an example, phrases such as “neither the state nor any person may unfairly discriminate against any person” as set out in section 6; “no person may unfairly discriminate against any person” as set out in section 7; “no person may unfairly discriminate against any person” as set out in section

8. All these indicators, which are couched in the present tense and are clearly forward-looking, are clear indications that the

Equality Act was not intended to be retroactive. The Equality Act, therefore, cannot be the basis for causes of action which arose

before it came into operation.

[27] In *Maharaj v National Horseracing Authority of Southern Africa* 2008 (4) SA 59 (N) at [58] – [59] the Kwazulu Natal division of the high court, sitting as a court of appeal in a decision from the Equality Court, held as follows:

“The legislature could never have intended that the equality courts take up causes which arose prior to their establishment. There is no indication in the

Act itself of this. Indeed, the indications are that it is to operate prospectively.

As indicated above, the appellant calls upon us to find that the legal effect of the conduct he relies on brands the respondent as an organisation which is guilty of institutional race discrimination. In my opinion, an equality court is not competent to adjudicate on or grant relief in respect of conduct that occurred prior to the Act coming into operation.”

[28] Mr Botha, who appeared for the complainants, makes a point in his submissions and in argument before me, that the fundamental rights set out in the

Bill of Rights are rights that have existed all the time. They are rights with which each person was born. Mr Botha goes further to make a point that the Constitution, as well as its predecessor in the form of an Interim Constitution, does not purport to create a right against unfair discrimination. The Constitution, so the submission goes, merely seeks to entrench such a right. He goes further to make a point that even before the advent of the constitutional democracy, natural justice, the rule of law, and all those notions of fairness and justice, have been recognised as underpinning our common law before the advent of constitutional democracy, relying on authorities such as *R v Mogobaya* 1928 TPD 234; *In re Dube* 1979 (3) SA 820 (N) 821F-G; and *S v Adams* 1979 (4) SA 793 (T) at 801A to advance this proposition.

[29] The high water mark of Mr Botha’s submissions is that, in the light of the legal position as espoused in the preceding paragraph and the authorities there relied upon, it follows that the Equality court merely serves as an instrument to promote the enforcement of the right against unfair discrimination and that its competence is not merely limited to the present or the future. The establishment of the Equality court, so the submission goes, was also intended to be an enforcement instrument for past violations of rights to equality. In support of this proposition, Mr Botha relies on the authority of *National Coalition for Gay & Lesbian Equality v The Minister of Justice* 1999 (1) SA 6 (CC) paras

[61] and [62] where the Constitutional Court made the following observation:

“Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied. ... We could refer to such equality as remedial or restitutionary equality.”

[30] In my view, Mr Botha misses the point. I think the passage he relies upon in *National Coalition for Gay & Lesbian Equality* addresses issues such as the declaration as unconstitutional the then common law offence of sodomy; the common law offence of commission of an unnatural sexual act to the extent that it criminalised acts committed by a man or between men which, if committed by a woman or between women or between a man and a woman, would constitute an offence; section 20A of the Sexual Offences Act, 23 of 1957; the inclusion of sodomy as an item in Schedule 1 to the Criminal Procedure Act, 51 of 1977; and the inclusion of sodomy as an item in the Schedule to the Security Officers Act,

92 of 1987. At the time the constitutional challenge was launched on the constitutionality of those legal instruments, unfair discrimination, based on the common law and the aforementioned statutory provisions, was on-going and would only cease once the legal measures complained of would have been declared unconstitutional.

- [31] As I have pointed out elsewhere in this judgment, I do not understand the complainants' complaint to relate to on-going pension payments but, rather, to once-off payments which occurred sometime during 1993. These payments were, ostensibly, made on the basis of discriminatory legislation such as Railways & Harbours Pension Fund Non White Act, 1974. That piece of legislation, although clearly discriminatory even on the basis of its citation, was valid in the context of the parliamentary sovereignty regime which was in place at the time. But, as the Constitutional Court has pointed out in authorities such as *Du Plessis & Others v De Klerk & Another* [1996] ZACC 10; 1996 (5) BCLR 658 (CC); *S v Mhlungu* [1995] ZACC 4; 1995 (7) BCLR 793 (CC) both the Interim Constitution and the final Constitution and, ultimately, the Equality Act do not purport to make invalid what was valid or invalid what was valid prior to the enactment and coming into operation of the aforementioned legislative instruments. Measures such as those that were intended to address skewed land dispossessions and affirmative action measures contemplated section 9(2) of the Constitution do not confer general jurisdiction on the courts to remedy injustices of the past. The framers of both the interim and the final Constitution and, ultimately, the Equality Act, had to, for the sake of the future, draw the line and move on into the future except in those limited instances of unfair discrimination dealt with either expressly or by clear implication.)
- [32] There is a category of complainants whose claims arose after 27 April 1994, the day the Interim Constitution came into force but before 4 February 1997, the day the final Constitution came into operation. Those claims would have had to be dealt with in terms of the equality clause in the Interim Constitution.
- [33] I do not, at this stage of these proceedings, understand that I am called upon to determine the merits and the demerits of the complaint of each complainant. That will be a call for a court of competent jurisdiction to make. What I understand I am called upon to determine is the question as to whether, sitting as an Equality court, I have jurisdiction to adjudicate on cause of action that arose before the coming into operation of the Constitution of the Republic of South Africa, 1993; the Constitution of the Republic of South Africa, 1996; and, ultimately, the Promotion of Equality & Prevention of Unfair Discrimination Act, 4 of 2000 which came into operation on 16 June
2003. I have already held that all the aforementioned legislative instruments were not intended to be retrospective. The causes of action, in the instance of this matter, arose during or about 1993. It therefore follows that, sitting as the Equality court, I do not have jurisdiction to adjudicate on the complainants' claims that may have arisen on or about 1993.
- [34] In the result, the order I make, in the form of a declaration, is the following:

(1) Except in the instance of Dirk Ambross and Abram Apies, whose claims arose after 16 June 2003, this court does not have jurisdiction in respect of all those claims that had arisen on or about 1993 and in between 27 April 1994 and 4 February 1997;

(2) There shall be no order as to costs.

N J Yekiso

Judge of the Equality Court

Counsel for Complainants: Adv M Botha

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Counsel for 1st, 2nd & 7th Adv I Jamie SC

Respondent: Adv M Adhikari

Attorneys: Werksmans

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Counsel for 4th & 6th Adv S Witten

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