

SOUTH AFRICA / JUDGMENT

Mcinga v Dr Beyers Naude Local Municipality (PS42/19) [2021]

ZALCPE 2 (19 August 2021)

[2021] ZALCPE 2

COURT

Labour Court Port Elizabeth

BEFORE

Z Lallie

CASE / FILE NUMBER

PS42/19

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not

Reportable

CASE

NO: PS42/19

In

the matter between:

MXOLISI

AMOS

MCINGA Applicant

and

DR

BEYERS NAUDE LOCAL

MUNICIPALITY Respondent

Heard: 25

February 2021

Delivered: This

judgment was handed down electronically by circulation to the Applicant and the 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 15h00 on 19 August 2021.

JUDGMENT

[1] On 10 October 2019 the applicant instituted proceedings against the respondent in this court by filing a statement of claim to which the respondent responded by filing an exception.

[2] In the statement of claim the applicant alleged that the respondent perpetrated unfair discrimination against him. The applicant pleaded his case in the following terms:

'8.1 Whether or not the Respondent's infringement of its own policies and subsequent filing of the vacancy constituted unfair discrimination to the other candidates more specifically the Applicant.

8.2 Alternatively, whether or not the Respondent committed acts of unfair discrimination as against the Applicant in failing to evaluate the implementation of their process of filing the abovementioned vacancy.

8.3 Further, whether or not the political influence that undermined the process of filing the vacancy amounted to an unfair discrimination.'

[3] The applicant sought this court to declare the respondent's conduct in appointing Ms Klassen to the position of Human Resources Manager he had applied for to constitute unfair discrimination against him. He also sought ancillary relief.

[4] The respondent's basis for alleging that the statement of claim is excepiable is that it does not disclose a cause of action and is bad in law because it fails to disclose the grounds of unfair discrimination he relies on as envisaged in section 6 (1) of the

Employment Equity Act (EEA) [1]. It is trite that a respondent may except to a statement of claim that lacks averments which are necessary to sustain the applicant's

action. The applicant's action is based on discrimination in that he alleges that the respondent discriminated against him by not

appointing him to a position he had applied for. The respondent relied on the following dictum in *Aarons v University of Stellenbosch*[2]:

'[17] It would appear that the applicant's claims can only be based in section 187(1)(d) and/or section 187(1)(f) of the Act. Whilst the applicant does allege that she was unfairly discriminated against, she does not plead the grounds of this discrimination. For example, the applicant does not plead that she was discriminated against on any one or more of the grounds listed in section 187 (1)(f) nor does the applicant plead that she was discriminated against on grounds not listed in section 187(1)(f) but analogous to the listed grounds.'

The court went on to find that the facts on which unfair discrimination is based must be foreshadowed in the statement of claim.

[5] The relevance of the Aarons

judgment

is that at the time it was issued, discrimination was still governed by section 187 of the Labour Relations Act[3]. The listed grounds which are referred to in that judgment are similar to the following which are provided for in section 6(1) of the EEA:

'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 and birth.'
- [6] The correctness of the Aarons decision is confirmed in a number of judgments including Mbana v Shepston and Wylie[4].
- [7] The applicant conceded that he did not specifically disclose a ground of discrimination listed in section 6(1) of the EEA. He, however, sought to rely on the line of authorities which provide that the excipient must prove that on every interpretation, his statement of claim did not disclose a cause of action. He argued that a reading of his statement of claim does disclose that he was discriminated against by the respondent. The argument is untenable because every interpretation of his statement of claim does not cure his omission to disclose the specific ground of discrimination he sought to rely on as envisaged in section 6 (1) of the EEA. In addition, the facts the applicant sought to rely on in an attempt to prove his case support his omission to disclose the relevant grounds for discrimination as contemplated in section 6 (1) of the EEA. His case is therefore not foreshadowed in his statement of claim.
- [8] The excipient sought the dismissal of the applicant's claim. I was persuaded by the applicant not to dismiss his claim but to afford him an opportunity to address the flaws in his statement of claim. His argument is consistent with a number of decisions of our courts.
- [9] Considerations of both law and fairness require that a costs order not be granted as applicants for employment should not be deterred by a fear of costs orders from approaching this court when they reasonably believe that their rights have been violated.
- [10] In the premises, the following order is made:

Order:

1. The exception is upheld.
2. The applicant is granted 30 days from the date of this order to apply for leave to amend his statement of claim to comply with section 6 (1) of the Employment Equity Act 66 of 1995.
3. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearance:

For the Applicant: Mr Ndzuta of Ndzuta Inc

For the Respondent: Mr van Rensburg of Wikus van Rensburg attorneys

[1] Act 55 of 1998.

[2]

[2003] 7 BLLR 70 4 (LC) at para 17.

[3] Act 66 of 1995 as amended.

[4]

(2015) 36 ILJ1805 (CC).

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Prepared on 9 October 2026 · Esheria