

SOUTH AFRICA / JUDGMENT

Mkhatshwa v Shanduka Coal (Pty) Ltd (JS28/2016) [2022] ZALCJHB 177; (2022) 43 ILJ 2524 (LC) (6 July 2022)

[2022] ZALCJHB 177

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

JS28/2016

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JS28/2016

In

the matter between:

MKHATSHWA,
MBEKA SIPHO
Applicant
And
SHANDUKA
COAL (PTY) LTD
Respondent

Heard:

22 March 2022
(This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 06 July 2022)

Summary:

Pay discrimination – section 6(4) of EEA – no proof that race was a sine qua non for being paid less than comparators.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicant was employed by the respondent as a Mine Manager: Decommissioned Mine. He was retrenched on 31 July

2015. Subsequently, he instituted this action, challenging the alleged unfair pay discrimination based on race. The relief he seeks, as pleaded, is payment of the amount calculated on the difference between the salary packages of employees on the Patterson Band D3 level and those on a D5 level for the period between May 2012 and 31 July 2015. In the closing heads arguments, the applicant contends that he also seeks compensation that is equivalent to 24 months' remuneration.

Pertinent facts

[2] The applicant was employed by Umcebo Mining (Pty) Ltd (Umcebo) as a Mine Manager on 8 February 2006 at a Patterson Band D3 level (D 3 level). In May 2012, the respondent took over Umcebo. Glencore Operations South Africa (Pty) Ltd (Glencore) took over the respondent in May 2013.

[3] The crux of the applicant's case is that he was discriminated against as a Mine Manager as his two white counterparts, Messrs CJ Leonard (Leonard) and MC van den Berg (Van den Berg) were paid at a higher rate than his and were placed on the Patterson Band D5 level (D5 level).

[4] He testified that he was the first Mine Manager that had been appointed by Umcebo in 2006. At the time, he was responsible for the operational mine and was placed at D3 level. Thereafter, Umcebo appointed four other Mine Managers.

[5] In 2012, the applicant signed a contract of employment with the respondent, accepting the position of Mine Manager: Decommissioned Collieries, D3 level. However, soon thereafter he realised that other Mine Managers, Messrs Leonard and Van den Berg, were paid at D5 level. When he confronted the respondent, his salary was changed to D4 level.

[6] He was aggrieved by the fact that Messrs Leonard and Van den Berg, his comparators, were not Mine Managers when they commenced employment with Umcebo. Mr Van den Berg was a Production Manager and became a Mine Manager in 2011.

[7] On the other hand, the respondent disputes that it discriminated

against the applicant. Alternatively, if it were to be found that it did discriminate against the applicant, it contends that the

discrimination was fair.

[8] Mr Gerard Stenzel (Stenzel), Glencore's General Manager: Opencast Technology, explained the difference between a decommissioned and operational mines. A decommissioned mine goes into care and maintenance and rehabilitation in order to ensure that it is not flooded in the event it is to be re-opened. There are few employees required in a decommissioned mine. Normally they comprise of security task team mostly contractors to ensure that machinery and equipment are not stolen; and some cleaning staff.

[9] On the contrary, an operational mine involves drilling and blasting, maintenance of vehicles; soil stripping; attending to ongoing

rehabilitation; and pumping. The Mine Manager of an operational mine has daily pressure to ensure that production is delivered; compliance with regulatory prescripts,

including the Mine Health and Safety Act[1] (MHSA) and Explosives Act[2]; manages employees and contractors; manages running budgets, and community-related issues. This evidence was not controverted.

[10] Mr Stenzel further testified that the appointment of the applicant in terms of sections 3(1)(a) and 7(2) of the MHSA was not indicative of the fact that he had the same responsibilities as the Mine Managers

of operational mines because any competent person could be appointed in terms of section 3(1)(a) of MHSA. However, he conceded under cross examination that there was no job evaluation even though he was adamant that the job specification and individual negotiations were the reasons for the pay disparity.

[11] The main controversy pertains to the salary gap between the applicant and his comparators. The amounts tabulated below are common cause:[3]

Employee Salary per month

2012 2013

2014 2015

Applicant 60 853.08 R

78 345.83 R 83 830.00 R 88 859.20

Leonard R 95 650.08 R 107 198.17

R 110 763.58 R 117 409.36

Van den Berg R 88 408.42 R 108 920.42 R 112 639.50 R 119 397.87

- [12] Ms Sunelle Viljoen (Viljoen) testified that she was responsible for job grading at Glencore. Glencore used the JP Expert Grading System which correlates with the majority of other grading systems, such as Patterson. She explained that job evaluation entails the grading of positions and not incumbents. Hence, the job profile is important as it contained the purpose of the job; the key outputs required; the reporting structure; and the number of subordinates reporting to that particular position.
- [13] Ms Viljoen conceded under cross examination that there was a huge wage gap between the applicant and his comparators hence in 2013 and 2014 the applicant received a salary increase of 22% and 7% respectively, which was higher than his comparators. However, she was adamant the salary gap was basically informed by the different scope of work and the functions performed by Mine Managers of operational mines and decommissioned mines.
- [14] Even though the respondent did not conduct any job grading, following the takeover by Glencore, a process of standardising the grading system was initiated. As a result, the D5 level position had been done away with and standardised to a D4 level in line with the mining industry benchmark.
- [15] It is common cause that the applicant did not lodge a formal grievance to challenge the salary discrepancies up until the time of

his retrenchment. While Mr Stanley Joubert (Joubert), who was the respondent's Human Resources Manager between 2012 and 2015, conceded that he did have informal discussions with the applicant about his grade and remuneration which he escalated to his supervisor.

Legal principles and application

- [16] Section 6(1) of the of the Employment Equity Act[4] (EEA) provides:

'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.'

- [17] While section 6(4) of the EEA pertinently provides:

'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.'

- [18] Since the applicant impugns the alleged racial pay discrimination, in terms of section 11(1) of the EEA, the respondent bears the onus to prove, on a balance of probabilities, that such discrimination did not take place as alleged; alternatively, is rational and not unfair, or is otherwise justifiable.[5]
- [19] The respondent concedes that there was a difference in rates of remuneration between the applicant and Messrs Leonard and Van der Berg. It submits, though, that there was no discrimination as the work that was performed by the applicant as the Mine Manager of the defunct mines was not comparable to the work that was performed by the Mine Managers of the operational mines.
- [20] The enquiry in this matter, therefore, turns on whether the impugned distinction in remuneration rates pertains to work of equal value. In terms of regulation 4 of the Employment Equity Regulations[6] (Regulations) work of equal value means that the work performed by an employee –
- ‘(1) is the same as the work of another employee of the same employer, if their work is identical or interchangeable;
- (2) is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;
- (3) is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7.’
- [21] Regulation 6(1) provides that the assessment of whether work is of equal value is an objective process which takes into account the following criteria:
- ‘(a) the responsibility demanded of the work, including responsibility for people, finances and material;
- (b) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
- (c) physical, mental and emotional effort required to perform the work; and
- (d) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.’

[22] The respondent's main defence is that the work performed by the Mine Manager of an operational mine is has more demands in terms of responsibility and accountability for people, budget and compliance with legislation. Ms Viljoen was adamant that the job profile was important is assessing the value of work as it contains the purpose of the job; the key outputs required; the reporting structure; and the number of subordinates reporting to that particular position.

[23] The applicant, on the other hand, contends that, without conducting a job evaluation, the respondent could not objectively distinguish between the work performed by the Mine Manager of the operational mine and defunct

mine. While it is true that a job evaluation process is one of the methods normally utilised to assess the value of the work, it is not the only the acceptable method. In instances such as the present one, the distinction in the value of the work is easily discernable from the scope of the work performed by the Mine Manager of an operational mine as opposed to that of a defunct mine. It must be remembered that the respondent's evidence in this regard was not disputed.

[24] It well accepted that that a bald claim that a distinction in remuneration constitutes an unfair discrimination is inadequate for the onus to shift to the employer to prove that the discrimination was fair.[7] In *South African Municipal Workers Union and another v Nelson Mandela Bay Municipality*, [8] it was held that:

'In this case the disparate treatment would occur if it is established that the employer treated the complaining employee less favourably on the basis of sex or gender by placing her on a lower remuneration scale for performing the same or similar work as her male

comparators. It was not controverted that the assistant directors in the Human Settlement Directorate are performing the same or similar work, some with added responsibilities. It was also not in dispute that there are salary disparities amongst these directors. What remains for the employee to demonstrate is that there is a causal nexus between the differentiation on the basis of her gender

or sex and the treatment accorded to her in respect of the grading of her post and the concomitant remuneration. In other words, that being female was a *sine qua non* for the less remuneration she earned...' (Emphasis added)

[25] By parity of reasoning, the applicant in the present case failed to demonstrate that his race was a *sine qua non* for being paid less than his white comparators. The applicant seems to suggest that, since he used to be a Mine Manager of an operational

mine prior to 2012, he ought to have been paid at D5 level as his comparators. The problem with this assertion is that the applicant's

claim is limited to the period commencing from 2012 when he accepted the position of a Mine Manager: Decommissioned Mines. In my view, there is nothing much that turn on the fact that a defunct mine could be reopened and operationalised in future as the nature and volume of work performed by Mine Managers of operational mine is dissimilar from the Mine Manager of a defunct mine.

[26] Also there is no merit in the applicant's attack on the respondent's endeavour to address the wage gap between him and his comparators by improving his remuneration as it was aimed at addressing historical challenges that

it had inherited. Still, it is the respondent's undisputed evidence that race played no role in the pay distinction between the applicant and his comparators; but it was the actual functions and responsibilities of the positions they occupied.

Conclusion

[27] In all the circumstances, the applicants failed to make a case to sustain a claim of unfair pay discrimination in terms of section 6(4).

Costs

[28] Tritely, costs do not follow the result in this Court in accordance with the requirements of law and fairness.

[29] In the circumstances, I make the following order:

Order

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

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

Applicant:

Mr T Ntshebe from Thabang Ntshebe Attorneys

Respondent: Advocate YS Ntloko

Instructed by:

The State Attorney, Pretoria

[1] Act 29 of 1996.

[2] Act 15 of 2003.

- [3] See: Bundle B, the respondent's bundle of documents, p. 10.
- [4] Act 55 of 1998, as amended.
- [5] See: Sun International Ltd v South African Commercial, Catering and Allied Workers Union obo Ramerafe and others [2019] 7 BLLR 733 (LC) at para 12.
- [6] Employment Equity Regulations, Gazette No. 37873, 1 August 2014; see also Code of Good Practice On Equal Pay/Remuneration for Work of Equal Value, Gazette No. 38837, 1 June 2015, clauses 5.3 and 5.4.
- [7] See: Mangena and others v Fila SA (Pty) Ltd and others [2009] 12 BLLR 1224 (LC) (Mangena) at para 7; South African Municipal Workers Union and another v Nelson Mandela Bay Municipality (SAMWU) [2016] 2 BLLR 202 (LC) at paras 25-26.
- [8] SAMWU ibid at para 26.

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