

SOUTH AFRICA / JUDGMENT

Moloko v Tshwane Economic Development Agency (JS741/17)

[2020] ZALCJHB 237 (22 October 2020)

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COURT

Labour Court Johannesburg

BEFORE

M A Mathebula

CASE / FILE NUMBER

JS741/17

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS741/17

In

the matter between:

FLOYD MOLOKO

Applicant

and

TSHWANE

ECONOMIC DEVELOPMENT AGENCY

First Respondent

Heard

: 12 & 13

September 2019 and 3 February 2020

Delivered:

This judgment was handed down electronically by circulation to the parties representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 22 October 2020.

JUDGMENT**MATHEBULA, AJ****Introduction**

[1] The claim by the applicant is based on unfair discrimination as defined in section 6 of the Employment Equity Act 55 of 1998. At the centre of the dispute is the issue of an equal remuneration between the applicant and other employees within the organization more specifically Imraan Bakhas (Bakhas) and Paseka Rakosa (Rakosa). The contentious point is that the applicant is earning less than others despite performing similar work of equal value and also on the same level. The respondent is vehemently opposed to the claim arguing that the applicant did not do work of equal value to others and the difference in remuneration is not irrational. Of fundamental importance the contention is that the differentiation in remuneration is not based on attributes and characteristics which have the potential to impair the fundamental human dignity of the applicant as a person or to affect him on a comparably serious manner. In a nutshell, it the submission is that the applicant has failed to prove that he had been unfairly discriminated against on an arbitrary ground.

Evidence

[2] Tshifiwa Mafela a former and inaugural Executive Manager: Trade and Investment

Promotion of the respondent who was also responsible for recruiting the applicant testified on his behalf. He was tasked with the

responsibility to set up the unit he was assigned to lead. Among his responsibilities was to generate the advertisements for positions

occupied by the applicant of Senior Manager: Export Development and Promotion and that of Senior Manager: Investment Promotion. The two positions carried equal weight and the required qualifications were the same.

[3] At its infancy stage the respondent did not have written policies relating to remuneration. The two (2) were identified as suitable candidates and he made recommendation among others that their salary should be on par. The response of the then Resource Department was that employees had to be paid a certain percentage above what they were earning from their previous employer. The decision was not based on any existing remuneration policy or supported by documentation. In the absence of any evidence, it is safe to conclude that it was at best an arbitrary decision. The applicant did lodge his dissatisfaction about the differentiation salary between him and his colleague namely Bakhas. In an effort to normalize the situation he authored a report to be submitted to other heads recommending that the salary of the applicant be adjusted to be in line with that of his colleague.

[4] He explained that the key performance areas of the applicant included ensuring that potential exporters were export ready, provide training to them, expose them to international markets as well as participate

in trade exhibitions. The tasks of the other Senior Manager (Bakhas) entailed attracting new investors, retaining the ones already on hand and expanding the network for more. Accordingly the two positions were interlinked and none was superior to the other. On the issue that the target allocated to the two differed markedly, he responded that the issue did not feature anywhere during the selection, recruitment and appointment. In order to illustrate that the respondent strove to achieve parity all Executive Managers who were recruited and appointed were offered the same salary irrespective of their previous salary with the previous employer. In conclusion he agreed with the document titled Job description - Senior Manager: Export Development Promotion. He emphasized that both jobs involved facilitation of the investment. The applicant did develop the export and investment strategy. He pointed out that at the time the grievance was lodged there was no policy in place to deal with issues of this nature.

[5] The applicant testified that he applied for both positions because he met the requirements for them. It is common cause that he was appointed to the one of Senior Manager: Export Development and Promotion. Having assumed duties and on realising that there was a salary differentiation with Bakhas, he raised a grievance about it with his immediate supervisor Tshifiwa Mafela. His main gripe was that they were doing work of the same value and appointed on the same

day but remunerated on an unequal scale. On the advice of his supervisor he penned a memo around April 2014 essentially to resolve his grievance. The said memo was submitted to the then Chief Financial Officer and Human Resources Executive. Regrettably the complaint remained unresolved. It is at this point that he felt discriminated against given the treatment meted out to him.

[6] The matter was raised with the new Executive namely Karin Liebenberg who succeeded Mafela. In a memo dated 7 February 2017 she recommended that the current Chief Executive Officer approve the salary package of the applicant to be adjusted in line with that of other senior manager(s). The Chief Financial Officer approved

as per the recommendation. The Chief Executive Officer added a note that it will be prudent to specify amounts envisaged by the

adjustment. Although he did not approve a note was added that the matter will be tabled before the Executive Officer for approval.

Nothing transpired because several inquiries thereafter did not yield positive results. For unexplained reasons the Executive Corporate

Affairs did not append her signature. It is important to note that this is the person who over the years has resisted implementation of recommendations for salary adjustment.

[7] In his testimony he emphasised that the differentiation in salary is unfair and adversely affected his personal integrity and made him feel worthless and inadequate. He could not participate in the activities that he would otherwise take part in at home like assisting with homework. The bad treatment against him at the workplace intensified and escalated from bad to worse between the two hearings. In conclusion the differentiation is not premised on any rational grounds.

[8] The evidence of Solomon Daniel Mogaladi (Mogaladi) is that he was appointed the Chief Executive Officer of the respondent with effect from 24 April 2014. The applicant and the other senior manager were already employed at the time. The grievance or complaint was already raised by the applicant and an unresolved issue. Prior to his arrival

there were no instruments measure job grading and profiling. He was aware of the recommendation made by Karin Liebenberg who was always accompanying the applicant on work assignments.

[9] He emphasised that the two positions were not work of equal value as alleged by both the applicant and Mafela. He explained that the applicant had the responsibility to assist the companies or businesses with exposure to enter the market but not finalise deals. This is clearly demonstrated with a paltry target of R6 million which

is far lower than that of the other Senior Manager. The Senior Manager Investment was tasked with sourcing investment given the fact that the applicant is an investment promotion agency. His target was set at R1.7 billion which must generate and it create job opportunities. Perhaps the glaring difference is that the latter must analyse investment trends, create firm investment pipelines and establish leads which must result in investment conversions. On the other hand the tasks of the applicant involved investment promotion, retention and expansion.

Applicable law

[10] Section 6(1) of the Employment Equity Act 55 of 1998 states that

“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.”

In holding that the mission of the Employment Equity Act is diverse, the Constitutional Court emphasized that one of its important objects is to eliminate unfair discrimination at the workplace which is expressly prohibited.[1]

[11] In this matter it is the case for the applicant that he is being unfairly discriminated against on arbitrary grounds because his pay is less than that of two (2) other senior managers. The respondent admit that there is differentiation in their salaries but hold the view that the applicant has not discharged the necessary onus on a balance of probabilities.[2]

[12] The applicant quoted and relied on the judgement of the court in K Naidoo and 68 others[3] where the court said the following:-

“The test set out in Harksen v Lane NO & others will apply and, in order for the alleged grounds of arbitrary discrimination to qualify as such they must, objectively, constitute grounds based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparable serious manner to a listed ground. In short: the unequal treatment must be based on attributes and characteristics attaching to a person before it will fall within the meaning of ‘discrimination’.”

[13] The contention, it appears, is that the differentiation is not rationally connected to the achievement of any legitimate government purpose. To that extent it is both arbitrary and capricious. Turning to the parties, it was argued that this specifically applied to the respondent being an entity owned by the local authority deriving its powers from no other place but statute. The respondent did not possess any policies justifying the existence of the differentiation.

[14] The contention of the respondent in a nutshell is that the applicant did not do work of equal value with his colleagues Bakhas and/or Rakosa. The difference that existed between their salaries was not irrational. The high water mark of the submission is that the difference in remuneration as stated is not based on attributes and characteristics of the applicant which have the potential to impair his fundamental dignity as a human being or to affect him in a comparably serious manner.

[15] The respondent relied on Chitsinde v Sol Plaaaitjie University that the term arbitrary ground does not mean lack of reason but a violation of human dignity.[4] The crux of the submission is that it has been held that the differentiation must be in pejorative sense in that it must undermine human dignity. On those bases the applicant has failed to prove that he has been unfairly discriminated on any arbitrary ground(s) and the claim must be dismissed with costs.

Discussion

[16] The starting point is to determine whether the claim by the applicant that he was involved in work of equal value to the work performed by Bakhas and Rakosa is correct or not. In his evidence, Mafela testified that he was responsible for generating the advertisements basically profiling the candidates. His conclusion is that the two positions required the same or equivalent qualifications entailing responsibilities of equal value. On this aspect the evidence of Mogaladi is inconsequential because he arrived after the two had been employed. He can only testify about the changes he introduced but not

the fact that the structure was established to be equal by Mafela and his colleagues at the time.

[17] The considerations that must be examined to make the determination include inter alia skills, qualifications and experience required to perform the work. As correctly argued by the respondent, the key point is that the work must be sufficiently similar to the extent that they can be considered to be performing the same job. The evidence tendered points to the conclusion that the core work of the applicant was of the same value to the work performed by Bakhas. Of course the responsibilities of each will not be the same. That said, it is not the only yardstick which the evidence of Magaladi seems to suggest. The two (2) while Bakhas was in the employ of the respondent worked hand in hand to achieve the objectives of the respondent. When Bakhas left, the applicant stepped into his shoes without any training whatsoever over and management was aware of the situation. No issue was raised about his qualifications being inadequate for performing the work that Bakhas did. This demonstrates that the applicant possesses the necessary skills and knowledge to perform. The inescapable conclusion is that the work of the two was work of equal value.

[18] The next aspect up for consideration is whether the difference in remuneration was rational as contemplated in section 11(2) of the Employment Equity Act. The evidence of Mafela is that it was not rational because there was no basis for it. The only explanation is that they were remunerated on the basis of some percentage based on what they earned from their previous employer. As to what informed the percentage, it is unclear. This piece of evidence is largely hearsay and no one was called to testify in support of such claim. To demonstrate that this explanation cannot hold, a similar complaint by the Executive Managers was attended to without any difficulties. Besides, the fact that it is irrational was long recognized by Mafela and Liebenberg who recommended that his salary be adjusted. In the

memorandum dated 7 February 2017 addressed to Magaladi, his only concern was effect on the figures (budget) that will be caused by the adjustment. He desired a calculation in rands and cents which is a prudent thing to do. At no stage did he demonstrate his disapproval based on any factor whatsoever. All the other senior executives to whom the copy was circulated, answered in the positive for an adjustment.

[19] The irrationality of this situation is further demonstrated by the actions of Magaladi in his response to the way forward. On 13 March 2017, he noted on the memorandum that the matter will be tabled before the Executive Committee. Despite the lapse of a considerable time nothing turned on this issue. The submission that the differentiation was not irrational is untenable. There is nothing on the facts to support it that it was necessary or even to the benefit of the applicant. On these basis, there can be no talk that there is any rationality on this issue. It remains arbitrary to the extent of being labelled “purposeless, capricious and for no reason”.

[20] Clearly the applicant was treated differently to others without any specific reason. This in the bigger scheme of things constitutes unfair discrimination. I say so because without the unfair discrimination being beneficial to him it can only be detrimental to him. This is the

case in point. The contention of the respondent that the applicant has failed to prove discrimination in a pejorative sense cannot be sustained. It was argued that he had fallen short in explaining how his human dignity has been impaired comparable to the listed grounds. I find it unthinkable that conduct which occurred largely out of personal whim rather than any reason or system and directed at the person as an individual can be deemed not to qualify as proscribed conduct in terms of law. It is my considered opinion that the evidence adduced for the applicant is adequate to conclude that it affected him in a manner that it diminished his self-worth, questioned his integrity and lowered his self-esteem.

Therefore, the applicant ought to succeed in his claim with costs.

Order

[21] The following order is made;

21.1. The respondent must pay the applicant the difference of what he would have earned had he been paid same amount as his comparator/s, less tax and other statutory deductions together with interest on the amount of 10% a tempore mora.

21.2. The respondent must forthwith retrospectively adjust the applicant's benefit packages to be similar to that received by his comparator/s.

21.3. The respondent must retrospectively contribute to the applicant's pension fund from the applicant's date of appointment to date of correcting or adjusting his salary in the amount the respondent would have contributed had the applicant's salary been equal to that of his comparator/s.

21.4. The respondent is ordered to pay costs.

M. A. MATHEBULA

Acting Judge of the Labour Court of South Africa

Appearance

On behalf of applicant: Adv. E. Sithole

Instructed by: Tshiqi

Zebediela Inc

On behalf of respondent: Mr Ludwig Frahm-Arp

Instructed by: Fasken

Martineau Inc.

[1] South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC) at para 40

- [2] Section 11 (2) reads as follows: - “If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-
- (a) the conduct complained of is not rational; (b) the conduct complained of amounts to discrimination; and
 - (c) the discrimination is unfair.
- [2] Section 11 (2) reads as follows: - “If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-
- (a) the conduct complained of is not rational;
 - (b) the conduct complained of amounts to discrimination; and
 - (c) the discrimination is unfair.
- [3] (2019) 40 ILJ 864 (LC) at para 38
- [4] (2018) 10 BLLR 1012 (LC) at para 3.1
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