

SOUTH AFRICA / JUDGMENT

Nkosi and Another v Commission for Conciliation, Mediation and Arbitration and Others (JR2354/18)

[2025] ZALCJHB 123 (25 March 2025)

[2025] ZALCJHB 123

COURT

Labour Court Johannesburg

BEFORE

VG Mkwibiso

CASE / FILE NUMBER

JR2354/18

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR2354/18

In

the matter between:

AMOS NKOSI AND
ANOTHER
Applicant
and
COMMISSION FOR
CONCILIATION,
MEDIATION
AND ARBITRATION
First Respondent
SIBONGISENI
SITHOLE N.O
Second Respondent
BARLOWORLD
Third Respondent

Heard:

26 February 2025

Delivered: 25 March

2025

Summary: Unopposed

application – review of arbitration award dismissing

applicants' referral of unfair discrimination

claim –

Applicants claimed they were discriminated against based on arbitrary

grounds – Equal pay for work of equal

value –

Commissioner ruled that an arbitrary ground had to be analogous to

the grounds listed in section 6(1) of the Employment

Equity Act and

dismissed the referral due to a failure by the applicants to advance

an analogous ground.

JUDGMENT

MKWIBISO, AJ

Introduction

- [1] In this matter the applicants (Messrs Amos Nkosi and Siyabulela Miya) seek an order reviewing and setting aside an arbitration award rendered by the second respondent (the Commissioner), dismissing their referral of an unfair discrimination claim to the first respondent (the CCMA).
- [2] In the award, the Commissioner found that the applicants' discrimination claim was based on an alleged arbitrary ground, and an arbitrary ground had to be analogous to one or more of the listed grounds in section 6(1) of the Employment Equity Act[1]. The Commissioner found that the applicants had failed to allege a ground of discrimination that was analogous to the grounds listed in section 6(1) of the Employment Equity Act.
- [3] The review application, which was filed many months out of time, complains that the Commissioner committed an irregularity.

Relevant facts and evidence

- [4] The two applicants were employed as a General Mechanic earning a salary of R15 786.25 and a Spray Painter earning a salary of R8 765.91, respectively.
- [5] On 15 December 2016, the applicants referred their dispute to the CCMA. Their referral form requesting conciliation of the dispute summarised the facts of the dispute as follows: "the employer is paying the employees who are doing the same job differently". The result they required was: "to be paid equal salaries as the other employees who are doing the same job (salary adjustments)".

- [6] The matter was scheduled for arbitration on 29 May 2017. On that date, both applicants were present. The third respondent (the employer) was not in attendance and the arbitration proceeded in the absence of the employer.
- [7] During the arbitration hearing, the Commissioner asked the applicants to explain their claim, and they informed him that they were being discriminated against on arbitrary grounds because they were doing the same work as their colleagues who occupied positions similar to theirs but they were paid less remuneration. The Commissioner then referred them to section 6(1) of the Employment Equity Act and asked them to identify the ground they were relying on. He said the arbitrariness the applicants were complaining about had to be similar to a specific listed ground. The applicants advised the Commissioner that they did not know why they were being discriminated against, and the employer was the one who could explain the basis of the discrimination. The Commissioner also asked the applicants to state the colleagues they were comparing themselves to, and they did so.
- [8] On 8 June 2017, the Commissioner issued his award stating, inter alia, that “the applicants have not ascribed the differential treatment in question, to any ground analogous to the listed grounds in section 6(1) of the EEA”. He further stated that “the applicants have failed to allege that the reason for the differentiation is some characteristic that impacts upon their human dignity”. As a result, the Commissioner found that the applicants had failed to make sufficient allegations to sustain their claim of discrimination, within the meaning of section 6(1) of the Employment Equity Act.
- [9] The applicants launched a review application challenging the Commissioner’s award, which appears to have been filed on 6 August 2019, long after the 6 weeks deadline envisaged in section 145 of the Labour Relations Act[2]. By order dated 3 December 2019, the applicants were directed to apply for condonation for the late filing of the review application. On 13 December 2019, the applicants applied for condonation, alleging that they did not challenge the outcome of their case timeously because they were waiting for the outcome of another arbitration concerning their colleagues and it was only after that case was dismissed that they decided to pursue their review application. They alleged that their review application was 16 months out of time.

Analysis

- [10] The issue is whether condonation for the late filing of the review application should be granted. In determining this issue, regard must be given to the degree of delay, the explanation for the delay, the prospects of success and the general interests of justice.
- [11] On their own version, the applicants’ review application was launched 16 months out of time. This is a significant delay.
- [12] The explanation for the delay is not reasonable. The applicants contend that they waited for the outcome of another arbitration

hearing in which they were not parties, involving a similar dispute. They believed they would benefit if the outcome of that arbitration

hearing was in favour of the employees in that case who were their colleagues. It is not clear how they envisaged benefiting in law from litigation in which they were not parties. They should have rather pursued their review application timeously and then withdrawn it in the event that they ended up benefiting from some other litigation in which they were not parties.

[13] Even if the explanation for the delay was valid, the prospects of success are not good at all, for the reasons set out below.

[14] With effect from 1 August 2014, sections 6(1) and (4) of the Employment Equity Act were amended to read as follows:

‘(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, birth or on any other arbitrary ground.

...

(4) 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.’

[15] Section 11 of the Employment Equity Act provides that:

‘(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination —

(a) did not take place as alleged; or

(b) is rational and not unfair, or is otherwise justifiable.

(2) 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.’

[16] In *Naidoo and others v Parliament of the Republic of SA*[3] (Naidoo), the Labour Appeal Court dealt with the proper interpretation of sections 6(1), 6(4) and 11 of the Employment Equity Act. The Court observed that the issue was whether the “narrow” or “broad”

interpretation of the words “any other arbitrary ground” in section 6(1) of the Employment Equity Act should prevail. The “narrow” interpretation required that the words “any other arbitrary ground” be limited to a ground that is analogous to the grounds that are specifically listed in section 6(1) of the Employment Equity Act, whilst the “broad” interpretation required the words “any other arbitrary ground” to be a stand-alone ground that did not have to be analogous to the specifically listed grounds in section 6(1) of the Employment Equity Act. The Court held that the need to link the grounds that are not specifically listed in section 6(1) of the Employment Equity Act to the specifically listed grounds was the foundation of the line of authority that supports the “narrow” interpretation of the words “any other arbitrary ground”.

[17] The Labour Appeal Court held that section 6(1) of the Employment Equity Act was not a catch-all phrase:

‘[24] ... The thesis advanced was that the phrase “any other arbitrary ground” had to be saved from redundancy. Thus, it must be understood to add something distinctive to the listed grounds. This thesis assumed the addition of a fresh class of grounds that is amorphous and is knowable simply by the external manifestation of capriciousness. Its broad scope was argued to be desirable.

[25] This is a radical idea. It would make s 6(1) a font of a remedy for grievances with virtually no limits. But the EEA is not intended to be a catch all or a panacea. Indeed, the EEA is the instrument of s 9 of the Constitution and therefore its mission is to give teeth to that constitutional guarantee within the scope of the terms expressed in that section. Section 9 is not an all-encompassing injunction, rather its purpose is to give recognition to the value of our humanity and provide a remedy for aggression against us on the grounds of our intimate attributes, whether inherent or adopted. In other words, section 9 has a specific and concrete focus, intelligible within the context of the historical experience of South Africa’s legacy of oppression. The writers, Garbers and Le Roux, rightly caution against being seduced by the idea that anti-discrimination law can be weaponised to solve all labour market ills. Other vicissitudes of life find remedies elsewhere, not least of all in the panoply of protections in Labour Legislation.’ (own emphasis)[4]

[18] The Labour Appeal Court held that the term “any other arbitrary ground” was not meant to be a self-standing ground:

‘[26] The insertion of the word ‘other’ supports the conclusion that the phrase “any other arbitrary ground” was not meant to be a self-standing ground, but rather one that referred back to the specified grounds, so that a ground of a similar kind would fall within the scope of section 6.’

[19] The Labour Appeal Court upheld the narrow compass interpretation of the phrase “any other arbitrary ground”, thus rejecting the broad interpretation of that phrase.

[20] I am bound by the authority of the Labour Appeal Court, based on the stare decisis doctrine. In my view, the approach of the Labour Appeal Court is not unfair or unjust. The mere fact that the applicants in the current matter are unable to rely on section 6(1) or (4) of the Employment Equity Act does not mean they do not have a remedy. In other words, the fact that they are unable to link the employer's conduct to an arbitrary ground that is analogous to a ground specified in section 6(1) of the Employment Equity Act in support of their claim of discrimination based on an arbitrary ground does not mean they are without a remedy under our labour laws, as the employer's conduct may still constitute unfairness as envisaged in section 186(2)(a) of the Labour Relations Act, which provides that:

‘(2) “Unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving –

(a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.’ (own emphasis)

[21] Such a claim based on section 186(2)(a) of the Labour Relations Act would be continuous by nature. In *South African Broadcasting Corporation Ltd v Commission for Conciliation, Mediation and Arbitration and others*,^[5] the Labour Appeal Court held the following:

‘[27] ... While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example where an employer selects an employee on the basis of race to be awarded a once-off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no end and is therefore ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination.

[28] Hence in the present matter the date of dispute does not have to coincide with the date upon which the unfair labour practice/ unfair discrimination commenced because it is not a single act of discrimination but one which is repeated monthly. In the circumstances the dispute being labelled as ongoing was an accurate description of the “dispute date” and the decision arrived at by the commissioner that there was no need for the respondent to seek condonation was correct.’

[22] The Commissioner's decision in this current matter is not unreasonable and does not amount to an irregularity. It is in line with the Labour Appeal Court's decision in *Naidoo*.

[23] Condonation cannot be granted, due to the poor prospects of success and the significant delay for which there is no proper explanation. The refusal to grant condonation means the review application must be dismissed.

Costs

[24] The application was not opposed and as such there should be no order as to costs.

[25] In the premises, I make the following order:

Order

1. Condonation for the late filing of the review application is refused.
2. The review application against the arbitration award under case number GAEK449-17 dated 8 June 2017 is dismissed.
3. There is no order as to costs.

VG Mkwibiso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr E. M. Modiga of Modiga Attorneys

For the Third Respondent: No appearance

[1] Act 55 of 1998.

[2] Act 66 of 1995, as amended.

[3] Naidoo and Others v Parliament of the Republic of South Africa (2020) 41 ILJ 1931 (LAC); [2020] 10 BLLR 1009 (LAC).

[4] Naidoo at paras 24-25.

[5] (2010) 31 ILJ 592 (LAC), [2010] 3 BLLR 251 (LAC) at paras 27-28.

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