

SOUTH AFRICA / JUDGMENT

SACCAWU v Lawson (J1529/22) [2024] ZALCJHB 448 (12 November 2024)

[2024] ZALCJHB 448**COURT**

Labour Court Johannesburg

BEFORE

A Snider SC

CASE / FILE NUMBER

J1529/22

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case No: J1529/22****In**

the matter between:

SACCAWU
Appellant
and
COMMISSIONER
MADELEINE LAWSON
First
Respondent
COMMISSIONER
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Second
Respondent
PICK
& PAY RETAILERS (PTY) LTD
Third
Respondent

Heard:

28 March 2024

Delivered: 12 November 2024
Summary: Appeal in terms of section 10(8) of the Employment Equity Act 55 of 1998 against the award made by the First Respondent in a referral to her of a dispute in terms of section 6(1) of the said act. Question arising whether the relevant employees had been discriminated against in relation to pay differentials in respect of work on Sundays.

JUDGMENT

SNIDER, AJ

Background

- [1] This is an appeal to the Labour Court in terms of section 10(8) of the Employment Equity Act, [1] as amended (the EEA).
- [2] The appeal is against an arbitration award made by the First Respondent (the Commissioner) delivered on 9 November 2022 in terms of which the Commissioner dismissed the Appellant's referral of an unfair discrimination dispute.
- [3] The appeal includes an appeal against a postponement ruling made by the Commissioner on 5 September 2022, in terms of which the Commissioner refused a postponement application brought on behalf of the Appellants. It does not appear that the Appellant persists with this part of the appeal.
- [4] The matter was referred to the CCMA for arbitration in terms of section 10(8) of the EEA and was arbitrated, intermittently, from January to October 2022 on the Teams platform.
- [5] It was agreed between the Appellant and Pick 'n Pay (PnP), the Third Respondent, that pleadings would be produced for the purposes of conducting the arbitration. A pre-arbitration conference was conducted, and a minute of the conference was produced.
- [6] It is well known that Pick 'n Pay (PnP) is a large retail organisation with numerous employees, approximately 35 000 in all, at the relevant times. There are 20 400 employees out of the 35 000 who are members of the Appellant Union (the Appellant) and fall within what is known as the Non-Managerial Bargaining Unit (the NMBU).
- [7] These employees do various kinds of jobs. For example cashiers and packers. They are employed on either a full time, part time or variable time basis.
- [8] The Appellant's members (the employees) fall into eight categories. Different rates of pay apply to different groups of employees in respect of normal time worked on Sundays. Although the Commissioner used the term "rates of pay" it does seem to be somewhat inaccurate, and it is not the way it was finally argued on behalf of the Appellants. It is not the pay rates themselves which vary, but rather the multiplier that is applied to the relevant

employees normal Sunday rate of pay to yield the relevant adjusted Sunday rate of pay when such adjustments are made.

[9] The question as to whether the application of different multipliers (or no multiplier) to normal Sunday rates of pay in respect of different groups of employees constitutes discrimination against the employees for the purposes of the EEA, is at the core of this matter.

[10] The Appellant contends that the relevant employees are discriminated against because they do not receive the benefits of additional income for work on a Sunday, as no multiplier is applied to their Sunday earnings.

[11] In terms of the pre-arbitration minute, the parties agreed that the dispute that was referred to the CCMA, was alleged discrimination in that –

‘The employer pays different rates for Sunday work – for different categories – being, normal rate for some, 1½ times for some and double pay for others.’

[12] The CCMA was required to determine the following -

12.1. Firstly, there were 4 preliminary points raised by PnP in respect of which it persisted with two –

12.1.1. prescription, and

12.1.2. work of equal value.

[13] The remaining points recorded were that, subject to the outcome of the preliminary points –

13.1. Whether PnP unfairly discriminated against NMBU members who were employed after 1 December 2011 in comparison to NMBU employees employed prior to 1 December 2011;

13.2. Whether PnP unfairly discriminates against employees who are and are not employed in stores; and

13.3. Whether PnP unfairly discriminates against the employees compared to MSA[2] employees who are not employed in stores and who work in PnP’s corporate offices.

[14] The Appellants have set out the various groupings of employees, the time period during which such groupings existed and the multiple of their normal hourly rate which they were paid for Sunday work.

[15] The Appellant, in its statement of case before the CCMA identifies 8 different categories of employees.

[16] All of the allegations made by the Appellant in this regard were dealt with at some length in the arbitration. I am of the view that the chronology of events that led to this matter coming into existence, the collective bargaining and collective agreements that deal with the relevant issues, Sectoral Determination 9 (SD9) and certain statutory provisions are

unquestionably relevant. However the facts are that certain employees were and are paid with a multiplier applied to their Sunday rate, and certain are not. This is either unfair discrimination in terms of the EEA and the relevant jurisprudence or it is not.

[17] The core of the Appellant's case is that certain employees in the NMBU are paid by the application a multiple of 1½ times their ordinary hourly rate for normal hours worked on Sundays while other employees in the NMBU receive no multiplier. The Appellants contends that this discrepancy between the two categories of NMBU employees constitutes unfair discrimination. The basis relied on in respect of the alleged unfair discrimination are gender, status, an arbitrary ground, and family responsibility. Certain employees in the MSA job categories have a multiple of 2 applied to their ordinary rate of pay for work on Sundays. The Appellant contends that such differentiation amounts to discrimination against NMBU employees in terms of the EEA. The Appellant claims that all employees have family responsibilities, the requirement for time off, and religious observance on Sundays. A premium for work on Sundays is therefore unfair to those who are not paid the premium. This particularly affects females as they are the most vulnerable group in society and bear the brunt. Family responsibilities operate most onerously against them.

[18] The differentiation in pay between the various categories of employees in the NMBU which are the subject of part of the

Appellants' claim was introduced by the 2011 agreement. This agreement was concluded between the Appellant and PnP on 24 November 2011 as an alternative to the potential forced retrenchment of about 1800 NMBU employees.

[19] The following categories of the employees were introduced –

- 19.1. FTE196, namely full time employees in the employment of PnP at the time;
- 19.2. FTE001, namely full-time employees employed on or after 1 December 2011;
- 19.3. VTE085, namely variable time employees in employment with PnP at the time;
- 19.4. VTE001, namely variable time employees employed on or after 1 December 2011; and
- 19.5. OTE, namely occasional-time employees employed at the time. No employees in this category were employed after 1 December 2011.

[20] FTE196 and VTE085 (who were ring-fenced) would be paid 1½ times the ordinary rate of pay for ordinary hours of work on Sundays. FTE196 employees would be required to work 45 hours per week and 196 hours per month. VTE085 employees would be guaranteed a minimum of 85 working hours per month.

- [21] Employees in the category FTE001 and VTE001, namely those employed after 1 December 2011, would be paid their normal rate of pay for ordinary hours of work on Sundays. FTE001 employees would be required to work a 40 hour week of no more than 5 days a week with Sunday being a normal working day. The same applied to VTE001 employees except that they were not guaranteed any minimum ordinary hours of work per week.
- [22] On 29 June 2016, the Appellant and PnP concluded the 2016 wage agreement in terms of which employees in the VTE001 category would be guaranteed 85 normal working hours per month and a new category names NCVTE, was introduced. These employees would work between 85 and 176 ordinary hours per month, 40 hours per week, Monday to Sunday. Sunday would be an ordinary working day, and these employees would receive normal pay for work on Sundays.
- [23] On 29 April 2019 the Appellant and PnP concluded the 2019 conversion agreement. In terms of this agreement, full time employees in the FTE001 category were converted to the FTE196 category, the FTE001 category ceased to exist, and NCVTE employees with more than 3 years' service were eligible to convert to the VTE001 category. Employees in FTE196 category would be required to work 45 ordinary hours per week, 6 days a week, Monday to Saturday. Sunday is not an ordinary working day for employees in the FTE196 category. Should they work on a Sunday, such work is overtime in respect of which they are paid double pay.
- [24] All of these provisions are in accordance with SD9.
- [25] In relation to pay for normal hours worked on a Sunday, there are three factors which distinguish such employees –
- 25.1. the employees' date of employment, before or after 1 December 2011;
- 25.2. the employees' rate of pay; and
- 25.3. the number of ordinary working hours they are required to work per week.
- [26] The categories FTE196, FTE176, VTE085 and OTE were employed before 1 December 2011 i.e. they were in PnP's when the 2011 agreement was concluded.
- [27] The categories FTE001 and VTE001 employees were employed after 1 December 2011.
- [28] The NCVTE category was introduced in terms of the 20166 wage agreement, therefore after June 2016.
- [29] In respect to Sunday rates of pay, differences occurred over time –
- 29.1. the 2011 agreement had the effect that FTE196 employees would be paid at 1½ times their ordinary rate of pay. The rate of pay accordingly reduced from double time prior to 1 December 2011 to 1.5 times after 1 December 2011. In terms of the 2019 conversion agreement this category would no longer ordinarily work on Sundays and if they do, they are paid double their normal rate, this being overtime;

29.2. FTE001 employees were paid their normal rate for Sundays and the category ceased to exist in terms of the 2019 conversion agreement. They were converted to the FTE196 category;

29.3. the VTE085 category is paid 1½ times the ordinary rate of pay for work on Sundays; and

29.4. VTE001 employees are paid their normal rate of pay for work on Sundays.

[30] In respect of ordinary hours per week –

30.1. category FTE196 Sunday work is overtime;

30.2. category FTE176 Sunday work is overtime;

30.3. VTE001 employees would work 5 days a week and have 2 days off per week;

30.4. the NCVTE category was introduced in 2016. Employees in this category would work between 86 and 176 ordinary hours per month, 40 hours per week, 5 days per week, Monday to Sunday in terms of the 2019 conversion agreement. NCVTE category employees with more than 3 years services are eligible to convert to the VTE001 category, and

30.5. in terms of SD9 which come into effect on 1 February 2003 – it applied to the regulation of working time of employees working 40 hours or less per week and removed the Sunday premium in respect of such employees. It also provides for 2 full days off during every week and 1 Sunday off during every 4 consecutive weeks. The principle set out in SD9 is also contained in section 55 of the Basic Conditions of Employment Act (the BCE).[3]

[31] In 2011 during the course of the negotiation and conclusion of the 2011 agreement, a category of the employees, namely FTE001 and VTE001 was created in accordance with the principles contained in section 12(3) of SD9. The 2011 agreement is the agreement which saved approximately 1800 jobs from forced retrenchments and there was an undertaking by PnP to not retrench any NMBU employees for a period of 2 years after December 2011.

[32] SD9 permits the existence of difference categories of employers with reference to working hours and paid for ordinary hours of work on a Sunday.

[33] The particulars of the differentiation are regulated by collective agreements concluded between the Appellant and PnP.

[34] Needless to say, the retail sector changes on an ongoing basis, as do customer requirements and there is always a need for flexibility.

[35] As set out in the pleadings and testified by PnP's witnesses, the differences arose over time as a result of changes in trading patterns in the retail sector, amendments to legislation, collective agreements concluded between the Appellant and PnP, and the ring-fencing of employees who, at the particular time, enjoyed certain contractual entitlements.

[36] The case before the Commissioner was ultimately as follows -

36.1. Certain employees in the NMBU receive payment with the application of a 1.5 multiplier applied to their ordinary hourly rate for normal hours worked on Sundays, while other employees in the NMBU receive payment for such work at their normal rate of pay. The Appellant contended that such differentiation between these two categories of NMBU employees amounts to unfair discrimination, on the basis of gender, family responsibility, and status (an arbitrary ground).

36.2. Certain employees employed in PnP's MSA job categories receive payment at double their ordinary rate of pay for work on Sundays and others not. The Appellant similarly contends that such differentiation amounts to unfair discrimination against NMBU employees.

[37] It is common cause that there were discrepancies in the multiplier applied to different groups of employees. The question is thus whether any conduct on the part of PnP in applying different multipliers to different groups, and at different times, in respect of Sunday work, constituted actionable unfair discrimination in respect of which the employees are entitled to relief.

[38] The Appellants make the point, for example, that PnP differentiated, in respect of Sunday pay rates, between the NMBU employees employed before 24 November 2011 and those employed after 24 November 2011 even though they performed the same or similar jobs.

[39] PnP's answer to this was that this distinction arose as an alternative to potential forced retrenchments. The allegation is that it was agreed to by the Appellants and involved the ring-fencing of certain employees employed prior to 1 December 2011 who had the contractual entitlement to the application of a 1½ times multiplier to their Sunday rates, and the lower flat rate, for the employees employed subsequently. This was permitted in terms of SD9. The submission was that ultimately the ability of PnP to have some flexibility in relation to the way it managed its labour complement increased its capacity to be profitable and dynamic in the market.

Preliminary points

Prescription

[40] As set out above, PnP raised the issue of the possible prescription of the Appellant's claim as a preliminary point. The Appellant referred the dispute to the CCMA on 15 May 2018. The Appellant contended that the claim arose on 1 March 2018, which was not disputed, as per the referral to the CCMA, and accordingly, in PnP's case any claim for alleged under payment prior to 15 May 2015 had prescribed. On that basis PnP pleaded that the Appellants claim for alleged unfair discrimination pertaining to the period 1 December 2011 (being the commencement of the so-called "unequal period" which will be described in more detail below) to 15 May 2015 had prescribed and the claim should, to this extent, be dismissed.

[41] The Commissioner found in favour of PnP in relation to the issue of prescription.

[42] The Appellant's basis for challenging the finding in relation to the prescription made by the Commissioner is that –

42.1. The wrong is continuous;

42.2. There was a reservation of rights in 2011 for the Appellant to pursue the claim;

42.3. Even if the defence is good, it only extinguishes part of the claim.

[43] The question arises as to whether unfair discrimination claims in terms of the EEA can prescribe.

[44] PnP made reference to the decision in Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd[4] in which it was found that unfair dismissal disputes under the LRA are subject to the provisions of the Prescription Act. By parity of reasoning, PnP submits that prescription, as it applies under the LRA, should apply equally to unfair discrimination claims under the EEA. The relevant passage in Pieman's Pantry referred to similar objectives that both the LRA and the Prescription Act seek to achieve such as the efficient and timely resolution of disputes within a specified time frame. They do not seek to advance different and inconsistent litigation imperatives. The two acts can and do co-exist alongside each other in an integrated fashion.

[45] Similarly, both pieces of legislation give effect to constitutional rights and may raise constitutional issues. This is not an impediment to the application of prescription.

[46] The Appellants point out that the facts in this matter point to a continuous wrong, and that the finding in Pieman's Pantry cannot simply be transposed onto the Employment Equity Act.

'[20] In considering the special plea of prescription, the postulation is, of course, that the allegations underpinning the Government's claim had in fact been established. Broadly stated, it must therefore be accepted for the prescription issue that the defendants' occupation of their sites constitutes a contravention of both the Decree and the common law. Departing from this premise, the answer to the prescription defence is, in my view, to be found in the concept which has become well-recognised in the context of prescription, namely that of a continuous wrong. In accordance with this concept, a distinction is drawn between a single, completed wrongful act - with or without continuing injurious effects, such as a blow against the head

- on one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures (see eg *Slomowitz v Vereeniging Town Council* 1966

(3) SA 317 (A); *Mbuyisa v Minister of Police*, Transkei 1995

(2) SA 362 (T); *Unilever Bestfoods Robertsons (Pty) Ltd v Soomar* 2007 (2) SA 347 (SCA) para 15.'

[48] Accordingly, I am of the view that in respect of this issue, the Appellant must succeed.

Preliminary point – work of equal value

[49] I deal now with PnP's preliminary point in relation to "Work of Equal Value". This raises the question as to whether the Commissioner had jurisdiction to determine the unfair discrimination claim in respect of the pay for normal work on Sundays, between the NMBU and certain MSA Bargaining Unit employees.

[50] The Commissioner found that –

50.1. claims under section 6(4) of the EEA are confined to unfair discrimination claims where the relevant employees do work that is the same, similar or of equal value;

50.2. the employees (the NMBU and MSA) are not similarly situated because they do not do the same work, similar work, or work of similar value;

50.3. there was insufficient evidence to establish that the employees are similarly situated because they make the same sacrifices in order to work on weekdays;

50.4. the Appellant's claim is premised, not on section 6(4) of the EEA, but on the constitutional right to equality and non-discrimination, and

50.5. the facts of this matter fall under section 27 of the EEA as it relates to vertical income differentials that are envisaged in section 27, and that accordingly section 27 of the EEA provides a remedy to the appellant. *AMCU v Chamber of Mines South Africa and others*[7] provides support for this approach.[8]

[51] PnP submitted, in this regard, that because the claim in respect of Sunday pay, in respect of NMBU employees as opposed to MSA employees concerns a comparison of employees who do not perform the same, similar or work of equal value, there is no basis for the claim that the difference in remuneration for Sunday work amounts to unfair discrimination as envisaged in section 6(4) of the Act.

[52] The section quite clearly requires proof that the jobs being compared are the same, similar or of equal value if such claims are brought under the EEA.

[53] Such claims might be addressed under section 27 of the EEA.

[54] On the facts in this matter, the reason for the difference in terms and conditions in respect of operational categories is not unfair discrimination.

[55] In respect of the Appellant's view that the employees were similarly situated because they made the same sacrifices to work on Sundays, the point was made by PnP that this was a generalization without supporting evidence.

- [56] Similarly, the valid submission was made on behalf of PnP that it may well be in such a large workforce, that there would be employees without religious convictions and no family responsibilities that would impact on their ability to work on Sundays.
- [57] It was conceded by the Appellant that the relevant NMBU and MSA positions do not do the same or similar work or work of equal value. The concept of “permissible vertical comparison” was rather utilised by the Appellant. This argument relies on the employers being similarly situated in respect of family responsibility. The argument suffers the same fate as in respect of the evidence, or insufficiency thereof, already referred to. I refer also to AMCU (*supra*) in this regard in respect of which more will be said below.
- [58] On this basis, the Commissioner found that she does not have jurisdiction to hear the claim as it is not, by virtue of the evidence, located within the confines of Section 6(4) of the EEA.
- [59] The EEA, in Section 6(4) contemplates a level of parity in employees' terms and conditions of employment in order to consider if there is discrimination between them.
- [60] Accordingly, I find in favour of PnP in regard to this point.

Grounds of appeal and responses

- [61] The Appellant regards the failure to apply the same multiplier in respect of NMBU employees, including those employed on the watershed dates referred to above, and junior managers as demeaning and insulting to the Appellant members because they should be treated no differently as regards payment for Sunday work.
- [62] PnP, in defence to this allegation states that – “The Appellant hasn’t explained in what manner the differentiation is allegedly demeaning and insulting”. It also denies that the reason for the differentiation adversely affects the inherent human dignity of the Appellants as it would in a comparably serious manner as would differentiation on one of the listed grounds, such as race, language or religion. Here the Appellant relies on an arbitrary ground which, in short, must have essentially the same characteristics of a listed ground, particularly in that it must impact human dignity.
- [63] The Constitutional Court has interpreted ‘discrimination’ and concluded that the word ‘discrimination’ is used in a pejorative sense, and not in a merely neutral sense. In *Prinsloo v Van der Linde and another*,^[9] the Court considered the concepts of differentiation and discrimination, and it was held that -

‘The proscribed activity is not stated to be “unfair differentiation” but is stated to be “unfair discrimination”. Given the history of this country we are of the view that “discrimination” has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them.’

- [64] This Court observed in *Ntai and others v SA Breweries Ltd*^[10] -

‘However, it also means that a mere differentiation in pay between employees who do similar work or work of equal value does not mean that an act of discrimination is being perpetrated. It is only when such differentiation is based on or linked to an unacceptable ground that it becomes discrimination within its pejorative meaning.’[11]

[65] PnP also relied on length of service as a ground for differentiation, which is legitimate. Pioneer Foods[12]

[66] The Appellants’ claim, as pleaded in the CCMA, is that PnP discriminated directly or indirectly against the Appellant’s members on the grounds of their status (an arbitrary ground) and/or family responsibility and/or gender (inasmuch as the policy and practice regarding Sunday pay affects females disproportionately) alternatively, on grounds that are analogous to the listed grounds contained in section 6(1) of the EEA), and continued to discriminate against them during the unequal period.[13] In broad terms, PnP’s response to these allegations was as follows –

66.1. The differentiation between full time employees only existed from 1 December 2011 to the 2019 conversion date and since then all full-time employees were treated the same. It was denied that the differentiation between full time employees during the 2011 agreement period amounted to unfair discrimination;

66.2. the differentiation between variable time employees was introduced in terms of the 2011 agreement and continues to exist;

66.3. NMBU employees who commenced employment prior to 1 December 2011 were differentiated on Sunday pay from those who were employed after 1 December 2011. This is not “status”, but date of employment and thus a form of length of service which is recognised as a factor which need not constitute discrimination;

66.4. Pioneer (supra) Foods recognises that conclusion of a collective agreement is a permissible basis to treat different categories or groups of employees differently, including because of length of service;

66.5. this differentiation came about as an agreed alternative to potential retrenchment, as set out above, brokered through CCMA facilitation, with due recognition of the existing employees’ contractual entitlements, and

66.6. accordingly, it is denied by PnP that the reason for the differentiation between NMBU employees, emerging out of length of service and collective bargaining, adversely affects the inherent human dignity of the Appellant’s members in a comparably serious manner as would differentiation on one of the listed grounds.

[67] I agree with this approach.

Indirect discrimination on listed grounds

- [68] In respect of indirect discrimination on the listed, specified grounds of gender and family responsibility the Commissioner made the following findings.
- [69] The Commissioner explained indirect discrimination as follows - where an apparently neutral provision, criteria or practice (in this case the rate of remuneration for normal time worked on a Sunday) would put persons bearing a certain personal characteristic at a particular disadvantage compared with other persons, unless such provision, criteria or practice is found to be rational, reasonable and fair. The practices may appear neutral i.e. the policies apply to all employees but adversely affect a disproportionate number of a certain group. The argument of the Appellant in this case being that the application for Sundays of a different multiplier for groups of employees for Sunday normal time disproportionately impacts woman and those with family responsibilities and is therefore directly or indirectly discriminatory.
- [70] Ultimately it had to be found that the policy detrimentally and more harshly affects females and those with family responsibility. The Commissioner found that to determine this is essential to consider the proportions of the groups negatively affected – in other words, the proportions of employees who are females and those who have family responsibilities.
- [71] Similarly, the group of affected employees that will form the basis of the comparison must be identified, in this case, the NMBU employees who are subject to the policy. Within that pool, women not receiving a premium are one group and their comparator, based on their claim of gender discrimination are therefore males – those with whom they compare themselves – employees receiving a Sunday premium.
- [72] The Commissioner did an analysis based on the numbers and percentages of employees, considering gender in the NMBU and found that a greater proportion of males did not receive a higher multiplier as opposed to the proportion who did not.
- [73] The Commissioner also dealt with the argument on the part of the Appellant that men also suffer a poor life/work balance and are victims of oppression because of the class of workers they belong to. They are prejudiced by the rostering system compared to other employees in the NMBU who are paid in terms of a multiplier and making the same Sunday sacrifices and should therefore be rewarded on the basis of the same multiplier.
- [74] The Commissioner finds that this argument is directly the opposite of the one concerning discrimination on the grounds of gender where the comparators are men.
- [75] Accordingly, the Commissioner rejected the claim that women were proportionately more greatly impacted by the policy.
- [76] In respect of the claim related to indirect discrimination on the grounds of family responsibility, the Commissioner rejected the survey results and finds that there are no reliable statistics before her in this regard which could show that those with family responsibilities were more impacted upon than those without.

[77] The Commissioner further finds that the claim of indirect discrimination on the grounds of gender and family responsibility

cannot pass muster. Accordingly, the Commissioner found –

77.1. PnP had not subjected the Appellant employees to unfair discrimination.

77.2. She dismissed the matter; and

77.3. She advised the parties of their rights to appeal.

[78] It is necessary to compare the grounds of appeal raised by the Appellants to the responses thereto set out by PnP.

Status

[79] In respect of the issue of “status” being an arbitrary ground relied on by the Appellant, the Appellant submits in its notice of appeal in this regard that the Commissioner erred in finding –

79.1. that in the context of the dispute, it was unclear what “status” was referred to by the appellant and that this was never specifically clarified;

79.2. that the discrimination in pay did not impact on the dignity of the employees in a way that rendered the discrimination unfair;

79.3. that there is an inherent contradiction and duality in the Appellant's case pertaining to the listed grounds and the case pertaining to arbitrary discrimination, and

79.4. the Commissioner erred in finding that the “status” relied upon by the Appellant does not constitute an ordinary ground as envisaged by the EEA.

[80] In its submissions, in terms of Rule 9(6) of the Labour Court Rules, PnP sets out the following arguments –

80.1. in relation to the ground of “status” this is not a ground listed in Section 6(1) of the EEA and accordingly, an “arbitrary ground” is contended for;

80.2. the EEA does not prohibit discrimination, but unfair discrimination. It also does not prohibit arbitrariness or arbitrary discrimination. It prohibits unfair discrimination on any “other” arbitrary ground. This means that a ground must be identified, and this ground must be “another” arbitrary ground, and

80.3. read with Section 11(2) of the EEA, differentiation per se is not sufficient. The ground in question must share the characteristics of the listed grounds and cause an injury to human dignity in a comparable, similar manner.

- [81] The Commissioner found that for an arbitrary ground to be viewed as analogous to specified grounds, it would have related to a personal characteristic attaching to the employees which is immutable or at least difficult to change.[14]
- [82] The Commissioner then deals further with the issue of status and notes that for discrimination on an analogous ground, it must also be pejorative in intent, seeking to ostracise and marginalise holders of that personal characteristic and to oppress them.[15] The analogous ground must be one where the differentiation and treatment results in an impact on human dignity, not mere disagreement. Neither will a sense of insult or a sense of deep dissatisfaction and deprivation suffice. It must amount to an attack on one's human dignity and an affront to the essence of one's identity – it must penetrate to the very heart of who one is as
a human being.
- [83] The Appellants referred to the Constitutional Court decision in *Mahlangu & another v Minister of Labour & others (Commissioner for Gender Equality & another as Amici Curiae)* [16], which dealt with “domestic servants”, a group of employees which it found was dominated by females. It described the social plight of such employees, and it was argued that the position of the Appellant's female employees is no different. However, the mere fact of females allegedly being a different “status” as employees of PnP compared to other employees, does not mean that they are treated in the workplace as contemplated above. The Commissioner found no evidence that the NMBU employees of PnP are viewed in that manner at the workplace or even in wider society.
- [84] The Commissioner further found that in fact PnP's employees are from a relatively privileged group in our society, having employment with a stable and successful national retailer, access to medical aid, provident funds, participating in collective bargaining, training opportunities, promotion and leadership opportunities and the protection of a powerful trade union. They cannot be compared to employees in the truly vulnerable sectors of the economy, such as domestic workers, farm workers or the security sector. On this basis the Commissioner found that the comparison with domestic workers was unsustainable.
- [85] The Commissioner found that promoting equity and tackling discrimination to stop certain people being treated as lesser human beings because they belong to a particular group. The more vulnerable the group affected the more likely the discrimination will be held to be unfair.
- [86] The Commissioner rejected the argument that the reason for the differentiation is the “status” of the employees. This would suggest a difference in status within the bargaining council which was not the case in terms of the Commissioner's

analysis.

- [87] The Commissioner made the point that the Appellant admitted that some of the NMBU employees already receive a premium and accordingly it cannot be the Appellant's case that it is the employees' "status" that causes the difference in premium. The ultimate finding of the Commissioner in this regard is that "status" does not meet with the requirements to constitute a ground analogous to the listed grounds and therefore does not constitute an arbitrary ground for purposes of the EEA.
- [88] What caused the difference in pay for work during normal hours on Sunday was the neutral ground of pay categories agreed to in collective bargaining over many years as well as a reflection of prevailing and relevant legislative provisions including SD9.
- [89] The Appellant argued extensively in favour of the thesis that there was significant discrimination on arbitrary grounds and dealt extensively with the jurisprudence in this regard. However it was not able to make a connection, as would be required, as to the precise nature of the arbitrary ground and the impact that it would have, specifically in respect of dignity on the relevant employees.
- [90] The Commissioner found that it was not the employees' "status", as members of the NMBU, that caused the difference (some employees in the NMBU receive a premium for ordinary work on Sundays and some not). The reason is not "status", it is the applicable contractual regime underpinned by legislation that causes the difference. The reason for "status" in this instance, does not impact an individual's human dignity in a comparably serious manner to the listed grounds. It does not undervalue the employee's worth as a human being. The historical matrix of events including the collective agreements entered into, SD9, the different number of days off work relative to Sunday pay, and the length of service must all be taken into account when coming to an understanding of the differentials in the multipliers applied to different employees' pay for ordinary Sunday work. These do not go to the employees worth as human beings. They are not akin to the listed grounds set out in Section 6(1).
- [91] Mahlangu (supra) dealt with the exclusion of domestic workers from the provisions of COIDA.[17]
- [92] The situation of domestic workers in our society cannot be compared to the employees in this matter, this was the submission made on behalf of PnP, concurring with the Commissioner. Although this is somewhat apocryphal, I would agree with the Constitutional Court in Mahlangu (supra) that domestic workers form part of one of the most vulnerable and indigent groups of people in our society. In summary, "status" is not the ground for differentiation in Sunday pay rates and it does not have the characteristic of discrimination in that it does not affect human dignity in a comparably serious manner as would differentiation on the listed grounds.

[93] The recent Labour Appeal Court decision in *AMCU (supra)*[18] contains elements that are relevant to this matter -

“The Labour Court correctly noted that the test set out in Harksen v Lane NO and others[19] applies in the determination of a discrimination claim under section 6(1) of the EEA; and that in order for the alleged grounds of arbitrary discrimination to qualify as such, these 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 comparably serious manner to a listed ground. The unequal treatment alleged must therefore be based on attributes and characteristics attached to a person before it will fall within the meaning of discrimination. In Naidoo and others v Parliament of the Republic of South Africa[20] this Court made it clear that an “arbitrary ground” must be analogous to a listed ground of discrimination in the sense that it has the potential to impair human dignity in a comparable manner or have a similar serious consequence.

[94] The entire scope and background to why different multipliers were applied in respect of work on Sundays has been exhaustively canvassed by PnP in this matter. I am unable to agree that PnP’s conduct in this regard shows that there are grounds based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings ... I am in agreement with PnP in this regard.

Gender and family responsibility

[95] In respect of these listed grounds, the Appellant raised the following grounds of appeal, that the Commissioner erred in finding that –

95.1. the pay difference did not constitute discrimination on gender and/or family responsibility grounds;

95.2. that PnP honoured its contractual obligations to the employees to the highest extent it possibly could;

95.3. that the ring-fencing did not constitute discrimination;

95.4. that PnP did not exercise discretion on meeting its operational requirements when rostering;

95.5. finding that the Kronos system was properly explained;

95.6. no evidence was led by the Appellant to justify the allegation that disproportionality is determined not only by reference to numbers but also by impact;

95.7. in finding that the Appellant failed to provide creditable and relevant statistics;

95.8. in finding that the problem the Appellant had is simply unhappiness with the system and with the flexibility the system affords to PnP;

95.9. the issues in this matter are mutual interest issues, and that the claim was simply one for more money, and

95.10. the Commissioner was inconsistent in the manner that she dealt with the collective agreements, relying on them to find that there was no unfair discrimination.

[96] I turn now to the Appellant's submissions in this regard.

[97] In respect of gender discrimination, the Appellant submitted that a vast majority of employees in the category who received no Sunday pay premium are women and women are the vast majority of the Appellants in the claim.

[98] The predominance of women in certain roles in the sector is reflective of broader structural discrimination against South African women who are expected to occupy service roles based on traditional assumptions and are still employed in the lowest paying jobs in the country.

[99] There is no comparator necessary in their case because the evidence proves a systematic and structural discrimination against them which meets the requirements of the EAA which does not always require comparative tests to establish discrimination. A prima facie case is made out merely on the common cause data which establishes the disproportionate effect on women, this on its own is sufficient

to establish the discrimination.

[100] To the extent that a comparator is required, all the employee Appellants in the NMBU have been discriminated against, compared to the management group, that being the first comparator and full time employees employed after 24 November 2011 received no premium for Sunday work until March 2019, and variable time employees employed after 24 November 2011. Collectively, the new FTE's and VTE's who have never received premium for Sunday work have been discriminated against compared to employees in the NMBU who were paid a premium for Sunday work, albeit at a lower rate than employees in the junior management group. All of these categories of staff do the same work.

[101] It was the finding of the Commissioner that PnP had demonstrated that the difference in Sunday pay premiums did not constitute discrimination based on gender and/or family responsibility, directly or indirectly.

[102] The Appellant's submissions were different.

[103] The positions of service and cashier staff at PnP are occupied by women because they are low paying roles, as conceded by Morne Oosthuizen, an expert witness called for PnP.

[104] The way in which Sunday work is rostered means that the majority of employees who work on Sunday are women and furthermore the majority of VTEs scheduled for Sunday work receive no premium at all.

[105] There are alternatives available to PnP.

[106] The system is designed in a manner that is of prejudice to female employees, directly and indirectly. Kronos, the Sunday roster system does not take into account the personal circumstances of the employees, their gender, whether they have minor or older children or what their childcare and social circumstances are. The Kronos system thus prejudices female employees in relation to the terms of the code of good practice on the regulation of working time.

[107] In Employment Equity Law at 8.8.4[21] the following is noted –

‘When designating shift rosters, it is important that an employer should be sensitive to the impact on employees, their families and family life. Certain shifts may have disproportionate impact on woman, pregnant woman in particular, married employees and employees with family responsibilities.’

[108] Accordingly, PnP’s practice was discriminatory on the basis of gender.

[109] PnP responded to the above grounds of appeal as follows –

109.1. there is no evidence to suggest that the difference in Sunday pay rates is based on an employee’s gender or family responsibility and that there is direct discrimination on these bases;

109.2. in respect of the finding that PnP honoured its contractual obligations to the employees to the greatest extent possible, the ring-fencing of the contractual entitlements of employees at the time was precisely this, i.e. that PnP honoured its contractual obligations vis-à-vis these employees;

109.3. in respect of the discriminatory or otherwise character of the ring-fencing that was undertaken by PnP, length of service is expressly recognised as a justifiable basis for differentiation in terms of the regulations (supra);

109.4. in relation to PnP not exercising its discretion when rostering employees for Sunday work to meet its operational requirements, PnP is entitled to roster employees in the most cost-effective manner possible. In any event when employees who are not entitled to a Sunday premium are rostered to work on a Sunday, such employees get two days off and they only work 40 ordinary hours in a week;

109.5. employees who are paid a Sunday premium get only one day off and they must work 45 ordinary hours per week;

109.6. in respect of the finding by the Commissioner that there was no credible and reliable evidence before her to support the allegation of the disproportionate impact on women; there was not. The case the Appellant seeks to make is that, because in mere numbers there are more women than men in the NMBU there is a disproportionate impact on women. This is not the test; the test requires an analysis of the proportions concerned and the Commissioner is correct that there was no evidence that demonstrated this;

109.7. that the Commissioner erred in finding that the problem that the Appellant has is unhappiness with the system, the matters are mutual interest issues, that the Appellant disguised the claim as an unfair discrimination claim, and that the Appellant's claim is, in reality, a demand for more money. These findings are plausible;

109.8. PnP is clearly dressing up a wage demand as an unfair discrimination claim, and

109.9. in relation to the issue of the collective agreements it is submitted on behalf of PnP that the Commissioner found that the difference in normal work for Sunday pay rates arose over the neutral ground of pay categories underpinned by collective bargaining over many years as well as reflected in prevailing and relevant legislative provisions, underpinned by SD9, which provides for a careful balancing of working hours, payment of a Sunday premium, and time off. The Commissioner emphasised the primacy of collective agreements. There is nothing circular in her reasoning.

[110] The mere fact that there are more women than men in NMBU roles does not mean that there is direct discrimination because of gender or family responsibility.

[111] PnP disputes that the common cause data establishes the disproportionate effect on women. This is simply not borne out by the evidence.

[112] Insofar as the comparison between NMBU employees and MSA employees is concerned, this is a comparison between male and female NMBU employees on the one hand and male and female MSA employees on the other. No conclusion of direct gender or family responsibility discrimination can be made through this comparison.

[113] Insofar as the comparison is made between the various NMBU categories, such categories consist of male and female employees, and for this reason, no conclusion of gender or family responsibility discrimination can be made through this comparison.

[114] The Kronos system schedules employees (males and females) in the most cost-effective manner. As stated above, where employees are scheduled and they do not receive a Sunday premium, they get two days off and they only work 40 hours in the week (not 45). This is the quid pro quo for not getting the Sunday premium. The evidence before the Commissioner established that there are equal proportions of male and

female employees who are entitled to Sunday premium and who are not. There is no evidence to suggest that the Kronos system is

“demonstrably designed” in a manner that is prejudicial to female employees.

[115] It is correct that the Kronos system does not take into account individual employee's gender or family responsibilities. It schedules employees with reference to their contract type. Employees, men and women alike, take up employment knowing full well what the working hour arrangements are and that if they are employed in a category where they will be required to work on Sundays with no premium, they will work 40 hours a week and get two days off. This is not unfairly discriminatory; it is in fact a permissible working hour

arrangement as expressly provided for in SD9 and is accordingly not in violation of the employment practice and regulation of working time.

[116] The Appellant contends that one of the purposes of the payment of the Sunday premium is to reward employees because they sacrifice time with their families and children. The Appellant conveniently omits to state that employees who receive a premium for Sunday work only get one day off per week, whereas employees who do not receive a Sunday premium get two days off. The working hour regime, as contained in the various collective agreements and SD9 accordingly balances the right to a premium with days off as well as reduced working hours – 40 versus 45. This does not amount to direct discrimination based on family responsibility.

[117] In respect of the allegations concerning gender discrimination, the submissions made on behalf of the Appellants is that the vast majority of the employees in the category who receive no Sunday pay premium are women and that they represent the vast majority of Appellants in this claim.

[118] This is a contentious issue between the parties. In this regard, I refer to page 30 of PnP's heads of argument in the CCMA, table 9, which illustrates that in respect of the proportion of males and females who are not entitled to the Sunday premium, the relevant percentages are 60.2% in respect of woman and 60.5% in respect of men. Without wishing to state the obvious, these percentages are almost identical.

[119] Accordingly, there can be no gender discrimination in operation, other criteria must be considered such as collective bargaining and the like.

[120] The Commissioner then went on to deal with the question of direct discrimination on the listed, specified grounds of gender and family responsibility.

[121] The fact that there is a difference in the multiplier used for different groups of employees on a Sunday is, as set out above, not in dispute.

[122] The issue to decide is whether the difference is attributable to direct discrimination on the grounds of gender or family

responsibility, and if so, whether it is rational, justifiable and fair.

[123] Given that differentiation on a listed ground is presumed to be unfair discrimination, the onus rested on PnP to prove that the differentiation did not amount to discrimination and if found that it did, that it was nevertheless rational, justifiable and fair.

[124] Section 6 of the EEA provides –

‘6. 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, cultural, language, birth or on any other arbitrary ground. . .
- (4) A difference in terms of condition 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.’
- [125] On this point the Commissioner found that PnP’s witnesses, De Light and North, showed that gender and family responsibility played absolutely no role in the determination of which employees work on a Sunday or are paid at a normal rate and those who indeed receive a premium when working on Sundays. The witness’ testimony was that the differences came about through negotiation and collective agreements entered into after the wage determination published by the Minister.
- [126] The Commissioner emphasised that PnP honoured its contractual obligations to employees to the greatest extent possible by ring-fencing existing employees given their length of employment, whereas new dispensations were mainly applied to new entrants to a category of employment. This aspect contains one of the allegations relating to discrimination on the part of the Appellant in respect of which the Commissioner finds that, inter alia, ring-fencing practises in employment are an accepted method of addressing disparities in remuneration. It is not gender related discrimination in that the employees who were ring-fenced were not only men but women as well.
- [127] Regulation 7(1)(a) of the EEA regulations states that length of service may justify differentiation. The requirement is that the factors utilised to differentiate are rational fair, justifiable, and not discriminatory.
- [128] The argument was made by the Appellant that PnP in rostering employees for work on Sunday exercised its discretion to meet operational requirements. The evidence was that rostering is done without any reference to gender, family responsibility, or any criteria related to “status”. The Appellant argued that rostering should be sensitive to the genuine requirements, such as child care responsibilities and the like, of individual employees.
- [129] The “Kronos” system was explained in evidence and it was stated that any departure from the “Kronos” system immediately led to action being taken by the employer.
- [130] The argument was also made by the Appellant that the Commissioner’s finding that the problem the Appellants have is simply one of unhappiness with the system. The Appellant was vehemently opposed to this argument.

- [131] The Commissioner found that it was nothing but unhappiness with the flexibility the system allows the employer and unhappiness with the fact that many of the employees had accepted an offer of employment which remunerated them at a lesser rate for Sunday work than some of their ring-fenced colleagues, or at a lesser rate than other categories of employees in the NMBU for Sunday work.
- [132] She further found that these issues are matters of mutual interest and the Act may not be used to circumvent a process of negotiation to change rates of remuneration for Sunday work or to increase the wages of employees.
- [133] She found that the Appellant having brought this matter of mutual interest to litigation under the guise of a discrimination claim was disingenuous.
- [134] Bearing in mind the evidence of Papale and Dlamini, it was clear to the Commissioner that the Appellants simply wanted to earn what others earn on Sunday – disregarding or ignorant of the rationale which informs that situation; disregarding and ignorant also of the fact that their own representatives had on their mandate entered into agreements which facilitated the situation.
- [135] The claim of gender and family responsibility discrimination could not be sustained during cross-examination when the witnesses conceded that all they wanted was the same rate of pay be that 2 times or even 1.5 times that which others earned if they worked on a Sunday.
- [136] The Survey tendered by the Appellant, so found the Commissioner, could not substantiate a claim of discrimination on the grounds of gender or family responsibility. In her view PnP, having given effect to the wage determination and collective agreements, had not perpetrated discrimination on unlisted arbitrary ground, much less unfair discrimination on a listed ground.
- [137] In order to illustrate this point, the Commissioner referred to Pioneer Foods[22] where it was held that

‘Differential treatment is ubiquitous in modern life and in the workplace. The EEA does not regulate such differential treatment at all unless and until it is established that it is both “not rational” and constitutes “discrimination”. (To constitute “discrimination” the differentiation must take place on a listed ground or any “other arbitrary ground” as contemplated in s 6(1). The following seminal passage from the Constitution Court in *Prinsloo v Van der Linde & another* is directly applicable, notwithstanding the different statutory context:

“If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by resort to s 33, or else constituted discrimination which had to be shown not be unfair, the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct... The courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional

impermissibility and is unequal or discriminatory “in the constitutional sense”.

- [138] The Commissioner further emphasised the principle of voluntarism and referred to the fact that there were negotiations with the Appellant and there were several collective agreements that came into existence during the period in question. As an illustration of the principle of voluntarism, the Commissioner referred to Association of Mineworkers & Construction Union & others v Royal Bafokeng Platinum Ltd & others.[23]
- [139] The Commissioner emphasised the supremacy of collective agreements. This is not to say, as pointed out by the Commissioner, that a collective agreement can justify discrimination on a listed ground or an analogous ground.
- [140] it is denied that PnP unfairly discriminates directly or indirectly, against the Appellants members because of gender vis-à-vis the employees in the MSA.
- [141] it is denied that the junior management category is male dominated. The breakdown of MSA employees by gender is as follows –
- 141.1.1. females 2 315;
 - 141.1.2. male 2 384;
 - 141.1.3. total 9688;
 - 141.1.4. percentage female 49.3%; and
 - 141.1.5. percentage male 50.7%.
- [142] There is no discrimination based on gender. The Sunday pay arrangements apply to both men and women.
- [143] PnP does not unfairly discriminate indirectly against the Appellant’s members because of gender and the Sunday pay arrangements do not disproportionately affect women.
- [144] At the relevant time dealt with in the context of the arbitration, the number of employees in the NMBU was, in total, 20 654 women and 7 920 men, a total of 28 574 of which 72.3% are women and 27.7% are men.
- [145] It is submitted on behalf of PnP that there is no differentiation between any category of employee based on family responsibility. As set out above, SD9 and the subsequent wage agreements between the parties provide that any NMBU employees who receive normal pay for work on Sunday do not work on more than 5 days in any week, and therefore have 2 full days off per week.
- [146] A premium is paid for work on Sundays where NMBU employees and MSA employees in stores work 6 days a week and therefore only have one full day off per week, or to MSA employees who are not ordinarily required to work on Sundays.

Indirect discrimination

[147] The Appellant contends that the Commissioner erred by finding that there was no indirect discrimination, inter alia, by –

147.1. restricting the enquiry into direct discrimination to the variants (if any) between the ratio of males and females in the NMBU with a ratio of males and females in rostering;

147.2. finding that the claim with respect to males who do not receive a premium for Sunday work is directly opposite to its claim in respect of gender discrimination;

147.3. finding that there is no basis for the Appellants' claim that females were disproportionately more impacted by the policy, and

147.4. Finding that there were no reliable statistics to show that employees with family responsibilities were more greatly impacted than those without.

[148] PnP submitted that the Commissioner did not err in the manner she determined the claim for indirect discrimination.

[149] The Commissioner applied the correct test for indirect discrimination. This test is as follows –

149.1. the application of a neutral policy or practice;

149.2. that detrimentally affects a substantially higher proportion of a protected group or class, and

149.3. causality, mainly that it is the neutral ground that causes the detriment.[24]

[150] The Commissioner applied this test and held that, on the evidence, there was no disproportionate impact on women. In doing so the Commissioner correctly rejected the flawed survey results which the Appellant sought to rely upon in establishing the alleged adverse impact on women.

Postponement

ruling

[151] The Appellant contends that the Commissioner erred in dismissing its application for postponement. In particular, it contends that –

151.1. the Commissioner erred in finding that in the absence of an application by the Appellant to reopen its case, she could not consider the postponement application, and

151.2. the Commissioner erred in failing to take into account that the purpose of the postponement application was to afford the Appellant further time to procure a survey and expert evidence to support its intended application to reopen its case.

[152] The Appellant does not advance this ground of appeal in its Rule 9(6) representations, it does not seem to pursue it at all at this stage.

[153] By the time the Appellant brought the postponement application, about a year had passed since the previous postponement of the arbitration. By this time, the Appellant had filed 13 witness statements as well as results in respect of a survey of more than 1000 employees. The purpose of the postponement was to procure yet another survey, with there being no way of knowing whether it would in fact support its case or not. The Commissioner properly exercised discretion in refusing the postponement which, in the circumstances, cannot be interfered with on appeal.

Conclusion

[154] The essence of discrimination in the context of employment equity, is the impact that discriminatory conduct has on the employees who are victims of it. As set out in numerous authorities, some of which are referred to above, it goes to the dignity of the employee, to the essence of who they are.

[155] I am of the view that the facts of this matter do not meet the test of a requirement for a fundamental impact on human dignity. The differentials between the relevant employees are indeed caused by –

155.1. the history of collective bargaining referred to by the parties; the collective agreements that came into existence;

155.2. the variety of different job categories that arose within PnP;

155.3. differentiating between employees on the basis of when they were employed;

155.4. the trading conditions in the retail industry, where in one instance a significant number of retrenchments were avoided, and some jobs created, arising out of agreements in respect of Sunday rates;

155.5. the difference in the “work of equal value” question which arises from section 6(4) of the EEA;

155.6. PnP exercising its discretion when rostering employees for Sunday work to meet its operational requirements, which it is entitled to do in the most cost-effective manner possible, and

155.7. the provisions of SD9.

[156] These circumstances, although they appear unfair to the employees, have been comprehensively dealt with by PnP.

[157] In my view none of the allegations against PnP when viewed in their proper context amount to discrimination in terms of the EEA.

[158] This is not to say that the employees are without remedies. They can exercise their rights in respect of these issues as mutual interest issues, utilise collective bargaining, or engage utilising section 27 of the EEA.

[159] In the premises the appeal is dismissed, save in respect of prescription, in respect of which it succeeds.

[160] I am most grateful to both counsel for their comprehensive heads of argument.

[161] I have a broad discretion in relation to costs in terms of section 162 of the LRA which I must exercise according to the requirements of law and fairness.

[162] The parties have an ongoing relationship which would be hardened by the granting of a costs order.

[163] Accordingly, I make the following order –

Order

1. Save in respect of prescription, the appeal is dismissed.
2. There is no order as to costs.

A. Snider SC

Acting Judge of the Labour Court of South Africa

Appearances:

For the Appellant: Instructed by: F Boda SC Dockrat Attorneys For the Respondent: Instructed by: A Myburgh SC Bowmans

[1] Act 55 of 1998.

[2] Management, salaried and administration.

[3] Act 75 of 1997

[4]

(2018) 39 ILJ 1213 (CC); [2018] 6 BLLR 531 (CC) at para 214.

[5] [2007] ZASCA 95; 2007 (11) BCLR 1214 (SCA) at para 20.

[6] See also *Lombo v African National Congress* 2002

(5) SA 668 (SCA) at paras 26-27.

[7] Labour Appeal Court case number JA20/2023 heard on 20 February 2024, judgment delivered on 14 May 2024.

[8] *AMCU* (supra) at page 20 paragraphs [53] and [55].

[9]

[1997] ZACC 5; 1997 (3) SA 1012 (CC) at para 31.

[10]

[2000] ZALC 134; (2001) 22 ILJ 214 (LC) at para 17.

[11] (Cited in Lebelo & others v City of Johannesburg J2055/2014 dated 17 March 2022).

[12] Pioneer Foods (Pty) Ltd v Workers Against Regression & others

(2016) 37 ILJ 2872 (LC).

[13] for VTES in all categories 1 December 2011 until the date of the award and for FTES (FTE 196, FTE 001 and FTE 176), 1 December 2011 to 31 May 2019

[14] She referred in this regard to Harksen v Lane N.O. 1997

(11) BCLR 1489 (CC); [1997] ZACC 12 and other decisions.

[15] She refers in this regard to Harksen, Prinsloo v Van der Linde [1997] ZACC 5; 1997

(6) BCLR 759 (CC) and Hoffman v South African Airways [2000] 12 BLLR 1365 (CC); [2000] ZACC 17.

[16]

(2021) 42 ILJ 269; [2021] 2 BLLR 123 (CC).

[17] Compensation for Occupational Injuries and Diseases Act 130 of 1993, as amended.

[18] At p17 para [48]

[19] [1997] ZACC 12; 1998 (1) SA 300 (CC)

[20] [2020] ZALAC 38; (2020) 41 ILJ 1931 (LAC)

[21] Employment Equity Law, Klick and Others.

[22] Pioneer Foods (Pty) Ltd v Workers Against Regression & others

(2016) 37 ILJ 2872 (LC);

[2016] 9 BLLR 942 (LC) at para 50.

[23]

(2018) 39 ILJ 2205 (LAC); [2018] 11 BLLR 1075 (LAC). [26] The voluntary nature of our labour relations system is held together by collective agreements. Collective agreements are part of the package. The gains made by collective bargaining which lead to collective agreements should not be unravelled easily. The risk, of course, being that the unravelling of one thread might lead to the destruction of the entire garment.

[24] Pretorius et al, Employment Equity Law at 4 to 27.

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