

SOUTH AFRICA / JUDGMENT

Sayiti v Sun International Management Limited (JS1019/16) [2023] ZALCJHB 104; (2023) 44 ILJ 1613 (LC) (17 January 2023)

[2023] ZALCJHB 104

COURT

Labour Court Johannesburg

BEFORE

M T M Phehane

CASE / FILE NUMBER

JS1019/16

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS1019/16

In

the matter between:

LUCKY
THANDIKHAYA
SAYITI
Applicant
and
SUN
INTERNATIONAL MANAGEMENT LIMITED
Respondent

Heard:

8, 10 and 11 August 2022

Delivered:

17 January 2023 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 17 January 2023.)

JUDGMENT

PHEHANE, J

Introduction

- [1] The applicant (Mr. Sayiti) brings this referral in terms of the provisions of section 187(1)(f) of the Labour Relations Act^[1] (LRA).
- [2] Mr. Sayiti was dismissed by the respondent on 11 September 2016, following an incapacity enquiry into allegations regarding his poor performance. Mr. Sayiti alleges that the incapacity hearing was a farce and that the true reason for his dismissal is that the respondent unfairly discriminated against him on the basis of his religion and belief. Thus, he submits that his dismissal is automatically unfair.
- [3] Following his dismissal, Mr. Sayiti launched an automatically unfair dismissal dispute at the Commission for Conciliation, Mediation and Arbitration (CCMA). In his referral form, he summarised the facts of the dispute as “[a]utomatically unfair dismissal due to religion”.^[2] The CCMA issued a certificate of non-resolution of the dispute.^[3] The dispute now serves before this Court and is opposed by the respondent on the basis that the discrimination was fair. This defence is expanded on below.

Background

- [4] Mr. Sayiti was employed by the respondent in March 2015. At the time of his dismissal, he occupied the senior position of Market Manager: East Africa/SADC^[4] in the sales department. At the time, he was reporting to the Sales Manager: Africa. Mr. Sayiti is a member of the Seventh-day Adventist Church. It is a practice of this religion that its followers strictly observe the Sabbath. In other words, followers of the Seventh-day Adventist Church are not permitted to work from sunset on Friday to sunset on Saturday. For the purposes of this judgment this period will be referred to as “the Sabbath”.
- [5] The respondent contends that an “inherent requirement” of Mr. Sayiti’s job is to travel and work over weekends. Trade shows, which are held in various countries in the African region and where the respondent markets the hospitality and tourism industries in South Africa, take place typically over a weekend. Mr. Sayiti’s job required him to travel and to attend trade shows. The respondent contends that it tried to accommodate Mr. Sayiti by excusing him from work over the Sabbath but this put strain on his line managers and other colleagues who had to take over his responsibilities. Consequently, an incapacity hearing was held. The chairperson of the hearing found that travelling and working over the weekend was an inherent requirement of Mr. Sayiti’s job as he was required to travel over weekends, both locally and within the African region. The chairperson recommended that Mr. Sayiti be placed in an alternative position that did not require him to work over the Sabbath. Mr. Sayiti refused to accept this alternative position and instead, wanted to remain

in his position but not work on the Sabbath. Having declined to accept the alternative position, Mr. Sayiti was dismissed.

- [6] It is common cause that the contract of employment between the parties is silent on work over the weekend. However, the respondent contends that by virtue of the industry in which Mr. Sayiti was employed and given his past work experience in the hospitality industry, Mr. Sayiti was aware that he was required to work over weekends.
- [7] The respondent denies that it unfairly discriminated against Mr. Sayiti on any basis. It contends that Mr. Sayiti failed to meet the “inherent requirement” of his job, that is, to travel and

work over weekends, which work included the attendance at and the hosting of events. The respondent further contends that Mr. Sayiti

failed to disclose at the interview stage that his religion does not permit him to work on the Sabbath.

- [8] In essence, the respondent raises the defence of an “inherent requirement of the job”, to meet the applicant’s case of an automatically unfair dismissal based on discrimination on the grounds of religion and belief. The respondent concedes that there was discrimination and that such discrimination was fair.[5]

Preliminary point

- [9] The respondent raises a preliminary point that Mr. Sayiti has not identified a comparator in support of his allegation regarding unfair discrimination on the basis of religion and belief. The respondent, in the circumstances, contends that the applicant has failed to make out a case of discrimination on the pleadings.[6]
- [10] It is in dispute as to whether the applicant needs to identify a comparator.[7]
- [11] Mr. Sayiti contends that the preliminary point is an exception, which firstly, should not succeed as the respondent did not arise the exception as contemplated in rule 23 of the Uniform Rules of Court, read with rule 11 of the Rules for the Conduct of Proceedings in the Labour Court.[8] Secondly, the exception lacks merit on the basis that the statement of case clearly sets out a cause of action and the respondent knows ex facie the statement of case, the case it is to meet.[9] No exception is raised by the respondent. The objective of raising an exception on the basis that the pleading complained of lacks

averments necessary to sustain a cause of action (or defence as the case may be) or is vague and embarrassing, is to remove the cause of complaint in the pleading, by way of an amendment, failing which, the claim (or defence) may be struck out. The applicant must demonstrate that the pleading is prejudicial to it and it cannot plead in answer thereto. In casu, the respondent has delivered a statement of response, in the circumstances, an exception would be an irregular step.

- [12] The preliminary point, in my view, lacks merit as Mr. Sayiti's case is crisp. It is simply this: he was dismissed due to his alleged inability to perform his duties; the true reason for the dismissal is that the respondent unfairly discriminated against him on the basis of his religion and belief. In the premises, his dismissal is automatically unfair and is premised on section 187(1)(f) of the LRA. The basis of the respondent's defence is that travelling and working over weekends is an inherent requirement of Mr. Sayiti's job.
- [13] From the afore-going, Mr. Sayiti's case is that he was treated differently from other employees on the basis of his religion and belief. In my view, identifying a comparator *per se* is unnecessary in circumstances where the applicant's case is that he was treated differently by his employer as compared to all employees on the basis of his religion and beliefs. In the circumstances, the preliminary point falls to be dismissed.

Evidence

- [14] Mr. Sayiti was invited by Karen Terell-Travis (Ms. Terell-Travis) whom he knew from the hospitality industry, to apply for a national sales manager position within the respondent. He submitted his curriculum vitae to Ms. Terrell-Travis. He was then approached by Jennifer Beattie (Ms. Beattie), to whom he had been referred by Ms. Terell-Travis, as she was of the view that he was a good match for the department that Ms. Beattie headed (Africa Team). Mr. Sayiti was subsequently interviewed by Ms Beattie and was appointed to the position of Market Manager: East Africa/SADC in March 2015. This position reported to Ms. Beattie. (Ms. Beattie has since left the employ of the respondent).
- [15] Mr. Sayiti stated that he was not provided with the job advertisement for the position of Market Manager: SADC and East Africa when he was interviewed by Ms. Beattie. Ms. Beattie's evidence is the job advertisement was made available to Mr. Sayiti during the interview. The document relied upon by the respondent in this regard is entitled "Internal Vacancy Advice".[10] Even if the version of Ms. Beattie that Mr. Sayiti was presented with this document at interview stage is to be accepted, it does not assist the respondent's case, as this document merely states that the incumbent of the role is required to represent the respondent at trade shows in relevant and various international and local markets. It does not state that the inherent requirement of the role entails travelling to various markets and attending trade shows over the weekend.
- [16] The respondent submits that this Court is to determine whether it was an inherent requirement of the position that the incumbent of the role was required to work over weekends.[11] Nothing is mentioned in the internal vacancy or the letter of appointment that Mr. Sayiti signed, to the effect that working over

weekends is an inherent requirement of the job. On the evidence, the contract of employment in relation to both positions of Market

Manager did not state that work over weekends was an inherent requirement of the job. This was stated in the job advert after Mr. Sayiti was dismissed.

[17] Approximately two months after he was employed, in May 2015, when Ms. Beattie informed Mr. Sayiti that he is to attend a tradeshow in Durban, he informed her that due to his religion, he is to strictly observe the Sabbath and is not to work during this period. Ms. Beattie was understanding of his position and she stepped in and took over Mr. Sayiti's responsibilities for approximately 16 months, which included removing the East Africa region from his responsibilities in June/July 2015. Ms. Beattie was under strain and could no longer carry his load. Her evidence was that the revenue numbers in Africa grew and she took over a bigger role. She sent an email to Mr. Sayiti on 5 July 2016 (which the respondent's Counsel confirmed is not contained in the trial bundle without further elaboration), explaining that it was a huge burden that he could not travel, to which Mr. Sayiti responded he was accommodated for so long and enquired why someone could not continue taking over

his responsibilities.

[18] Mr. Sayiti's evidence was that as future events were planned, he would travel with the team, attend events but would observe the Sabbath. Mr. Sayiti stated that in his previous employment at Lonrho Hotels, he observed the Sabbath. He did not mention at his interview with the respondent that his religion requires him not to work over the Sabbath, as it was not stated in his employment contract that he is to work over weekends, if it was, he would have raised the tenets of his religion with the respondent earlier when he contracted employment.

[19] In July 2016, Mr. Sayiti was called to an incapacity hearing for his inability to perform his duties as required by the respondent. The alleged incidents he failed to attend span from May 2015 to September 2015.[12] The outcome was that he was incapable of performing an inherent requirement of the job. The chairperson recommended that Mr. Sayiti be placed in a role that would accommodate his religion and belief. The respondent offered Mr. Sayiti the position of Co-ordinator sales, which he refused for the reasons mentioned below.

[20] Mr. Sayiti denies that he performed poorly. On the contrary, he was rewarded for his performance.[13] It is not disputed that Mr. Sayiti was a good performer. Mr. Sayiti received a salary increase in 2016. This is confirmed by Ms. Beattie.

[21] Why then the need for an incapacity hearing based on poor performance?[14] This is the argument made by Mr. Sayiti. How then, is travelling and attendance at events over the weekend an inherent requirement of the job, if for 16 months, the respondent through Ms. Beattie, took over Mr. Sayiti's responsibilities and took over the East Africa Region? I deal with the definition of "inherent requirement of a job" and whether working on weekends was an inherent requirement of Mr. Sayiti's job later in this judgment.

- [22] Ms. Beattie's evidence was that it was vital for the team to attend trade shows and events locally and within the SADC and East Africa Region. The team members that attend trade shows are market managers and co-ordinators. Market Managers are the "face" of the respondent at these events.
- [23] Ms. Beattie stated that, given Mr. Sayiti's previous roles at previous employers and at a senior level, it was expected in the hospitality industry that Market Managers would attend and host events locally and within the SADC and East Africa region ("in-market" or "in-country") over weekends. She assumed, given his previous work experience, that Mr. Sayiti would know that it is expected of Market Managers to travel and work over weekends and that he did so. Ms. Beattie stated that the respondent's human resources department ought to have confirmed that Mr. Sayiti worked over the weekend at the interview stage but they failed to do so. Her evidence remains an assumption that she made. Mr. Sayiti's evidence is that he did not work over the Sabbath at his previous employment. This version is uncontested.
- [24] Ms. Beattie's evidence was that itineraries relating to trade shows are shared with the team well in advance. Other events happen at the drop of a hat and employees are required to be available to attend all such events as they are based on consumer behaviour. When the Durban event came up in after Mr. Sayiti was employed, she shared and discussed the itinerary with him and it was only at that point, that he mentioned that his religion does not permit him to work over the Sabbath. She enquired why he did not mention this before, and his response was that had he mentioned it, he would not have secured the job. Mr. Sayiti denies this. Ms. Beattie stated that Mr. Sayiti was dishonest in not informing the respondent at the outset that his religious beliefs did not permit him to work during the Sabbath. Despite her evidence in this regard, no charges of dishonesty were levelled against Mr. Sayiti. He continued to render his services and performed well.
- [25] Mr. Ishmael Kashiku formerly held the position of Market Manager for the West Africa Region from 2012 to 2015. From 2016 to 2021, after Mr. Sayiti's dismissal, he held the position of Market Manager: SADC and East Africa, having been encouraged by Ms. Beattie to apply for this position. Mr. Kashiku is the current International Sales Manager for Africa, Middle East and Russia, since February 2021.
- [26] He stated that the position formally occupied by Mr. Sayiti had merged with his own position. He now, essentially, performs the role that was previously occupied by Mr. Sayiti. He confirmed Ms. Beattie's evidence that Market Managers are required to attend trade shows. As brand ambassadors, Market Managers are required to be physically present at trade shows, as they are the face of the respondent. Human interaction is required to establish contacts to market the tourism and hospitality industry. He also confirmed that some events are planned in advance while others are at short notice and employees are required to be in attendance. Trade shows typically occur on weekends and are based on consumer behaviour. Market Managers host trade shows. Failure to be present at trade shows would result in damage to the business of the respondent.

[27] Mr. Kashiku's evidence was that the majority of the work of Market Managers is performed during the week. He practices the Islam faith and it is by choice whether to observe certain prayer times. His evidence was that when he is not available during a trade show, due to observing the tenets of his faith, he would leave his business card in order that potential clients could contact him at a later stage. He stated that this is how the respondent accommodates him. In essence, his evidence was that it is required for a Market Manager to be available at trade shows "when the need arises, not always".

Applicable legal framework and evaluation

[28] Section 15(1) of the Constitution[15] provides that "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion". Section 10 of the Constitution makes provision for the inherent dignity of everyone and the right to have one's dignity

respected and protected.

[29] Section 9 of the Constitution makes provision for the right to equality and the prohibition of unfair discrimination on the listed grounds in subsection (3) and reads as follows:

'9.

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.' (Emphasis added).

[30] The Employment Equity Act[16] (EEA) is one of the pieces of national legislation that prevents and prohibits unfair discrimination. The EEA provides for the prevention and elimination of unfair discrimination in the workplace.[17]

[31] Sections 5 and 6 (1) and (2) of the EEA provide as follows:

'5. Elimination of unfair discrimination – Every employee must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

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, culture, language, birth or on any other arbitrary ground.
- (2) It is not unfair discrimination to –
 - (a) take affirmative action measures consistent with the purposes of this Act; or
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.’

[32] In *Lewis v Media24 Ltd*,^[18] the Court held as follows at paragraph 36:

‘The concept of discrimination is made up of three issues: differential treatment; the listed or analogous grounds; and the basis of, or the reason for, the treatment. Once a difference in treatment is based on a listed ground, the difference in treatment becomes discrimination for the purposes of s 9 of the Constitution and s 6 of the EEA.’

[33] As quoted above, the EEA provides that distinguishing, excluding or preferring any person in the workplace on the basis of an inherent requirement of the job does not constitute unfair discrimination.

[34] What then, is the meaning of an inherent requirement of the job? In *TFD Network Africa (Pty) Ltd v Faris*^[19] (TFD Network) the Labour Appeal Court (LAC) quoting from the decision in *Department of Correctional Services and Another v Police and Prisons Civil Rights Union and Others*^[20] ascribed the following meaning to the term ‘inherent requirement of the job:

‘An inherent requirement of a job has been interpreted to mean “a permanent attribute or quality forming... an essential element... and an indispensable attribute which must relate in an inescapable way to the performing of the job”.’ (Emphasis added).

[35] The Court in *TFD Network*^[21] went on to state as follows in paragraphs [37] and [38]:

‘[37] The test for whether a requirement is inherent or inescapable in the performance of the job is essentially a proportionality enquiry. Considering the exceptional nature of the defence, the requirement must be strictly construed. A mere legitimate commercial rationale will not be enough. In general, the requirement must be rationally connected to the performance of the job. This means that the requirement should have been adopted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose and must be reasonably necessary to the accomplishment of that purpose.

[38] However, even if that is shown, the enquiry does not end there. In addition, the employer bears the burden of proving that it is impossible to accommodate the individual employee without imposing undue hardship or insurmountable operational difficulty. In *SA Clothing and Textile Workers Union and Others v Berg River Textiles – A Division of Seardel Group Trading Pty*, [(2012) 33 ILJ 972 (LC) at para 38.6] the Labour Court correctly and succinctly put it as follows:

“In particular, the employer must establish that it has taken reasonable steps to accommodate the employees’ religious convictions. Ultimately the principle of proportionality must be applied. Thus an employer may not insist on the employee obeying a workplace rule where that refusal would have little or no consequence to the business.”

[36] Although not eloquently pleaded, the respondent’s defence to Mr. Sayiti’s claim of unfair discrimination based on religion and belief is that it was an inherent requirement of the role of Market Manager to work over weekends and he ought to have known this given his work experience in the hospitality industry.

[37] The defence of an inherent requirement of the job is an absolute defence to a claim for unfair discrimination. In *Damons v City of Cape Town*[22], the Constitutional Court stated that the “...the [inherent] requirement must be genuine. Once a requirement is determined to be inherent, then as a matter of law, it is not unfair discrimination for an employer to insist on employees meeting the requirement”.

[38] It is common cause that Mr. Sayiti’s contract did not state that it was an inherent requirement of the job of Market Manager to work over weekends. It is also common cause that pursuant to his dismissal, the job description of the position of Market Manager contained weekend work as an inherent requirement.

[39] Having raised the defence of an inherent requirement of the job, the respondent bears the onus to prove that the discrimination is fair, by demonstrating firstly, that weekend work is rationally connected to the performance of the job and secondly, that it is impossible to accommodate Mr. Sayiti without imposing undue hardship on its operations.[23]

[40] On the evidence of Messrs. Sayiti and Kashiku, weekend work is not intricately linked to the fulfilment of the targets of the position of Market Manager nor is it reasonably necessary, or an essential element or indispensable attribute to the performance of the job of Market Manager. In the premises, my view, this requirement is merely commercial gain – to establish a face-to-face human connection with (potential) clients. On the evidence, contact can be established through business cards being left at the events and further, in office during the week. Not only that, but it is not the incumbent of the role per se that makes the contact, it can be made by any available team member. The requirement of weekend work is not rationally connected to the performance of the job. In the premises, I do not find that weekend work is an inherent requirement of the job. The defence therefore fails on the first leg. There is therefore, no need to canvass the second leg, i.e. that it was impossible to reasonably accommodate Mr. Sayiti without causing undue hardship on the operations of

the respondent.

[41] For completion, I mention on the evidence, that the respondent has taken no reasonable steps to accommodate Mr. Sayiti's religious

convictions. This is apparent from the respondent hauling him to an incapacity hearing for non-performance when, on the common cause facts, he was a good performer. The non-performance is related to Mr. Sayiti's unavailability due to his religious convictions, not his refusal to do work. On the facts, he did not refuse to travel. In some instances, he travelled with the team to events, but would observe the Sabbath and thereafter, avail himself to perform his duties. This is not an employee who refused to work – on the contrary, he worked and was rewarded for his work. To punish Mr. Sayiti by hauling him to an incapacity hearing without any basis, after approximately a year of supporting him by permitting him to observe the Sabbath, under the guise of added work pressure for Ms. Beattie in particular, has infringed Mr. Sayiti's dignity and right to equality, and freedom of religion and belief. It does not end there. To offer Mr. Sayiti a role of co-ordinator (reasonable accommodation) that was approximately 45% less than his salary and still require him to work weekends is a further insult and infringement of his right to dignity, equality, freedom of religion and belief. The infringement of Mr. Sayiti's dignity is perpetuated by Ms. Beattie alleging that he was dishonest in not divulging his religious beliefs at the outset and stating that the reason he failed to do so, was because he informed Ms. Terrell-Travis that he was of the view that he would not get the job if he made such disclosure. Mr. Sayiti denies that he said this to Ms. Terrell-Travis. Further, despite such a serious allegation of dishonesty, it is common cause that Mr. Sayiti was not charged for such misconduct.[24]

[42] Ms. Terrell-Travis was not called by the respondent to give this testimony, despite the respondent informing this Court that she would be called as a witness. In the circumstances, a negative inference is drawn by the failure of the respondent to call Ms. Terrell-Travis as a witness.[25] In the premises, Ms. Beattie's evidence in regard to Mr. Sayiti being dishonest about failing to disclose his religion at the outset is rejected.

[43] There was no basis to bring Mr. Sayiti before an incapacity hearing for poor performance. There is simply no evidence of any poor performance. Mr. Sayiti was dismissed pursuant to the incapacity hearing and refusing to accept a lower position that still obliged him to work on weekends against his religious convictions. There is therefore a causal connection between his religious convictions and his dismissal. But for his religious convictions, Mr. Sayiti would not have been dismissed.[26] In the circumstances, the true reason for his dismissal is premised on his religious convictions and constitutes unfair discrimination on the basis of religion and belief. I have already mentioned that the respondent failed to prove that the discrimination was fair. In view of the afore-going, I find that the dismissal of Mr. Sayiti is automatically unfair.

Is reinstatement an appropriate remedy?

[44] It is trite that the primary remedy for a finding of unfair dismissal is reinstatement where it is practicable.

[45] Mr. Sayiti wants to be placed in his former position and wants to observe the Sabbath. The respondent bears the onus to prove that reinstatement is not practicable. There is no evidence before this Court that the respondent may not place Mr. Sayiti in his former position where he observes the Sabbath without undue hardship on it. The evidence before this Court is that Mr. Sayiti performed well in his position while observing the Sabbath and the revenue of the respondent grew in 2016, through the contribution of Mr. Sayiti and with teamwork. The scope of work may well have increased pursuant to a restructuring process, however, on the evidence of Mr. Kashiku, weekend work is not critical to the position; further, that work over weekends is not critical to the role, as targets can be met during the week. The facts demonstrate that this was achieved by Mr. Sayiti while observing on the Sabbath. In the circumstances, I see no reason why it would not be practicable to reinstate Mr. Sayiti.

[46] In light of the afore-going, the following order is made:

Order

1. The preliminary point is dismissed.
2. The applicant's dismissal is automatically unfair.
3. The respondent is to reinstate the applicant retrospectively.
4. The respondent is to ensure that policies are developed and implemented that observe all religious practices and beliefs without placing undue hardship on its business operations.
5. There is no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. Grove of Smit and Grove Attorneys
For the Respondent: Adv. Omar
Instructed by: Cliffe Dekker Hofmeyr Inc.

[1] Act 66 of 1995, as amended. Section 187(1)(f) of the LRA reads thus: '187. Automatically unfair dismissals (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is – ... (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour,

sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family

responsibility’.

[1] Act 66 of 1995, as amended. Section 187(1)(f) of the LRA reads thus:

‘187. Automatically unfair dismissals

(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –

...

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour,

sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family

responsibility’.

[2] Bundle B, p 110 (B110).

[3] B112.

[4] Southern African Development Community.

[5] Pre-trial minute at para 18.3. The respondent somewhat oscillates between, on the one hand, a defence of a fair dismissal based on incapacity premised on poor performance (the respondent stops short of stating that Mr. Sayiti is a poor performer – on the facts, he was a good performer although he did not work over the Sabbath) and on the other hand, a defence of fair discrimination based on the inherent requirements of his job. Apart from denying in its pleadings, that any discrimination took place, the respondent falls short of pleading that the discrimination was fair as it is based on the inherent requirements of the job. That being said, this Court is entitled to rely on the content of the pre-trial minute as concluded between the parties, and the concession by the respondent that its defence is that the discrimination was fair. This Court would not be clothed with jurisdiction to adjudicate an unfair dismissal dispute premised on incapacity – such dispute would need to be determined at the arbitration hearing before the CCMA. This clearly is not the applicant’s case. I mention this in view of the defence of the respondent, which is in my view, not clearly pleaded. To this end, much is made by the respondent of the findings of the incapacity hearing that Mr. Sayiti is “unable to perform the full range and extend of his responsibilities due to religious reasons and it is impacting on fellow employees and his employer” and “...is not capable of performing the work of Market Manager based on its inherent requirements”. (See: statement of response at paras 14 and 15, A22 to 23).

[6] Pre-trial minute at para 3.1.2.

[7] See: pre-trial minute at para 5.8.

- [8] GN 1665 in GG 17495 of 14 October 1996.
- [9] Applicant's heads of argument at paras 117 to 132 and the authorities cited therein.
- [10] B12.
- [11] Respondent's heads of argument at para 10.1.
- [12] See: Notice to attend incapacity hearing, B6 to 9.
- [13] Applicant's heads of argument at para 28.
- [14] Oddly and unconvincingly, the respondent submits at para 13.6 of its heads of argument that the allegation against Mr. Sayiti was incapacity and not poor performance. This submission is at odds with the notification to attend the incapacity hearing which appears at B6 to 9.
- [15] Constitution of the Republic of South Africa, 1996.
- [16] Act 55 of 1998.
- [17] The other piece of national legislation is the Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000. The EEA prohibits unfair discrimination in the workplace and for the purposes of this judgment, it is the applicable national legislation as envisaged in the Constitution.
- [18]
- (2010) 31 ILJ 2416 (LC) at para [36].
- [19]
- (2019) 40 ILJ 326 (LAC) at para [36].
- [20]
- (2013) 34 ILJ 1375 (SCA) at para [23].
- [21] TFD Network *supra* at paras [37] – [38].
- [22]
- (2022) 43 ILJ 1549 at para [67].
- [23] TDF Network at paras [37] and [38].
- [24] In paragraph 47 of the respondent's heads of argument, it is stated that disciplinary steps were taken against Mr. Sayiti when Ms. Beattie and co-employees felt the burden of taking over Mr. Sayiti's responsibilities. On the evidence, no disciplinary steps were taken against Mr. Sayiti, rather, he was called to answer allegations of incapacity based on alleged poor performance.
- [25] See: Absa Investment Management Services (Pty) Ltd v Crowhurst

(2006) 27 ILJ 107 (LAC) at para [14]; and *Tshishonga v Minister of Justice & Constitutional Development & another*

(2007) 28 ILJ 195 (LC) at para [112] where the Court held that: ‘...an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.’

[25] See: *Absa Investment Management Services (Pty) Ltd v Crowhurst*

(2006) 27 ILJ 107 (LAC) at para [14]; and *Tshishonga v Minister of Justice & Constitutional Development & another*

(2007) 28 ILJ 195 (LC) at para [112] where the Court held that:

‘...an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.’

[26] See: *TFD Network supra* at para [31] where the LAC in considering whether the employee’s religion was the proximate reason for her dismissal, stated as follows: ‘Firstly, the dismissal would not have occurred if Faris had not been an Adventist. Had she not been an Adventist she would have willingly worked on a Saturday. The evidence suggests that her work performance was exemplary in all other respects. It is disingenuous

to argue that her non-availability on Saturdays was the reason for her dismissal without having regard to the underlying reason for non-availability. But for her religion, she could have worked on a Saturday and would not have been dismissed. Her religion was a dominant and proximate reason for dismissal.’

[26] See: *TFD Network supra* at para [31] where the LAC in considering whether the employee’s religion was the proximate reason for her dismissal, stated as follows:

‘Firstly, the dismissal would not have occurred if Faris had not been an Adventist. Had she not been an Adventist she would have willingly worked on a Saturday. The evidence suggests that her work performance was exemplary in all other respects. It is disingenuous

to argue that her non-availability on Saturdays was the reason for her dismissal without having regard to the underlying reason for non-availability. But for her religion, she could have worked on a Saturday and would not have been dismissed. Her religion was a dominant and proximate reason for dismissal.’

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Prepared on 11 October 2026 · Esheria