

SOUTH AFRICA / JUDGMENT

Swanepoel v Laerskool Muldersdrift (JS369/16) [2018] ZALCJHB 127 (20 March 2018) [2018] ZALCJHB 127

COURT

Labour Court Johannesburg

BEFORE

Lekale

CASE / FILE NUMBER

JS369/16

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IN THE LABOUR COURT OF SOUTH
AFRICA, JOHANNESBURG

Reportable / Not Reportable

Of interest to other Judges / Not of
interest to other judges

Case no: JS 369/16

In the

matter between:

ALLEMEIN
SWANEPOEL
Applicant
And
LAERSKOOL
MULDERSDRIFT
Respondent

Heard:

05 March 2018

Delivered:

20 March 2018

Summary:

JUDGMENT**LEKALE, AJ****Introduction and background**

- [1] On or about 24 November 2014 the applicant and the respondent concluded a trial four months first term employment contract in terms of which the latter appointed the former as agreed to teacher with effect from 01 January 2015 and terminating on 31 December 2015.
- [2] The applicant duly commence employment but on or about 02 May 2015 she discovered she was pregnant and proceeded to inform the respondent's principal accordingly on 18 June 2015. Upon receipt of the news the principal inquired from the applicant if she intended to continue her employment in 2016 to which the latter responded in the affirmative.
- [3] On or about 19 June 2015 the principal informed all the respondent's staff of the applicant's pregnancy. On or about 16 September 2015 the principal informed the applicant about the envisaged structural changes in the respondent's lower grades and pointed out that it was not certain if a vacant post existed for the applicant for the 2016 academic year.
- [4] Latter in that year one grade two teaching post was advertised for 2016 academic year and the applicant applied for the same. She attended an interview for the position in question on or about 22 October 2015 together with three other candidates. One Ms Breedt, the applicant's colleague, emerged as the first best candidate and got appointed while the applicant was scored the third best candidate.
- [5] On 13 October 2015 one Van der Walt also the applicant's colleague, resigned and her position became vacant for the 2016 academic year. On 02 November 2015 the applicant met the principal and the chairperson of the respondent's School Governing Body "(SGB)" who informed her not to have expectations in filling the relevant position as her contract comes to an end in December 2015. The applicant was later informed by the chairperson that she would not be considered for the relevant position as she did not make the shortlist.
- [6] The applicant's services terminated at the end of December 2015 in accordance with her fixed term contract and she later learnt that one Nadine Van Rooyen (nee Van Heerden) was appointed in the relevant position for 2016 as she was scored the second best candidate during the interview leading to Breedt's appointment.
- [7] She felt aggrieved by the situation and referred a dispute concerning alleged unfair discrimination to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for resolution. When the dispute remained unresolved after an attempt at conciliation she approached this court for adjudication.

- [8] The matter was duly allocated to my trial roll and at the commencement of the trial the parties confirmed their pre-trial minute duly filed in terms of which the background hearing was, effectively, minuted as common cause between them.
- [9] At the close of the applicant's case on 06 March 2018 the respondent, through Mr Groenewald applied for absolution from the instant which application was duly opposed by Mr Thompson for the applicant. I, thereupon, reserved judgment and undertook to deliver the same within a reasonable time before the end of the term.
- [10] This is, therefore, my judgment on such an application.

Issue for determination

- [11] The question in the instant matter is whether or not there is evidence upon which a court, applying its mind reasonable to the evidence properly before it, could or might find that the applicant is a victim of either direct or indirect discrimination at the hands of the respondent.

Applicant's case

- [12] The applicant, Ms Allemein Swanepoel, testified under oath as the sole witness in support of her claim, inter alia, to the effect that she was satisfied with the results of the interview at the time of the appointment of Breedts and she still has no quarrel with the scores in that regard. She feels aggrieved by the appointment of Nadine because she was more qualified than her. Members of the interview panels were biased against her and in favour of Nadine. Panellist from the SGB were not qualified to score candidates and the tertiary representative on the SGB who was also a panellist was clearly biased against her regard being had, inter alia, to her score sheet, the negative report she gave about her contained respectively in exhibit "B" as pages 43 and 51. The budget report on page 45 of exhibit "B" providing for maternity leave for 2016 is a sham.
- [13] She was discriminated against because of her pregnancy regard being had to the fact that the practice at the respondent is that the post in question was for the person in her position as she was already inside and Nadine was an outsider. Nadine also gave the name of the relevant teacher representative on the SGB as her mentor as evidenced by her curriculum vitae ("CV") on page 17 of exhibit "B". the principal also pointed out the costs involved in appointing her for 2016 regard being had to the fact that she would be going on maternity leave, thus, necessitating appointment of a relief.

Contentions for the parties

- [14] Mr Groenewald submits, inter alia, to the effect that the applicant failed to establish a prima facie case of discrimination insofar as she failed to show differentiation linked to her pregnancy in her evidence. The applicant simply draws unreasonable inferences from the factual matrix insofar as it is not her case that she was told that she was not appointed because of her pregnancy. She was clearly afforded an opportunity to contest for the

relevant position when it was already known that she was pregnant. Her evidence is not credible nor is it reliable.

- [15] On behalf of the applicant Mr Thompson submits, inter alia, to the effect that the respondent has a case to meet insofar as it is saddled with a burden of proof in circumstances of the instant matter. The panellist had conflict of interest and the presumption is in section 11 of the Employment Equity Act of 1995 (“the EEA”) serves to assist claimants in the position of the applicant insofar as it is difficult to establish the required nexus between the differentiation and the listed ground of discrimination.

Applicable legal position

- [16] In a claim for unfair discrimination the claimant must lay the basis by establishing a prima facie case insofar as “a nexus that is now the three dots in terms of the EEA, a claimant is obliged to establish the differentiation that forms the basis of the claim and to establish a link between that differentiation and one of the listed grounds in section 6(1) of the EEA, or an unlisted ground in circumstances where the claimant is able to show that the ground relied upon has the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.”[1]
- [17] A bold allegation of discrimination does not suffice for the purposes of section 11 of the EEA which saddles the alleged perpetrator with the burden of proof where an allegation of unfair discrimination on a ground listed in section 6(1) of the EEA is made because “[a mere allegation of discrimination will not suffice to establish a prima facie case of discrimination calling on the alleged perpetrator then to justify its actions.”[2]
- [18] In order to survive absolution the plaintiff, in the position of the applicant, “has to make out a prima facie case in a sense that there is evidence relating to all the elements of the claim.”[3]
- [19] Inferential reasoning in our civil justice system is based on two cardinal rules of logic insofar as the inference sought to be drawn should be consistent with all the proven facts and should be the most plausible in the circumstances.[4]

Application of legal position to the facts and findings

- [20] The applicant’s case is based on circumstantial evidence insofar as her evidence is not to the effect that she was told that the reason for her non-appointment was her pregnancy. She, thus, draws the inference that she was treated differently and that the differentiation was linked to her pregnancy from the facts that she was not appointed although she was already in the fold, she was pregnant, the respondent’s principal referred to the costs associated with her going on maternity leave if appointed and the appointment of a relief teacher in her position and she was better qualified than the successful candidate who also came from the outside.

- [21] Applicant gradually considered in her evidence that the respondent had a policy governing interviews in place and that it was entitled to consider subjective factors such as the characters of respective candidates over and above minimum qualifications for the post in question, she, further, considered that the respondent had a budget for maternity leave and relief staff for the relevant year.
- [22] The applicant, furthermore, considered that Nadine was appointed on the basis of her score mark during the interview but maintained that the scores were a sham and was fabricated to exclude her from competition. It is, however, not the applicant's case that the scores were doctored after the appointment of Breedt and for the purposes of leaving the position being left vacant by Van der Walt when she resigned.
- [23] The evidence is to the effect that when interviews were held Van der Walt position was not vacant and available. There is, further, nothing before the court to suggest that during the interviews the panel was already aware that Van der Walt was going to resign. It can, therefore, not be reasonably possibly be said that the panel scored Nadine better than the applicant in anticipation of Van der Walt's resignation with a view, eventually, appointing her in the relevant position when it became available.
- [24] The question is primarily whether or not there is prima facie evidence of differentiation, if so, whether or not there is prima facie evidence linking the differentiation in question to the applicant's pregnancy before the court in order to establish an allegation of discrimination.
- [25] I am not persuaded that there is prima facie evidence of differentiation before the court insofar as both the applicant and Nadine as the comparative were both shortlisted and invited for interviews. In my view to the preceding extent it cannot be said that they were treated differently to each to each other. It is, further, not the applicant's case that the relevant scores should have been disregard and interviews conducted afresh between her and Nadine. It is, furthermore, not her case that those scores were preferred solely for the purpose of discriminating against her because of her pregnancy.
- [26] The applicant relies on the score sheet to demonstrate the differentiation. She, however, accepts the scores as valid and acceptable in the appointment of Breedt as the best candidate but rejects them when it comes to the appointment of Nadine. There is, thus, no prima facie evidence that the applicant was scored differently because of her pregnancy for if that was the case that fact would also be valid and relevant to the appointment of Breedt. There was only one position to fill when the applicant was pitted against Nadine on the basis of their interview scores. Only one candidate could be appointed and such a candidate was the best between the two according to the scores.
- [27] Even if I am wrong in the preceding finding I am not satisfied that there exists prima facie evidence linking the differentiation to the applicant's pregnancy insofar as the inference that there exists a nexus between the pregnancy and the alleged differentiation is not the plausible to draw in the circumstances regard being had to the score sheet.

[28] There is, as such, no allegation of unfair discrimination made out in order to saddle the respondent, as the alleged perpetrator, with any burden of negating the allegation or justifying the discrimination.

Order

[29] In the result:

1. The respondent is absolved from the instant.
2. I make no order as to costs.

LJ Lekale

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Adv D Groenewald

Instructed by:

Du Randt Attorneys

For the respondent: Mr M Thompson (Thompson Attorneys)

[1] See *Mangena & Others v Filler SA (Pty) Ltd and Others*

[2009] 12 BLLR 1224 (LC) and *Mbamba v Shepstone and Wylie*

(2015) 36 ILJ 1805 (CC). [2] See *Mangena supra* at paragraph 7 quoting with approval *Ntai & Others v South African Breweries Ltd*

(2001) 22 ILJ 214 (LC) at 218F.

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[3] See *Gordon Lloyd Page and Associates v Riviera & Another* 2001 1 SA 88 (SCA) at paragraph 2. [4] See *AA Onderlige Assuransie-Assosisasie Bpk v De Beer* 1982 2 SA 603 (A) and *Cooper And Another N.N.O. v Merchant Trade Finance Ltd* 2000 3 SA 1009 (SCA).

[3] See *Gordon Lloyd Page and Associates v Riviera & Another* 2001 1 SA 88 (SCA) at paragraph 2.

[4] See AA Onderlige Assuransie-Assosisasie Bpk v De Beer 1982 2 SA 603 (A) and Cooper And Another N.N.O. v Merchant Trade Finance Ltd 2000 3 SA 1009 (SCA).

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