**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JR 393/18

In the matter between:

**PHATHUXOLO PATRICK MAQAVANA** **Applicant**

and

**MASSBUILD (PTY) LTD** **First Respondent**

**MASSMART HOLDINGS LIMITED** **Second Respondent**

**THE COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION** **Third Respondent**

**COMMISSIONER J NKOPANE** **Fourth Respondent**

**Heard**: **27 March 2019**

**Delivered**: **03 April 2019**

**Summary: A jurisdictional review – commissioner declined jurisdiction on the strength of *res judicata* principle. Are grounds of unfair discrimination separate and distinct causes of actions – if so does resolution of one ground leave room for another separate determination**

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**of the others. Held (1) The application for review is dismissed. (2) Each party to pay its own costs.**

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**JUDGMENT**

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**MOSHOANA, J**

Introduction

[1] Before me is a simple yet complicated jurisdictional review. The question that should obtain is whether the commissioner was correct or incorrect in declining jurisdiction? However an interesting question that emerges in this matter is whether grounds of unfair discrimination constitute separate and distinct causes of action, such that determination of one ground does not bring to the fore *res judicata*, when the undetermined ground is raised. The impugned decision in this matter is one where the commissioner refused to assume jurisdiction on application of the principle of *res judicata* in the circumstances where only the ground of race was "determined" and the applicant was seeking to rely on an arbitrary ground the second time around. The application is opposed by the first and second respondents.

Background facts

[2] Given the test of review applicable to this type of reviews, it is apposite to give a detailed account of the objective facts as they obtained before the commissioner.

[3] The applicant, Patrick Mqavana (Mqavana) was appointed as a merchandise controller by Massmart. He earned an amount of R12 500 per month. He was at some point informed that Ms Melles, a merchandise controller as well, was earning an amount of R16 500 per month. He was aggrieved by this revelation and lodged a grievance

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internally. He was given various reasons why he was not on the same salary scale with Melles.

[4] Dissatisfied with the explanations and reasons offered, he, on 15 November 2016, referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging unfair discrimination within the contemplation of section 6 of the Employment Equity Act[1] (EEA). Owing to the fact that the dispute was not resolved through conciliation, Mqavana requested resolution of the dispute through arbitration. A senior commissioner was appointed to resolve the dispute. Arbitration was conducted over a period of about three days. At the conclusion of the evidence stage, an arbitration award was issued. It is important at this stage to record the issue to have been determined at arbitration. The senior commissioner recorded it thus, in his award:

> **"ISSUES TO BE DETERMINED**
>
> 9 The applicant's complaint is one of unfair discrimination, in that he did not receive equal pay for work of equal value when compared with colleagues or former colleagues.
>
> 10 At the time of the commencement of these proceedings the applicant's case appeared to be unfair discrimination on an arbitrary ground. On the second day it became apparent that the applicant was alleging discrimination based on race." [My own underlining and emphasis]

[5] Before dismissing the claim of Mqavana, the senior commissioner recorded thus:

> 38 In summary, I am satisfied that the respondent has shown on a balance of probabilities that no discrimination took place. It has shown a rational, legitimate, fair and/or genuine reason for the

[1] 55 of 1998.

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> disparity, which is not discriminatory.[2] That is the end of the inquiry. [My own underlining and emphasis]

[6] The award was published on 31 August 2017. It was not subjected to any form of challenge by Mqavana. However, on 20 November 2017, Mqavana made another referral. Mqavana was constrained to seek condonation for the late referral[3]. In opposing the condonation, the respondent raised a jurisdictional point of *res judicata*. The jurisdictional point was enrolled for argument on 10 January 2018.

[7] On 18 January 2018, Commissioner Nkopane, the fourth respondent before me, issued a ruling upholding the point of jurisdiction and declined jurisdiction without entertaining the condonation application. On 06 March 2018, Mqavana launched the present review application.

Grounds of review

[8] Mqavana raised nine grounds of review, which may be summarised thus:

8.1 Failure to consider the condonation application – late referral of the dispute.[4]

8.2 Misconstrued the nature and cause of action of the first dispute – equal pay for work of equal value based on race.

8.3 Misconstrued the nature and cause of action of the present dispute by finding that both relate to equal pay for work of equal value.

8.4 Applied an incorrect test for *res judicata*.

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[2] It is important to note that in instances where arbitrary grounds are alleged, the complainant must prove that the conduct complained of is irrational and amounts to discrimination that is unfair.

[3] It is unclear to me why the Mqavana was seeking condonation. On his own version, he discovered the real reason of the disparity on 23-24 August 2017. Section 10(2) of the EEA provides that any party to a dispute may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination. Therefore, if the payslips disparity constituted a separate act or omission amounting to unfair discrimination, then condonation was not required. However, it is clear that Mqavana was relying on the same unfair discrimination which formed the subject matter of the arbitration award.

[4] Mqavana refers to this as the true jurisdictional fact, without which the matter is not properly before the Commissioner.

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8.5 Failed to examine whether the grounds of, or causes of action in the first and the present dispute are the same.

8.6 Erred in finding that the "pay-slip issue" was decided upon.

8.7 Materially incorrectly characterized the first dispute.

8.8 Erred in part-applying the *res judicata* principle.

8.9 Erred in finding that the applicant had options to pursue the present dispute on appeal.

Evaluation

[9] For the purposes of this judgment it is unnecessary to consider each of the grounds set out above. Suffice to mention that the ground of not considering the condonation application first was not pursued with any vigour before me. In these types of reviews, the issue remains whether on the objective facts, Nkopane had the necessary jurisdiction or not.

[10] Thirty five years ago, the Court in *Pinetown Town Council v President of the Industrial Court and others*[5] said the following, which still holds true to this day:

> "[w]here the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions precedent to jurisdiction known as jurisdictional facts which must objectively exist before tribunal has power to act."[6]

[11] Section 6 of the EEA prohibits unfair discrimination. In other words employers are statutorily prohibited to discriminate unfairly. Before a referral can be made to the CCMA, there must be a dispute concerning unfair discrimination. If there is no dispute, then the CCMA has no powers to attempt to resolve. Proper reading of section 10(2) suggest that the dispute must be about an act or omission that allegedly

[5] 1984 (3) SA 173 (N)
[6] This judgment was quoted with approval by the Labour Appeal Court in the matter of *Shell Energy (Pty) Ltd v NBCCI and others* Case number JA42/10 [2012] ZALAC 39 (12 December 2012)

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constitutes unfair discrimination. It is not about any act or omission but one that allegedly constitutes unfair discrimination. Therefore, existence of a dispute of unfair discrimination is a jurisdictional fact that must objectively exist before an attempt to resolve takes place. The power to attempt resolution on the part of the CCMA emanates from section 10(5) of the EEA.

[12] Primarily, a dispute that has been resolved ceases to exist, unless the process that resolved it is challenged. Section 10(8) provides that a person affected by an award pursuant to a dispute contemplated in subsection (6) may appeal to the Labour Court. Absent an appeal, the dispute is finally[7] resolved.

[13] Perusal of the ruling of Nkopane reveals that she did not find any exceptional circumstances to depart from the principle of *res judicata*. On this, she was fortified by the decision of the Constitutional Court. Simply put, *res judicata* means that a matter is already judged[8]. Then the question I must turn to now is whether the dispute justiciable in terms of EEA was judged or not?

Has the dispute been judged or resolved?

[14] Before dealing with this question, it must be stated upfront that, in my view, there is only one dispute that can be resolved by the CCMA under Chapter II of the EEA. The Chapter prohibits unfair discrimination. Under this Chapter, parties can quibble about whether unfair discrimination happened or not[9].

[15] In order to answer the question, regard must be had to the principle of *res judicata* as applied by the commissioner in this matter and its

[7] Section 143(1) of the LRA provides that an arbitration award issued by a commissioner is final and binding.

[8] It is important to emphasize that clause 4.2 of the Code of Good Practice on Employment of Persons issued in terms of section 54 of the EEA provides that the principle of equal pay/remuneration for work of equal value addresses a specific aspect of workplace discrimination and the undervaluing of work on the basis of listed or on any other arbitrary ground in terms of section 6(1) of the Act.

[9] Section 11(1) (a) speaks of such discrimination did not take place as alleged. Section 11(2) (c) ultimately gravitates the conduct complained of to a discrimination that is unfair.

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purpose. In *Royal Sechaba Holdings (Pty) Ltd v Coote and Another*[10], the Supreme Court of Appeal said the following:

> "[11] The requisites of a valid defence of *res judicata* in Roman-Dutch law were that the matter adjudicated upon must have been for the *same cause*, between the *same parties* and that the *same thing* must have been demanded."

[16] At footnote 1 of the judgment, Theron JA, writing for the majority, simplified the principle thus:

> "Simply stated the requirements are *aedem persona* (same person), *aedem causa pretendi* (same cause) and *aedem res* (same right)."

[17] Absent any of the three requirements, the defence cannot be validly invoked.[11] With regard to the purpose of the principle, Brand JA in *Prinsloo NO and others v Goldex 15 (Pty) Ltd and another*[12] said the following:

> "[23]…That purpose, so it has been stated, is to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue."[13]

[18] It is important to also consider and determine what was finally decided upon in *casu*. Whether the decision maker was right or wrong is beside the point.[14] With regard to the matter before me, what applies is the *res judicata* and not the attenuated defence of *issue estoppel*. I do not agree with Boda SC, appearing for Mqavana, when he submitted that what

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[10] 2014 (3) All SA 431 (SCA).
[11] Voet, *Commentarius ad Pandectas* 44.2.3 translated in Bertram v Wood 1893 (10) SC 177 – under no other circumstances is the exception allowed than where the concluded litigation is again commenced between the same parties, in regard to the same thing, and for the same cause of action, so much so, that if one of these requisites is wanting the exception fails.
[12] 2015 (5) SA 297 (SCA).
[13] See also *Fidelity Guards Holdings (Pty) Ltd v PTWU and others* (1999) 20 ILJ 82 (LAC).
[14] See: *G Liviero and Son Building (Pty) Ltd v Sundowner Property Development (Pty) Ltd* (2012) 2 All SA 43 (SCA).

obtained in this regard was not a classical *res judicata* defence but the attenuated defence of *issue estoppel*[15].

[19] The dispute between the parties is not that one of the requirements is lacking thus relaxation of the principle is required. The applicant's case is that one of the requirements is lacking thus the principle does not find application. The applicant contends that it is not the same cause of action involved. Before I conclude whether the dispute has been judged, I turn to the following relevant question.

What is a cause of action?

[20] The concept was defined by Lord Esher, MR in *Read v Brown*[16] to be:

> "Every fact which would be necessary for the plaintiff to prove if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is material to be proved to entitle a plaintiff to succeed in his claim.

[21] A cause of action can mean that particular act on the part of the defendant which gives the plaintiff his or her cause of complaint. Elsewhere the concept was seen as ordinarily used to describe the factual basis, the set of material facts that begets the plaintiff's legal right of action.[17]

[22] Mqavana begot a legal right of action from the provisions of the EEA. As pointed out above, the EEA, flowing from the Constitution of the Republic of South Africa, prohibits unfair discrimination. The right that Mqavana has is that of not being unfairly discriminated against. His complaint is and can only be that he should not be unfairly discriminated upon. In other words a fact that Mqavana must prove to obtain a relief under the EEA is that he has been unfairly discriminated upon.

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[15] With regard to the concept issue estoppel *see Hyprop Investments Ltd and others v NSC Carriers and Forwarding CC and others* 2014 (2) All SA 26 (SCA).
[16] 22 QBD 131.
[17] See: *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) and *Duet and Magnum Financial Services CC (in liquidation) v Koster* 2010 (4) All SA 154 (SCA).

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[23] Returning to the question, on the objective facts, the dispute of unfair discrimination has been judged upon by the senior commissioner, it being the same cause of action in the second referral.

Are grounds (listed and unlisted-arbitrary) separate and distinct causes of action?

[24] One argument, passionately pursued with sufficient force was, that each of the grounds mentioned in section 6 of the EEA constitute a separate and distinct cause of action. I cannot agree. The grounds are the fulcrum upon which a claim of discrimination must rotate. In other words, they (grounds) complete, as it were, a cause of action. It ought to be remembered that discrimination on its own is not an actionable cause. It becomes an actionable cause once the element of unfairness is present. The grounds are enablers of this element of unfairness. Therefore, the listed grounds refer to the basis on which the differentiation is made, not to the reason or purpose of the differentiation.

[25] Ordinarily, a discrimination based on any of the listed grounds is presumably unfair unless it can be shown to be fair. However, if it is based on unlisted grounds – arbitrary grounds – unfairness need to be proven. To demonstrate that grounds are not causes of action, section 6 of the EEA reads in parts: "*on one or more grounds*". This suggests that a party can rely on two or all the grounds to prove unfairness. If the argument of Mqavana is accepted, it would mean that such a party would be relying on multiple and different causes of action if reliance is placed on two or more of the grounds. That is untenable.

[26] In *Louw v Golden Arrow Bus Services (Pty) Ltd*[18], this Court noted that in applying the former item 2(1)(a) of Schedule 7 of the LRA, discrimination on a particular ground means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people of, for an example, different race is not discrimination

[18] (1998) 19 ILJ 1173 (LC).

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on the ground of race unless the difference in race is the reason for the disparate treatment.

[27] Reverting to the definition of a cause of action, "grounds" constitute piece of evidence necessary to prove the cause of action – unfair discrimination. Put differently, in the absence of any of the grounds listed or unlisted differentiation lacks a legal basis to constitute an actionable claim.[19] There can never be a legal claim of unfair discrimination if the grounds are not alleged to any form of differentiation. Therefore, a ground is not a separate and distinct cause of action. To suggest that the first claim was based on race thus a different cause of action is to stretch the concept of cause of action beyond what the concept actually means.

[28] The dispute referred was one of alleged unfair discrimination. What begets a relief is the unfair discrimination and not unfair race discrimination or unfair social belief discrimination for an example. Section 50 (2) of the EEA provides thus:

> '(2) If the Labour Court decides that an employee has been unfairly discriminated[20] against, the Court may make any appropriate order that is just and equitable in the circumstances…"

[29] The argument must thus fail. It lacks legal cogency by any means whatsoever. Applicant's counsel did not provide the Court with any authority in support of the argument. The Court could not find any authority that supports the argument.

[30] The applicant submitted that *Ndudula and others v Metrorail – Prasa (Western Cape)*[21] was wrongly decided, when it held thus:

> "The crux of the test for unfair discrimination is the impairment of human dignity or an adverse effect in a comparably similar manner, not the classification of the ground as listed or unlisted as is evident from the

[19] See: *Sethole and others v Dr Kenneth Kaunda District Municipality* [2018] 1 BLLR 74 (LC).

[20] Most importantly, reference is not made of the grounds. Therefore, the remedy is for unfair discrimination and not on each of the specified grounds.

[21] (2017) 7 BLLR 706 (LC).

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> quotation from *Hasken*. The constitutional distinction between listed and unlisted grounds affects only the burden of proof and nothing else… [22]

[31] I am unable to agree that *Ndudula* was wrongly decided. In fact the underlined portion correctly reflects the provisions of section 11 of the EEA. I fully agree with the *Ndudula* judgment. The criticism of the judgment was based on four reasons, all of which lacks merit. The first being that the finding is not in line with the definition of a cause of action. I have already dealt with the issue of a cause of action above. I am not persuaded that the finding does not fit the cause of action as submitted. In this regard, the *facta probanda* is the unfair discrimination and the *facta probantia* is the ground. The second reason is that section 11 affects also the *facta probanda* and not the burden of proof only. I disagree. The f*acta probanda* occurs in section 6 and it is the prohibited unfair discrimination and the *facta probantia* also occurs in section 6 being any of the listed or unlisted grounds. The third reason is that the findings are inconsistent with previous judgments of this Court. I fail to see how. The judgment is consistent with what was said in all those judgments relied upon.[23] The last reason being that *Ndudula* relegates a component of a cause of action to *facta probantia* and such is inconsistent with the authorities. Again, for the same reasons as set out above, I am unable to agree.

[32] Reliance was placed on the decision of the Labour Appeal Court (LAC) in *SABC Ltd v CCMA and others*[24]*.* To my mind this decision is not of assistance to Maqavana's case. There, the LAC was dealing with the need to seek condonation. The LAC held that where the alleged discrimination is ongoing, condonation is not necessary, as the alleged unfair labour practice, as it was then, had no end date. On the contrary, the issue in *casu* is whether Mqavana was entitled to have the same dispute heard again. It cannot be said that since the payment on a lower

[22] The underlined portion is the one submitted to be wrong. The submission being that the classification also affects the cause of action.
[23] *Mothoa v SAPS and others* (2007) 28 ILJ 2019 (LC); *Aarons v University of Stellenbosch* (2003) 24 ILJ 1123 (LC) and *NUMSA v Gabriels (Pty) Ltd* (2002) 24 ILJ 1123 (LC)
[24] Case JA36/07 dated 18 November 2009.

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scale continues on a monthly basis, then there may be continuing different causes of actions each month.

[33] To conclude, in my judgment, listed or unlisted grounds do not constitute separate but distinct actionable causes of action but are pieces of evidence to aid the alleged unfairness of the differentiation in order for same to transform into an actionable cause of action – unfair discrimination.

Is the jurisdictional ruling reviewable?

[34] A simple answer to this question is that where a dispute is *res judicata*, the CCMA lacks power to resolve such a dispute. *Res judicata* is a bar to a rehearing of a dispute if all the requirements of the principle are present. This principle is a necessary one for reasons that rule of law and legal certainty will be compromised if the finality of a dispute is in doubt and can be revisited in a substantive way. The administration of justice will be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. The ratio underlying the principle is that the law requires a party with a single cause of action, like Mqavana's unfair discrimination complaint, to claim in one and the same action whatever remedies the law accords him upon such cause.

[35] On the objective facts – the arbitration award dealt with the alleged discrimination – I am unable to find fault in the conclusion that the principle of *res judicata* was applicable, thus the jurisdiction of the CCMA was ousted. It is incorrect to even suggest that the so-called pay-slips issue is a distinct and separate cause of action. The complaint of Mqavana was and remained that of equal pay for work of equal value, a specific aspect of workplace discrimination.

[36] In any event there is a slew of authorities that an arbitrary ground is not a self-standing ground as, in order to succeed using it, it must share commonality with any of the listed grounds. As recorded by the senior commissioner, initially, Mqavana relied on an arbitrary ground. In order to succeed Mqavana had to link the arbitrary ground with one or more of

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the listed grounds. He chose race. Race can be the only ground to which Mqavana could link his equal pay for work of equal value claim, if regard is had to his comparators. The ruling that the CCMA lacked jurisdiction is correct and is being upheld by this court.

[37] In the results I make the following order:

Order

1. The application for review is hereby dismissed.

2. Each party to pay its own costs.

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GN Moshoana

Judge of the Labour Court of South Africa.

Appearances:

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| For the Applicant: | Advocate F Boda SC, with M Sibanda and H Drake. |
| Instructed by: | Cheadle Thompson & Haysom Inc, Braamfontein. |
| For the Respondents: | Mr D Masher of ENSafrica, Sandton. |

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