IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Reportable

CASE NO: P54/22

In the matter between:

PSA obo LINDA MONICA JACOBUS **First Applicant**

And

THE MINISTER: JUSTICE AND CORRECTIONAL SERVICE **First Respondent**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Second Respondent**

Heard: 15 August 2024

Delivered: This judgment was handed down electronically by circulation to the Applicant's and Respondents' 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 14h00 on 08 November 2024.

JUDGMENT

LALLIE, J

[1] The applicant approached this court in terms of section 10 of the Employment Equity Act[1] (the EEA), alleging that the respondents discriminated unfairly against her. She delayed in launching this application causing it to be late by 15 days late and sought condonation for the delay. Her condonation application was opposed vigorously by the respondents. The delay may be condoned on good cause shown.

[2] I have carefully considered the submissions on behalf of both parties as well as the authorities they sought to rely on. In *Grootboom v National Prosecuting Authority and Another*[2] the Constitutional Court required that all the relevant circumstances be taken into account when the discretion whether to grant condonation is exercised. In the condonation application the applicant seeks this court to open its door for her to assert her right not to be discriminated against at the workplace. The delay is about 15 days in extent. It is not excessive and the applicant provided a reasonable explanation for the late filing of the application. The respondents did not suffer prejudice as a result of the delay but the applicant will be prejudiced should condonation be refused as she will lose the right to present her main case. I am satisfied that the applicant has shown good cause to have the delay excused. Her condonation application must therefore be granted.

[3] Section 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution) guarantees 'the right to have any dispute that can be resolved by the application of the law decided in a fair hearing before a court'. The rules regulating the conduct of the proceedings of the labour court (the Labour Court Rules) are

[1] 55 of 1998.
[2] 2014 (1) BCLR 65 (CC).

designed to facilitate the exercise of the Constitutional right to access to courts provided for in section 34 of the Constitution. The application at hand was brought when applications were regulated by the predecessor to the current Labour Court Rules. Those rules will be referred to in this judgment as the old Labour Court Rules. Rule 7(3) of the old Labour Court Rules provides as follows:

> "7(3) The application must be supported by affidavit. The affidavit must clearly and concisely set out-
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> *(a)* the names, description and addresses of the parties;
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> *(b)* a statement of the material facts, in chronological order, on which the application is based, which statement must be sufficiently particular to enable any person opposing the application to reply to the document;
>
> *(c)* a statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any party to reply to the document; and
>
> *(d)* the relief sought."

[4] When this matter served before court it was argued on behalf of the applicant that the issue for determination is discrimination on the basis of race which resulted in the impairment of her dignity. It was argued on behalf of the respondents that the applicant failed to plead her case of unfair discrimination properly and failed to discharge the onus of proving that she was discriminated against by the respondents.

[5] The applicant seeks the following relief in her notice of motion:

"1. That the Respondents are ordered to pay the Applicant six (6) months compensation calculated at the gross monthly remuneration of the Applicant alternatively, as the Court deems just and equitable;

2. Permanent transfer to the Directorate: Public Prosecutions

3. A written apology from Sello Matlhoko and

4. Costs on the party-and-party scale, alternatively as the Honourable Court deems just and equitable"

[6] The applicant is the personal assistant to Mr Matlhoko (Matlhoko), a Chief Prosecutor. It was submitted on behalf of the applicant, a colored person, that Matlhoko discriminated against her on grounds of race by making the following utterance to her: 'Sy moet fokof uit my kantoor, ek soek haar nie meer as 'n P.A' He also said in public at a farewell function that the applicant was a useless personal assistant. Lastly, Matlhoko told the applicant that she had 'opgefok' a docked she had photocopied for him.

[7] In the allegations the applicant made in her founding affidavit she omitted the legal issue of racial discrimination and the facts on which it arose. The omission constituted non-compliance with rule 7(3)(b) and (c) of the old Labour Court Rules. The direct consequence of the omission is that the respondents were unable to answer to allegations that were not made in the founding affidavit. Although not every non-compliance with the rules is fatal, litigants need to comply with them as they play a pivotal role in the administration of justice and enable litigants exercise their right to access to courts effectively. The applicant's omission to comply with rule 7(3) of the old Labour Court Rules which is retained in the current rules proved disastrous. Had there been compliance with the rule the applicant would have

made all the required averments in her papers particularly the founding affidavit. Her case would have been pleaded properly. As a case is determined on its pleadings, failure to plead a case properly has serious consequences which may hinder a litigant in exercising the right to access to courts of law.

[8] It is trite that an applicant must state his or her case in the founding affidavit. The applicant omitted to pleaded and prove that she was subjected to the conduct she complained of because she is a coloured person. It is impermissible for the applicant to raise the issues of racial discrimination after the filing of the answering affidavit and in argument as it does not form part of her pleaded case. Argument must be foreshadowed in pleadings.

[9] The applicant's claim for compensation is based on harassment. She submitted that she filed her first grievance on 23 July 2019. The reasons for that grievance were that one of the prosecutors, Mrs Matlhoko, the wife of her immediate supervisor, was the only prosecutor who disregarded the supervisor's instruction to report her whereabouts to the applicant. On 18 October 2017, her supervisor, Matlhoko told her in the presence of 2 co-employees "sy moet fokof uit my kantoor, ek soek haar nie meer as 'n P.A.' Included in that grievance is the decision to move her from Matlhoko's division. The applicant further alleged that an accusation of poor work that was leveled against her cost her her 2018/209 performance bonus. She added that in a speech Matlhoko made at a farewell function in 2018, he said that she was a useless personal assistant. In 2018 while studying public administration, she was denied the opportunity to gain experience in human resources management. On 25 March 2020 the applicant received a letter

informing her that as a means of resolving her grievance she would be transferred to the office of the director: administration. She expressed the view that the transfer did not resolve her grievance satisfactorily as it failed to deal with substantive issues.

[10] The last portion of the events which allegedly constituted the applicant's harassment is contained of her second grievance which she filed on 2 September 2021. What aggrieved her was that she had agreed to work as Advocated Roothman's (Roothman), personal assistant in August 2020. However, in March 2021, Roothman refused to continue working with her. On 3 August 2021 she was instructed to return to Matlhoko's office. She lodged a grievance because Roothman had labelled her a problematic person and she did not trust that Matlhoko would change the way he treated her which resulted in her being moved from his office. The grievance meeting in which she was represented by her trade union official was held on 9 November 2021. At the end of the meeting she was informed that she should return to Matlhoko's office as there was no vacant position at her level. Her grievance was thereafter considered closed.

[11] The applicant submitted that the last incident happened on 27 January 2022 when Matlhoko told her that the docket she had diligently photocopied for him was '*opgefok*'. In a letter dated 4 February 2022 she was informed that her grievance for 2019 and 2021 had been addressed and that she was neither harassed nor victimized. The applicant differed and expressed the view that her grievances especially those in respect of Matlhoko had not been resolved as the language he used constituted undignified treatment and bulling.

[12] The code of good practice on the prevention and elimination of harassment in the workplace (the code of good practice) defines harassment as follows:

> "4.1 The term "harassment" is not defined in the EEA. Harassment is generally understood to be-
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> 4.1.1 unwanted conduct, which impairs dignity:
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> 4.1.2 which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences: and
>
> 4.1.3 is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6 (1) of the EEA."

[13] The applicant seeks compensation from the respondents in their capacity as employers of their employees who allegedly perpetrated acts of discrimination against her. Vicarious liability of employers for acts of unfair discrimination of their employees is regulated by section 60 of the EEA which provides that:

> '(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
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> (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
>
> (3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant

provision, the employer must be deemed also to have contravened that provision.

(4) …'

[14] For the applicant to be entitled to relief against the respondents in terms of section 60 of the EEA she must prove that the respondents' employees contravened provisions of section 6 of the EEA which proscribe discrimination. Section 11 of the EEA which regulates the burden of proof in discrimination disputes provides as follows:

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

(a) did not take place as alleged; or

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

(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-

(a) the conduct complained of is not rational;

(b) the conduct complained of amounts to discrimination; and

(c) the discrimination is unfair.'

[15] Implicit in section 11 of the EEA is the applicant's duty to plead and prove that she was discriminated against either on a listed or non listed ground. The applicant's pleaded case is that she was harassed by the respondent's employees especially Matlhoko who spoke to her in a manner that impaired her dignity. Harassment is defined in item 4 of the code of good practice. As stated earlier in this judgment, it is, *inter alia*, unwanted conduct which impairs dignity, creates a hostile or

intimidating work environment and is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6 (1) of the EEA.

[16] The applicant did not disclose the ground in respect of which discrimination is prohibited in section 6 (1) of the EEA. The consequences of the omission of the essential element of harassment are that she did not prove the harassment she sought to rely on. She further did not discharge the onus of proof that she was discriminated against by the respondents' employees. In reaching this decision I took into account the authority the applicant sought to rely on in *Ntai and Others v South African Breweries Limited*[3]. The authority supports my decision in that it correctly provides that 'a mere allegation of discrimination will not suffice to establish such prima facie case'.

[17] In the circumstances I must accept the respondents' submission that the applicant failed to discharge the onus of proving that she was discriminated against by them. Absent the proof, the applicant cannot be entitled to relief. The applicant did not pursue the other prayers in her notice of motion.

[18] The respondents sought a costs order against the applicant. They, however, provided no reason in fairness for the order. In the absence of a fair reason the costs order may not be granted.

[19] In the premises, the following order is made:

1. The late filing of this application is condoned.
2. The application is dismissed.
3. There is no order as to costs.

[3] (J4476/99) [2000] ZALC 134 (16 November 2020).

MZN Lallie J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate van den Berg

Instructed by PGMO Attorneys Inc

For the Respondent: Advocate R.B Mofokeng

Instructed by State Attorney