



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS485/23

In the matter between:

MELISSA PADAYACHEE

Plaintiff

and

GAUTENG DEPARTMENT OF EDUCATION

Defendant

Heard: 29 October 2024

Delivered: 9 December 2024

Summary: Claim of unfair discrimination under section 6 of the Employment Equity Act, 1998. Claim upheld.

JUDGMENT

DANIELS J

Introduction

- [1] The plaintiff seeks compensation or damages from the defendant for the discriminatory conduct by its senior managers and officials. Despite having been served with the plaintiff's statement of claim, the defendant failed to file its statement of response. Accordingly, the matter was enrolled for default judgment. At the hearing, the plaintiff was requested to testify as to the nature of the discrimination and the harm suffered as a result.

Material facts

- [2] The plaintiff is a woman employed as a social worker by the defendant. Since 2013, she has been posted to the Ezibeleni School for Physically Disabled Children (the "School"). The plaintiff presented herself as capable, diligent, and committed to giving her of best, both to the school and its learners. There are no reasons to doubt these qualities.
- [3] The School, which is based in Katlehong township, forms part of the City of Ekurhuleni. Given its location, the vast majority of learners are black and African.¹ The plaintiff, on the other hand, is a black person of Indian descent,² previously classified under Apartheid terminology as "Asian". She is the only person of Indian descent at the School.
- [4] The plaintiff states that before May 2022 she experienced few difficulties at work. However, on 23 May 2022, acting on instructions, the plaintiff met with Ms. Boa Gabasiane ("Gabasiane") the recently appointed head

¹ Given that there are 11 official languages (recognised as such in terms of section 6(1) of the Constitution of the Republic of South Africa) it may be assumed that the learners can speak one or more of the 11 official languages. However, this being a school for the physically disabled it may well be that some of the learners communicate by sign language.

² There are, of course, a number of black South Africans, of Indian ancestry or descent, who identify as black and African.

of department. Gabasiane advised the plaintiff that she intended to appoint an auxiliary social worker to assist the plaintiff to overcome “language barriers” which prevented her from properly performing her duties.³ This came as a shock to the plaintiff. The plaintiff advised Gabasiane that she had no difficulties performing her duties, and it was unnecessary to appoint an auxiliary social worker.

- [5] On 26 July 2022, again acting on instructions issued to her, the plaintiff met with Gabasiane, and a Ms Dagada. They informed the plaintiff that the auxiliary social worker would be appointed to assist her with “cultural and language barriers”. Gabasiane told the plaintiff she did not understand “*our children and their culture*”. Gabasiane did not explain how she had reached those conclusions.
- [6] Thereafter, two of the foundation phase educators, Ms Margaret Moloi and Ms Mookho Mbokane, refused to refer learners to the plaintiff and they too said: “*you do not understand our children and their culture*”.
- [7] Sometime later, the Department indeed appointed a social worker, ostensibly to assist the plaintiff. The plaintiff states that this individual (whose fixed term contract has since expired) had no job description, little experience, performed few functions, and was of little assistance.
- [8] The plaintiff approached her attorneys and requested them to direct a letter of demand to the defendant.

³ It is unclear why Gabasiane believed that the plaintiff was not able to communicate effectively with learners. Presumably, if proficiency in one or more of the official languages (such as Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, isiNdebele, isiXhosa, and isiZulu) was an inherent requirement of the job, and the plaintiff did not possess such abilities, the plaintiff would not have been placed at the School.

- [9] Plaintiff's attorneys addressed a letter, dated 26 September 2022, to the defendant, which undertook to investigate the matter but took no concrete steps to do so. At that time, the plaintiff also laid a grievance.
- [10] The plaintiff's attorneys directed a further letter of demand, dated 20 February 2023, to the defendant.
- [11] The letters dated 26 September 2022, and 20 February 2023, accused the defendant's officials of behaving in a discriminatory manner based on race, ethnicity, culture and language. The letters demanded, inter alia, an end to the discrimination and harassment.
- [12] Neither the grievance nor the investigation have been finalised more than two years later. Clearly the complaint was not taken seriously.
- [13] Plaintiff testified that, since her meeting with the defendant's officials during July 2022, she been regularly ridiculed and belittled for allegedly not understanding the culture of the learners. In addition, says the plaintiff, she has been fed false information in order to undermine her ability to perform her duties. As a result of this harassment, the plaintiff says, she considered resigning, but decided against it, because she enjoys assisting and counselling learners.
- [14] On 23 April 2023, the plaintiff referred a dispute to the Commission for Conciliation, Mediation, and Arbitration (the "CCMA") in terms of section 10 of the Employment Equity Act, 55 of 1998 (the "EEA"). The dispute was set down for conciliation on 12 May 2023, but remained unresolved after conciliation.
- [15] On 11 August 2023, the plaintiff referred a dispute to this court seeking compensation or damages in terms of section 50 of the EEA.

[16] The plaintiff, who broke down in the witness stand, testified that the conduct of the defendant's officials have traumatised her. She testified that these events wounded her emotionally, psychologically, and even caused her physical harm. She states that the conduct of the defendant's officials have caused her sleepless nights, and caused or aggravated inflammation in her joints. The plaintiff states that she has been forced to seek the help of a psychologist. There being no evidence to the contrary, the court must accept that the conduct of the defendant's officials have caused significant harm to the plaintiff.

Legal principles and analysis

[17] The following provisions of the EEA are relevant:

17.1 Section 6(1) states: "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more of the following 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 and birth." (the grounds identified in section 6(1) are frequently referred to as "listed grounds").

17.2 Section 6(3) states: "Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)".

17.3 Section 6(2) provides that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.⁴

17.4 Section 11(1) states that where unfair discrimination is alleged on a listed ground the employer 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.

17.5 Section 60 provides that all allegations of breaches of the Act, by employees (the “offending employee”) must be brought to the attention of the employer. The employer must consult and take necessary steps to eliminate the unlawful conduct (and comply with the Act). If the employer fails to take the necessary steps, and the offending employee indeed contravened the Act, the employer is deemed also to have contravened the Act. The employer is not liable for the unlawful conduct, if it did everything reasonably practicable to ensure that the offending employee would not act in contravention of the Act.

[18] The notion of racial discrimination has appropriately been described in the following terms: *“Racial discrimination occurs where physical attributes associated with a particular race group are used to prejudice the group or its individual members. In South Africa’s racist past, racial categories were explicitly defined as including African, coloured, Asian, and white and these categories continue to shape people’s thinking and people’s experiences of disadvantage.”*⁵ The term “ethnic origin” closely aligns to race, but may be understood as *“a biological group that shares a common*

⁴ There is no basis for the court to proceed on the basis of such assumption given that the defendant, who has not opposed these proceedings, has made out no such case.

⁵ Constitutional Law of South Africa (Second Edition) Vol. 3 (Juta & Co) by Woolman et al, at p35-54

*descent, with a common cultural heritage and sometimes, a territorial base.”*⁶

[19] Discrimination, on the basis of language, in the context of education, is a complex issue. It involves balancing the competing rights and interests of learners, educators, the state, and parents. One may assume that educators prefer to teach in their mother tongue, and learners prefer to learn in the language of their choice⁷ but, to dismantle racist ideologies and practices, the state promotes diversity among both learners and educators. Indeed, in the context of an affirmative action dispute, this court put it as follows: *“The workforce target profile in general and the numeric targets in particular must be measured against the constitutional objective of non-racialism and non-sexism.”*⁸

[20] There are three primary workplace language policies or practices⁹ that may form the basis for potential language-based discrimination claims: a) a policy that prescribes the use of specific languages and the prohibition of others; b) a policy that requires a specific level of proficiency in a certain language for appointment; and c) a policy or practice which prohibits, or denigrates, aspects of language used by the employee (e.g. certain accents, dialects or speech patterns). In this matter, the plaintiff contends that she has discriminated against, and harassed, based on her race, ethnic origin, culture, and language.

[21] Harassment is not defined in the EEA. However, the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 (“PEPUDA”)

⁶ Ibid. p35-63

⁷ In fact, learners in public educational institutions have a constitutional right to learn in a language of their choice to the extent that this is reasonably practicable. See section 29(2) of the Constitution.

⁸ *Naidoo v Minister of Safety & Security & others* (2013) 34 ILJ 2279 (LC) at para 176

⁹ Louw AM "Language Discrimination in the Context of South African Workplace Discrimination Law" PER / PELJ 2022 (25) at p6

provides some assistance. Section 1 of PEPUDA defines harassment as “unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to - (a) sex, gender or sexual orientation, or (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group”. (own emphasis)

[22] In *Stokwe v MEC for the Department of Education, Eastern Cape & another*¹⁰ the applicant applied for promotion, to the position of principal, of an Afrikaans medium school. Following interviews, the interviewing committee ranked her as the top candidate. However, when the School Governing Body (“SGB”) learnt that she was African they doubted her ability to speak Afrikaans, and revised the ranking. As a result, another candidate was appointed. The evidence demonstrated that the applicant was reasonably proficient in Afrikaans. In addition, while the medium of instruction for subjects taught was Afrikaans, it was not the medium of management of the school. The court found that the applicant had been unfairly discriminated against on the basis *inter alia* of her race, colour and language. This judgment serves as a warning to those who wish to make assumptions of language and communication skills based solely on race or ethnic origin.

[23] The facts of this matter demonstrate that the conduct of the defendant's officials was unwanted, such conduct was of a persistent, and serious nature, which had the effect of humiliating the plaintiff and undermining her dignity. In addition, the impact of the offensive conduct was to ostracise the plaintiff and create a hostile and intimidating work environment. The abuse of power by the officials constituted discrimination, in the form of harassment, based on race, culture, ethnicity, and language. The conduct of the officials was not only unprofessional, but also incompatible with the

¹⁰ (2005) 26 ILJ 927 (LC)

values of our constitutional order based on values of non-racism, equality and dignity. The defendant, despite being invited to address the unlawful conduct of its officials, far from taking steps to address the issue, shirked its responsibilities. By so doing, the defendant is itself guilty of, and liable for, having unfairly discriminated against the plaintiff.

Just and equitable remedy

[24] This court is empowered by section 50(2) of the EEA to make an order that is just and equitable in the circumstances. This may include an award of compensation or damages, and an order directing the employer to take steps to prevent the discriminatory conduct in the future. Having considered all the facts of this matter, including the emotional and psychological harm caused to the plaintiff, and the blasé manner in which the defendant conducted itself in relation to a serious complaint, it is just and equitable that defendant be ordered an amount of R50 000, 00 (fifty thousand rands). It is also proper that the defendant pay the costs of this matter. Finally, it is appropriate that defendant be ordered to investigate the complaints and grievances of the plaintiff and to take appropriate disciplinary steps against the officials mentioned in this judgment.

Conclusion

[25] In the circumstances, I make the following order:

25.1 The defendant is ordered to pay the plaintiff an amount of R 50 000, 00 (fifty thousand rands) within 14 days of receipt of this order,

25.2 The defendant is ordered to investigate, and thereafter take appropriate action, into the grievances of the plaintiff such investigation to be completed within 60 days of receipt of this order,

25.3 The defendant is ordered to pay the plaintiff's costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant
Adv Charlene Grant
Attorney GJ Brits

LABOUR COURT