REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: JS 660/11

In the matter between:

RHODA NOMPUMELELO YEDWA **Applicant**

and

NEDBANK GROUP LTD. **Respondent**

Heard: 30-31July 2013

Delivered: 31 July 2013

Summary: (Absolution from the instance – claim of unfair discrimination - failure to make out a prima facie case).

JUDGMENT

LAGRANGE, J

Introduction

[1] This matter concerns a claim of unfair discrimination based on the applicant's gender or marital status. In her statement of claim the applicant had identified three distinct causes of action involving her performance evaluations, salary increments, a promotion, and the application of the

bank's travel policy. On the first day of proceedings, the applicant advised that she was only proceeding with the matter relating to the alleged unfair discrimination she suffered in the application of the bank's travel policy. No prior notice was given to the respondent of her abandonment of the other claims.

[2] At the close of the applicant's testimony, the respondent applied for absolution from the instance.

Absolution from the instance

The legal principle

[3] *In* ***De Klerk v Absa Bank Ltd and Others 2003 (4) SA 315 (SCA)*** the SCA confirmed the test for absolution from the instance:

> *"[10] The correct approach to an absolution application is conveniently set out by Harms JA in Gordon Lloyd Page & Associates v Rivera and Another2001 (1) SA 88 (SCA) at 92E - 93A:*
>
> *'[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel1976 (4) SA 403 (A) at 409G - H in these terms:*
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> *". . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2)1958 (4) SA 307 (T).)"*
>
> *This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G - 38A; Schmidt*

Bewysreg 4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (Gascoyne (loc cit)) - a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.'"[1]

Requirements of an unfair discrimination claim

[4] In ***SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)*** **(2013) 34 *ILJ* 590 (LAC**), Mlambo JP, reiterated the basic requirements of proving a claim of unfair discrimination laid down by the Constitutional Court:

"[21]... In Harksen v Lane NO & others the Constitutional Court, set out the test for determining whether differentiation amounts to unfair discrimination :

'[Section] 8(2) [now s 9(2) of the Constitution] requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to "discrimination" and, if it does, whether, secondly, it amounts to "unfair discrimination". It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the

[1] At 323

grounds that are defined in s 8(2), which by virtue of s 8(4) are presumed to constitute unfair discrimination , it is possible to rebut the presumption and establish that the discrimination is not unfair'.

[22] This statement illustrates the point I have already made that when one talks of discrimination, that is one is in fact alleging that a differentiation of some sort between and/amongst people has taken place."[2]

[5] Apart from these principal requirements, an employer can only be held liable for a contravention of an employee's right not to be unfairly discriminated against if the alleged conduct is immediately brought to the employer's attention and the employer does not take necessary steps to comply with the provisions of the Act.[3]

Material factual issues

[6] In 1998, the applicant was employed as an auditor in the bank's Group Internal Audit department ('GIA). The department had a travel policy in terms of which provision was made for a 'spouse' or 'partner' to stay with the employee when the employee was engaged in work that required them to stay away from home when the work at the remote location involved the employee being there for more than a week. In essence, the policy provided that if a staff member was engaged in an audit which extended for more than a week and if that member had a spouse or partner, the

[2] At 598-9

[3] Section 60 of the Employment Equity Act, 55 of 1998, states *inter alia* 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.

(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."

bank would provide an air ticket for the spouse or partner so they could join the staff member. Persons without a spouse or partner were not eligible for this benefit in terms of the written policy. However, it is common cause that there was a well-established practice that persons who were unmarried or without an intimate partner could obtain an air ticket for a family member to join them. The written policy makes no mention of this and refers only to spouses and partners. The existing travel policy was terminated from 1 August 2010, after negotiations with stakeholders, but the dispute arose when it was still applicable.

[7] The applicant testified that she had previously been issued with an air ticket for her daughter to join her on weekends whenever she stayed over at a location where the audit was being conducted. However, when she requested such a ticket in May 2010, the request was turned down by her immediate manager, Mr T Mahlalela, who, even on the applicant's own version, was 'new', though she inexplicably quibbled about whether he could be described as 'fairly new'.

[8] According to her evidence, he interpreted the policy to mean that it only applied to married persons or persons with an intimate relationship with someone else. He allegedly made a remark to the effect that the applicant should get married if she wanted to benefit from the policy. The applicant further testified that she called Ms V Fourie to explain to Mahlalela how the policy had been applied in cases like her own. Despite the explanation, Mahlalela maintained that the policy had been wrongly applied in those cases and would not authorise a ticket to be issued for her daughter.

[9] The applicant protested the decision and lodged a grievance over the matter on Monday 17 May 2010, having warned Mahlalela on Friday 14 May that she would be lodging a grievance. In describing the nature of the grievance, the applicant classified the issue as "marital status/family responsibility". The settlement she desired at the time was stated in the following terms:

> *"GIA travel policy states that where travel outside Gauteng audits extending for more than a week (applicable to southern Africa:- RSA, Namibia, listen to, Swaziland, Zimbabwe and Malawi) a*

spouse/partner may come on weekends. My manager refused to sign off air ticket cost for my daughter citing the reason as she is not my spouse or partner. It is known that I'm not married and I have on previous occasions brought my daughter to the regions I'm auditing without any questions. The new manager refused to despite the fact that the staff responsible for making bookings told him that this has never been a problem since I'm not married."

[10] It is interesting to note that the applicant did not mention the alleged remark made by Mahlalela in her grievance when recounting why Mahlalela had refused to issue the ticket. Likewise, all the correspondence between her and Mahlalela concerns a dispute over interpretation of the word 'spouse', and contains no mention of the alleged offensive remark. The applicant testified that she had made arrangements to have her daughter transported to the airport and her daughter had applied for a day's leave from work on 21 May 2010. On 19 May 2010, the applicant was contacted telephonically and advised that the decision not to issue a ticket for her daughter had been reversed and her daughter could still join her in Cape Town. The applicant then responded that: "Unfortunately it is too late to change the arrangements I have made now. I'm flying back tomorrow." She was further advised that the bank would change her own ticket if she wanted to stay in Cape Town so her daughter could join her instead of returning home, but the applicant declined the offer.

[11] The applicant made much of the fact that having made arrangements for her daughter to come down on the weekend of 21 May 2010, those arrangements had to be scrapped when the ticket was not authorised and there was too much effort involved to revert back to this arrangement by the time she was notified on Wednesday that the decision was reversed. On the question of the arrangements, the applicant mentioned three specific issues which proved irksome to her, namely: her daughter would have to re-approach her employer for leave which might jeopardise her career prospects; she had cancelled the original transport arrangements and would have to make others, and she had already arranged to come back to Johannesburg for the weekend. No mention was made of any financial prejudice suffered by her or her daughter arising from

arrangements that had to be cancelled or that would result if she made fresh arrangements when the decision was reversed. In this regard, it must be mentioned that the evidence was that the applicant's daughter did not want to request leave again, not that she was refused leave by her employer. The applicant also did not testify that fresh arrangements could not practically be made. Effectively, her complaint was that she had been inconvenienced by the initial refusal and too much effort would be involved in making new arrangements. When the applicant was asked what was unsatisfactory about the bank's reversal of the decision as a resolution of the grievance, her response was two-fold.

[12] On the one hand, the applicant implied that it should never have been necessary for her to have lodged the grievance and the matter should have been sorted out by the Friday before her departure for Cape Town the following Monday. She also emphasised that she was still not satisfied with the reversal of the decision and the apology made by Mahlalela because the chairperson of the grievance hearing, which was conducted on 16 September 2010, had referred to the travel benefits as 'privileges' not 'rights', which could not give rise to claims of discriminatory treatment.

[13] Initially, when the applicant gave evidence in chief, the applicant asked the court to ensure that nobody went through what she experienced at the bank and that staff should be trained on how to manage people and to understand that no form of discrimination can be permitted whether big or small in nature. When pressed on the relief she sought, the applicant emphasised that she wanted disciplinary action taken against Mahlalela and anyone associated with making the initial decision with him. It was only under re-examination the applicant indirectly confirmed that the relief she sought was compensation and an end to unfair discrimination by the bank, as set out in her statement of case.

[14] On the applicant's own account, when she was refused permission to take her daughter, she challenged Mahlalela's interpretation of the word 'partner' in the written policy. In her view it was term quite capable of referring to her daughter, in the same way that her daughter might 'partner' her when attending a company function. The applicant felt

reinforced in her view that her interpretation was correct because she had been granted the benefit in the past, as had other staff in the GIA.

Analysis

[15] The essential question is whether the applicant has made out a prima facie case of unfair discrimination based on her marital status.

Was the travel policy discriminatory?

[16] The first point to make is that even the written policy did not discriminate against anyone on the basis of their marital status, since the same benefit was available for unmarried staff with partners. Strictly speaking, since marital status is the listed ground of unfair discrimination identified by the applicant as the reason she was refused a ticket for her daughter by Mahlalela, her claim fails to surmount the first hurdle. In short, there was no differential treatment of married and unmarried staff in respect of their entitlement to receive an air ticket for their close partner.

[17] If we go further and accept for the sake of argument that the applicant correctly interpreted the written travel policy to imply that the word 'partner' had an extended meaning which included not only partners in intimate relationships based on choice, but also included a family member chosen by the staff member to accompany them, was the applicant discriminated against in that sense? Firstly, it must be emphasised that this was not part of the applicant's pleaded claim. Even if it was, it is common cause that the travel policy as it was usually applied included unmarried staff who wished to fly a family member to join them. The applicant's case was premised on the fact that this *was* the standing practice and Mahlalela had deviated from this. Therefore in terms of the rule established by practice there was also no differential treatment of unmarried staff without an intimate partner who wished a family member to join them.

[18] But the applicant says in May 2010 she was treated differentially in an unfairly discriminatory manner by being refused a ticked for her daughter on that occasion. Certainly, the initial decision of Mahlalela was indisputably a departure from the existing practice and the applicant's irritation and frustration when he refused to authorise the issuing of the

ticket is perfectly understandable. The treatment certainly amounted to differentiation between the benefit granted to staff with spouses or with intimate partners of choice and persons without either who wished to take another family member instead. Whether such differentiation would be considered unfair is not necessary to decide for the purposes of this analysis. Even if it were unfair, the difficulty the applicant has to overcome is that the employer reaffirmed the policy and reinstated the benefit at a time when the applicant could still have taken advantage of it. Thus, it cannot be said that the applicant was prevented by Nedbank from flying her daughter down to Cape Town to join her, and could still have done so. Even though it might have entailed making fresh arrangements, it was not obviously impractical to do so, nor would it have been unduly onerous and thereby amounting to an effective bar to her exercising the right.

[19] The characterisation of the travel benefit for a spouse or partner as a privilege rather than a right, which therefore could not be considered discriminatory, by the chairperson of the final grievance hearing was plainly an incorrect conceptualisation of the matter. However, his conclusion is what mattered. He decided that the applicant had been correct about the policy and the matter had been resolved in her favour. He further found that Mahlalela's initial decision was an error of judgment, not an act of serious misconduct. However, whatever the chairperson's views were, the applicant's version of how the existing policy was applied was confirmed as correct and redress was made reasonably promptly. I have dealt with this point only because the applicant raised this as a cause of complaint in her evidence, though it did not appear to form part of the facts she pleaded in her statement of case in support of the unfair discrimination claim.

[20] In summary, the written and unwritten provisions of the travel policy did not differentiate between married and unmarried staff, nor between staff without spouses or partners who wished to fly a family member at the bank's expense to join them. To the extent that there was a temporary deviation from the unwritten policy by Mahlalela, that deviation was addressed timeously and fully.

Can the employer be held liable in terms of s 60 of Employment Equity Act?

[21] To take the analysis one step further, even if Mahlalela's decision had amounted to an act of unfair discrimination in terms of the Employment Equity Act, could Nedbank be held liable for it? To some extent this has been addressed already in the analysis above. The applicant's own version does not lay a basis for such a conclusion. The reason for this is that as soon as she formally complained about the decision in a grievance, the problem was addressed and the unfavourable decision was reversed sufficiently quickly to remedy the breach, thereby eliminating Mahlalela's conduct in compliance with s 60(2) of the Employment Equity Act.

Conclusion

[22] In short, the applicant has not established a basis for claiming differential treatment on grounds of marital status, nor has she established a basis for claiming that she was differentially treated on some other unlisted ground that would be unfair, bearing also in mind that such alternative ground was also not pleaded. In any event, she has not laid a basis for holding the employer liable for Mahlalela's decision as an act of unfair discrimination in the light of s 60 of the Employment Equity Act.

[23] For these reasons, the applicant has not made out a prima facie case and absolution from the instance is warranted under the circumstances.

Costs

[24] I believe the court should be slow to discourage applicants from seeking redress for claims of unfair discrimination, where there is some prospect of succeeding even if it is slender. In a case where substantial redress was timeously made by the respondent it is harder to find a justification for her proceeding with this matter.

[25] Moreover, in this case, the applicant also had a number of other claims which she only abandoned at court. The respondent thus engaged in a significant amount of wholly unnecessary preparation and incurred costs

associated with that wasted effort. For example, 11 volumes of documents were prepared by it, of which only a few had a bearing on this dispute. In the circumstances, it would be inequitable for the applicant not to bear any of the respondent's costs. It was argued that the applicant is currently unemployed and cannot afford costs, but that cannot justify her litigating in a reckless manner that requires the opposing party to incur completely wasteful expenditure.

[26] Consequently, I believe it is fair and equitable that the applicant should at least pay a portion of the applicant's costs.

Order

[27] In light of the above, I made the following order:

27.1 The respondent is granted absolution from the instance.

27.2 The applicant must pay half the respondent's costs of preparing for trial.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	C Sihlali instructed by Qina-Sekahabisa Attorneys
RESPONDENT:	F A Boda instructed by Cliffe Dekker Hofmeyr Inc.