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IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case Number: C604/2012

In the matter between:

ZAMEKA AGATHA DUMA **Applicant**

and

MINISTER OF CORRECTIONAL SERVICES **First Respondent**

NATIONAL COMMISSIONER, CORRECTIONAL SERVICES **Second Respondent**

REGIONAL COMMISSIONER, CORRECTIONAL SERVICES, WESTERN CAPE **Third Respondent**

Date set down for trial: 20 November 2014; stated case received 14 September 2015 subsequent to directive of this court.

Delivered: 2 February 2016

Summary: Unfair discrimination based on arbitrary ground of 'geographical location';

JUDGMENT

RABKIN-NAICKER J

[1] This matter was filed at court as an opposed action but is before me for decision in terms of a stated case in terms of an order by agreement dated 20 November 2011.

[2] On 20 November 2009 the applicant (together with two other employees) lodged an unfair labour practice dispute relating to promotion at the GPSSBC. The matter was conciliated and a certificate of non-resolution issued on the 26 January 2010. The arbitration award issued on the 31 May 2010 described the issue in dispute as being "11. Whether the facts constitute an unfair labour practice in terms of section 186(2)(a) referring to promotion and if so, 12. Whether the referral is late and the applicant needs to seek condonation."

[3] The arbitrator found that the application did not fall with the ambit of the section and stated that accordingly "the GPSSBC has no jurisdiction to consider the matter". The award reads "52. The present application does not fall within the ambit of section 186(2)(a) of the Act and the application is dismissed." It must be noted that no issues relating to alleged unfair discrimination are dealt with in the said award. In other words there is no indication that the Commissioner was addressed on or considered whether the dispute was one involving unfair discrimination. He found that the facts as presented to him did not found an unfair labour practice dispute.

[4] An unsuccessful attempt was made to rescind this award under section 144 of the LRA. The applicant did not seek to review the award in this court.

[5] Two years later, the applicant referred a dispute on the same facts to the CCMA on 1 June 2012 along with a condonation application. A condonation ruling in applicant's favour was issued on the 2 July 2012 under case number WECT 8847-12. This ruling was also not taken on review. The applicant launched her claim in this court on the 18 August 2012. The background to this matter is set out in

relevant part below, based on the stated case. I deal first with one of the points in limine raised by the respondents i.e. that Duma's claim has prescribed.

[6] On the 8 September 2000 Duma was appointed as a custodial officer at salary level 3 at the Department. She subsequently completed her B.Iuris degree and therefore qualified to be appointed as a Legal Administration Officer. She was appointed to the post of Senior Correctional Officer (SCO): Manager: Legal Services: Voorberg Management Area: Western Cape, advertised and filled as SCO post (level 8), with effect from 1 August 2006.

[7] On 7 May 2007, a notice was circulated advertising vacancies for, inter alia, positions of SCO: Legal Services, being equivalent to the post held by Duma. An amendment was later issued that the advertised posts should be changed to Assistant Director (ASD) posts as opposed to SCO posts.

[8] On the 7th February 2008 an agreement was reached at the General Public Service Sectoral Bargaining Council to retrospectively implement PSCBC Resolution 1 of 2007 in respect of the development and application of the Occupational Specific Dispensation (OSD) as of 1 July 2007.

[9] With regard to the alteration of pre-OSD salary levels, Duma contended that the SCO salary level 8 position at Voorberg should have been determined at ASD salary level 9 prior to the implementation of the OSD and as a consequence: "Duma should have been appointed on a salary level 9 and translated to the OSD on such salary level."

[10] The respondents submit that the applicant became aware of the alleged discrimination on May 7 2007 when the notice of the Legal Administration Officer Positions on salary level 9 in KwaZulu Natal were circulated. Her claim, they submit, became prescribed in May 2010. The dispute before this court was only referred to the CCMA some 2 years later, in June 2012.

[11] If it is accepted that the applicant's claim to remuneration on the level of an ASD was a 'debt' due in terms of the Prescription Act, and that it was due in May 7

2007, such a claim would have prescribed three years later. In **Umgeni Water & others v Mshengu**[1] the SCA stated as follows:

"[5] Section 10 of the Prescription Act 68 of 1969 (the Act), provides for the extinction of a debt after the lapse of periods determined in s 11. The period of prescription applicable to the plaintiff's claim is that provided for in s 11(d) of the Act, namely three years. According s 12(1) of the Act, prescription shall commence to run 'as soon as the debt is due'. The words 'debt is due' must be given their ordinary meaning. In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.

[6] A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression 'cause of action' has been held to mean: 'every fact which it would be necessary for the plaintiff to prove, 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 necessary to be proved'; or slightly differently stated 'the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action'."

[11] The applicant submits that discrimination claims are not 'debts' for the purposes of the Prescription Act based on the proposition that the right to equality is fundamental to our constitutional democracy and that "Proper respect for the centrality of the right to equality and sufficient protection of it can only be realised if it is found that claims bases on infringements of the right to equality are not debts

[1] (2010) 31 ILJ 88 (SCA)

for the purposes of the Prescription Act and do not prescribe." In addition, the argument is made that the Employment Equity Act is not compatible with the Prescription Act relying on labour court jurisprudence in respect of the LRA. These labour court decisions relied upon, were not upheld on appeal in the matter of **Sizwe Myathaza and Johannesburg Metropolitain Bus Service (Soc) Limited t/a Metrobus; Daniel Mazibuko and Concor Plant and Cellucity(Pty) Ltd and CWU obo Peters**[2] in which the LAC found that an arbitration award under the LRA is not a judgment debt under the Prescription Act but a simple debt subject to a three-year prescriptive period.

[12] The LAC stated the following in that judgment

> [29] In his work, "*Extinctive Prescription*", M Loubser,[3] in my view correctly, states that:
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> '*The main object of extinctive prescription is to create legal certainty and finality in the relationship between the parties after the lapse of a period of time, and the emphasis is on the protection of the defendant against a stale claim that has existed for such a long time that it becomes unfair to require the defendant to defend himself against it. The emphasis is on the protection of the defendant because the claimant is responsible for enforcing his right timeously and must suffer the consequences of failure in this regard. Essentially extinctive prescription embodies a desire for finality and serves the common good by creating legal certainty in individual cases.*'[4] [Footnotes omitted]
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> [30] In *Mohlomi v Minister of Defence,*[5] Justice Didcott stated the reason for time limits in litigation: He said:
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> '*Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations*

[2] Unreported judgment delivered on 6 November 2015 under case numbers JA122/14; JA38/14 and CA 3/14.
[3] M Loubser *Extinctive Prescription* (Juta & Co 1996).
[4] At 33.
[5] 1997 (1) SA 124 (CC).

sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor, in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.[6] (emphasis added)

[31] In *Uitenhage Municipality v Malloy,*[7] Mahomed CJ said the following about the purposes of the Prescription Act:

'*One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription that purpose would be subverted.*[8]

[32] In *Road Accident Fund and Another v Mdeyide,* Justice Van der Westhuizen stated with regard to the purpose and necessity of time limits, the following:

'*This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events*

[6] At para 11.
[7] (1998) 19 ILJ 757 (SCA).
[8] At 13.

may be faded. The quality of adjudication is central to the rule of law.[9] [Footnote omitted]

[33] A common thread to be found in the above quotations is that prescription, *per se*, is justified and necessary. It is clear from section 16(1) of the Prescription Act that every debt, contemplated in that section, must in our law prescribe within a certain period. If the Act of Parliament under which the debt resides does not prescribe that period, then the Prescription Act is applicable and it prescribes within that period. Prescription is based on considerations of fairness and equity and it is therefore not correct to argue that prescription is inconsistent with such considerations. Those hallowed concepts do not only apply to one party, but apply to all parties including employers and employees."

[13] Given the reasoning of the LAC and its rejection of the approach that the Prescription Act is not compatible with the LRA, I can find no basis in the arguments submitted on behalf of the applicant based on the submission that the reasoning applied in the Labour Court's judgment in **Cellucity** applies *mutatis mutandi* with equal force to the current matter.

[14] In the alternative, the applicant submits that each failure to pay what was due was a separate act of discrimination and the running of prescription was interrupted on 20 November 2009, alternatively 1 June 2012. Reliance is placed on the judgment in **SA Broadcasting Corporation Ltd v CCMA & Others (2010) 31 ILJ 592 (LAC)** in particular the following dictum:

"While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example where an employer selects an employee on the basis of race to be awarded a once-off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees

[9] At para 8. See also *Brummer v Minister for Social Development and Others* 2009 (6) 323 (CC) at para 51; and *POPCRU obo Sifuba* at paras 28-30 (inclusive).

who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no end and is therefore ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination.

[28] Hence in the present matter the date of dispute does not have to coincide with the date upon which the unfair labour practice/unfair discrimination commenced because it is not a single act of discrimination but one which is repeated monthly. In the circumstances the dispute being labelled as ongoing was an accurate description of the 'dispute date' and the decision arrived at by the commissioner that there was no need for the respondent to seek condonation was correct."

[15] The following is contained in the stated case reflecting applicant's argument in this respect:

"That there was no single 'debt' for the purpose of the Prescription Act. The discrimination against the Applicant (in the form of the failure to pay her what she claims ought to have been paid) was and is ongoing. The running of prescription was interrupted when the Applicant referred a dispute to the GPSSBC on 20 November 2009. This entails that only acts of discrimination prior to November 2006 (i.e. August, September and October 2006) would have prescribed.

If the referral to the GPSSBC did not have the effect of interrupting prescription, at the very least, from 8 August 2009 (three years before the Applicant filed her statement of claim in this court which interrupted the running of prescription), the Applicant's claims in relation to the Respondent's unfair discrimination in failing to pay the Applicant the salary she alleges was due to her have not prescribed."

[16] Given that the unfair labour practice referral to the GPSSBC was not entertained as an unfair discrimination dispute, it is not necessary to consider whether such a referral should be considered as interrupting prescription. Based on the **SA**

Broadcasting case referred to above, I however consider that the claim has not prescribed in that the referral to this court interrupted prescription. Thus a claim covering a three year period before 18 August 2012 falls to be adjudicated.

[17] A second point in limine was raised in the stated case i.e. that the Minister of Public Service an Administration ought to have been joined as a respondent party. This point was not pursued by the Respondents in heads of argument dated 30 January 2015.

[18] The stated case records that applicant claims she was discriminated against in the ground of her 'geographical location'. The following agreed facts read:

"16. With regard to the alteration of the pre-OSD salary levels and their subsequent translation:

16.1 The Manager: Legal Services position in, inter alia, Limpopo, Mpumalanga, Norrth-West and KwaZulu-Natal were at ASD level 9. Further in terms of the Department's organisational structure, the job descriptions and title of Manager:Legal Services should be at least ASD level 9. Therefore, regardless of the construction and interpretation of the OSD, there are disparities among various employees who are performing work with the same job description at different rates of remuneration. As such, Duma contended that the SCO salary level 8 position at Voorberg should have been determined at ASD salary level 9 prior to the implementation of the OSD and as a consequence should have been appointed on a salary level 9 and translated to the OSD on such salary level. Duma brought this disparity to the Department's attention but no action has been taken to correct it." (my emphasis)

[19] Duma relies on section 6(1) of the Employment Equity Act[10] and on an unspecified unspecified ground therein. Section 6(1) provided that:

"(1) No person may unfairly discriminate, directly or indirectly, against an employee, ground in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic

[10] Prior to the proclamation of the Employment Equity Amendment Act 47 of 2013.

or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language or birth." (my emphasis)

[20] An applicant bringing a claim in terms of this provision must prove:

20.1 That there was differentiation which amounted to discrimination. If it is on a ground specified in section 6(1), the discrimination is established. If it is not on a specified ground then whether or not there has been discrimination will depend on whether, objectively, the grounds are based on attributes and characteristics which have the ability to impair the fundamental human dignity of people in a comparably serious manner;

20.2 That the differentiation amounting to discrimination is unfair discrimination. If the discrimination is on a specified ground, unfairness is presumed. If on an unspecified ground, unfairness will have to be established by the applicant. The EEA makes it clear that it is not unfair discrimination for an employer to treat an employee differently on a specified ground, or an analogous ground, if that is based on affirmative action or an inherent requirement of the job.[11]

[21] The basis for the differentiation at issue, i.e. the fact that Duma is employed by a national organisation in one province and not another, appears on the stated case before me to be entirely arbitrary. As submitted by Mr Bosch on her behalf, arbitrariness has long been recognised as one of the hallmarks of discrimination.[12] The amended EEA reflects this by prohibiting discrimination in section 6(1) on any "arbitrary ground". I agree that the ground of geographical location as a basis to prejudice an employee (by paying them less for the same work as another employee in a different location) has the ability to impair the dignity of that person in a manner comparable to the listed grounds and amounts to discrimination. My view is fortified by the fact that the amended EEA, although not applicable to this case, provides in section 6(4) that:

[11] Harksen vLane N.O. 1998 (1) SA 300 (CC) at para 53; NUMSA & Others v Gabriels (Pty) Ltd (2002) 23 IJ 2088 (LC) at 209E-I; Mangena & Others v Fila SA (Pty) Ltd & Others (2010) 31 ILJ 662 (LC) at 668B-C
[12] Prisloo v Van der Linde and Another 1997at paragraph.

"(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination."

[22] Given that we are dealing with the EEA before the 2014 amendments, it is necessary for the court to consider whether Duma's claim based on an unspecified ground of discrimination amounts to unfair discrimination. In **SA Airways (Pty) Ltd v Jansen van Vuuren & Another**[13] the LAC considered the determination of fairness under the EEA (albeit in a matter dealing with a listed ground) and stated:

"[44] What is clear is that in considering the issue of fairness under the EEA, the position and interests of the employee and employer must be considered and balanced, and that the objectives of the EEA must be the guiding light in applying a value judgment to established facts and circumstances. The determining factor, however, is the impact of the discrimination on the victim. This is consistent with the approach in Hoffmann…..

[46]……An enquiry into fairness contemplated in the EEA will necessarily involve more than a consideration of the moral issues and the impact of the discriminatory action on the complainant. It will also include a consideration and require a balancing of the defences raised by the employer for the discrimination as well as issues such as proportionality of the measure, the nature of the complainant's right that he alleges has been infringed, the nature and purpose of the discriminatory measure, and the relation between the measure and its purpose."

[23] In this matter, there appears to be little more than a bald denial by the respondents that unfair discrimination has taken place. It is recorded by the respondents in the stated case that: "The Respondents deny that the manner in which Duma was treated was motivated by discrimination on arbitrary grounds i.e. it denies that it discriminated against Duma." Nor is the issue of the purpose of the differentiation between the Western Cape posts and the posts in other

[13] (2014) 35 ILJ 2774 (LAC)

provinces dealt with. It would appear that the respondents, in their defence of the matter, are more concerned with the remedy the applicant seeks and whether it is competent for the court to grant that relief.

[24] On the other hand, the submissions on Duma's behalf that it must be accepted that the discrimination against her were unfair are compelling. These include that:

24.1 She was treated arbitrarily on a ground that impacted on her dignity;

24.2 The respondents have put up nothing to show that it was necessary to differentiate between Managers:Legal Services in the Western Cape differently from their counterparts in other provinces. There is no apparent purpose for the distinction in treatment;

24.3 The applicant has been prejudiced financially over a number of years given that the effect of the discrimination was that she was not remunerated at the correct levels;

24.4 Any distinction between employees based solely on the area of the country in which they work is, given our history, anathema to the society envisaged by the Constitution;

24.5 The EEA is premised on amongst others giving effect to the right to equality and the eradication of discrimination.

[25] I therefore accept that Duma has met the onus of proving that the discrimination was unfair. She seeks an order praying for "retrospective correction of her post" i.e. that she ought to have been placed at level 10, alternatively level 9, and translated through the various levels and grades accordingly. Given that I have found that her claim can only be considered to have arisen in 2009, there is a limit on the retrospective effect of any order that this court may make. There is nothing before me that establishes that level 10 should have been the level at which she should have been employed prior to translation in terms of the OSD process.

[25] The EEA sets out the remedies of the Labour Court in cases where it finds that unfair discrimination has been established in section 50, as follows:

"(2) If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-

(a) payment of compensation by the employer to that employee;

(b) payment of damages by the employer to that employee;

(c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;

(d) …….;

(e) ……..;and

(f) the publication of the Court's order.

(3) The Labour Court, in making any order, may take into account any delay on the part of the party who seeks relief in processing a dispute in terms of this Act….."

[26] The court must therefore be guided by the principles of justice and equity in the exercise of its discretion as to remedy. The list of possible remedies in section 50 (2) is not a closed list. I have not been provided with any computation regarding remuneration by the parties. My order will therefore not be specific as to the amount of compensation to be paid. If the parties wish to approach the court as to specific quantum, if such cannot be agreed, they may do so. In all the circumstances I make the following order:

Order

1. The applicant has suffered unfair discrimination.

2. The respondents are ordered to pay Zameka Agatha Duma the following compensation:

"An amount equivalent to the difference between the remuneration she received from August 2009 to the date of this order, and the remuneration

she would have received during that period had she been graded on level 9 as of the date of her translation in terms of the OSD."

3. The respondents are ordered within one calendar month after the date of this of this order to adjust the monthly remuneration paid to Zameka Agatha Duma to align with the current remuneration entitlement of an employee with her job description who was in a level 9 post, prior to translation in terms of the OSD.

4. The respondents are to pay the costs jointly and severably.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Adv. Craig Bosch instructed by Bradley Conradie Halton Cheadle

First Respondent: Adv. PC Pio instructed by the state attorney