THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 576 / 13

In the matter between:

D M SETHOLE AND 18 OTHERS **Applicants**

and

DR KENNETH KAUNDA DISTRICT MUNICIPALITY **Respondent**

Heard: **11 and 12 May, 26 and 27 June 2017**

Delivered: **21 September 2017**

Summary: Interpretation of statute – amendment to EEA – retrospectivity considered – EEA does not have retrospective operation

Discrimination – equal pay dispute – alleged discrimination on unlisted ground – principles considered and discussed

Discrimination – differentiation – mere differentiation does not constitute discrimination – what constitutes impermissible differentiation considered – meaning of arbitrary ground considered – impermissible arbitrary differentiation not shown to exist

Discrimination – equal pay dispute – principles considered – what must be shown to establish discrimination in equal pay dispute discussed

Practice and procedure – bringing of a case of discrimination based on unlisted ground – crucial to properly plead and set out case of discrimination in pleadings – applicants failing to plead proper case

Onus – burden is on complainant replying on an unlisted ground to establish the existence of discrimination – applicants failing to discharge such onus even on their own pleaded case and evidence presented

Absolution from the instance – principles stated – applicants failed to make out a case of impermissible differentiation or discrimination on their own version as it stands – absolution from the instance granted

Costs – applicants persisting with case despite warnings and it being clear it had no merit – costs awarded

---

JUDGMENT

SNYMAN, AJ

Introduction

[1] It seems to me that despite the advent of our democracy and the adoption of our progressive Constitution, now more than two decades ago, discrimination claims, especially in the context of employment law, are unfortunately still a regular occurrence. This leaves one pondering the question, why is this so? Is it true that discrimination is still alive and vibrant in the workplaces of this country? Is it a case that litigants simply do not understand what a discrimination claim in fact entails? Or is it just a new form of ambulance chasing with the view to extort monetary benefits, considering the fact that such claims in effect have a substantial punitive component and no limit on compensation?[1] I must confess that I have my concerns that the spate of discrimination claims seeking money are founded on this latter consideration.

[1] See Section 50(2) of the EEA; *SA Airways (Pty) Ltd v Jansen van Vuuren and Another* (2014) 35 *ILJ* 2774 (LAC) at paras 78 – 80; *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC) at paras 73 – 74.

[2] But the above being said, the fact however remains that because of the nature of the issues and fundamental rights involved in discrimination claims, a Court should be careful and circumspect in declining to entertain the claim, especially where it comes to deciding issues such as absolution from the instance.[2] After all, Courts are the custodians of the right to equality under the Constitution.

[3] These opening remarks then bring me neatly to the case now at hand. It is a claim by the applicants based on unfair discrimination as contemplated by Section 6 of the Employment Equity Act ('the EEA')[3]. At the heart of the case is a complaint about a remuneration differentiation between the applicants and employees in another post at the respondent, with the applicants saying that they perform same or similar work as these other employees, but are paid less and receive lesser benefits. As far as the applicants are concerned, this difference in remuneration and benefits is not founded on a listed ground in Section 6 of the EEA, but on an unlisted arbitrary ground, also contemplated by Section 6 of the EEA.

[4] The applicants initially brought their case by way of motion proceedings in terms of Rule 7 of the Labour Court Rules, filed in 2013. This was followed by an application for default judgment by the applicants, and interlocutory applications under Rules 23 and 30 by the respondent as well as an answering affidavit. At some point, it was agreed that the matter rather proceed by way of oral evidence, which meant that a pre-trial had to be held. The Court file then also contains a plethora of directives relating to the holding of a pre-trial conference, and the signing and submitting of a pre-trial minute.

[5] This matter was set down for default before Lagrange J on 25 October 2016. The default judgment did not proceed. Instead, the parties held a pre-trial conference, and filed a pre-trial minute. In terms of this pre-trial minute, all the aforesaid interlocutory applications were withdrawn, and I shall have no further regard to such processes. It was agreed that the matter would proceed to trial. Lagrange J then ordered, in this context, that the founding and answering affidavits filed by the parties would stand as a statement of case

[2] See the warning dispensed in *Commercial Stevedoring Agricultural and Allied Workers Union on behalf of Dube and Others v Robertson Abattoir* (2017) 38 ILJ 121 (LAC) at paras 23 – 24.
[3] Act 55 of 1998.

and an answering statement respectively, and the parties were directed to conduct a supplementary pre-trial so as to comply with the directives prescribed for pre-trial minutes relating to discrimination claims. Lagrange J also ordered that the matter be set down for two days, on trial.

[6] The supplementary pre-trial minute was only ultimately filed on 5 May 2017. In it, the applicants then listed a number of individual grounds of alleged discrimination, which will be dealt with later in this judgment.

[7] The matter came before me for trial on 11 and 12 May 2017. At the outset of the proceedings on 11 May 2017, the applicants' attorney, Mr Vuyizsa Vuza, stated that the applicants were now longer seeking relief as contemplated by prayer 1 of the notice of motion. This prayer reads: 'That the post of Pollution Control Officer be nullified as it is derived from the scope of Practice of Environmental Health Practitioners.' Mr Vuza made it clear that the applicants were no longer attacking the legality of the creation of the posts of Pollution Control Officer, but that the applicants were saying that the creation of these posts, and then differentiating between them, constitutes discrimination against the applicants as Environmental Health Practitioners.

[8] I then expressed my concerns to Mr Vuza about the fact that the discrimination case of the applicants was not properly pleaded or identified, despite the supplementary pre-trial. I enquired from Mr Vuza if he could indicate to me what exactly the unlisted arbitrary ground was that the applicants would rely on in establishing their claim, especially in the context of the judgment in *Harksen v Lane NO and Others.*[4] I was informed by Mr Vuza that he could not provide me with a definitive answer, but that the ground relied on would become 'apparent' during evidence. As unsatisfactory as such a mystery ground of discrimination may be to the proper conducting of a discrimination case, I nonetheless allowed Mr Vuza to continue to lead the evidence of his first witness so as to establish where all of this could possibly be going.

[9] One of the applicants, Mirriam Sethole ('Sethole') was then called to testify. I will deal fully with her evidence later in this judgment. Suffice it to say, after Sethole had been cross examined and concluded her evidence, it was still not apparent to me what the unlisted arbitrary ground was that the applicants were

[4] 1998 (1) SA 300 (CC).

relying upon. In short, the mystery ground of discrimination did not come to the fore in the evidence. I pointed out to Mr Vuza that I remained concerned that even after the conclusion of the testimony of Sethole, the applicants, even on a *prima facie* basis, had made out no case of discrimination. I then adjourned the proceedings to 26 June 2017, so as to afford the applicants an opportunity to consider their options and whether they in fact should proceed with the case.

[10] The trial reconvened on 26 June 2017. This time, the applicants had been bolstered in the conducting of their case by counsel that had now been briefed, being Mr B Sibuyi. Mr Sibuyi indicated to me that he had been consulted by the applicants about the matter, and that he was satisfied that the matter should proceed. The applicants then also moved an application for an amendment of the statement of claim (former founding affidavit), together with an application to join two employees of the respondent as further respondents to the proceedings, on the basis that these employees may be affected by the case the applicants were seeking to make out. This further process had been filed about a week before the resumption of the trial.

[11] Counsel for the respondent, Mr D L Dikolomela, indicated that the respondent did not oppose the applications for joinder and amendment, and left it in the hands of the Court. He indicated that the respondent's attorneys also represented the two individual respondents the applicants sought to add to the proceedings, and recorded that these respondents waived their rights to individually participate in the proceedings, and would abide by what the respondent would do to oppose the matter.

[12] I made a proposal to the parties that in the interest of now concluding this matter, which had been dragging since 2013, the matter proceed on the basis of it being assumed that the amendment and the joinder sought by the applicants as being granted, and if needs be, I would address these issues pertinently in my judgment to follow. Both parties agreed to this, and the matter then proceeded with the applicants calling their next witness, Mr Wilfred Gaonnwe ('Gaonnwe'). At the conclusion of his testimony, the applicants then closed their case.

[13] Mr Dikolomela then indicated, after the applicants closed their case, that the respondent intended to apply for absolution from the instance on the basis that the applicants failed to make out even a *prima facie* case against the respondents in respect of their discrimination claim. The application was opposed by Mr Sibuyi. Both parties filed written argument. It is this absolution from the instance application that now forms the subject matter of this judgment.

Principles: absolution from the instance

[14] It is trite that the Labour Court has the power to consider and determine applications for absolution from the instance.[5] The test to be applied in considering an application for absolution from the instance was described in *Gordon Lloyd Page and Associates v Rivera and Another*[6] as follows:

> '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 Daniel* 1976 (4) SA 403 (A) at 409G - H in these terms:
>
> '... (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 and 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 court

[5] See *Janda v First National Ba*nk (2006) 27 *ILJ* 2627 (LC) at para 4; *Joubert v Legal Aid South Africa* (2011) 32 *ILJ* 1921 (LC) at para 5; *Wallis v Thorpe and Another* (2010) 31 *ILJ* 1254 (LC) at para 9; *Sihlali v SA Broadcasting Corporation Ltd* (2010) 31 *ILJ* 1477 (LC) at para 4; *Bandat v De Kock and Another* (2015) 36 ILJ 979 (LC) at para 4; *Mangena and Others v Fila SA (Pty) Ltd and Others* (2010) 31 ILJ 662 (LC) at para 4.

[6] 2001 (1) SA 88 (SCA) at para 2. See also *Robertson Abattoir* (*supra*) at para 17.

> 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.'

[15] In terms of the *dictum* in *Gordon Lloyd* referred to above, I thus need to consider if the applicants have produced sufficient evidence to at least, on their own case, reasonably establish the *prima facie* existence of discrimination on an unlisted arbitrary ground. Therefore, considering the case as pleaded and the evidence of the two witnesses for the applicants together with the documentary evidence, did the applicants do enough to even substantiate the claim in the absence of anything presented by the respondent? In *Motaung v Wits University (School of Education)*[7] the Court said the following in this respect:

> 'In view of the nature of the applicant's claim, it has to be established whether the applicant has adduced sufficient evidence supporting the facts required to back up her claim, and upon which this court might give judgment against the respondent. …'

[16] Further, and when considering an application for absolution from the instance, it is still evidence that must be considered, and determined. This means that the enquiry must entail some measure of evaluation of the evidence of the applicants up to the point of the closing of their case. It would also include a credibility assessment of the testimony presented so far. In other words, the consideration of an absolution application is not done on the basis of simply accepting that all the testimony presented by the applicant is true, without any consideration or reservation. In *Bandat v De Kock and Another*[8] the Court said:

> '… The evidence must still be evaluated and in particular, be compared to the evidence of the other witnesses for the applicant that testified as well as the agreed and accepted documentary evidence, as well as the pleadings. It must

[7] (2014) 35 *ILJ* 1329 (LC) at para 13.
[8] (2015) 36 ILJ 979 (LC) at para 7. Compare the evaluation of the evidence in *Du Plessis v AMIC Trading (Pty) Ltd t/a Toys 'R US and Others* [2017] JOL 37944 (LC) at paras 26 – 39, conducted by the Court in deciding to ultimately grant absolution from the instance (at para 40 of the judgment).

> be decided if the applicant's case is at least one reasonable inference that can at this stage be drawn from the evidence properly before the court as a whole …'

In *Commercial Stevedoring Agricultural and Allied Workers Union on behalf of Dube and Others v Robertson Abattoir*[9] the Court followed a similar approach in dealing with an appeal of a judgment of the Court *a quo* in granting absolution from the instance in an automatic unfair dismissal claim, when saying:

> '… But that on its own should not detract a court from a proper enquiry, namely whether there was evidence produced by the appellants upon which a court applying its mind reasonably could or might have found a sufficient credible possibility that an automatically unfair dismissal had taken place.'

[17] It must therefore be decided if the applicants' case at this stage has at least one reasonable inference that can be drawn from the evidence properly before the Court as a whole. In *Nombakuse v Department of Transport and Public Works: Western Cape Provincial Government*[10] the Court held:

> 'In the case of an inference, the test at the end of the applicant's case is as follows: the court will refuse the application for absolution from the instance unless it is satisfied that no reasonable court could draw the inference for which the applicant contends. The court is not required to weigh up different possible inferences but merely to determine whether one of the reasonable inferences is in favour of the applicant.'

[18] In deciding any absolution application, the issue of who bears the *onus* is also of importance.[11] The point is that if the applicants do not bear the *onus*, then it simply cannot be said that the applicants are required to make out a *prima facie* case. Therefore, the consideration of any absolution application is always

[9] (2017) 38 ILJ 121 (LAC) at para 24
[10] (2013) 34 *ILJ* 671 (LC) at para 23.
[11] See *Robertson Abattoir* (*supra*) at para 16; *Bandat* (*supra*) at para 8; *Mouton v Boy Burger (Edms) Bpk* (2011) 32 *ILJ* 2703 (LC) at 2709A-B; *Bedderson v Sparrow Schools Education Trust* (2010) 31 *ILJ* 1325 (LC) at para 20*; Schmahmann v Concept Communications Natal (Pty) Ltd* (1997) 18 *ILJ* 1333 (LC) at 1337H-1338C; *Rockliffe v Mincom (Pty) Ltd* (2007) 28 *ILJ* 2041 (LC) at para 20.

inextricably linked with the party who bears the *onus*. The Court in *Janda v First National Bank,*[12] in dealing with an absolution application, said:

> The test to be applied by the court at this stage of the proceedings is whether there is sufficient evidence upon which a reasonable person could find for the applicant or, as it has also been expressed, the question is whether there is such evidence, assuming it to be true, upon which a reasonable court might, not should, give judgment against the respondent. (See Zeffertt et al *The SA Law of Evidence* at 164-5 and the authorities referred to.) To answer this question it is necessary to determine the nature of the onus and where it lies. As correctly submitted by Mr *Hulley*, for the applicant, the incidence of the onus is determined by the law and that the views of the parties as expressed in the pretrial minute are not conclusive thereof…'

Similarly and in *Black v John Snow Public Health Group*[13] the Court held:

> '… It has been said that absolution from the instance can only be granted if the onus rests on the plaintiff and not on the respondent'

[19] Can it be said that the applicants bear the *onus* in this case to establish the existence of discrimination on an unlisted arbitrary ground? In my view, certainly so. The applicants instituted proceedings in the Labour Court in this matter in July 2013. This was prior to the amendments to the EEA,[14] which came into effect on 1 August 2014. Where it comes to the issue of the *onus*, this is dealt with in Section 11 of the EEA. Prior to the amendments, Section 11 of the EEA read:

> 'Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.'

[20] It has been generally accepted that this text of Section 11 of the EEA contemplated the application of the principles as set out in *Harksen.*[15] The *Harksen* approach entails that it must firstly be established by the complainant that the differentiation (conduct) in fact amounts to discrimination, and then secondly, only if this is established, the duty then shifts to the respondent to

[12] (2006) 27 *ILJ* 2627 (LC) at para 5.
[13] (2010) 31 ILJ 1152 (LC) at para 35.
[14] EEA Amendment Act 47 of 2013.
[15] (*supra*) at paras 43 – 46. These principles will be elaborated on further, later in this judgment.

show that this discrimination is fair.[16] In short, an applicant has the *onus* to show the existence of discrimination, and once shown the respondent has the *onus* to show it is fair.

[21] This test articulated in *Harksen* has been consistently applied by the Labour Court in deciding discrimination claims, both when considering automatic unfair dismissals cases in terms of Section 187(1)(f) of the LRA[17], or outright discrimination claims in terms of Sections 10 and 50 of the EEA. It follows that the applicant must prove the existence of discrimination.[18] A few judgments bear specific mention. Specifically in the context of an absolution application, the Court in *Nombakuse*[19] said:

> 'Our courts have consistently held that, in order for the applicant to shift the burden of proof to the respondent to prove that the alleged discrimination was fair, the applicant must at least establish that there was discrimination on a listed (or analogous) ground.'

Similarly and *Farhana v Open Learning Systems Education Trust*[20] the Court held:

> '… in cases involving allegations of discrimination the duty is on the party making the allegations to show that there was discrimination and whether the discriminatory practice has impacted on the dignity of the affected individual.'

[22] In *Independent Municipal and Allied Workers Union and Another v City of Cape Town*[21], the Court properly summarized the position as follows:

> 'Moreover, s 11 of the EEA provides that whenever unfair discrimination is alleged, the employer against whom the allegation is made must establish that

[16] See *Department of Correctional Services and Another v Police and Prisons Civil Rights Union and Others* (2013) 34 *ILJ* 1375 (SCA) at para 21; *University of South Africa v Reynhardt* (2010) 31 *ILJ* 2368 (LAC) at para 21.
[17] Section 187(1)(f) of the LRA provides that a dismissal based on the same grounds as listed in Section 6(1) of the EEA is an automatic unfair dismissal.
[18] See *Biggar v City of Johannesburg (Emergency Management Services)* (2017) 38 ILJ 1806 (LC) at para 34; *Duma v Minister of Correctional Services and Others* (2016) 37 ILJ 1135 (LC) at para 21; SA Airways (*supra*) at para 36; *SA Municipal Workers Union and Another v Nelson Mandela Bay Municipality* (2016) 37 ILJ 1203 (LC) at para 26; *Co-operative Workers Association and Another v Petroleum Oil and Gas Co-operative of SA and Others* (2007) 28 *ILJ* 627 (LC) at para 34.
[19] *Nombakuse* (*supra*) at para 29.
[20] (2011) 32 *ILJ* 2128 (LC) at para 24.
[21] (2005) 26 ILJ 1404 (LC) at para 79.

> it is fair. This in effect creates a rebuttable presumption that once discrimination is shown to exist by the applicant it is assumed to be unfair and the employer must justify it - *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); (1999) 20 ILJ 525 (CC); and *Hoffmann v SA Airways* 2000 (2) SA 628 (W); (2000) 21 ILJ 891 (W). Once discrimination has been established, the employer will have to prove that the discrimination was fair …'

In specifically dealing with discrimination on an unlisted ground, the court in *Matjhabeng Municipality v Mothupi NO and Others*[22] said:

> '… a litigant who founds a cause of action on unfair discrimination based on an unlisted ground bears the onus to establish the discrimination and to prove that such discrimination is unfair.'

[23] Following the 2014 amendments to the EEA, Section 11 now reads:

> '(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.'

[24] These amendments however do not change the issue of where the *onus* lies, *in casu*, for two reasons. Firstly, the amendments to Section 11 of the EEA do not have retrospective application, and the applicable provisions of the EEA are those which applied at the point when the applicants referred this dispute to the Labour Court in 2013. As held in *Bandat*:[23]

---

[22] (2011) 32 ILJ 2154 (LC) at para 40

[23] (*supra*) at para 14. See also the analyses of the judgments relating to the issue of the retrospectivity of a statute in paras 11 – 13 of the judgment in *Bandat*. See also *Nelson Mandela Bay Municipality* (*supra*) at para 24; *Duma v Minister of Correctional Services and Others* (2016) 37 ILJ 1135 (LC) at paras 22 – 23.

> '… there is nothing in the EEA or in the amendment thereof which indicates that it must be applied retrospectively. As such, the presumption that must apply is that it is not retrospective and that the existing procedure prior to the amendment must find application. This presumption can then only be rebutted if there exists particular considerations of fairness and equity to do so and if there is a clear intention to be gathered from the statute itself that it was intended to apply to even pending proceedings. I can find no indication in the EEA of any intention that the amendment applies to existing and pending proceedings, already in existence prior to the amendment. I can equally find no compelling reasons of equity and fairness necessitating a departure from the general principles as stated. …'

This means that the principle that the *onus* is on the applicants to prove discrimination, as discussed above, remains applicable.

[25] Secondly, and even if Section 11 of the EEA after its amendment is considered, there is a clear distinction, where it comes to the issue of who bears the *onus*, between a case of discrimination based on one of the listed grounds in Section 6(1)[24] of the EEA, and a case based on any other unlisted arbitrary ground. In the case of a claim of discrimination based on a listed ground, an allegation of such kind of discrimination by a complainant suffices, and the *onus* is then on the respondent party to prove it does not exist. But in the case of a discrimination claim based on any other unlisted arbitrary ground, the *onus* is on the complainant to prove that discrimination based on that ground exists. Considering that the applicants' claim is squarely based on such an unlisted arbitrary ground, they would in any event bear the *onus* to prove the existence of discrimination, in terms of Section 11(2) of the EEA, as it stands after amendment.

[26] With the applicants thus bearing the *onus* in respect of their discrimination claim, it is therefore competent to proceed to decide, in terms of an absolution from the instance application, whether the applicants have at least made out a *prima facie* case in this regard and whether their evidence, as led to the point of closure of their case, can at least lead to a reasonable inference that they had been discriminated against in the context of remuneration disparity. I will

[24] These listed grounds are set out later in this judgment.

now proceed to set out the background facts as established by the evidence properly before me, as a whole, to the point of the applicants closing their case.

The relevant background

[27] The applicants are all employed as Environmental Health Practitioners ('EHP') by the respondent. They were all employed in terms of the National Health Act[25] and all stationed at various offices across the respondent's district municipal scope. Sethole, who testified for the applicants, was stationed at Matlosana, whilst Gaonnwe was based at Potchefstroom.

[28] The duties of an EHP are fairly broad. It included water quality monitoring, food control, waste management, health surveillance of premises, surveillance and prevention of communicable diseases during immunization, vector control, environmental pollution control, disposal of the dead, and chemical safety.

[29] The respondent also had in its organizational structure the position of Pollution Control Officer ('PCO'). A PCO is appointed in terms of the National Environmental Management: Air Quality Act.[26] The duties of a PCO is focussed only on pollution control, with a number of key performance areas relating specifically to this.

[30] It was common cause that the respondent introduced the position of PCO by way of a council resolution in 2008, and then appointed, in 2009, four incumbents into these positions. The fact is that the position of POC was created in the organizational structure before Sethole even became employed as EHP at the respondent.

[31] When this matter came before Court, the respondent had 21 EHPs in its employ, each covering a specific district allocated to them. As opposed to this, the respondent at the same time only had 2 POCs in its employ, who both covered all districts the EHPs also covered.

[32] In terms of the respondent's organizational structure, PCO positions are graded at a level 5 and the EHP position is graded at a level 7. It is common

[25] Act 61 of 2003.
[26] Act 39 of 2004.

cause that level 5 is a higher grade than level 7, and carries with it higher remuneration and benefits.

[33] In order to fill the post of a PCO, an incumbent would have to have a B Tech degree in the field of environmental management / health science, or a 4(four) year BSc degree. Minimum experience of 4(four) years' in environmental pollution control was also a requirement. The post of EHP requires the incumbent for the post to have a National Diploma in environmental health (or related qualification), and to be registered at the Health Professions Council. On face value in terms of this, the PCO positions appear to be a higher level and more specialized position, to that of an EHP.

[34] The job descriptions of the two respective positions also formed part of the undisputed documentary evidence. A comparison of these job descriptions show that the EHP position was far more general and wide ranging to that of PCO, and sets out three pages worth of key duties. It was, simply described, a generalist position which, as defined in the job description itself, had as its core responsibility 'To identify, evaluate, monitor and control all factors in the environment that can potentially affect the health and well-being of communities'. As opposed to this, the job description of PCOs set out only one page of specific duties all relating only to pollution control, with the job description describing the core responsibility of the position as being 'To manage and co-ordinate Environmental Pollution Control activities …'. A comparison of the job descriptions, just on face value, show that only a small component of the duties of an EHP would relate to what can be termed pollution control, with most of these duties being marked 'as required' from time to time, as opposed to the job description of the PCO, which stipulated these kind of duties as being 'ongoing'.

[35] Accordingly, and on the documentary evidence as it stands, the positions of PCO and EHP are not the same. The level, speciality and qualification requirements for the positions are not the same. The job descriptions show, despite an overlap in only a smaller part of the duties of an EHP, the PCO to be focussed only on pollution control, with detailed responsibilities in this regard on an ongoing basis, as opposed to the general responsibilities of the EHP only as required where it comes to pollution control functions.

[36] In presenting testimony, Sethole conceded that as far as she could recall, the position of PCO always appeared in the respondent's organogram. She however took issue with the fact that a PCO was graded higher than her position of EHP, because the kind of pollution control work being allocated to the PCO was part of her duties as EHP. She in fact complained that pollution control was only one of her many functions, and it was thus 'unfair' that her position was being graded lower.

[37] But faced with the prospect that the position of PCO in fact existed at all times, with the particular grade attached to it, and with its own job description and qualifying criteria that she did not meet, Sethole then fell back on the contention that the creation of the post of PCO by the respondent was 'illegal'. It is perhaps important to interpose the summary of the evidence of Sethole, at this stage, to reiterate that at the outset of this matter, the applicants specifically abandoned seeking any relief to the effect that the creation of the post of PCO was unlawful and thus had to be nullified. This being the case, Sethole's evidence that the creation of the post of PCO was unlawful is simply not acceptable, and smacks of being an afterthought to try and explain the unexplainable.

[38] Under what was in my view effective cross examination by Mr Dikolomela for the respondent, Sethole conceded that the respondent in fact advertised the positions of PCO to be filled, at the higher grade, and that she could have applied for it if she wanted. She said that she decided not to apply for it, explaining that as far as she was concerned, she was already doing pollution control work as part of her duties. When it was put to her that some of the other EHPs applied for the PCO positions (which the documentary evidence showed did happen), she avoided answering the question.

[39] Sethole was asked how the creation of the positon of PCO could constitute discrimination against her, considering it was created before she even started working for the respondent. Once again, Sethole avoided answering the question, but when pressed, conceded that the creation of the post of PCO was not discrimination against her. Sethole also conceded that she could not say that when persons were then appointed to the positions of PCOs, this was done on a discriminatory basis towards her.

[40] When asked what she then saw as being discrimination against her, Sithole answered that she considered herself discriminated against when she saw what PCOs were earning, under circumstances where she did not only similar work, but even more work. She then made the concession that she in effect wanted was for her position to be regraded and that she be remunerated according to PCOs received.

[41] Mr Dikolomela asked Sithole whether part of her duties included pest control, also referred to as vector control, and she answered that this was indeed the case. It was then pointed out to her that the respondent also had dedicated vector pest) control officers, and Sethole conceded this, stating that these officers were also doing part of her job. She was asked why the appointment of these vector control officers doing part of her job could not be seen to be discrimination against her for the same reason as the PCOs doing part of her job, and her answer was that she did not see it as discrimination because vector control officers were graded lower than her.

[42] Sithole in the end conceded that her contention of discrimination was squarely founded on the position of PCO being graded higher than her position of EHP, and that there was a higher remuneration attached to such higher grade, which she believed was 'unfair'.

[43] Again, and in cross examination, and when faced with difficult questions as to how the creation of the post of PCO could be seen to constitute discrimination, Sithole fell back on the abandoned case that the creation of that post was unlawful and that she wanted the Court to nullify the position. Under re-examination, Sithole then changed her tune and said she had no problem with the post of PCO, but her problem was one of fairness where it came to comparing the two positions. Then, and in virtually the same breath, she again complains that the position of PCO is invalid.

[44] As touched on above, and when the trial reconvened in June, Gaonnwe was the second witness for the applicants. His evidence added very little to the enquiry of establishing discrimination. The thrust of his evidence was that PCOs should be issuing licences and did not do this, as this was being done by the EHPs. He also stated that he was being discriminated against because

he carried out the same functions as PCOs but he was graded and earned less.

[45] Under cross examination, Gaonnwe conceded that he could have applied for the position of PCO, but he decided not to do this as 'a matter of principle'. He also admitted that he did not have the required qualification to be appointed as PCO. Goannwe however then added that as far as he was concerned, the position of PCO was 'illegal'.

[46] Mr Dikolomela then explored a pertinent proposition with Gaonnwe. He was asked if he wanted the salary and benefits of a PCO, and he answered that this was indeed the case. It was then put to him that if he said the position was illegal, he thus wanted the salary and benefits of an illegal position, which is surely not permissible. He could not answer this proposition.

[47] It was then explored with Gaonnwe why he was of the view that the post of PCO was "illegal'. His answer was that as far as he was concerned, whenever an employee fulfilled any of the functions as listed in the scope of work of the EHP, such an employee had to be registered with the Health Practitioners Council. He stated that part of the functions of the EHP was pollution control, so anyone doing pollution control had to be so registered, and PCOs were not. He was then also confronted with the issue of pest control which was part of the functions of an EHP, and it was put to him that vector control officers doing this function did not have be so registered. He could provide no satisfactory answer for this.

[48] Goannwe ultimately contended that his complaint was that he was being unfairly treated, because he was doing the same and even more work that the PCOs, but was graded and remunerated less.

[49] As no further witnesses testified, the aforesaid is then the crux of the evidence upon which the applicants' discrimination claim is based. I will now turn to deciding whether this even makes out a *prima facie* case of discrimination.

Evaluation

[50] Before deciding the discrimination case, I am compelled to deal with the contention that the creation of the post of a PCO was unlawful and had to be

nullified. The applicants persisted in arguing this point when opposing the application for absolution, despite specifically abandoning it at the start of the trial, and the respondent agreeing to the same. They also sought to raise this issue again in the belated joinder application filed in June 2017. It is not permissible to raise an issue for consideration again in a trial, where it has been specifically abandoned prior to the trial commencing, pursuant to an agreement between the parties. As specifically said in *Filta-Matix* (*Pty) Ltd v Freudenberg and Others*:[27]

> '… If a party elects to limit the ambit of his case, the election is usually binding …'

[51] In dealing with an agreement to limit issues as contained in a pre-trial minute, and in *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another*[28], the Court said:

> 'I think it is necessary immediately to accept as a point of departure that, where a litigant is a party to a pre-trial minute reflecting agreement on certain issues, our courts will generally hold the parties to that agreement or to those issues. …'

[52] In *GE Security (Africa) v Airey and Others,*[29] the Court was again confronted with a situation where a litigating party sought to rely on issues outside the ambit of a pre-trial minute and the Court held:

> 'The respondents' counsel submitted, relying on the matter of *Shill v Milner* 1937 AD 101, that the issues in the pretrial minute had been broadened because of a lack of an objection to the questions put to McKenzie… I reject this submission for two additional reasons:
>
> 21.1 Firstly, there was never any formal application made to withdraw the admission.
>
> 21.2 Secondly, the appellant's counsel was not obliged to object to questions which sought to elicit an answer to a common cause fact which had been settled and was entitled to remain silent and argue at the end that the

[27] 1998 (1) SA 606 (SCA) at 614B-D.
[28] (2000) 21 ILJ 142 (LAC) at para 83. See also *Shoredits Construction (Pty) Ltd v Pienaar NO and Others* [1995] 4 BLLR 32 (LAC) at 34C-F.
[29] (2011) 32 ILJ 2078 (LAC) at para 21.

court could ignore the answer of a witness that was at variance with what were the agreed facts. A court does not have the power to go beyond the agreed common cause facts in the absence of fraud or the granting of an application to withdraw an admission….'

[53] The applicants must thus be held to that which they had agreed to when this trial started.[30] It is impermissible to seek to change positions basically half way though the trial. I may add that Mr Dikolomela frequently took the two witnesses for the applicants to task in cross examination, where they sought to rely on a contention that the PCO posts were illegal, because of this agreement.

[54] Therefore, the case of the applicants that the creation of the PCO posts was unlawful and must be nullified is not open for consideration. For this reason as well, the joinder application must be refused. However, and in any event, both Sethole and Goannwe in evidence conceded that the PCO posts were legitimately created in the respondent's organizational structure as far back as 2008, had already been created before they started working there, and that they could have applied for these positions when the same was filled, but elected not to. It is also clear from the evidence that these posts were filled in 2009 and the first complaint emanating from the applicants about the PCOs only arose in April 2012. It can hardly be said, even on the evidence as presented by the applicants, that the legitimacy of the creation and then filling of the PCO posts, in 2008 and 2009 respectively, was ever really in issue.

[55] I will therefore proceed to decide this matter on the basis that the post of a PCO properly formed part of the respondent's organizational structure, was a post that has been legitimately created in that structure, and that the post had its own qualifying provisions, job description and grading level.

[56] The point of departure in deciding whether the applicants had made out a *prima facie* case of discrimination has to be a consideration of Section 6(1) of the EEA. Prior to the 2014 amendments to the EEA, the Section read:

---

[30] See *Zondo and Others v St Martin's School* (2015) 36 ILJ 1386 (LC) at para 10; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others* (2013) 34 ILJ 2347 (LC) at para 67.*Lowies v University of Johannesburg* (2013) 34 ILJ 3232 (LC) at para 29; *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v CTP Ltd and Another* (2013) 34 ILJ 1966 (LC) at para 105.

> 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more 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.'

What the 2014 amendments to the EEA did was to add the phrase '… or on any other arbitrary ground' to the end of the Section.[31]

[57] The applicants have also argued that Section 6(4)[32] of the EEA applied in this case, and that they also relied on that provision. Of course, and when this claim was brought in 2013, Section 6(4) did not exist. But in the founding affidavit, it is clear that the applicant's claim is articulated in the form as one would articulate a claim under Section 6(4). This position was reaffirmed by way of the notice of intention to amend dated 20 June 2017, which the respondent did not oppose. I will therefore accept that reliance on Section 6(4) of the EEA is part of the applicants' case. That being said, reliance on this provision *per se* and as it now stands can however be swiftly disposed of. As I have said earlier in this judgment[33], Section 6(4) came about as a result of the 2014 amendments to the EEA, and these amendments do not have retrospective effect. At risk of repetition, I reiterate that this matter must be decided on the basis of the EEA as it existed at the time when the applicants initiated their claim in the Labour Court in 2013.

[58] The above being said, what is in any event clear is that the 2014 amendment to Sections 6(1) and 11 of the EEA, together with the introduction of Section 6(4), did nothing more than to simply give written manifestation to the manner in which the Labour Court had already been interpreting and applying Sections 6 and 11 of the EEA prior to amendment, especially in the context of what

---

[31] The amended Section 6(1) now reads, in full, as follows:: 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more 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, birth or on any other arbitrary ground.'

[32] Section 6(4) reads: "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.'

[33] See para 24 (*supra*).

became known as 'equal pay' disputes. This was aptly summarized in *Mangena and Others v Fila SA (Pty) Ltd and Others*[34] as follows:

> 'The first question that arises is whether equal pay claims, and in particular claims for equal pay for work of equal value, are contemplated by the EEA. Unlike equality legislation in many other jurisdictions, the EEA does not specifically regulate equal pay claims. Section 6 of the Act prohibits unfair discrimination in any employment policy or practice, on any of the grounds listed in s 6(1) or on any analogous ground, if an applicant is able to show that the ground is based on attributes or characteristics that have the potential to impair the fundamental human dignity of persons or to affect them in a comparably serious manner. … 'Employment policy or practice' is defined by s 1 of the EEA to include remuneration, employment benefits and terms and conditions of employment. To pay an employee less for performing the same or similar work on a listed or an analogous ground clearly constitutes less favourable treatment on a prohibited ground, and any claim for equal pay for work that is the same or similar falls to be determined in terms of the EEA. Similarly, although the EEA makes no specific mention of claims of equal pay for work of equal value, the terms of the prohibition against unfair discrimination established by s 6 are sufficiently broad to incorporate claims of this nature. … I see no reason why the principle of equal pay for work of equal value should not be extended beyond the listed ground of sex to other listed and analogous grounds …'

In *Duma v Minister of Correctional Services and Others*[35] the Court also, in dealing with an equal pay claim under the EEA prior to amendment, accepted that the reference to 'one or more grounds, <u>including</u> …' (emphasis added) in Section 6(1) of the EEA prior to amendment contemplated unlisted arbitrary grounds. In my view, it is clear that the amendments to the EEA contemplate *inter alia* the aforesaid considerations.

[59] Therefore, and similar to the approach that has been consistently adopted in the Court so far, Section 6(4) still contemplates the establishment of differentiation, and then requires that this differentiation be based on the grounds in Section 6(1), for it to be discrimination. In short, whether one relies on the amended Section 6(1) and the newly created Section 6(4) of the EEA,

[34] (2010) 31 ILJ 662 (LC) at para 5. See also *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) at 196F.
[35] (2016) 37 ILJ 1135 (LC) at paras 20 – 21 and 23.

or the application of Section 6(1) of the EEA prior to the 2014 amendments, the position relating to establishment of differentiation and then whether that differentiation amounts to discrimination, remains the same.

[60] As I have touched on above in the introduction in this judgment, the applicants in effect sought to rely on a mystery unlisted arbitrary ground as the foundation for their claim of discrimination. What was pleaded as alleged grounds of discrimination in the founding affidavit were that the duties of PCOs were simply an extract from part of the duties of the EHPs, that the PCOs were graded and paid higher that EHPs, that is was unjustified for the respondent to create the post of PCOs rather than simply increasing the number of EHPs, and that the respondent must prove and justify the difference between the functions of the two posts of EHP and PCO.

[61] The pre-trial that followed did not assist much. In terms of the pre-trial minute, the disputed issues where it came to discrimination was that the positions of PCO and EHP were the same in terms of scope of work, that the two positions should be graded the same based on their operational output, and that the two positions should be paid the same and receive the same benefits.

[62] In the supplementary pre-trial minute it is said by the applicants that the grounds of direct discrimination against them are: (1) that the post of PCO was created despite their 'protestation'; (2) the position of PCO was a duplication of the role of EHPs and might render the role of the applicants redundant; (3) the position of PCOs was created at a grade higher that EHPs; (4) the PCOs do not possess the skill and know how to discharge their function; (5) the role of PCO militates against 'legal and policy directive and trajectory'; (6) the respondent pays the PCOs salaries and benefits higher than EHPs for the same amount of work; (7) the positions of PCOs are not justified by the Air Quality Act and not in line with the National Health Act; and (8) PCOs are not registered with the Health Professions Council.

[63] It is clear that all of these alleged grounds of discrimination, as pleaded in the founding affidavit and pre-trial minutes, provide no particularity of any kind which could inform even the most generous reader what exactly the arbitrary

ground would be, considering the test for unlisted arbitrary grounds set out in *Harksen* (which I will discuss later).

[64] The approach of the applicants in prosecuting their case thus bedevilled this matter from the outset. The Labour Court has been consistently saying that complainant parties must properly identify the unlisted arbitrary ground relied on, up front, and in the pleadings.[36] In *National Union of Metalworkers of SA and Others v Gabriels (Pty) Ltd*[37] the Court held:

> 'What is therefore required, is that a complainant must clearly identify the ground relied upon and illustrate that it shares the common trend of listed grounds, namely that 'it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparable manner …'

And in *Fila SA*[38] the Court held as follows specifically in the context of the differentiation claim:

> 'This court has repeatedly made it clear that it is not sufficient for a claimant to point to a differential in remuneration and claim baldly that the difference may be ascribed to race. …'

[65] In the absence of proper pleading of the unlisted ground, I was then promised a revelation of the unlisted arbitrary ground once the evidence was in. But I still remain uninformed, despite the evidence led, considering the testimony summarised above. In presenting argument opposing the application for absolution, Mr Sibuyi for the applicants argued that the evidence in fact revealed the following, in summary, as the unlisted arbitrary grounds:

65.1 The scope of work of PCOs fall under the scope of work legislatively allocated to EHPs;

65.2 Insofar as it is contended that the establishment of PCO positions was done in terms of the Air Quality Act, this was fallacious for a number of

[36] See *Ntai* (*supra*) at para 73; *Public Servants Association of South Africa v Minister: Department of Home Affairs and Others* [2013] 3 BLLR 237 (LAC) at para 55.
[37] (2002) 23 ILJ 2088 (LC) at para 19.
[38] (*supra*) at para 7.

reasons, including (1) the Act was promulgated in 2004 and the respondent only created the positions in 2009; (2) the PCOs were still not fulfilling licencing functions as required which indicated an intention to disadvantage the EHP by taking part of their core functions away; (3) the Act does not envisage a post of PCO; (4) the appointment of PCOs prejudice EHPs from possibly being trained and becoming Environmental Management Inspectors under this Act; (5) there is no environmental planning subject needed for pollution control in B Tech which was designated to be a requirement for the PCO position; (6) 'tampering' with the scope of work of EHPs was unjustified as they never failed to execute their pollution control functions; and (7) any one fulfilling work under the scope of work of EHPs must be registered with the Health Professions Council;

65.3 Employing PCOs who are not even registered with the Health Professions Council to do the work of registered EHOs and then paying then a higher salary is 'totally unfair';

65.4 The conduct of the respondent in this case showed a 'naked preference' that served no legitimate governmental purpose, and the establishment of the PCO posts were irrational.

[66] How the above case, even if taken on face value, can serve to establish the existence of unfair discrimination against the applicants, boggles the mind. It is simply not unfair discrimination based on an unlisted arbitrary ground as contemplated by the EEA. What the applicants simply seem unable to comprehend is that an enquiry into whether differentiation constitutes unfair discrimination is a three level enquiry. As will be discussed hereunder, all the applicants did was to seek to prove the first of the three levels of this enquiry, being the existence of impermissible differentiation, and then stopped on the assumption that unfair discrimination automatically follows impermissible differentiation being shown to exist. As I will now elaborate on, this approach is simply wrong.

[67] The three level enquiry seeking to establish whether differentiation constitutes unfair discrimination starts off by determining whether the differentiation that exists is of the kind that could give raise to a case of discrimination. In short, and even if there is differentiation, it does not mean that such differentiation *per se* would violate the right to equality. This was specifically contemplated by the judgment of the Constitutional Court in *Prinsloo v Van der Linde and Another*[39], where the Court said:

> 'If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or else constituted discrimination which had to be shown not to be unfair, the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. … The courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory "in the constitutional sense"'

[68] The Court in *Prinsloo* then proceeded to identify those criteria which would separate legitimate differentiation from that which could be seen to be impermissible or possibly discriminatory, as follows:[40]

> '… It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as "mere differentiation". In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. …'

[69] In my view, what the Court did in *Prinsloo* was to make it clear that only specific kinds of differentiation would be impermissible. This would be differentiation that is irrational, or arbitrary, or based on what the Court called a

[39] 1997 (3) SA 1012 (CC) at para 17.
[40] Id at para 25.

'naked preference', or served no legitimate purpose. Differentiation that cannot be shown to fall within one of these categories would be permissible differentiation, the discrimination enquiry would be at an end there and then, and the discrimination claim must fail.

[70] However, and once it is found that the differentiation is indeed impermissible, on one of the grounds set out in *Prinsloo*, then the second and third stage of the enquiry is embarked upon, namely deciding whether such differentiation can be seen to be discrimination, and if so, whether that discrimination is unfair. The Court in *Prinsloo* described this as 'the further element', which could take two different forms (specified or unlisted grounds) of unfair discrimination.[41] In *Mbana v Shepstone & Wylie*[42] the Constitutional Court specifically dealt with an unfair discrimination claim based on differentiation, and which concerned the application of a policy of an employer to a particular employee said to amount to differentiating against that employee on an unfair discriminatory basis. The Court dealt with that enquiry at hand, specifically in the context of the *dictum* in *Prinsloo* set out above, as follows:[43]

> 'The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. …
>
> It must be noted, however, that once an allegation of unfair discrimination based on any of the listed grounds in s 6 of the EEA is made, s 11 of the EEA places the burden of proof on the employer to prove that such discrimination did not take place or that it is justified. Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.'

What is clear from the aforesaid is that the rationality or not of the conduct complained of, is an enquiry distinct from that of whether such conduct constitutes discrimination.

---

[41] See paras 26 and 27 of the judgment.
[42] (2015) 36 ILJ 1805 (CC).
[43] Id at paras 26 – 27.

[71] The 2014 amendments to Section 11(2) of the EEA therefore also does nothing more than give proper legislative effect to the above principles, where it comes to unlisted arbitrary grounds, in that it reflects the three stage enquiry, namely whether the conduct is rational, and then whether the conduct is discrimination, and lastly, whether the discrimination is unfair. This was recognized in *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others*[44] where the Court held:

> '… But in relation to alleged discrimination on an unlisted ground, s 11(2) obliges the complainant to prove that the conduct complained of 'is not rational'; and that it 'amounts to discrimination'; and that the discrimination is 'unfair'. Unless the complainant proves that the conduct complained of 'is not rational' that is the end of the matter. In this respect s 11(2)*(a)* mirrors the approach adopted by the Constitutional Court in para 25 of *Prinsloo*. It is only if the differentiation is arbitrary or manifests 'naked preferences' that serve no legitimate purpose that one even moves on to consider whether there has been 'discrimination' and, if so, whether the discrimination was unfair.'

[72] So therefore, and whether one applies the approach in *Prinsloo* or the text of Section 11(2) of the EEA as amended, the enquiry remains the same. In my view, the case argued by the applicants that the conduct of the respondent in differentiating between the PCOs and EHPs is irrational, unlawful and constitutes a 'naked preference' can only serve to establish the existence of the kind of impermissible differentiation that could give rise to a possible case of discrimination, as the first stage in the three stage enquiry. What the applicants do not comprehend that all these contentions, even if true, do not establish the 'further element' of discrimination. In simple terms, the phrase 'arbitrary' in the context of the unlisted grounds in terms of Section 6(1) of the EEA is not a synonym for 'irrationality' or even 'unlawful'. They are different concepts. Something may therefore be irrational or unlawful, but would not be discrimination, without also establishing the 'further element' as per *Prinsloo*. As held in *Chizunza v MTN (Pty) Ltd and Others*:[45]

[44] (2016) 37 ILJ 2872 (LC) at para 35.
[45] (2008) 29 ILJ 2919 (LC) at para 17.

> 'It is, however, trite law that although the existence of a differentiation is a precondition for discrimination, the mere fact that there is a differentiation or an arbitrary treatment of an individual, one could not equate a mere differentiation with discrimination … Discrimination has a decidedly negative or pejorative connotation. A differentiation only becomes discrimination once a differentiation takes place for an unacceptable reason. These unacceptable reasons are all listed in s 6(1) of the EEA …'

As a result, and at best, the applicants have proven impermissible differentiation, but not discrimination, on the evidence that they have advanced.

[73] I must further say that I have my doubts as to whether this case of the applicants concerning impermissible differentiation has merit on the facts, in any event. The fact is that ultimately, the actual creation and grading of the PCO posts in the organisational structure of the respondent was properly arrived at, lawful, and remained in reality unchallenged. The attempts by the two witnesses for the applicants to fall back on challenging the legality and rationality of the creation of the PCO posts, was nothing else but an afterthought due to their difficulty in dealing with very proficient cross examination illustrating the *lacunae* in their case, especially considering the abandonment of this challenge at the outset of this case.[46]

[74] Both witnesses conceded in the end that they had no difficulty with the creation of the PCO posts. Finally, the simple fact is that even if the creation of the PCO posts are tainted by illegality, this decision by the respondent stands until set aside,[47] which is relief the applicants decided not to pursue.[48]

---

[46] Compare *Ekhamanzi Springs (Pty) Ltd v Mnomiya* (2014) 35 ILJ 2388 (LAC) at para 19.

[47] See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 26; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) at para 103; *Manok Family Trust v Blue Horison Investments 10 (Pty) Ltd and Others* 2014 (5) SA 503 (SCA) at para 17; *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para *62; Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) at para 14; *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd and Another* (2016) 37 ILJ 128 (LAC) at para 17.

[48] I therefore see no need to consider or decide the applicants' arguments about what the Air Quality Act and the National Health Act requires or prescribes. Suffice it to say, and after having read both these statutes, I am in any event not convinced that a PCO post cannot be created under the auspices of the Air Quality Act, and that pollution control can only be done under the National Health Act.

[75] There is however another important obstacle to the applicants' differentiation case founded on an allegation of illegality. As stated above, the nub of the applicants' argument was that the Air Quality Act did not provide for the position of PCO, and the respondent acted irrationally in creating this post where the functions of a PCO were adequately fulfilled by the EHPs. But the consequential relief the applicants want is to be graded and remunerated at the same level (grade) as PCOs. What this means is that the applicants want to benefit, using a differentiation claim based on unfair discrimination, for what they themselves say is an illegal / unlawful position. In simple terms, the applicants want to be graded and remunerated on the basis of comparing their positions to a position they contend should not exist in the first place because it is unlawful and irrational. The proposition is untenable. What is considered to be unlawful surely cannot be legitimately used as a comparator to elevate the applicants' positions, remuneration and grading.

[76] But perhaps the most telling illustration of the opportunistic nature of the applicants' argument can be found when one considers the issue of vector control (pest control). As stated above, it clear that vector control is, just the same as pollution control, part of the specifically listed duties of an EHP. But then, just the same as is the case with a PCO, there are pest control officers who just fulfil the function of vector control. The applicants however do not complain about these pest control posts as being unlawful, irrational, eroding their responsibilities and duties, or having to be registered with the Health Professions Council. The simple reason for this is that the pest control posts are graded lower than EHPs. This was properly explored by Mr Dikolomela for the respondent in cross examining Sethole and Gaonnwe, and they could provide no satisfactory answer for this obvious difficulty. This serves to cement my view that the dispute is not the about legality or rationality of the creation of the position of a PCO and the duties fulfilled in terms thereof, but it is about its grading as opposed to and compared to the grading of the position of EHP.

[77] On the evidence as it stands, it is undoubtedly so that the functions fulfilled by the PCOs are similar to the pollution control functions of the applicants as EHPs. But what such a singular comparison ignores is that the EHP functions of pollution control are a much smaller part of the duties of that position and

was a general duty only to be fulfilled as required, whilst the PCO position has specific duties relating to pollution control on an ongoing basis. It is also true that the PCO positions are graded at a higher level and thus carry a higher salary, but it is clear that the PCO position is a specialized one, requiring a degree of speciality and higher qualification. EHPs have to be registered with the Medical Practitioners Council, whilst PCOs do not, indicating a different kind of core scope in duty, which is actually recognized in the core duty description in the two respective job descriptions. Finally, EHPs have a smaller region (area) of responsibility than PCOs.

[78] Thus, and considering the actual evidence about the two positions as led by the applicants, as it stands, this evidence is simply insufficient to enable me to conduct a proper comparison between the two positions in order to decide whether there is impermissible differentiation, on the facts. The kind of evidence that needs to be led can be gathered from considering what is contained in the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value[49], which provides, in clause 5.4 thereof, certain objective criteria to be used when comparing positions in the context of an equal pay claim.

[79] These criteria[50] are the responsibility demanded of the work (including responsibility for people, finances and material), the skills, qualifications, learning and experience required to perform the work, the formal or informal, physical, mental and emotional effort required to perform the work, and the assessment of actual working conditions which may include an assessment of the physical environment, psychological conditions, time when and geographic location where the work is performed. Further in terms of this Code, the weighting attached to each of these criteria may vary depending on the sector, employer and the job concerned. Clause 7.3 of the Code provides that it is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the individuals' respective seniority or length of service, the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job, the individuals' respective performance, quantity or quality of work

[49] As promulgated by way of GN 448 in *GG* 38837 of 1 June 2015, in terms of Section 54 of the EEA.
[50] See sub clauses 5.4.1 – 5.4.4.

(provided that there is consistent application of a performance evaluation system), whether the employee is permanent or temporary in a position, and the existence of a shortage of relevant skill in a particular job classification. None of these kind of particulars have been provided by the applicants, in evidence.

[80] Of comparable application to the matter *in casu*, the Court in *Fila SA*[51] held:

> '… there is simply no evidence before the court to establish the relative value that should be accorded to the work that I have found was performed by Shabalala and McMullin respectively. Mr Maluleke appeared to suggest in argument that this was a self-evident matter, and that the court could take a view on the facts as to the relative value of the respective jobs. … But this court has no expertise in job grading or the allocation of relative value to particular occupations or functions. An applicant claiming equal pay for work of equal value must lay a proper factual foundation that would enable the court to make an assessment, as best it can, on what value should be attributed to the work in question and the tasks associated with it. This factual foundation, as I have indicated above, might include factors such as skill, effort, responsibility and the like. In the present case, in the absence of sufficient evidence to establish even remotely that the work performed by Shabalala and McMullin was of equal value, the basis for the applicant's alternative claim is simply non-existent.'

[81] In my view, the applicants followed the same kind of approach the Court was critical of in *Fila SA*. There simply does not exist sufficient evidence to conduct a proper comparison for the purposes of establishing whether there is impermissible differentiation. I may add that from the undisputed correspondence forming part of the documentary evidence, it is clear that the respondent acknowledged the similarities between the pollution control functions of the PCOs and EHPs, but explained that the position of PCO was a more specialized position focussing only on one discipline, and that considering the scope of the responsibilities of EHPs, they could not give pollution control the attention it deserved. This is an explanation that makes sense. It follows that the applicants have failed to even satisfy the first level of

[51] (*supra*) at para 15.

the enquiry discussed above. On this basis alone, the applicants' claim is bound to fail.

[82] But even if I am wrong in this regard, and even should one accept the existence of impermissible differentiation, the second level of the enquiry must still be conducted, which is to establish whether discrimination exists. As said, this is an enquiry distinct and separate from the enquiry into impermissible differentiation. What could therefore be seen to be discrimination in the case where impermissible differentiation is found to exist? Of course, if a complainant relies on a listed ground such as found in Section 6 of the EEA, the answer is obvious. But in the case of an alleged unlisted arbitrary ground, answering the question is far more difficult. In the case of an 'arbitrary ground' as a basis for a differentiation discrimination claim in terms of the EEA, the Constitutional Court in *Mbana*[52] held that it contemplated differentiation between 'people'. That being the case, the differentiation must, in order to constitute discrimination based an unlisted ground, and as said in *Harksen*[53], be:

> '… based on attributes and characteristics which have the potential to impair fundamental human dignity of persons as human beings or to affect them adversely in a comparable serious manner …'

[83] The Constitutional Court recently in *AB and Another v Minister of Social Development (Centre for Child Law as amicus curiae)*[54] specifically applied the above *dictum* in *Harksen* as follows:

> 'In this case, it is argued that the discrimination is based on infertility and the genetic link requirement. These grounds are not specified in section 9(3) of the Constitution. The differentiation will amount to discrimination if the impugned provision authorises unequal treatment of people based on certain attributes and characteristics attaching to them …'

[84] The aforesaid dictum in *Harksen* has also been consistently applied in the Labour Court. In *Pioneer Foods*,[55] the Court said:

---

[52] (*supra*) at para 26.
[53] (*supra*) at para 53.
[54] 2017 (3) BCLR 267 (CC) at paras 297 – 298.

> 'In short, if the differentiation is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner …'

[85] Accordingly, discrimination contemplated in this context means that it has to be shown that *dignitas* or right of equality of the complainant as a person, or that person's personal attributes and characteristics, have been impaired or prejudiced. To describe it simply, the arbitrariness must be something akin or related to the kind of listed grounds in Section 6(1) of the EEA. As said in *Stojce v University of KwaZulu-Natal and Another*:[56]

> 'The Constitutional Court and the Labour Court have considered unlisted grounds as acts of discrimination if they are analogous to the listed grounds …'

[86] Further examples of the kind of 'arbitrary ground' not specifically listed which would be seen to be discrimination, can be found in *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*[57] which concerned mental illness based on depression and *Smith v Kit Kat Group (Pty) Ltd*[58] which concerned a physical disfigurement as a result of attempted suicide.

[87] The difficulty in establishing discrimination *in casu* is exacerbated by the fact that the applicants, as I have touched on above, failed to with sufficient particularity identify and plead what the ground is that is relied upon. Therefore, how is it possible to decide in what respect the human dignity or right of equality of the applicants has been prejudiced or impaired? In *Ntai*[59] the Court held:

> 'The applicants, in alleging 'arbitrary' discrimination, failed to identify the specific (unlisted) ground upon which they alleged that they have been

---

[55] (*supra*) at para 55. See also *City of Cape Town* (*supra*) at para 81; *Fila SA* (*supra*) at para 5.
[56] (2006) 27 ILJ 2696 (LC) 25. See also *Gabriels* (*supra*) at para 18.
[57] (2009) 30 ILJ 2875 (LAC) at para 23.
[58] (2017) 38 ILJ 483 (LC) at para 54.
[59] (*supra*) at para 72.

discriminated against. In the event, the applicants failed to cross the very first hurdle to establish discrimination on an unlisted ground. In other words, in the absence of an identified unlisted ground it is impossible to determine whether the ground that is relied upon is comparable to the listed grounds (such as race) in that it is based upon 'attributes and characteristics which have the potential to impair the fundamental human dignity of the applicants as human beings'. In the result, the applicants have also failed to show (in terms of their burden of proof) that the differentiation in pay in casu amounted to 'discrimination' …'

[88] The Court in *City of Cape Town*[60] articulated a very useful basis of deciding whether an 'arbitrary ground' could be seen to constitute discrimination, where the Court said:

'… The impact of the discrimination complained of on the complainant is generally the determining factor regarding the unfairness of alleged discrimination. Factors which must be taken into account include: the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage; the nature of the provision or power and the purpose sought to be achieved by it; the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.'

Similarly, and in *Stojce*[61] the following guidance was given:

'The test is that the differentiation must impair the fundamental dignity of people as human beings because of attributes or characteristics attached to them. Not every attribute or characteristic qualifies for protection against discrimination. Smokers, thugs, rapists, hunters of endangered wildlife and millionaires, as a class, do not qualify for protection. What distinguishes these groups from those who deserve protection? The element of injustice arising from oppression, exploitation, marginalization, powerlessness, cultural imperialism, violence and harm endured by particular groups or the worth and value of their attributes are qualifying characteristics that distinguish differentiation from unfair discrimination …

[60] (*supra*) at para 82.
[61] (*supra*) at para 26 – 27.

> An employee who relies on an unlisted ground as being discriminatory must establish the difference, show that it defines a group or a class of persons and that the difference is worthy of protection. To warrant protection, the applicant must show that the conduct complained of impacts on him as a class or group of vulnerable persons, such as persons with disabilities or family responsibility, or that the conduct is inherently pejorative as a racist or sexist utterance might be.'

[89] The fundamental difficulty with the applicants' case is that they have simply dismally failed to prove any of the above considerations where it comes to establishing an arbitrary ground. They have failed to identify and plead the actual basis of the ground relied on. They have not shown, even if the testimony and documentary evidence is taken as it stands, how their fundamental human dignity or *persona* has been impaired or prejudiced. There is virtually no proper evidence of the impact the alleged discrimination would have on them. What the applicants have done, as I dealt with above, is to simply equate their complaint of irrational and unlawful behaviour by the respondent in creating and then grading the PCO posts (being the differentiation) as being discrimination, which, as illustrated, it is not. As said in *Mothoa v SA Police Service and Others*[62]:

> '… Although s 6 of the Employment Equity Act does not provide a closed list of grounds, that in my view is not licence to bring in all and everything that appears to be different from the other.'

On this basis alone, the applicants have failed to establish even a *prima facie* case of discrimination on an arbitrary ground, should the existence of impermissible differentiation be accepted to exist.

[90] The above being said, and even if the evidence as it now exists is considered to try and extract an arbitrary ground from it, and thus resolve the mystery ground the applicants relied upon, this extraction equally must fail. What the evidence in my view shows is that the applicants' claim has little to do with the kind of arbitrariness as required. The gravamen of the complaint of the

[62] (2007) 28 ILJ 2019 (LC) at para 18.

applicants is that they are not happy with the grading of their EHP positions by the respondent, if considered as against the grading of the PCO positions. They say, in essence, that it is 'unfair' to grade them lower, and thus pay them lower, than the PCOs, considering that they do the same and even more work. This is evident not only from what I have discussed above, but from all the documents accompanying the founding affidavit, in which it is made clear that the issue is about the differential treatment of employees concerning salaries and benefits, *per se*. I simply cannot see how this makes out any case of an arbitrary ground. It has nothing to with the kind of characteristics I have discussed above. The case of the applicants is in reality a grading dispute, which may be an unfair labour practice, but is certainly not a case of discrimination.

[91] If it can be said that the conduct of the respondent is open to criticism because of the manner in which it considered and then applied the applicable legislation concerning the two posts at stake, it can hardly be said that the respondent decided to create the PCO post merely at its own whim and without reason. The respondent always behaved transparently, and motivated the creation of the PCO post on the basis that it believed that the Air Quality Act provided for and required it. Even if these views may turn out to be wrong, there is no suggestion that these actions were *mala fide*. In my view, the actions of the respondent cannot be seen to be capricious or arbitrary behaviour. In *Ntai*[63] the Court said:

> 'It also needs to be pointed out that, in any event, on the facts which presented themselves in casu (discussed fully above), it can, in all probability, be accepted that the respondent, in paying the comparators more than the applicants, did not act in an arbitrary fashion, that is to say, the evidence did not show that the respondent acted in a capricious manner or proceeded merely from will, not based upon reason or principle. …'

The same conclusion is in my view apposite *in casu*.

[92] Considering all of the above, it is my view that the applicants have in any event failed to satisfy the second level of the enquiry. They have, on their own

[63] (*supra*) at para 74. See also *Pioneer Foods* (*supra*) at paras 63-64.

evidence presented to this point and when closing their case, failed to make out any case of discrimination on an unlisted arbitrary ground as contemplated by Section 6(1) of the EEA. As said in *Gabriels*:[64]

> 'It is clear from the above, and on a reading of the applicants' statement of case, as amplified, that the applicants have not ascribed the differential treatment in question to any ground analogous to the listed grounds in s 6(1) of the EEA. The applicants have failed to allege that the reason for the differentiation is some characteristic that impacts upon their human dignity. They do no more than attempt to describe the difference in pay as being 'disproportional, irrational, arbitrary and capricious', and 'arbitrary, capricious and irrational actions/practices of the respondent'.
>
> The applicants have, accordingly, failed to make the minimum sufficient allegations to sustain a claim of unfair discrimination…'

[93] I mention in conclusion that in circumstances comparable to the matter *in casu*, the Court in the two judgments of *Nombakuse* and *Nelson Mandela Bay Municipality* upheld applications for absolution from the instance.[65] The same outcome must now follow. The respondent's application for absolution from the instance thus succeeds.

Conclusion

[94] For all the reasons set out above, I conclude that the applicants have failed to provide sufficient evidence to even establish a *prima facie* case that they had been discriminated against. In this respect, the applicants have failed to make out a *prima facie* case both on the basis that impermissible differentiation exists, and that any differentiation that may exist is founded on an unlisted arbitrary ground as contemplated by Section 6(1) of the EEA. The application for absolution from the instance is accordingly granted.

[95] This then only leaves the issue of costs. I accept that there is still an employment relationship between the parties. However, and despite this, it is my view that a costs order against the applicants is nonetheless justified. I

[64] (*supra*) at paras 22-23.
[65] Both judgments are referred to earlier in this judgment.

say this for a number of reasons. Firstly, and being legally represented throughout, it should have been obvious that a proper discrimination case had not been formulated and brought to Court. In particular, in relying on a mystery arbitrary ground to be extracted from the evidence once led, is an entirely unsatisfactory scenario. As referred to above, I specially warned the applicants, after the first witness had concluded her testimony, that their discrimination case faced serious challenges, and they should reconsider their position. I also consider that when giving testimony, the two witnesses for the applicants sought to fall back on aspects of their case specifically abandoned, when they had difficulty in answering pertinent cross examination. In my view, the applicants' conduct bordered on pure opportunism to extract a re-grading of their positions and thus a pay increase from the respondent. It must also be remembered that the respondent is a public service entity, and thus the legal costs to defend this case had to come from an already depleted public purse. As the Court said in *Motaung v Wits University (School of Education)*[66] in granting costs when upholding an absolution application:

> '… The old adage that the judicial process is not there for the taking is even more apposite in this case. It is in this regard that considerations of law and fairness dictate that an adverse costs order should follow the result. …'

All said, I have a wide discretion under Section 162 of the LRA where it comes to the issue of costs. I conclude by exercising this discretion in favour of making a costs award against the applicants.

Order

[96] For all of the reasons as set out above, I make the following order:

1. The respondent's application for absolution from the instance succeeds.

2. Absolution from the instance is granted in respect of all of the claims as contained in the applicants' statement of claim.

3. The applicants' joinder application is refused.

---

[66] (2014) 35 ILJ 1329 (LC) at para 36. See also See also *Wallis v Thorpe and Another* (2010) 31 ILJ 1254 (LC) at para 16.

4. The applicants shall pay the respondent's costs, jointly and severally, the one paying the other to be absolved.

_____

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants:	Advocate W Sibuyi and Mr V Vuza
Instructed by:	Tshabalala Vuza Tabane Attorneys
For the Respondent:	Advocate T L Dikolomela
Instructed by:	Morathi and Mataka Attorneys