IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

Case No: C124/17 and C728/16

Reportable

In the matter between:

SHIRLEY SIMMADARI Applicant

and

ABSA BANK LIMITED Respondent

Heard: 5 March 2018

Delivered: 6 March 2018

Summary: Point *in limine*: dual claims under Employment Equity Act s 10(1) and Labour Relations Act s 187(1)(f) – whether permissible. Exception: Claims of unfair discrimination and unfair dismissal based on race not disclosing a cause of action.

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] The applicant, Ms Shirley Simmadari, has referred two claims to this Court: One claiming unfair discrimination[1] in terms of ss 6, 10 and 50 of the Employment Equity Act[2]; and one claiming automatically unfair dismissal[3] in terms of s 187(1)(f) of the Labour Relations Act.[4] The two claims were consolidated on 31 January 2018.

[2] The matter was set down for trial commencing on Monday 5 March 2018. It was set down for five days, being the time requested by the parties in their pre-trial meeting conducted on 26 October 2017; but a week before the trial Mr *Chamisa*, for the applicant, filed a practice note indicating that he wished to call 20 witnesses, many of whom had been subpoenaed. It became clear that the trial would not be finalised in the allocated time.

[3] In the EEA claim, the respondent (ABSA) raised a point *in limine* relating to jurisdiction. It argued that the applicant sought unfair dismissal relief and not relief for alleged unfair discrimination; that the EEA claim and the LRA claim arose

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[1] Case number C 728/16.

[2] Act 55 of 1998 (the EEA).

[3] Case number C 124/17.

[4] Act 66 of 1995 (the LRA).

from the same facts and comprised the same dispute; and that the Court did not have jurisdiction to hear the EEA claim. At the pre-trial meeting the parties agreed that the point *in limine* should be decided after the Court had heard the evidence; but Mr *Sibanda*, for ABSA, sought to persuade the Court otherwise at the commencement of the trial, as will appear below.

[4] ABSA had also raised an exception to the applicant's original statement of claim in the LRA claim. She amended her statement of claim. But, as will appear below, Mr *Sibanda* argued that the amended statement of claim remained excipiable.

POINT *IN LIMINE* AND EXCEPTION

[5] Shortly before the commencement of the trial – in fact, on the Saturday before the Monday on which the trial was to start – ABSA's attorneys delivered heads of argument pertaining to the exception in the LRA claim (also pertaining to the EEA claim) and the point *in limine* in the EEA claim. He argued that, despite the agreement in the pre-trial minute, the Court should hear both before the leading of evidence as, if successful, it would dispose of the issues and of the costs that will be incurred in what would be a lengthy trial, given the applicant's insistence to call some twenty witnesses. Mr *Chimasa* did not deliver any heads of argument but addressed the Court orally.

[6] As Mr *Sibanda* pointed out, at the commencement of a trial, the Court has the discretion, *mero motu*, to decide matters that can separately be resolved. This discretion arises from Uniform Rule 33(4) of the High Court which is applicable to this Court where the rules of this Court are silent, and given this Court's overall discretion in terms of rule 11. Rule 33(4) of the High Court rules states:

> "(4) If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."[5]

[7] This principle is vital to eliminating avoidable delays and costs.[6] This is consonant with the objectives of expedient resolution of disputes under the Labour Relations Act, 66 of 1995 ("LRA"). Mr *Sibanda* invited the Court to exercise this discretion, as both claims, he argued, are fatally defective.

[8] I decided to exercise my discretion to hear the preliminary points, albeit at the insistence of the respondent and not *mero motu*, as it would, if successful, eliminate a lengthy trial

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[5] Erasmus, Superior Court Practice, Volume 2 OS 2015, D1, 435.

[6] *Rauff v Standard Bank Properties* 2002 (6) SA 693 (W) at 703I-J.

and significant legal costs for both sides. I also took into account that the applicant's counsel had been forewarned and had indeed been furnished with a copy of Mr Sibanda's heads of argument two days before, apart from the point raised in the response to the EEA claim.

THE POINT *IN LIMINE* AGAINST THE EEA CLAIM

[5] ABSA raised this jurisdictional point *in limine* in its response, based upon s10(1) of the EEA. It is premised upon an argument that s10(1) of the EEA excludes disputes about automatically unfair dismissals from adjudication under the EEA.

[6] Section 10(1) of the EEA states:

> "(1) In this section, the word "dispute" excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act."[7]

[7] Mr *Sibanda* argued that section 10(1) of the EEA only has meaning if automatically unfair dismissal disputes are excluded from adjudication under the EEA. He did so by addressing —

7.1 the literal and purposive interpretation of s10(1);

[7] According to s1 of the EEA, a dispute includes an alleged dispute.

7.2 the presumptions of interpretation that support this contention; and

7.3 the disparity – in his view -- in the authorities.

(i) The literal and purposive interpretation

[8] Section 10 is located within Chapter II of the EEA, which prohibits unfair discrimination. It applies only to disputes in "this section". The section goes on to establish procedures under "this chapter", being Chapter II.

[9] Section 6(1) is the substantive provision of Chapter II. It proscribes unfair discrimination on, *inter alia*, grounds of race.[8] Section 6(2) excludes affirmative action measures from its ambit. Conversely, s6(4) includes claims for equal pay within the ambit of discrimination.

[10] Section 10(1) expressly excludes disputes about "unfair dismissal". I agree with Mr *Sibanda* that the only species of unfair dismissal to which the LRA could have referred in relation to s6(1), is automatically unfair dismissal. An automatically unfair dismissal includes a dismissal where the reason is:

[8] Section 6(1) states:

"*No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more 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.*"(my emphasis)

> "…that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility…"[9]

[11] Section 10(1) cannot be read to refer to what he called a "plain vanilla" unfair dismissal.[10] This is so because the moment a "vanilla" unfair dismissal is for the reasons espoused in s6(1) of the EEA, it becomes an automatically unfair dismissal. The notion of a "vanilla" unfair dismissal for reasons espoused in s6(1) of the EEA is absurd. Thus, when s10(1) refers to an "unfair dismissal," it can only mean an automatically unfair dismissal.

[12] The effect of s10(1) is, therefore, to consign disputes about automatically unfair dismissal to be dealt with under Chapter VIII of the LRA.

[13] Given its peremptory language, disputes about automatically unfair dismissal "must" be adjudicated under the aegis of the LRA. They cannot be determined under the EEA.

[14] I agree that this reading is the only way to preserve the meaning of s10(1) of the EEA. The legislature's clear purpose was to remove disputes about automatically unfair dismissal from the ambit of s10(1) of the EEA. Moreover, this

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[9] s187(1)(f) of the LRA

[10] As opposed to an automatically unfair dismissal

contextual and purposive reading harmonises s10(1) of the EEA with Chapter VIII of the LRA.[11]

[15] But does that mean that an employee cannot refer to separate claims – one under the EEA and one under the LRA – and that this Court is precluded from adjudicating both claims? I think not, despite the further argument raised by Mr *Sibanda* on the basis of interpretive presumptions.

(ii) Interpretive Presumptions

[16] Mr *Sibanda* further relied upon two presumptions of statutory interpretation.

[17] The first is the presumption against legislation removing rights. This presumption was captured as follows in *Wolfaardt*:[12]

> "In considering whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the legislature did not intend to interfere with existing law and a fortiori, not to deprive parties of existing remedies for wrongs done to them. A statute will be construed as doing so only if that appears expressly or by necessary implication".

[11] *Natal Joint Administrative Pension Fund v Endumeni Municipality and Others* 2012 (4) SA 604 (SCA).

[12] *Fedsure Assurance Limited v Wolfaardt* 2002 (1) SA 49 (SCA) at para 16.

17.1 Section 10(1) of the EEA expressly, and in peremptory terms, abrogates the right to refer dismissal disputes under s6(1). And in order to give s10(1) any meaning, argued Mr *Sibanda,* it must expressly, or by necessary implication, deprive a party of a cause of action under s6(1) when the nub of the dispute is an automatically unfair dismissal. I do not agree. What it does, is to deprive an employee of the right to refer an *unfair dismissal dispute under the EEA*; but it does not necessarily prevent the employee from referring a separate dispute in terms of s 187(1)(f) of the LRA. And indeed, the latter view seems to be supported by the weight of authority, as I will show below.

[18] The second argument raised by Mr *Sibanda* is that when the Legislature envisages a specific remedy for proscribed conduct, a party cannot seek refuge in a general remedy.

18.1 Support for this principle can be found in *Madrassa,*[13] which formulated it as follows:

> "To my mind it is more in keeping with principle and authority to state the canon of construction in the following terms. If it be clear from the language of a Statute that the Legislature, in creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto and has no further legal remedy; otherwise the remedy provided by the Statute will be cumulative."

[13] *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 727.

18.2 The similarities between s6(1) of the EEA and s187(1)(f) of the LRA are immediately apparent:

18.2.1 Both sections animate the constitutional right to equality.[14] In this regard, there is an important distinction to be drawn between unfair and automatically unfair dismissals. An automatically unfair dismissal vindicates the right to equality and the right to fair labour practices. An unfair dismissal vindicates only the latter.

18.2.2 Both sections deal with similar themes, reflecting the language of the Constitution in their listed and analogous grounds.

18.2.3 Both sections create special remedies for unfair discrimination. The legislative provisions providing remedies for the breach of the right, grant similar remedies, including (i) compensation and (ii) conferring a wide discretion upon the Court, to order a just and

[14] Sections 9(3) and (4) of the Constitution state:

"*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

equitable remedy.[15] The only difference is that the EEA also provides for "damages".[16]

18.3 Despite these similarities, they are fundamentally different. The mischief targeted by s187(1)(f) of the LRA is dismissal for discriminatory reasons.

18.4 The specific remedy which Parliament crafted for this mischief is fully and specifically expressed in Chapter VIII of the LRA. Section 6(1) of the EEA provides a general remedy for unfair discrimination.

18.5 But this does not, in my view, preclude an employee from pursuing both claims. Conceivably, in a trial involving the same facts, an employee could be unsuccessful in proving that her dismissal was based on race and therefore automatically unfair in terms of s 187(1)(f) of the LRA; but she could succeed in showing that, while employed, she was subject to harassment and discrimination based on race, and thus succeed in an EEA claim.

18.6 I can see no reason why those two claims cannot be consolidated, as in this case. By analogy, in the recent Constitutional Court case of *CMI*[17] the applicants had referred two disputes arising from the same facts to the

[15] Compare s193 of the LRA with s50 of the EEA

[16] See s50(1)(e) read with s50(2)(b) of the EEA

[17] *September & ors v CMI Business Enterprise cc* [2018] ZACC 4 (27 February 2018).

> CCMA – one in respect of an alleged unfair labour practice and one in respect of alleged unfair discrimination in terms of the EEA. During conciliation, it became apparent that the primary issue was one of constructive dismissal. They referred a dispute to the Labour Court in terms of s 187(1)(f) of the LRA. The Constitutional Court accepted that it was a valid referral and cautioned against an "overly formalistic approach".

(iii) Judicial Interpretation

[19] Mr *Sibanda* further argued that there has been "disharmony" in the Courts' interpretation of s10(1) of the EEA. But on a closer reading of the two LAC judgments that he referred to – and the reported judgments of this Court – I think that the perceived "disharmony" is more apparent than real.

[20] In *Ditsamai*, [18] the employee referred a dispute about a substantively unfair dismissal to the CCMA. He was granted relief under the LRA. From the same facts, Mr Ditsamai subsequently referred a dispute to the Labour Court about unfair discrimination, under s6(1) of the EEA. The employer complained that the EEA dispute was *res judicata*. In deciding the matter, the LAC said:

> "[17] When the relevant facts are set out thus, it is clear that the second case brought by respondent was predicated on an allegation of unfair discrimination as set in s 6 of the

[18] *Gauteng Shared Service Center v Ditsamai* (2012) 33 *ILJ* 348 (LAC).

> EEA. This dispute requires a completely different determination to that which confronted the arbitrator, which turned on the fairness of an early termination of the contract. In the case based on the EEA, the court was required to make a determination as to whether there had been unfair discrimination in the refusal to appoint the respondent to a permanent position and the concomitant preferences given to other applicants who were of a different racial group."

[21] Mr *Sibanda* did not take issue with this judgment. Neither do I. The LAC recognised that an employee is entitled to refer an unfair dismissal dispute to the CCMA. Conceivably, from the same facts, a cause of action can arise from s6(1) of the EEA. But Mr *Sibanda* urged me to distinguish that from a dispute such as this one, where the employee has referred an automatically unfair dispute in terms of s 187(1)(f) as well as a discrimination claim under the EEA to this court. But I am not persuaded that it precludes this court from hearing both claims, as indeed the LAC found in the next case that he referred to (albeit without referring in terms to s 10(1) of the EEA).

[22] In *Hibbert*,[19] the LAC dealt in some detail with duality of claims under the EEA and the LRA. Specifically, it dealt with automatically unfair dismissal and unfair discrimination. It held that there is no bar to claiming compensation for both an automatically unfair dismissal and discrimination.[20]

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[19] *ARB Electrical Wholesalers v Hibbert* (2015) 36 *ILJ* 2989 (LAC); [2015] 11 BLLR 1081 (LAC).

[20] *Hibbert* at para 27.

[23] Mr *Sibanda* argued that *Hibbert* is distinguishable for two reasons:

23.1 First, the LAC did not deal with the impact of s10(1) on its enquiry. In holding that there is no bar to dual claims of this nature, there was no analysis of s10(1) of the EEA.

23.2 Second, and in any event, Ms Simmadari does not seek damages; she only seeks compensation.[21] In this regard, *Hibbert* discouraged dual compensation claims.[22]

[24] I disagree. Although the LAC did not interpret s 10(1) of the LRA in terms, it held in very clear terms, having held that the employee's dismissal was automatically unfair in terms of s 187(1)(f) of the LRA:[23]

> "The next issue is whether the Respondent's dismissal was also an act of unfair discrimination as contemplated by s6 of the EEA and if so, is the Respondent (i) entitled to claim under both the LRA and EEA and do so in a single action; and, (ii) entitled to separate remedies under both Acts for what is effectively a single wrongful act by the employer.
>
> There is also no bar for an employee to claim "compensation" for an automatically unfair dismissal based on being discriminated against under the LRA and to claim "compensation" for being unfairly

[21] SOC, p12, para 8.2 read with Pre-trial minute, p10, para 8.1

[22] *Hibbert* at para 30.

[23] At para 26 – 27 (my underlining).

discriminated under the EEA, and to do so in a single action. All evidence led in support of each of the claims will be the same. In the circumstances, not only is it expedient to institute one action but a party who institutes two separate claims could, if it seeks to lead same evidence in two separate actions, face a costs order for not combining the two claims in a single action."

[25] That is, essentially, what has been done in this case. The two claims have been consolidated, thus combining it in a single action and preventing unnecessary and costly duplication.

[26] The same approach has been followed in a number of decisions in this Court, as summarised by the learned authors in *Labour Relations Law: A comprehensive Guide*[24]:

"If the alleged unfair discrimination took the form of dismissal, it should be dealt with as a dispute concerning automatically unfair dismissal in terms of s 187(1)(f) of the LRA and referred as such to the appropriate Council or to the CCMA in accordance with Chapter VIII of the LRA [s 10(1)]. It may, however, also give rise to a separate claim based on unfair discrimination, which will be treated as a separate cause of action. In this event any damages claimed in terms of the EEA, over and above compensation in terms of the LRA, must be proved."

[27] In this case, the applicant did not claim damages. But that does not bar her claim for compensation under both the EEA and the LRA. This Court retains jurisdiction to hear both; whether it will award compensation on both claims, should

[24] Du Toit *et al, Labour Relations Law: A Comprehensive Guide* (6ed) at 717, citing *Dial Tech cc v Hudson* (2007) 28 *ILJ* 1237 (LC); *Evans v Japanese School of Johannesburg* [2006] 12 BLLR 1146 (LC); *Allpass v Mooikloof Estates (Pty) Ltd* [2011] 5 BLLR 462 (LC); *Atkins v Datacentrix (Pty) Ltd* [2010] 4 BLLR (LC); and *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* (2010) 31 *ILJ* 2383 (LC).

both succeed, is a different question. In *Hibbert*[25] the LAC expressed a strong view against "double dipping":

"Where there is a single action with claims under the LRA and the EEA based on the employee being discriminated against and the court is satisfied that there has been an automatically unfair dismissal and that the employer's action also constitutes a violation of the EEA, it must determine what is a just and equitable amount that the employer should be ordered to pay as compensation. In arriving at this determination, the court should not consider separate compensation under the LRA and the EEA but what is just and equitable for the indignity the employee has suffered. In doing this, it may take various factors into account inter alia, as set out in Tshishonga, additionally, including but not limited to the position held by the employee within the employer's establishment, the remuneration he earned, how reprehensible and offensive was the employer's conduct, how if at all did it affect the employee and what motivated the wrongful conduct by the employer to act as it did etc. If the claim is under the LRA only, the court must, if the amount determined by the court to be just and equitable exceeds the threshold set in s194(3) of the LRA, reduce the amount of compensation to bring it within the limitation provided in s194(3). The amount will not have to be reduced though if, like in this matter, the claim is brought under both the LRA and the EEA because there is no limit prescribed to the amount of compensation that can be awarded under the EEA. The importance of this is that the employee's right to claim under both the EEA and the LRA is recognised and given effect to while at the same time the employer is not being penalised twice for the same wrong as a single determination is made as to what is just and equitable compensation for the single wrongful conduct."

[25] At para 33.

[28] Mr *Sibanda* submitted that the correct approach has been followed in the unreported case of *Boeyens*,[26] where Everett AJ held:

> "This makes it clear that discrimination disputes must be distinguished from dismissal disputes and the two types of disputes have different dispute resolution procedures.
>
> Automatically unfair dismissal disputes must be conciliated by the CCMA or a bargaining council with jurisdiction and may then be adjudicated by the Labour Court, unless the applicant earns less than the threshold and elects CCMA arbitration. In this case, no automatically unfair dismissal dispute was referred to the CCMA or the MEIBC, nor conciliated by the CCMA or the MEIBC. The only dismissal dispute that was referred and conciliated was the dispute about unfair dismissal for misconduct which was correctly referred to the bargaining council."

[29] But that very passage distinguishes the cited case from *Hibbert* and the other cases cited above. In *Boeyens*, the applicant had not referred an unfair dismissal dispute and no such dispute had been conciliated, thus depriving the Labour Court of jurisdiction.[27] In the case before me, there is no dispute that there was an attempt at conciliation – albeit unsuccessfully -- in both disputes before the applicant referred them to this Court and before they were consolidated.

[30] For all these reasons, the first point *in limine* is dismissed.

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[26] *Jan Boeyens v Murray & Roberts (Pty) Ltd* [2016] ZALCJHB 163 (4 Feb 2016) paras 16-17.

[27] Cf *NUMSA v Intervalve (Pty) Ltd* [2015] 3 BLLR 205 (CC).

THE EXCEPTION TO BOTH CLAIMS

[31] But that is not the end of the matter. ABSA argues further that, in any event, Ms Simmadari's statement of claim (in both referrals) does not disclose a valid cause of action.

[32] In its statement of claim, a party is required to set out (i) the material facts in chronological order; and (ii) the legal issues arising from those material facts.[28]

[33] The Labour Court Rules do not expressly deal with exceptions. It is accepted that the Labour Court will deal with exception based on rule 11 of its rules read with Uniform Rule 23.[29]

[34] The test on exception is "*…whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.*"[30]

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[28] Rules 6(1)(b)(ii) and (iii) of the *Rules for the Conduct of Proceedings in the Labour Court* ("Rules")

[29] See: *Eagleton & Others v You Asked Services (Pty) Ltd* (2009) 30 *ILJ* 320 (LC) at para 15. Uniform Rule 23(1) reads:

> "*Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.*"

[30] *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at para 10.

[35] The object of pleading is to define the issues so as to enable the other side to know what case it must meet. This only requires the applicant to set out the architecture of its claims. She does this by pleading the *facta probanda* and not the *facta probantia*. The Rules contemplate that this matrix is completed during pre-trial procedures and evidence. In *Harmse*, [31] Waglay J set out the following test for exceptions:

> "When an exception is raised against a statement of claim, this court must consider, having regard to what I have said above, whether the matter presents a question to be decided which, at this stage, will dispose of the case in whole or in part. If not, then this court must consider whether there is any embarrassment that is real and that cannot be met by making amendments or providing of particulars at the pretrial conference stage."

[36] Ms Simmadari has already had one opportunity to amend her statement of claim (in the LRA dispute) as, on the statement of claim as it stood, it did not disclose a valid cause of action. Has this been rectified in the amended statement of claim? And does the EEA claim disclose a valid clause of action? I shall deal with each in turn.

(i) The EEA cause of action

[37] The unfair discrimination enquiry involves three stages. The Constitutional Court described it as follows in *Mbana*:[32]

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[31] *Harmse v City of Cape Town* (2003) 24 *ILJ* 1130 (LC) at paras 8 and 9.

[32] *Mbana v Shepstone and Wylie* 2015 (6) BCLR 693 (CC); (2015) 36 *ILJ* 1805 (CC) at para 27.

37.1 The first step is to establish whether there is differentiation.

37.2 The second step is to establish whether that differentiation amounts to discrimination.

37.3 Finally, the Court must establish whether that discrimination is unfair.

[38] When differentiation is based on a listed ground, it is presumed to be unfair unless the employer proves (i) that it did not take place; or (ii) it is rational, not unfair and justifiable.[33]

[39] The employer's onus is only triggered when the employee brings herself within the provisions of s6(1) of the EEA. That is, she must allege and prove that she is a victim of discrimination.[34]

[40] In *Nombakuse*[35] this Court summarised the position thus:

"[27] The burden of proof in claims of this nature is codified in s 11 of the EEA:

[33] Section 11(1) of the EEA.

[34] *Transport & General Workers' Union and Another v Bayete Security Holdings* (1999) 20 ILJ 1117 (LC) at para 4; *Mothoa v SA Police Service & Others* (2007) 28 ILJ 2019 (LC) at para 20.

[35] *Nombakuse v Department of Transport and Public Works: Western Cape Provincial Government* (2013) 34 *ILJ* 671 (LC) paras 27-33.

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

[28] Is it enough for the applicant merely to allege discrimination, i.e. has the onus shifted to the respondent to prove that the alleged discrimination is fair? If so, it cannot succeed in its application for absolution for the instance; because, in that case, the court can only make a finding once the respondent has discharged the onus.

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

[30] The legal position was perhaps best explained by Murphy AJ in *IMATU & another v City of Cape Town* [36]:

"Moreover, section 11 of the EEA provides that whenever unfair discrimination is alleged, the employer against whom the allegation is made must establish that 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) and *Hoffmann v South African Airways* 2000 (2) SA 628 (W)). Once discrimination has been established, the employer will have to prove that the discrimination was fair or have to justify the discrimination as justifiable under section 6(2)(b)...

The approach to unfair discrimination to be followed by our courts has been spelt out in *Harksen v Lane NO & others* 1998 (1) SA 300 (CC).

[36] [2005] 11 BLLR 1084 (LC) paras [79] – [81].

Although the *Harksen* decision concerned a claim under section 9 of the Constitution (the equality clause), there is no reason why the same or a similar approach should not be followed under the EEA.

The *Harksen* approach contains a specific methodology for determining discrimination cases. The first enquiry is whether the provision differentiates between people or categories of people. If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation of the guarantee of equality. Even if it does bear a rational connection, it might nevertheless amount to discrimination. The second leg of the enquiry asks whether the differentiation amounts to unfair discrimination. This requires a two-stage analysis. Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounted to "discrimination", did it amount to "unfair discrimination"? If it is found to have been on a specified ground, unfairness will be presumed under the Bill of Rights by virtue of the provisions of section 9(5) of the Constitution, which transfers the onus to prove unfairness to the complainant who alleges discrimination on analogous grounds. As I read section 11 of the EEA, no similar transfer of onus arises under the EEA. In other words, whether the ground is specified or not the onus remains on the respondent throughout to prove fairness once discrimination is shown."

He continued at para [88]:

"I doubt whether the shift of the burden applies in the context of the EEA. The shift of the burden in constitutional cases is the result of the

unambiguous language of section 9(5) of the Constitution which provides expressly that discrimination on one or more of the grounds listed in section 9(3) of the Constitution is unfair unless it is established that the discrimination is fair. No similar provision exists in the EEA. Nevertheless, it is still necessary to determine whether there has been differentiation on a ground specified in section 6(1) of the EEA."

[31] In other words, the applicant must still establish that she was treated differently on the grounds of her political affiliation, gender or race. Thus, in the earlier case of *Woolworths (Pty) Ltd v Whitehead*[37] , the Labour Appeal Court held that the employee was "unable to show that, but for her pregnancy, she would have been appointed to the position despite the appellant having another candidate who was better suited for the job than herself. The result of this is that, in my view, there is no causal connection between her not being appointed and her pregnancy."

[32] As Christof Garbers[38] puts it:

"[E]ven if we move away from thought processes and focus on effect, discrimination as a legal concept still suffers from the challenges of comparison, cause, causation and context. In legal terms – there still has to be differentiation which is linked to a ground of discrimination."

[33] In the context of an equal pay claim, Van Niekerk J explained:

"Writing in *Essential Employment Discrimination Law*, Landman suggests that to succeed in an equal pay claim, the claimant must establish that 'the unequal pay is caused by the employer discriminating

[37] [2000] 6 BLLR 640 (LAC) para [24].

[38] Garbers, "The prohibition of discrimination in employment" in Malherbe & Sloth-Nielsen (eds), Labour Law into the Future: Essays in Honour of D'Arcy du Toit (Juta 2012) p 21. (Footnotes omitted).

on impermissible grounds' (at 145). This suggests that a claimant in an equal pay claim must identify a comparator, and establish that the work done by the chosen comparator is the same or similar work (this calls for a comparison that is not over-fastidious in the sense that differences that are infrequent or unimportant are ignored) or where the claim is for one of equal pay for work for equal value, the claimant must establish that the jobs of the comparator and claimant, while different, are of equal value having regard to the required degree of skill, physical and mental effort, responsibility and other relevant factors. Assuming that this is done, the claimant is required to establish a link between the differentiation (being the difference in remuneration for the same work or work of equal value) and a listed or analogous ground. If the causal link is established, section 11 of the EEA requires the employer to show that the discrimination is not unfair, i.e. it is for the employer to justify the discrimination that exists.

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. In *Louw v Golden Arrow* [39], supra, Landman J stated:

'Discrimination on a particular 'ground' means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment...'

This formulation places a significant burden on an applicant in an equal pay claim. In *Ntai & others v South African Breweries Ltd* (2001) 22 *ILJ* 214 (LC) the court acknowledged the difficulties facing a claimant in these circumstances and expressed the view that a claimant was required only to establish a *prima facie* case of discrimination, calling on

[39] *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 *ILJ* 188 (LC).

the alleged perpetrator then to justify its actions. But the court reaffirmed that a mere allegation of discrimination will not suffice to establish a prima facie case (at 218F, referring to *Transport and General Workers Union & another v Bayete Security Holdings* (1999) 20 *ILJ* 1117 (LC)".

[41] The following principles stem from this passage, and other authorities.

41.1 The mere allegation of discrimination is not enough. The employee must substantiate that this discrimination is as legally defined.[40]

41.2 It is not enough to merely allege that this discrimination is based upon race. The applicants must allege and prove that the disparate treatment exists <u>because</u> of race.[41] Causation is a necessary element to uphold discrimination. The applicant must link the differentiation to a listed ground.[42]

41.3 The coexistence of race and differentiation does not, on its own, establish discrimination.[43]

41.4 The correct approach to causation is that the discrimination is unfair only to the extent that it is caused by a prohibited ground.[44]

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[40] *Mothoa* v *SAPS* (2007) 28 *ILJ* 2019 (LC) at para 17.

[41] *Louw* at para 26. See also: *Mangena and Others v Fila SA (Pty) Ltd and Others* at para 7.

[42] *NUMSA v Gabriels (Pty) Ltd* (2002) 23 *ILJ* 2088 (LC) at para 18

[43] *Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madlala* 2008 (1) SA 551 (SCA); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para 105

[44] *Louw* at para 33.

41.5 The discrimination alleged must be relative to another person. In *Aarons*,[45] Waglay J phrased various flaws vitiating a pleading in unfair discrimination as follows:

> "It would appear that the applicant's claims can only be based in s 87(1)(d) and/or s 187(1)(f) of the Act. Whilst the applicant does allege that she was unfairly discriminated against, she does not plead the grounds of this discrimination. For example, the applicant does not plead that she was discriminated against on any one or more of the grounds listed in s 187(1)(f) nor does the applicant plead that she was discriminated against on grounds not listed in s 187(1)(f) but analogous to the listed grounds. To the extent that the applicant alleges discrimination, she does not at all, or sufficiently claim that she has been discriminated against (or treated differently) relative to others, or another. The applicant does, in respect of the portfolio of acting chair in the temporary absence of Botha, allege that one Oosthuizen was appointed in circumstances that warranted her appointment. However this, at best for the applicant, is mere differentiation, On the facts pleaded, a case for unfair discrimination as contemplated in s 187(1)(d) and (f) is not foreshadowed by the statement of case. The applicant does not allege that the reason for the different treatment is based on one of the grounds listed in s 187(1)(f) or an analogous ground that adversely affects some characteristic that impacts upon her human dignity. The applicant does no more than allege that she was being persecuted. This is insufficient."

[45] *Aarons v University of Stellenbosch* (2003) 24 *ILJ* 1123 (LC) at para 17.

[42] For her claim to stand, Ms Simmadari must allege and prove that her victimisation was <u>because</u> of her race. She fails to do so.

[43] As Mr *Sibanda* pointed out, there are two possible constructions of Ms Simmadari's claim -- one pleaded and the other not.

43.1 In the pleaded claim, she contends that there was differential treatment on grounds of race. This is so, she says, because she pursued transformation.

43.2 The unpleaded claim's most flattering iteration appears in the pre-trial minute, where this Court is asked to determine whether "*…the failure to discipline Spangenberg and the failure to treat the applicant in a similar manner to Spangenberg by 'allowing her to retire gracefully' amounts to unfair discrimination.*"[46]

[44] The pleaded claim should fail for two reasons:

44.1 First, Ms Simmadari only alleges that there was differentiation on grounds of race, but does not identify a comparator. She merely says that she was "targeted for dismissal through artificial charges because of her race, vis-à-vis her [unnamed] colleagues who were allowed to retire by not being charged for non-performance" and

[46] Pre-trial Minute, p8, para 6.2.3

that she was "being treated differently through victimisation and harassment by the respondent due to the fact that she is black spearheading transformation…". And then, in an apparent *non sequitur*, the statement of claim reads: "It is therefore submitted that there was differential treatment based on race between the applicant and her colleagues who were of white race" [*sic*]. Spangenberg is first mentioned as a comparator in the pre-trial minute. Consequently, there is no case, on the pleadings, that there has been discrimination as defined. There is no attempt to identify in respect of whom she has been unfairly discriminated.

44.2 Second, where she says there has been victimisation because of her role in pursuing transformation, this is not in relation to her race. She says that she referred a dispute to the CCMA "based on victimisation and harassment due to the fact that she was pursuing transformation agenda of which it was her duty to implement such" [*sic*]. Her version is hotly disputed; but even if this Court were to accept it (perhaps after hearing evidence), this is still not in relation to her race. On her version, even if she was white and pursued transformation, she might still have been victimised. Consequently, whatever her race, this had no link to her alleged discrimination.

[45] The glaring defect with the unpleaded claim is that it is not pleaded. Even if it were, it also suffers another fundamental

defect: Ms Simmadari relies upon her own inaction to sustain a cause of action against Absa.

45.1 It is common cause that Ms Simmadari was Mr Spangenberg's immediate superior.[47]

45.2 It is also common cause that discipline of her subordinates was within Ms Simmadari's sole discretion. This is apparent from the request for further particulars and the response thereto.

45.2.1 In the request for further particulars, Absa asked Ms Simmadari whether she acknowledges that she had the discretion to proceed with the disciplinary process. In the reply to the request for further particulars, Ms Simmadari responded in the affirmative.

45.3 On the pleadings, the failure to discipline Mr Spangenberg was Ms Simmadari's fault, not ABSA's. She seeks to impute her failure to discipline Spangenberg to ABSA. This is illogical and impermissible. Simply put, Ms Simmadari cannot benefit from her own wrongdoing.

[47] Pre-trial minute, p3, para 4.5.1.

45.4 The applicant's claim under the EEA does not disclose a valid cause of action. The exception in this regard must be upheld.

(ii) The automatically unfair dismissal

[46] The test for automatically unfair dismissals was set out in *Afrox* as follows:[48]

46.1 First, the Court must determine the reason for dismissal. If that reason falls within section 187, then the second stage becomes relevant. This leg is objective, and considers the employer's motive.

46.2 Secondly, the Court must determine whether the automatically unfair reason was the factual and legal cause of the dismissal.

46.2.1 The test for factual causation is whether the protected action was a *sine qua non* for dismissal. Or rather, would dismissal have occurred without the listed ground? If the answer is yes, then the dismissal cannot be said to be automatically unfair. (Put differently, would the employee have been dismissed, but for the grounds she relies upon).

46.2.2 Legal causation requires a determination of the proximate cause for the dismissal. This is

[48] *SACCAWU and Others v Afrox Ltd* [1999] 10 BLLR 1005 (LAC) at para 31-32. See also *Mouton v Boy Burger (Edms) Bpk* (2011) 32 *ILJ* 2703 (LC).

determined by drawing inferences from the established facts.

[47] In the pre-trial minute, this Court is called upon to determine whether "*…the main reason for the applicant's dismissal was unfair discrimination based on grounds of race, gender and conscience.*"[49]

[48] Again, this cause of action is premised upon ABSA's alleged failure to discipline Mr Spangenberg.[50] This is impermissible for reasons mentioned above.

[49] In any event, the misconduct for which Ms Simmadari was dismissed is far more serious than the misconduct she claims Spangenberg committed (no such misconduct was proven). She claims that he was a poor performer; and at most, that he had been subordinate on one occasion. Ms Simmadari, on the other hand, was dismissed because of gross misconduct comprising the following:

49.1 Harassment and bullying of her subordinates. For example, she referred to individuals as "monkeys"; handed out inappropriate gifts such as oversized playing cards for Spangenberg (a reflection on his age) and gifts of a sexual nature; and threatened their jobs.

[49] Pre-trial Minute, p8, para 6.3.1 and 6.3.2

[50] Pre-trial Minute, p9, para 7.1 and, in particular, para 7.1.3.2

49.2 Making racist, ageist and other inappropriate comments. For example, she referred to management as “old white men who do not know what they’re doing” and “oxygen thieves”; with regard to Spangenberg and Deist she made references to “old white men and old age homes”; and made comments about “boere”.

[50] With regard to the LRA claim also, the applicant has not set out her cause of action. She has not established that she was dismissed on the grounds of her race rather than for misconduct; and she has not shown that she was treated differently to Spangenberg because of her race, gender or conscience.

CONCLUSION

[51] The first point *in limine* is dismissed, but the exception is upheld.

[52] As Mr *Sibanda* pointed out, the applicant has had three opportunities to amend her statement(s) of claim. It will serve no purpose to afford her yet another opportunity, given the fatal flaws identified in her case. It would only lead to further delays and unnecessary costs.

[53] On the subject of costs, both parties asked for costs to follow the result. I see no reason in law or fairness[51]to differ. There is no longer any relationship between the parties. And the

[51] LRA s 162.

applicant has made far reaching allegations against ABSA and against individuals such as Spangenberg without laying any basis therefor.

ORDER

[54] I therefore make the following order:

54.1 The first point *in limine* is dismissed.

54.2 The exception relating to both claims is upheld.

54.3 The applicant's claims in case numbers C 728/2016 and C 124/2017 are dismissed with costs.

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Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Dennis Chamisa

Instructed by: Swigelaar attorneys.[52]

RESPONDENT: Mabasa Sibanda

Instructed by: Gillian Lumb of Cliffe Dekker Hofmeyr.

[52] Mr Chamisa claimed in his practice note, filed a week before trial, for the first time, that he was briefed as counsel, instructed by Swigelaar attorneys. These attorneys have never come on record. All pleadings were signed and delivered by Mr Dennis Chamisa under the name and style of "Dech Legal" situated at Icon Building, third floor, 24 Hans Strijdom Avenue, Cape Town, and his email address given as dennisc@dechlegal.co.za.