



IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN DURBAN)

Case no: D 1342/19

Not Reportable

In the matter between:

BONISIWE PRECIOUS MCHUNU

Applicant

and

OLD MUTUAL LIFE ASSURANCE CO (SA) LTD

First Respondent

CCMA

Second Respondent

RICHARD LYSTER N.O.

Third Respondent

Application heard: 28 January 2021 (on the papers)

Delivered: 18 June 2021

JUDGMENT

WHITCHER J

- [1] This an application brought to review and set aside the award made by the third respondent acting as arbitrator under the auspices of the second respondent in which he dismissed the applicant's claim against the first respondent. The applicant had brought a claim under s 60 of the Employment Equity Act 55 of

1998 ('EEA'), read with s 6(1) and 6(3) of the EEA. She claimed that she had been subjected to harassment in the workplace and the first respondent had done nothing about it.

- [2] The applicant was employed by the first respondent in 2017 as a field financial adviser. Her job is to find clients for the first respondent to sell life insurance and other policies to. She and a group of other advisers report to Mr Manqeale in weekly meetings. The meetings are to discuss their respective performance. Her complaint, in short, is that Manqeale persistently harassed her about her performance in these meetings and after hours and spoke to her in a manner that was harsh and belittling; treatment he did not mete out to fellow colleagues who had not met their targets. His conduct reduced her to tears on at least two occasions and has caused her to be absent from work for months due to stress and depression. She further alleged that she had lodged a grievance and the first respondent had done nothing about it. At the time of the arbitration proceedings, she had been absent for over 8 months but was still being paid her basic salary. She viewed this as a concession of her allegations by the respondent. The respondent led evidence disputing the allegations of the applicant.
- [3] There is no need to make findings about the truthfulness or otherwise of the opposing allegations regarding the alleged harassment because this case turns on a key question that was put to the applicant and the scope of s 60 of the Employment Equity Act 55 of 1998 ('EEA') to which I now turn.
- [4] With regards to the grounds on which the applicant believed that Manqeale was discriminating against her, she said she had no idea whatsoever.
- [5] Section 60 provides thus:
- '(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
- (3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to provide that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.'

[6] The applicant's case must also be evaluated in terms of the relevant wording of s 6 (3) of the EEA:

'Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or combination of grounds of unfair discrimination listed in subsection (1).' (my emphasis)

[7] Section 6 (1) of the EEA provides thus:

'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.

[8] The Labour Appeal Court in *Samka v Shoprite Checkers (Pty) Ltd and Others* (2020) 41 (ILJ) 1945 (LAC); [2020] 9 BLLR 916 (LAC) (18 May 2020) held that section 11 of the EEA makes it clear that an allegation of harassment must be coupled to conduct based on a discriminatory ground. This section reads thus:

'(1) If unfair discrimination is alleged on a ground listed in s 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.’

[9] The LAC held that there is a burden placed upon the applicant to show, on a balance of probabilities, that the conduct alleged by her was not rational, that it amounts to discrimination and that the discriminatory practice was unfair. An allegation of harassment, even if indeed it can be shown to exist on its own and of itself, cannot and does not meet the requirements as set out in s 6(3) read together with s 11 of the EEA. More is required before an employer such as the first respondent can be held liable in terms of the EEA, where, as in the case brought by applicant, that is based on ‘an arbitrary ground’. So much is clear from the wording of s 11(2) of the EEA.

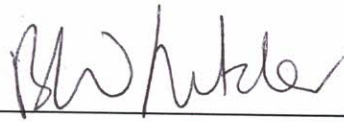
[10] In summary, no evidence which the applicant produced discharged the onus that she had been harassed on an arbitrary ground which would bring the first respondent’s conduct within the scope of the EEA.

[11] Furthermore, there was evidence that efforts had been made on numerous occasions by management of first respondent to meet with the applicant to deal with her grievance, but she consistently failed to respond to the invitations and to attend the meetings. This was thus not a case where management adopted a passive stance to the complaint lodged by the applicant.

[12] In the circumstances, there is no basis by which to disturb the finding of the third respondent.

[13] In my view, in the case such as the present it would not be appropriate to make a costs order.

[14] Accordingly, the review is dismissed. There is no order as to costs.



Benita Witcher

Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: Bhengu & Rajogopal Attorneys Inc

FIRST RESPONDENT: Cliffe Dekker Hofmeyer Inc

Labour Court