

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JS 753/18

In the matter between:

**VUKILE SOLOMON DAYIMANI**

**Applicant**

and

**NATIONAL DEPARTMENT OF HEALTH**

**First Respondent**

**S A HEALTH PRODUCTS REGULATORY  
AUTHORITY**

**Second Respondent**

**Heard: 26 February 2019**

**Delivered: 05 March 2019**

**Summary: An application for default judgment, wherein the applicant seeks an order for unfair discrimination and payment of salary difference for a certain period as well as accommodation costs. Held: (1) The claim for unfair discrimination is hereby dismissed (2) The applicants' claim for breach of contract is thus dismissed (3) No order as to costs.**

---

**JUDGMENT**

---

**MOSHOANA, J**

## Introduction

- [1] This matter came before me for default judgment. The applicant alleged discrimination within the contemplation of section 6 (4) of the Employment Equity Act (EEA). For some unknown reason, the respondents failed to oppose the referral. In addition, the applicant brought a section 77(3) of the Basic Conditions of Employment Act (BCEA) claim seeking to be paid relocation costs in terms of a clause in the letter of offer of employment.

## Evidence Led

- [2] Owing to the fact that the application came for default judgment, I only heard evidence from the applicant. Briefly, the applicant testified that he applied for a position that was advertised as being levels 10 – 13 post. On 30 October 2017, he attended an interview. On 4 January 2018, he was telephonically advised that he was successful. Later on, he received a written offer for the post he applied for. He was to indicate within 10 days of the offer whether he was accepting or not. If the offer was not accepted within the stipulated timeframe, it was to lapse. He did not accept the offer, instead he made a counter offer. His counter offer was to be paid at level 11 or 12. This counter offer was according to him accepted by the Chief Executive Officer (CEO) of the second respondent telephonically. On 5 February 2018, he assumed duties, however he noticed that his salary level was at 10, as offered before, as opposed to 12 as accepted by the CEO.
- [3] He then raised a complaint with the CEO, who advised that she will write a memorandum to the Human Resources Department. Indeed, on 7 March 2018, the CEO wrote a submission to the Directorate HRM&D. On 13 March 2018, a written response was provided by the Directorate not supporting the request by the CEO. On 14 May 2018, the applicant lodged a grievance in writing seeking salary adjustment to level 12 and the resettlement costs and benefits. The respondents failed to resolve the grievance. He then referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging unfair

discrimination. On 24 August 2018, the CCMA failed to resolve the dispute. He approached this Court for relief.

### Evaluation

[4] The ground upon which the applicant claims unfair discrimination is that of being arbitrary and not on any of the listed grounds. In terms of section 11 (2) of the EEA, the applicant bears the onus of proof. On this part of the case, the conduct complained of is that the applicant was offered salary level 10, when the previous incumbents were on salary level 12. In the statement of case an allegation was made that by denying the applicant a correct salary, he was discriminated on the ground of social origin, one of the listed ground. There is no credible evidence to substantiate this allegation. On the applicant's own version, he initially declined the offer, hence the counterproposal. A counter offer is equivalent to a rejection of the initial offer. Therefore, in law, there is no offer and acceptance to give rise to a contract. After his counter proposal was rejected, it is clear that the applicant accepted the situation. There is no evidence before me that seeks to show that there was any form of discrimination on the basis of social origin.

[5] The applicant takes issue with the statement that in his previous employment with KZN Department of Social Development he was remunerated at salary level 8. It is on this basis that he alleges discrimination on the ground of social origin. I am not satisfied that there is any evidence to suggest unfair discrimination. Returning to the salary scale complaint, item 4.4 of the Code of Good Practice on Equal Pay/Remuneration for work, states that when examining whether the obligation to apply pay/remuneration equity in the workplace is being complied with, three key issues require scrutiny and those are:

1. Are the jobs that are being compared the same, substantially the same or of equal value in terms of objective assessment?

2. Is there a difference in the terms and conditions of employment, including pay/remuneration, of the employees in the jobs that are being compared?
3. If there are differences in the terms and conditions of employment, can these be justified on fair and rational grounds?

[6] On the evidence before me I am unable to even begin to consider the key issues. Reference is made to previous incumbents being paid at a Deputy Director level for the same work. This cannot allow me to do an objective assessment. Basically, there is no comparator. The evidence is simply too shallow to enable the court to perform an objective assessment. I cannot simply take the subjective view of the applicant. Accordingly, I am not satisfied that there is any irrationality on the part of the respondent nor was one shown to exist. Therefore, the claim for unfair discrimination based on an arbitrary ground must fail.

[7] I shall now deal with the claim for resettlement costs and benefits. On this part of the case, the applicant is claiming the two days' accommodation costs and the travelling costs. The applicant pegs his claim on paragraph 2.8.1 of the offer made to him. In terms of the clause, the interim accommodation is a benefit that could be utilized after making a request at least three weeks before. The first difficulty with the applicant's case is that he did not accept the offer made to him. After discussions with the CEO, he made a decision to travel to Pretoria in order to resume duties. In terms of clause 5.2, the applicant was to accept in writing. There is no evidence that he did so. For all intents and purposes, the offer inclusive of the benefit lapsed after the 10 days' period. Assuming that the benefit has not lapsed, it is required that the request for the benefit must be made three weeks before it can be utilized. The applicant made a request on 20 March 2018, after he had used the "benefit" on 04 and 05 February 2018. Based on these reasons, I am not satisfied that the applicant has a claim arising from clause 2.8.1. Accordingly, his claim must fail.

[8] It is unclear on what does the applicant base his travelling claim. The applicant completed a travel and subsistence claim form on 18 March 2018. This claim appears to have been approved by the Acting CEO on 18 April 2018. On 05 April 2018, the applicant claimed in respect of an official journey undertaken by privately owned motor transport. This claim was not approved, nor is there any evidence that it was approved. It is apparent that this is a claim in terms of some policy of the employer. Failure to pay it may be an unfair labour practice. This court lacks jurisdiction to entertain this type of matters. Accordingly, this travelling claim before this court must fail.

[9] In summary, I am not satisfied that the applicant is entitled to any judgment by default. There is no credible evidence to support an allegation of unfair discrimination. The claim for relocation and travel costs has not been substantiated.

[10] For all the above reasons, I make the following order:

Order

1. The applicant's claim for unfair discrimination is dismissed;
2. The claim for breach of contract is also dismissed;
3. There is no order as to costs.

---

GN Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In Person.