IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. JS 257/2022

In the matter between:

THEMBINKOSI MKALIPI **Applicant**

and

MINISTER OF LABOUR AND EMPLOYMENT *N.O.* **First Respondent**

DEPARTMENT OF LABOUR AND EMPLOYMENT **Second Respondent**

Date heard: 21 April 2023

Date delivered: This judgment was handed down electronically by circulation to the applicant's and the respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date for handing down is deemed to be on 25 August 2023.

JUDGMENT

JOLWANA AJ

[1] The applicant issued a statement of claim in terms of rule 6(1) of the Rules of the Labour Court. In essence, the applicant claims that he is being arbitrarily unfairly discriminated in the difference in how he and a colleague of his, Mr Ndebele are treated. This he alleges, is because he performs a more complex and demanding work than Mr Ndebele or at the very least, they both perform work of equal value with no justifiable operational and employment reasons for the differential treatment. Therefore, the differential treatment between himself and Mr Ndebele constitutes unfair discrimination on an arbitrary ground as provided for in section 6 (1) of the Employment Equity Act[1] (the EEA).

[2] He further seeks another relief, albeit in the alternative and in the event that he is unsuccessful in the main relief. The alternative relief is that the failure to upgrade him constitutes an unfair labour practice relating to promotion or an infringement of the right to fair labour practice which is provided for in section 23 of the Constitution[2]. Further alternatively and in the event of it being held that the failure to upgrade him does not constitute a practice relating to promotion for the purposes of section 8 (3) (a) of the Constitution[3], he pleads

[1] Employment Equity Act No.55 of 1998 as amended.
[2] Constitution of the Republic of South Africa, 1996.
[3] Section 8 of the Constitution provides:
(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
(2) A provision of the Bill pf Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person terms of subsection (2), a court –
a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

that there being no legislation giving effect to the infringement of the pleaded right to fair labour practices, it is incumbent upon this Court to develop common law to give effect to this right and if necessary, it must develop rules to limit the right in accordance with section 36 (1) of the Constitution.

[3] The respondent has raised an exception to the applicant's claim in terms of rule 11 (3) of the Rules of the Labour Court read with rule 23 (1) of the Uniform Rules of Court. The exception is that the applicant's statement of claim is vague and embarrassing and/or lacks averments necessary to sustain a cause of action. This is because in order for the applicant to succeed in a claim based on unfair discrimination on an arbitrary ground, he is required to identify the arbitrary differentiating criteria used by the respondents which has the impact of infringing his dignity. Furthermore, in order to qualify as an arbitrary ground, the ground relied upon by the applicant must be analogous to at least one of the listed grounds of discrimination by it having the potential to impair human dignity in a comparable manner or have a similar consequence.

[4] The respondents allege that the applicant has failed to identify an arbitrary ground or has not pleaded a ground that is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner. That being the case, submit the respondents, the applicant has failed to plead an arbitrary ground upon which he relies to bolster his claim for

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

unfair discrimination. Therefore, and in the final analysis the applicant has failed to make the necessary averments to sustain a cause of action based on unfair discrimination on an arbitrary ground.

[5] In his statement of claim, the applicant makes the following allegations. He is in the employ of the Department of Labour and Employment (the department) occupying the position of Chief Director: Labour Relations. He holds a Master's Degree in Labour Law and has been working for the department since October 1996 at which stage he was a Deputy Director until July 2005 when he was promoted to the position of Director: Collective Bargaining. In the same year of 2005 he was further promoted to the current position of Chief Director: Labour Relations. There are 62 employees in his section whom he manages. The current annual budget for his section is approximately R62 million and overall he is responsible for an amount of approximately R1 137 billion which amount includes transfers of about R1.075 billion.

[6] He is responsible for policy formulation in respect of labour and employment laws and codes of good practice. He ensures compliance with the International Labour Organization standards. He represents the government in the governing body of the Commission for Conciliation Mediation and Arbitration (CCMA). He also represents the government in the National Economic Development and Labour Advisory Council commonly known simply as NEDLAC where he is the lead negotiator on his department's proposed labour and employment legislation. He represents the department

in Parliament on its labour and employment bills. He is required to be effective in dispute resolution and collective bargaining institutions. He is responsible for preparing government's responses to requests for information or reports that arise from the government's membership of international organisations. His job is complex with a lot of pressure which requires him to have a high degree of skill, expertise and effort in line with the scope of his position as indicated above.

[7] On 17 February 2016 the applicant submitted an application to have his level upgraded to S13 level. He was requested to make a proposal for the resolution of that dispute which was ultimately rejected and no reasons were given for its rejection. On 1 February 2021 a colleague of his, Mr Ndebele was appointed to the position of Director in International Relations. Mr Ndebele's position was soon upgraded to that of the Chief Director and was duly appointed to the position of Chief Director on 11 July 2021. On 18 October 2021 it came to the applicant's attention that Mr Ndebele was, on his promotion, placed at level SR14 and was placed at the top notch of the level. This made Mr Ndebele to be ten notches above that of the applicant despite the applicant having been in the position of Chief Director for seven years.

[8] In his position, Mr Ndebele is responsible for the promotion of South Africa's decent work programme which involves developing an annual plan and submitting reports. He is responsible for the capacitation of the departmental officials, public servants and social partners. This involves initiating national capacity building projects, coordinating attendance, negotiating funding and

submitting reports. He is responsible for the advancement of South Africa's national interest through multilateral and bilateral relations. This involves developing policy briefs, engagements and submitting reports. Mr Ndebele manages 14 employees in his section and has an annual budget of about R22 million with transfers of about R28 million. He is therefore responsible for about R50 million in his section.

[9] The applicant claims that despite the fact that he performs a much more complex and demanding work and has been in the position of Chief Director for significantly longer, Mr Ndebele was appointed as a Chief Director at a higher level and with the maximum number of notches. The applicant further alleges that the level at which an employee is appointed is a reflection of the second respondent's assessment of the value that that employee brings to the position. I understand him to further complain that his being at a lower level may affect the manner in which his colleagues and the employees he manages might regard him. The applicant alleges that the value he brings to his position is arbitrarily and unjustifiably under-valued and as such a continuing affront to his human dignity.

[10] In light of the above the applicant referred a dispute to the CCMA in respect of an alleged unfair labour practice and unfair discrimination which he alleged, were committed by his employer against him. That dispute was not resolved resulting in a certificate of non-resolution being issued hence he referred the dispute to this Court.

[11] The applicant claims that the differential treatment referred to above between himself and Mr Ndebele constitutes unfair discrimination as provided for in section 6(4) of the EEA. The applicant founds the unfair discrimination complaint on the grounds that he performs a more complex and demanding job than his colleague, Mr Ndebele and has been in his position for significantly longer than his colleague. In the alternative, his work and that of Mr Ndebele are of equal value. Therefore, there is no justifiable operational or employment reason for the differential treatment. He therefore, based on the provisions of section 6 (1) of the EEA, complains that the difference in treatment between himself and Mr Ndebele by his employer is arbitrary because there is no operational or employment reason for the difference.

[12] The applicant has pleaded that in the alternative, given his qualifications, experience, skills and expertise and the fact that other employees performing work of equal value are upgraded, the failure to upgrade him constitutes an unfair labour practice relating to promotion. Or it constitutes an infringement of his right to fair labour practice as provided for in section 23 (1) of the Constitution. There is no exception to the applicant's pleading to the extent that he relies on section 23 of the Constitution.

[13] Therefore, the main issue for determination is whether the applicant's pleading is excipiable to the extent that he claims that he is being arbitrarily unfairly discriminated against by his employer in the alleged differential treatment given to him as compared to Mr Ndebele which he says is for no justifiable operational and employment reason. The applicant relies on

section 6 (4) of the EEA read with section 6 (1) thereof. Put differently, the issue is whether he has pleaded a ground of unfair discrimination in the sense that he has pleaded a ground of discrimination which is unfair and which therefore constitutes an affront to his fundamental dignity as a human being.

[14] Section 6 (1) and (4) of the Act read:

"(1) 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.

…

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

[15] If I understand the grounds of exception properly, they amount to this. If Mr Mkalipi had relied on any of the other grounds listed in section 6 (1) of the EEA, save for the one he relies upon, there would be no exception to his pleadings. The respondent further makes the point that if the pleaded ground of unfair discrimination is not on one of the listed grounds, it must, at the very least, be on a conduct or practice that is analogous to one or more of the listed grounds.

[16] This is how the exception in the relevant part is couched:

"3. At paragraph 22 of the applicant's statement of case, he alleges that:

> 'The Applicant accordingly submits that the grounds on which he relies in section 6 (1) of the EEA is that the difference in treatment is arbitrary because there is no operational or employment reason for the difference.'

4. To succeed in a claim for unfair discrimination on an arbitrary ground, the applicant is required to identify the arbitrary "differentiating criteria" used by the respondents which has the impact of infringing his dignity.

5. Furthermore, to qualify as an arbitrary ground, the ground relied upon by the Applicant must be analogous to a listed ground of discrimination, in the sense that it has the potential to impact human dignity in a comparable manner, or have a similar serious consequence.

6. The applicant has not identified an arbitrary ground or has failed to plead a ground based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.

7. As such, the Applicant has failed to plead an arbitrary ground upon which he relies to bolster his claim for unfair discrimination.

8. In the circumstances, the Applicant has failed to make the necessary averments to sustain a cause of action of unfair discrimination on an arbitrary ground."

[17] Discrimination, in all its multifacetedness, is intractably linked to our checkered past as a nation. Our anti-discrimination posture is rooted in our Constitution through which we resolved to take that posture which also led to the legislative framework that basically outlaws unfair discrimination in any shape or form. For these reasons, when the issue of discrimination in general and unfair discrimination in particular arises, we always go back to our Constitution which undergirds our legislative framework that regulates all issues of discrimination and outlaws unfair discrimination. Section 9 of the Constitution reads:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or catergories of persons, disadvantaged by unfair discrimination may be taken.

(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.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[18] The Constitutional Court had occasion to deal with the notoriously complicated and at times, nuanced issue of discrimination and the examination that must go into it. In *Harksen*[4], Goldstone J, writing for the majority, explained the enquiry that must go into the determination of an issue of discrimination. That was in the context of section 8 of the interim Constitution, the forerunner to the current Constitution. He said:

"At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on s 8 of the interim Constitution. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 8 (1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

[4] Harksen v Lane NO and Others 1998 (1) SA 300 (CC) at 324 – 325 para 54.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) 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 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 adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, then unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8 (2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s33 of the interim Constitution)."

[19] It will be observed that the EEA was the legislation envisaged in section 9 (4) of the Constitution. In 2013 the EEA was amended to make provision for "any other arbitrary ground" at the end of the grounds original listed in section 6 (1) of the EEA. Recently the Labour Appeal Court had occasion to express itself on this amendment in *Naidoo* 2[5]. It said:

"In *Chitside v Sol Plaatjie University* [2018] 10 BLLR 1012 (LC), the issue was whether it was an act of unfair discrimination that only one candidate in a series of job interviews was required to write a test. The case failed on the facts. However, at [31] of that judgment, the Court endorsed the view that the 2013 amendments introduced a self-standing ground of arbitrariness and, as in *Kadiaka*, this meant

[5] Naidoo and Others v Parliament of the Republic of South Africa (2020) 41 ILJ 1931 (LAC); [2020] 10 BLLR 1009 (LAC) paras 25-26.

capriciousness. As I understand the judgment these remarks were obiter. Regrettably that court paid very little attention to the jurisprudence of the Constitutional Court with regard to section 9 of the Constitution which is also the source of section 6 of the EEA which is predicated, as already noted, on the basis that the prohibited grounds are all designed to protect the dignity of an affected person. That is the starting point of any enquiry regarding discrimination. This conclusion is reinforced by the 'words' any other arbitrary ground. The insertion of the word 'other' supports the conclusion that the phrase "any other arbitrary ground" was not meant to be a self-standing ground, but rather one that referred back to the specified grounds, so that a ground of a similar kind would fall within the scope of section 6. None of these important considerations were taken into account by the Court. In addition, the Court, ostensibly, did not have the benefit of the views of *Garbers and Le Roux* to which I now turn in some detail.

Garbers and Le Roux offer a critique of the broad compass idea and, in great detail, eviscerate the thesis. It is unnecessary to address all of their reasoning to demonstrate a convincing rejection of the broad compass interpretation. The essential point is that the phrase to which meaning must be attributed is "… any other arbitrary ground" and not the word "arbitrary", free from its context and function. In this context the word "arbitrary" is not a synonym for the word "capricious". The injunction in section 6 (1) is to outlaw, not "arbitrariness", but rather to outlaw unfair discrimination that is rooted in "another" arbitrary ground (the syntax of "… any other …" cannot be understood as otherwise than looking back at what has been stipulated in the text that preceds it). Capriciousness, by definition, is bereft of a rationale, but unfair discrimination on a "ground" must have a rationale, albeit one that is proscribed. The glue that holds the listed grounds together is the grundnorm of Human Dignity. The authors express this view, with which I agree:

> 'Discrimination is about infringement of dignity (or a comparably serious harm) about an identifiable and unacceptable ground and about the link directly or indirectly between that ground and the differentiation. Should a ground not be listed, it should meet the well-established test for unlisted grounds: it must have the potential to impair the fundamental human dignity of a person (or have a comparably serious effect) and has to show a relationship with the listed grounds.'"

[20] I must start by stating the obvious point that *Naidoo* 2 is binding on this Court. What can be gleaned from *Naidoo* 2 is that the Labour Appeal Court took the position that it is not enough for the conduct complained of to be merely capricious and therefore arbitrary. The ground relied upon must at the very least, have the effect of potentially impairing human dignity of a person which is what will make it analogous to the so-called listed grounds. Does the applicant plead a ground of unfair discrimination that is analogous to one or more of the listed grounds? The answer in my respectful view is, yes. It is yes because not only is the applicant pleading that there is no justifiable operational and employment reason for the difference. But also he, the applicant, allegedly performs a more complex and demanding work and has been a Chief Director for significantly longer than Mr Ndebele. Yet the latter was appointed at a higher level and with the maximum number of notches.

[21] He points out that this reflects the assessment placed by their employer on the value brought by Mr Ndebele to the post of Chief Director. His remaining placed at a lower level and on a lower notch has the effect on how his colleagues and junior employees whom he manages might regard him. This, he submits, is not only arbitrary and an unjustifiable under-evaluation of the value he brings to his post but is in fact a continuing affront to his dignity as a human being as it impairs his fundamental human dignity in a comparably serious manner. This is because the value he brings to the post is viewed as being less than that of Mr Ndebele by their employer for no justifiable operational and employment reason.

[22] I do need to make two points very clear. The first one is that the "any other arbitrary ground" being analogous to the other grounds of unfair discrimination, does not mean "sounding like" the other grounds either in meaning or context. I am of the view that the similarity referred to in both *Harksen* and *Naidoo* 2 is in respect of what the unfair discrimination does to a person's fundamental human dignity. Whether or not the complainant will, at the trial, be able to show that it does have that effect is not for determination at the pleading stage. The applicant merely has to plead that the ground he relies on has the effect of impairing his fundamental human dignity as a person. The attributes of the pleaded ground of unfair discrimination must show a relationship with the listed grounds by how his fundamental dignity is imperiled as a consequence. Just by way of illustration conscience is a listed ground of discrimination. But how does one show in pleadings that the basis for the alleged unfair discrimination is his/her conscience. Put differently, if the applicant is being unfairly discriminated against because of his conscience, what would be the conduct of his employer that he or she would be required to plead for him to have pleaded a discrimination on the ground of conscience or a ground analogous to conscience?

[23] The second point I need to emphasize if even at if the risk of stating the obvious, is that this is not the stage for a litigant to prove his or her allegations. Therefore, I am not making any suggestion, directly or indirectly that he has shown that there is unfair discrimination on an arbitrary ground or that he has proven the existence of the unfair discrimination on an arbitrary ground. It is the trail court, based on the evidence to be led during trial that

must determine those issues. The trial court may very well find against the applicant. But for present purposes and bearing in mind the fundamental principle on exceptions which is that a court must accept all allegations of fact made in the particulars of claim as true. I am of the view that the facts alleged by the applicant in his statement of claim, if proved, would amount to unfair discrimination in my view. I cannot see the respondents having any difficulties in pleading to the applicant's statement of claim.

[24] This is how this legal position was clearly articulated in *Pretorius*[6] in which the court said:

> "In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly-technical approach must be avoided."

[25] The debate about unfair discrimination on an unlisted ground which is considered to be what the additional ground of unfair discrimination – unfair discrimination "on any other arbitrary ground", has taken various forms and has been raging for a while now. I do not think that the dust has settled yet on that debate and in fact it does not look like it is about to settle anytime soon. This is hardly suprising regard being had to our nervousness, justifiably so, whenever two human beings are, for no apparent reason, treated differently

[6] Pretorius and Another v Transport Pension Fund and Others [2018] 7 BLLR 633 (CC).

and the harm that may do to human dignity. This is in part because in some ways when people complain of unfair discrimination, they are not always able to say that the unfair discrimination that they experience in the workplace for instance, is attributable to their race, colour or culture or any of the other listed grounds. Therefore, even to say that, as it has been said in some cases, unfair discrimination on an arbitrary ground must be on a ground similar to the listed grounds or one or some of them, does attract some degree of controversy in my respectful view. It therefore needs to be carefully assessed on the facts of that particular case.

[26] This is because the listed grounds are tied to our past discriminatory history. To then say that unfair discrimination on an arbitrary ground must mean unfair discrimination on a ground analogous to the listed ones could unintentionally create a closed or exhaustive list of grounds of unfair discrimination on arbitrary grounds by confining unfair discrimination to something analogous or similar to one or some of the listed ones depending on whatever ones' idea of that means. It seems to me that the legislature realized that unfair discrimination may not always be on any of the listed grounds hence adding the additional ground of unfair discrimination on any other arbitrary ground, thus opening up for a complainant to plead her or his case and lead evidence of the alleged unfair discrimination.

[27] In *Naidoo* 1[7] Prinsloo J had this to say:

[7] Naidoo and Others v Parliament of the Republic of South Africa [2019] 3 BLLR 291 (LC); (2019) 40 ILJ 864 (LC) para 30-31.

"In my view the correct approach is to accept the narrow interpretation and I say so for a number of reasons.

Firstly, I am inclined to follow, in fact I am bound to follow *Pioneer Foods and Metrorail*, where the narrow interpretation was accepted. In *Metrorail* it was effectively held that an arbitrary ground is nothing more and nothing less than a ground analogous to a listed ground, as contemplated in *Harksen.* The crux of the test for unfair discrimination is the impairment of human dignity or an adverse effect in a comparable, similar manner and not the classification of the ground as listed or unlisted. The distinction between listed and unlisted grounds affects only the burden of proof. Differentiation on both a listed and analogous ground amounts to unfair discrimination only if the differentiation has indeed affected human dignity or has had an adverse effect in a similar serious consequence."

[28] If it is indeed so that the issue is not whether the ground is listed or unlisted but it being listed or unlisted is only about the burden of proof as the court correctly said in *Naidoo* 1, which seems to have been upheld in *Naidoo* 2[8], the real issue being whether "the differentiation has the potential to impair human dignity", the ground being listed or unlisted becomes irrelevant. I understand our constitutional framework based on our discriminatory past to be that anything that is an affront to our human dignity in all our diversities cannot be countenanced. The question whether the conduct complained of is indeed an affront to human dignity is as it must be, determinable on a case by case basis depending on the facts of a particular case. Our general constitutional principles on discrimination must be applied on the facts that present themselves in any particular case. Therefore, whether a conduct is an affront to human dignity is a factual issue. The person alleging unfair discrimination on an arbitrary ground bearing the burden of proof.

[8] Naidoo and Others v Parliament of the Republic of South Africa (2020) 41 ILJ 1931 (LAC); [2020] 10 BLLR 1009 (LAC).

[29] The other issue which in my view is of some significance, is that I do not know if and to what extent the court in *Naidoo* 2 took into account the definition of the phrase, "employment policy or practice" referred to in section 6 (1) of the EEA. It certainly did not deal with it in the text of the judgment itself. Section 1 of the EEA defines the phrase "employment policy or practice" as follows:

"employment policy or practice" includes, but is not limited to –

(a) recruitment procedures, advertising and selection criteria;
(b) appointment and the appointment process;
(c) job classification and grading;
(d) remuneration, employment benefits and terms and conditions of employment;
(e) job assignments;
(f) the working environment and facilities;
(g) training and development;
(h) performance evaluation systems;
(i) promotion;
(j) transfer;
(k) demotion;
(l) disciplinary measures other than dismissal; and
(m) dismissal."

[30] The first point to make is that the use of the word, "includes" in the definition of "employment policy or practice" means that the above list is not intended to be exhaustive. It serves as examples of the kinds of conduct deprecated by the legislature and regarded as unfair discrimination. When section 6 (1) refers to employment policy or practice as unfair discrimination, it is so if the policy or practice as described embarked upon is one of or, includes those mentioned in section 1 on any arbitrary ground other than those ones specifically listed and mentioned in section 6 (1) of the EEA.

[31] I consider it quite significant that the legislature, in its wisdom, elected to give an in-exhaustive list of what it refers to when it says that such policy or conduct is in fact unfair discrimination and went on to add “any other arbitrary ground” over and above what is mentioned in section 6 (1) of the EEA through the 2013 amendment. The significance of this is that at the very least the complainant may or may not succeed in proving that whatever conduct she or he alleges amounted to unfair discrimination. However, an allegation that the conduct complained of whatever it is, which is arbitrary in nature to the extent that it is based neither on any of the listed grounds or anything analogous to them, is an affront to her or his fundamental human dignity is sufficient. Proving that it is in fact an affront to human dignity as alleged is a trial and not a pleading issue. When the court in *Naidoo* 2 said that the glue that holds the listed grounds together is the grundnorm of Human Dignity must have meant that any and everything that is an affront to human dignity must be removed from our society as being everything contrary to the constitutional promises of accountability and transparency.

[32] It must be remembered that unfair discrimination on the listed grounds was, during apartheid, so normalized within the legal framework ecosystem in the past that unfair discrimination on those listed grounds or even similar grounds was legally acceptable. If unfair discrimination is to be eliminated including unfair discrimination on the so called unlisted grounds or other arbitrary grounds, it is to the facts of a particular case that regard must be had, the

question sought to be answered being whether the conduct complained off is or is not an affront to human dignity.

[33] This brings me to the very fundamental issue before this Court. That issue being whether on all possible readings of the pleaded facts a cause of action based on unfair discrimination on an arbitrary ground cannot be said to exist. In *Fetal Assessment Centre*[9] Froneman J stated the legal position on exceptions as follows:

> "In the High Court the matter was decided on exception. Exceptions provide a useful mechanism "to weed out cases without legal merit", as Harms JA said in *Telematrix*. The test on exceptions 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."

[34] The respondents' contention that the statement of claim does not disclose a cause of action of an unfair discrimination is based on a mischaracterization of the pleaded case. The applicant's unfair discrimination case as pleaded is based on him allegedly performing what he regards as work of equal value or higher value than that of Mr Ndebele who, like him is holding the position of Chief Director. If Mr Ndebele was a white person an assumption of unfair discrimination on the basis of race or colour would have been an obvious allusion. This is exactly the point. Unfair discrimination must be removed from our society regardless of the basis thereof being put in one or other category. Once there is discrimination, the next question is whether it is unfair or not or whether protection against it can be limited as provided for in section

[9] H v Fetal Assessment Centre 2015 (2) SA 193 (CC) para 10

36 of the Constitution. The applicant says that considering the many years he has been doing his job compared to Mr Ndebele, it is unfair discrimination on an arbitrary ground that Mr Ndebele has been accorded better employment conditions to do work of a lesser or equal value to his. The basis upon which this complaint is founded is that the applicant's fundamental dignity as a human being is affronted by this allegedly discriminatory conduct.

[35] I do not know that a litigant who complains that his human dignity is fundamentally being undermined should, in all cases be expected to know exactly why that is so. It seems to me that it is at the trial that he would be able to show if the conduct complained of is unjustifiable, if indeed that is the case. The constitutional framework outlaws all unjustifiable unfair discrimination. The same process as articulated in *Harksen* must be followed in that it must be established if discrimination is even happening. If so, is it unfair discrimination or not. It is to the facts of the case and not the appellation given to the unfair discrimination like race or colour that must be paramount. I therefore do not think that the court in *Naidoo* 2 was laying a catch all rule in referring to the ground being analogous to the listed grounds. In fact it is not easy to give a precise definition to the word "analogous" as it refers to the many listed grounds to which the ground must be analogous to.

[36] This brings me to the alternative claims. The question of this Court not having jurisdiction on the alternative claim of unfair discrimination is unsustainable on the facts of this case. It seems to me that the pleaded factual matrix has to be subjected to adjudication by the Labour Court. Referring it to arbitration on

the basis that the court may, at this stage, lack jurisdiction would be splitting the hairs. This is so because on the same facts, unfair discrimination is undoubtedly determinable by this Court as is the applicant's case on which he relies directly on section 23 (1) of the Constitution, on which the respondents do not except.

[37] Therefore, it would, in my view, make more sense for the whole matter to be adjudicated, including the unfair labour practice alternative claim if the court were to find against the applicant on the unfair discrimination cause of action. I therefore see no benefit to either the applicant or the respondents in referring the issue of the alleged unfair labour practice to the CCMA. It seems that the interests of justice and in particular, the question of finality to the legal dispute calls, on the facts of this case, for this Court to deal with the unfair labour practice dispute as well, as the pleaded facts are, in any event exactly the same regardless of which cause of action is relied upon. In any event if the applicant succeeds on unfair discrimination, the unfair labour practice cause of action will not see the light of day.

[38] I am therefore not satisfied that the respondents have, on the case pleaded by the applicant established the test for exceptions which, as I said before, essentially is that on all possible readings of the pleaded case, no cause of action is made out. The respondents' exceptions to the applicant's statement of claim must therefore fail. This is so because the respondents have failed to satisfy this Court that on every interpretation that can put upon the facts of this case, no cause of action is made out.

[39] In the result the following order shall issue:

Order:

1. The exception is dismissed.

2. There shall be no order as to costs.

M. Jolwana
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant	:	Adv. A Roskam
Instructed by	:	Haffegee Roskam Savage Attorneys Inc.
For the respondent	:	Adv. JD Withaar
Instructed by	:	State Attorneys