

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

Not Reportable  
Case No: JS 618 /19

In the matter between:

**SACCAWU obo JABSY MABASO AND 4 OTHERS**

**Applicants**

and

**MASSTORES (PTY) LTD T/A MAKRO**

**Respondent**

**Heard: 13 & 14 February 2023**

**Delivered: 09 March 2023**

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**JUDGMENT**

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**MTHALANE, AJ**

Background facts

[1] The Applicants allege unfair discrimination, of employees directly or indirectly, based on race, despite the fact that the Applicants and the Comparator are allegedly performing the same or substantially the same work or work of equal value but are paid differently.

[2] The Applicants are all employed by the Respondent as Merchandise Controllers.

[3] The Applicants' comparator is a white female, Ms Nedine Sookoo (Sooko), who has been employed by the Respondent as a Merchandise Controller since 13 June 2011. At the time of referring the dispute, the Comparator earned more than the Applicants.

[4] According to the Applicants, they became aware of this as a result of Sooko's pay slip that was left at a printer.

[5] On 24 April 2018 (after becoming aware that Sooko earned more than them), the Applicants raised a grievance with the Respondent's management highlighting their dissatisfaction over salary disparities that were allegedly based on race. The Respondent denied that the disparities were based on race.

[6] On or about 3 May 2018, the Respondent's management held a meeting with the Applicants to discuss the alleged disparities. Detailed minutes were kept of the meeting. Several meetings were subsequently held with the Respondent's management. On 13 November 2018, the Respondent adjusted the Applicants' (and other employees) salaries.

[7] On or about 9 April 2019, the Respondent's management issued the outcome of the Applicants' grievance which, *inter alia*, stated as follows:

"All Merchandise Controller salaries were reviewed against the pay range and adjustments were made to ensure that all MC's were within the range (July 2018)."

"The Job Description was reviewed and sent for grading to ensure that the pay range is correct (August 2018)."

"Further adjustments were done based on an analysis of tenure in the position of an MC (November 2018)."

"The business has addressed the grievance and adjusted salaries in accordance with a fair process to ensure that disparities are eradicated. The business has exhausted the process and for this reason the grievance is concluded."

[8] The Applicants' case is premised on the provisions of section 6(4) of the Employment Equity Act<sup>1</sup> (EEA) that provides that 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 section 6(1), is unfair discrimination.

[9] The Applicants' case is simply that a white female, Sookoo who has been employed by Makro as a Merchandise Controller since 13 June 2011, earns more than the Applicants notwithstanding the fact that they perform the same or similar work. They contend that the decision to pay Sookoo a higher salary is because she is white, and the Applicants are black.

[10] The Respondent denies that there was discrimination and that the differentiation in salaries between the Applicants and the Comparator is due to race. The Respondent's only witness testified that historically, the recruitment process at the Respondent included considering a candidate's employment history whether with the organisation or not and the salary that the candidate was earning at the time. The Respondent aimed to make an offer to a candidate attractive by increasing the candidate's existing salary up to a maximum of 15%. In 2018, the Respondent introduced salary bands for all positions within the organisation including the Merchandise Controller position. The Respondent has subsequent to the introduction of salary bands adjusted the salaries of employees including the Applicants to ensure that remuneration was at least at the middle level of the respective salary band.

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<sup>1</sup> No 55 of 1998.

[11] The legal point to be considered is whether there was discrimination against the Applicants on the basis of race.

[12] Section 6(1) of the EEA provides that:

"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."

[13] Section 6(4) of the EEA provides that:

"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."

[14] The burden of proof required in a case brought in terms of section 6 of the EEA is set out in section 11(1):

"(1) If unfair discrimination is alleged on a ground listed in s6(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."

[15] The Court in *National Union of Metalworkers of SA and others v Gabriels (Pty) Ltd*<sup>2</sup> with approval, quoted the following test from *Harksen v Lane NO and others*<sup>3</sup>

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<sup>2</sup> (2002) 23 ILJ 2088 (LC) at paras [18]-[19].

where the Constitutional Court established a two-pronged test for determining whether differentiation between people or categories of people amounted to unfair discrimination:

"(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 be on a specified ground, then unfairness will be presumed. If on an unspecified ground, 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."

[16] The court in Harsken further stated that:

"whether there has been differentiation on a specified ground or unspecified ground must be answered objectively...If in either case the enquiry leads to a negative conclusion then section 8(2) has not been breached and the question falls away. If the answer is in the affirmative, however, then it is necessary to proceed to the second stage of the analysis and determine whether the discrimination is "unfair".

[17] The court then referred to *Prinsloo v van der Linde and another*<sup>4</sup> where the court held that:

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<sup>3</sup> 1997 (11) BCLR 1489 (CC) at para 50.

<sup>4</sup> 1997 (6) BCLR 759 (CC) at para 31.

“... Given the history of this country we are of the view that “discrimination” has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them...”

[18] In my view, the facts do not show that the case that the Applicant raised as the basis of comparison justify the conclusion that any salary differentiation was based on a prohibited ground of discrimination.

[19] It was not disputed by the Applicants that historically, the recruitment process at the Respondent included considering a candidate's employment history whether with the organisation or not and the salary that the candidate was earning at the time. The Respondent aimed to make an offer to a candidate attractive by increasing the candidate's existing salary up to a maximum of 15%. In 2018, the Respondent introduced salary bands for all positions within the organisation including the Merchandise Controller position. The Respondent has subsequent to the introduction of salary bands adjusted the salaries of employees including the Applicants to ensure that remuneration was at least at the middle level of the respective salary band. All the Applicant could say in response is that this was the first time that the Respondent had explained this to them. This was obviously not true as the Respondent had mentioned this in paragraph 6 of its statement of response. Furthermore, it is common cause that there are two black employees who earn more than the Comparator and they are referred to in the bundle of documents as “MC1” and “MC2”. The Applicants argue that the reason for that is because the two black employees have longer service. I find this irrelevant. The fact of the matter is that there are two black employees who earn more than the Comparator.

[20] It follows therefore that if there is no dispute on the process followed by the Respondent prior to 2018 and there are two black employees who earn way above Sooko, the Comparator, then that is the end of the enquiry as the process (not race) is the reason for the disparity.

[21] It is not enough for the Applicants to merely allege that the Comparator earned more because of race. Something more is required to prove discrimination. The unequal treatment must be based on attributes and characteristics attaching to a

person before it can fall within the meaning of "discrimination". The Applicants did not establish discrimination on grounds of race. The Respondent proved that the Applicants were remunerated in terms of the relevant legal prescripts which justified their comparators' higher salary. I cannot therefore find that there was discrimination.

[22] The Applicants have failed to make the minimum sufficient allegations to sustain a claim for discrimination within the meaning of section 6(1) of the EEA.

[23] In the premises the following order is made:

Order

1. The Applicants' case is dismissed.
2. There is no order as to costs.

**G. Mthalane**  
**Acting Judge of the Labour Court of South Africa**

Appearances:

For the Applicants : Piet Ngoato Union Official (SACCAWU)

For the Respondent : Dion Masher of Edward Nathan Sonnenbergs Inc