IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA15/18

In the matter between:

BULELWA SAMKA	**Appellant**
and	
SHOPRITE CHECKERS (PTY) LTD	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION	
AND ARBITRATION	**Second Respondent**
COMMISSIONER ELRIDGE EDWARDS NO	**Third Respondent**

Heard: **25 February 2020**

Delivered: **18 May 2020**

Summary: Unfair discrimination based on race – scope of the applicability of s60 of the EEA limited to conduct of an employee towards fellow employee/s - s60 does not extend to conduct of third party towards employee/s- consequently employer not committing unfair discrimination as a result of third party's action towards its employee/s.

Unfair discrimination on arbitrary ground – applicant bearing the onus to prove that he/she victim of unfair discrimination - failing to adduce evidence does not bring allegation within the confine of the EEA.

Coram: Davis and Sutherland JJA and Murphy AJA

JUDGMENT

DAVIS JA

Introduction

[1] This case primarily concerns the question of whether an employee can hold an employer liable in terms of s 60 of the Employment Equity Act 55 of 1998 ('EEA') for discrimination perpetrated by a customer against the employee on the grounds of the latter's race. A further question concerns whether the first respondent ('the employer') had unfairly discriminated against the appellant (the employee) by subjecting her to bullying and discrimination.

[2] The appellant was employed by first respondent at its Fish Hoek branch and commenced the employment on 3 March 2016. She was employed as a PT cashier. There is some uncertainty as to precisely the scope of the responsibilities of a PT cashier, but, from the evidence, it appears that she enjoyed the benefits of a full time cashier such as probation period, retirement benefits and various rights to leave including sick leave, maternity leave and annual leave.

[3] According to appellant, a white woman customer, Mrs Price approached her to pay for goods and to draw cash at her till. Mrs Price arrived at the till because the controller (referred to in the record as Nomfundo) did not have the R600 in her till which the customer required. According to the evidence given by appellant, the following then occurred:

> 'Ma'am, you would like to draw R600.00? And the customer said, Nomfundo was gone, the customer was at my till now, I didn't say, the customer said I didn't say R600.00, I said R1 000.00. I said I want R1 000.00, are you stupid, because I said I want R1 000, 00. And she started becoming aggressive and I said, no Ma'am, the only thing that I was told by my Controller was that you need a R600.00, not R1 000, 00. In any case, I do

> have R1 000.00 for you, I will give it to you. Then I took her card and drew the R600.00 and I gave it to her.
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> …
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> And she said I want the R1 000.000, I'll give you this card for the R1 000.00. I didn't say I want R1 000.00 on this Shoprite card. I said I wanted to pay R600.00 on the Shoprite card. It was a bit of a confusion, but I just calmed myself down, because I could see and the customer was angry, was upset, I calmed myself down.
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> …
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> And that was after Nomfundo left that the customer said I don't even know why you sitting there. I don't know what you doing there, you should go back, because you are so stupid. You are stupid. And I said, Ma'am, we assisted you and we did what you required us to do. And I don't understand now why, what is the reason for you to keep calling me stupid. She said you are stupid. You are a stupid kaffir. That is what you are, I don't know why you are sitting there, you don't know what you are doing there, you should go back to missionary.'

[4] According to evidence adduced by the first respondent, Mrs Price had provided the store with her contact details and indicated that she was willing to participate in any investigation which followed upon the alleged incident. She was however not called to testify by the first respondent. Furthermore, according to appellant when she spoke to both Mr Herman Beyleveld, the branch manager at Shoprite Fish Hoek, and Diane Roberts, the stock administrator, she was offered no assistance or understanding, notwithstanding her obvious distress at the verbal assault that she had reported to them.

[5] According to appellant, Roberts adopted the view that Mrs Price was a regular shopper who had patronised the store for at least 30 years, she knew that this customer would not be rude to the appellant and further 'she pays

your salary'. Under cross-examination, this phrase was also put to Mr Beyleveld who said 'I mean that sounds like something I would say that the customer pays our salary and we should not engage in an argument with the customer'. The lack of reaction by Mr Beyleveld and Ms Roberts induced the appellant to take her case to the CCMA. The third respondent who heard the dispute, on behalf of the CCMA, held in favour of the appellant, concluding that 'the approach adopted by Roberts and Beyleveld in respect of the Price incident was insufficient to address the racist abuse that the applicant suffered and that amounts to indirect racial discrimination.' Accordingly, he found that the respondent had contravened s 6 (1) of the EEA.

[6] The first respondent approached the Labour Court on appeal in terms of s 10(6) of the EEA against this order. The court *a quo* posed the question for determination thus: could the first respondent be held liable for the racist utterances of a customer as opposed to an employee? On the basis of the clear language of s 60 of the EEA, Steenkamp J, sitting in the court *a quo*, held that it could not, in that the section envisaged that, if an employee while at work discriminates against another employee, the employer is liable if it does not take the necessary steps to eliminate the racist conduct. By contrast, the provision could not be extended to hold that an employer was liable for the conduct of a customer which was directed towards an employer.

Appellant's case on appeal

[7] The essence of the appellant's case on appeal was that, the EEA applies where an employer fails to provide a protective work environment for an employee who has persistently claimed unfair discrimination in the workplace or fails to take active steps to address a complaint of racist verbal abuse of the employee even by a customer. In such a case, the employer would have failed to promote the achievement of equality in the workplace. The first respondent, by virtue of its failure to provide the necessary protective environment; facilitated the impairment of the human dignity of the appellant.

In the view of appellant's counsel, the third respondent had correctly found that indirect unfair discrimination on the grounds of race had been committed by first respondent present and that an order for compensation was appropriate in the circumstances.

[8] The key to the appeal turns on the scope of s 60 of the EEA, to which I now turn.

The EEA

[9] 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.
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> (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.
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> (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.
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> (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.'

[10] Section 6 (1) of the EEA is also relevant:

> '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.

[11] The wording of s 60 makes it clear that the EEA applies when there is a contravention by an employee who is defined in s 1 of the EEA as:

> 'any person other than an independent contractor who –
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> (a) works for another person or for the State and who receives or is entitled to receive, any remuneration; and
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> (b) In any manner assists in carrying on or conducting the business of an employer.'

[12] In *Mokoena and another v Garden Art (Pty) Ltd and another* [2008] 5 BLLR 428 (LC) at para 40, the Labour Court set out the requirements for the application of s 60 thus:

> '1. The conduct must be by an employee of the employer.
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> 2. The conduct must constitute unfair discrimination.
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> 3. The conduct must take place while at work.
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> 4. The alleged conduct must immediately be brought to the attention of the employer.
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> 5. The employer must be aware of the conduct.
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> 6. There must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA, and
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> 7. The employer must show that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA.'

[13] This approach follows the express wording of the section. The applicability of s 60 is expressly confined to an employee as defined in s1 of the EEA. It is to upon this section that appellant must base a viable cause of action. There is, however, no plausible basis to engage in interpretive moves to extend the scope of this provision which is clearly and unambiguously confined to specific relationships between employers and employees.

[14] That s 60 of the EEA applies exclusively to employees makes manifest good sense in that an employer exercises authority over an employee but none over a customer. An employer has no control over how a member of the public might behave in entering a store such as that own by the first respondent. It is difficult to see how such a cause of action could be implemented, that is to hold an employer liable to its employee for the action of a customer which is directed at the employee.

[15] The appellant is not without a remedy. She is entitled to launch a delictual claim against the customer and she could pursue an unfair discrimination claim against the same customer in the Equality Court in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. =But what she cannot do is to bring a case against her employer in terms of s 60 of the EEA, based exclusively on the conduct of the first respondent, her employer.

The cross appeal

[16] Appellant also brought a claim against the employer on the basis that she was subject to harassment at her workplace. She alleged that she had been defamed, victimised, bullied and subject to emotional abuse by employees of first respondent. The appellant contended further that the first respondent's practices in the store were racist towards black cashiers in general and that she, in particular, had been targeted for particular bullying and victimisation by supervisors and managers because she had raised a specific grievance with regard to these racist practices. After evaluating the evidence presented

by the parties, the third respondent concluded that there was no evidence that any of the issues raised by the appellant related to racial discrimination. In his view, 'they related simply to operational issues within the store such as the shortage of till packers'. For these reasons, he did not find any evidence of racial discrimination in relation to the alleged practices to which black cashiers were alleged to have been subjected.

[17] With regard to the specific issue of appellant being bullied and victimised, the third respondent found that there was no indication that these practices, which he accepted had taken place, were due to her race. Rather they were based on the frequency with which she lodged complaints and grievances, some of which her supervisors regarded as petty or frivolous. The bullying and victimisation could not be linked to race. Appellant bore the onus of establishing that some other ground in respect of which these actions could be regarded as discriminatory. Her failure to do so meant that this part of the case had to be dismissed.

[18] Appellant lodged a cross-appeal against this decision. Before the court *a quo,* appellant's counsel argued that the third respondent ought to have found that the first respondent was liable for unfair discrimination on the ground of bullying, harassment and victimisation on the basis that it had been sufficiently proved by the evidence presented by appellant.

[19] It appears that the finding that these actions were not based on race was not challenged. Thus the court *a quo* found that the appellant had not shown that the harassment was based on a listed or other arbitrary ground. Hence she had not shown the presence of unfair discrimination as defined in the EEA.

[20] On appeal, the appellant's counsel submitted that first respondent failed to show that it had a coherent policy against harassment, bullying or victimisation of its employees. Once the third respondent concluded that there was sufficient evidence of bullying, harassment and victimisation, in the

view of appellant's counsel, he should have found that first respondent was liable on a charge of unfair discrimination.

[21] This submission has to 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)

[22] Section 11 of the EEA makes it clear an allegation of that 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 –
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> (a) did not take place as alleged; or
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> (b) is rational and not unfair; or is otherwise justifiable.
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> (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –
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> (a) the conduct complained of is not rational;
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> (b) the conduct complained of amounts to discrimination; and
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> (c) the discrimination is unfair.'

[23] There is a burden placed upon the appellant 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 appellant, that is based on 'an arbitrary ground'. So much is clear from the wording of s 11(2) of the EEA.

[24] In evaluating the third respondent's award, it is important to note that there was no evidence from any other worker nor was there any other evidence to gainsay the following conclusion of the third respondent 'I formed the impression that although some of the witnesses signed the grievance letter they were not interested in testifying for the applicant.' While the appellant maintained that the other cashiers were intimidated, she conceded that she did not have proof thereof. The conclusion reached by third respondent is most certainly not an unreasonable conclusion based on the available evidence.

[25] The evidence presented by first respondent holds further significance with regard to the bullying and victimisation. Ms Natasha Kiewitz, the administrative manager of Shoprite Fish Hoek, who had been employed by first respondent for some 25 years, testified that, on occasions when the appellant had reported various incidents that had occurred to her, she had dealt with these and addressed appellant's complaints directly with the alleged perpetrators. She also testified that, on a further occasion, when the appellant had raised a grievance with regard to Mr Beyleveld, both she and Ms Skriker, the regional manager had insisted that Beyleveld apologies to appellant. This evidence was confirmed by Mr Skriker. Ms Kiewitz also testified that she had severely rebuked Mr Elton Arende for his conduct towards the appellant, after she had received a complaint from appellant.

[26] In summary, no evidence which the appellant was able to produce 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. Furthermore, there was evidence, which was not challenged, that efforts had been made on a number of occasions by management of first respondent to

ensure that behaviour of which the appellant complained was dealt with and that the perpetrators were suitably rebuked. This was not a case where management adopted a passive stance to the complaints lodged by appellant.

[27] In the circumstances, there is no basis by which to disturb the finding of the third respondent and the court *a quo* in respect of the cross-appeal that was brought against the dismissal by the third respondent of the complaints of racist practices and bullying. By contrast, for the reasons set out in this judgment the appeal stands to be dismissed.

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

[29] Accordingly, the appeal is dismissed. There is no order as to costs.

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Davis JA

Sutherland JA and Murphy AJA concur.

APPEARANCES:

FOR THE APPELLANT:	Adv Sidaki
	Instructed by Legal Aid SA
FOR THE FIRS RESPONDENT:	Adv Craig Bosch
	Instructed by Cliffe Dekker