IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Reportable

CASE NUMBER: C437/2003

DATE HEARD: 28/08/2006

DATE DELIVERED:1/09/2006

In the matter between:

CO-OPERATIVE WORKER ASSOCIATION (COWA) **FIRST APPLICANT**

INDEPENDENT DEMOCRATIC EMPLOYEES ASSOCIATION **SECOND APPLICANT**

and

THE PETROLEUM OIL & GAS CO-OPERATIVE OF S A **FIRST RESPONDENT**

UNITED ASSOCIATION OF S A **SECOND RESPONDENT**

CHEMICAL ENERGY PAPER PRINTING WOOD & ALLIED WORKERS UNION **THIRD RESPONDENT**

SOEKOR STAFF ASSOCIATION **FOURTH RESPONDENT**

JUDGMENT

PILLAY D, J:

Introduction

1. This claim based on discrimination is being pursued by the second applicant, the Independent Democratic Employees Association (IDEA). The first applicant withdrew from the proceedings in December 2004. The third and fourth respondents do not oppose the action.

2. The facts of this dispute are: About 2003 the Petrol Chemical Enterprises, Mosgas, Soekor and Strategic Fuel Farms (SFF) merged to form the Petroleum Oil & Gas Co-operation of South Africa (Pty) Limited (Petrol S A), the first respondent. Petrol S A and the trade unions, representing its work force, including the United Association of South Africa (UASA), the Chemical Energy Paper Printing Wood & Allied Workers Union (CEPPAWU) and the Soekor Staff Association (SSA), the second to fourth respondents respectively and IDEA, the second applicant, engaged in negotiations to streamline, standardise and consolidate the conditions of employment of the various categories of employees. At some stage the second applicant withdrew from the negotiations.

3. The respondent trade unions referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA). Negotiations under the auspices of the CCMA culminated in a collective agreement that is binding on not only the parties to the agreement, but also the second applicant and its members.

4. The second applicant was not party to the deliberations under the auspices of the CCMA. It had 33 members. All of them were employees of Petrol SA. Petrol SA had about 1 300 employees.

The second applicant's representivity was barely 2,5% of Petrol SA's total work force. It was clearly a minority trade union.

5. Prior to the merger, the Mosgas employees, who included members of the second applicant received superior medical aid for dependents. Mosgas had contributed 94% towards the total medical aid cost which was paid to the medical aid fund. The contributions toward the employee as the principal member was R888,00, to the spouse or adult dependant of the employee, R658,00 and to each dependant child, R318,00.

6. One of the terms of the collective agreement was that the actual cost of the employees' medical aid would be consolidated into the employees' total guaranteed remuneration (TGR's). The employees could then choose how they wish to use that portion of their remuneration. They could elect not to use it for medical aid at all. The consequences of this term of the agreement was that the employees with dependent spouses and children benefited significantly more than employees without dependants. The TGR of employees with family-responsibilities increased substantially. The second applicant's members had no quarrel with that. They were opposed to the unintended consequence of the consolidation of the medical aid contribution to the TGR.

7. Other terms and conditions of employment, including car benefits, retirement funding and group life assurance were calculated on the basis of the TGR. As the employees with family responsibilities had higher TGR's, the amounts of these components of the remuneration were higher for employees with family responsibilities than for employees without family responsibilities.

8. The crux of the second applicant's complaint therefore, is that the employees doing the same work are differentiated purely on the basis of their family responsibilities or more precisely, the absence of such responsibilities. It contends that the differentiation amounts to discrimination which is unfair and unjustified as it is a violation of the principle of the right to equal pay for equal work or work of equal value.

Objections *in limine*

9. Mr Ntsebeza (SC) for Petrol S A raised several objections at the outset:

10. Firstly he contended that the second applicant's statement of claim did not disclose a cause of action. This ground was not specifically pleaded but the second applicant did not object to it being raised. The Court will deal with it.

11. Disclosing a cause of action refers to pleading every fact which an applicant has to prove to support a judgment in its favour. It is not every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. (Classen – *Dictionary of Legal words and phrases*: July 2006, Butterworths)

12. It is not correct that the second applicant's statement of claim does not disclose a cause of action. The second applicant set out the terms of the collective agreement in paragraph 5.2 and from paragraphs 5.3 to 5.11, it explains the impact of the application of the first respondent's employment policies. There is no material dispute over these facts. The point of departure emerges in

paragraph 5.5 where the second applicant alleges that there is no justification in law or the moral values of society for the differentiation.

13. Petrol S A concedes the differentiation, but denies that it amounts to discrimination or that it is unjustified.

14. The second applicant had at all times opposed the application of the collective agreement to its members. To this end it lodged an internal grievance which was followed by a dispute to the CCMA. When it remained unresolved, it was referred to the Labour Court in terms of section 10(6)(a) of the Employment Equity Act 55 of 1998 (EEA). The facts pleaded and the legal submissions of the second applicant fall squarely within the ambit of section 10(6) of the EEA and accordingly, the jurisdiction of this Court.

15. As Ms Barnard for the second applicant points out, the crux of the complaint is discrimination. Discrimination is a matter over which the Labour Court undisputedly has jurisdiction. *SALSTAFF & Another v Swiss Port South Africa (Pty) Ltd & Others (2003) 3 BLLR 295 LC*. The pleadings do disclose a cause of action and the court has jurisdiction to hear it.

16. The second objection was that the dispute should have been referred to arbitration in terms of section 186(2)(a) as it is an unfair labour practice.

17. Section 186(2)(a) defines "unfair labour practice" to mean any unfair action or omission that arises between an employer and an employee involving:

> ''(a) Unfair conduct by the employer relating to the promotion,

> demotion, probation (excluding disputes about dismissals for reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee*."

18. Relying on *Schoeman & Another v Samsung Electronics SA (Pty) Ltd 1997(10) BLLR 1364 LC*, Ms Barnard correctly pointed out that the second applicant's claim is not for a benefit but for remuneration. The components of the employees' pay packets that were added to the basic pay, were terms and conditions of employment that were agreed or prescribed by law, as in the case of overtime pay. They were not optional or discretionary payments.

19. The third ground of objection was that the dispute should have been referred to arbitration in terms of section 24 of the Labour Relations Act 66 of 1995 (the LRA) as it concerns the interpretation and application of the collective agreement.

20. The interpretation and application of the collective agreement is common cause. There is no dispute about what the agreement means, and to whom and under what circumstances it applies. It is also common cause that the effect of the application is to differentiate employees with family responsibilities from those without family responsibilities. The only issue is whether the differentiation is unjustifiably discriminatory. The dispute is not arbitrable under section 24.

21. The fourth objection *in limine* was that the issue in dispute was not regulated by the collective agreement; it involved unilateral changes to terms and conditions of employment and matters of mutual interest. The applicant's members should, therefore, have gone on strike in terms of section 64.

22. The first question is whether a strike would have been the most

appropriate form of dispute resolution. A strike is the most extreme form of dispute resolution. On an imaginary triangle, where negotiation forms the base layered over by conciliation, mediation, facilitation, arbitration and litigation, industrial action is at the apex of the triangle. Symbolically, the triangle implies that few disputes should be resolved by resorting to industrial action and most disputes should be settled by consensus. They elected to litigate, a less extreme form of dispute resolution.

23. Section 64 allows even a single employee to strike. Assuming that the second applicant's members could have gone on strike, as a minority union whose members commanded no significant bargaining power, the strike would have had little impact. A strike would not have been an appropriate form of dispute resolution.

24. If the dispute was framed as a matter of mutual interest, say for better pay and conditions of service, industrial action is the prescribed method of dispute resolution. Even though a strike could be ineffective for a minority union, it is the only form of dispute resolution available unless they can persuade the employer to consent to some other process such as interest arbitration.

25. In this case the dispute was not framed as a matter of mutual interest or a unilateral change in conditions of employment. The second applicant astutely framed it as one concerning a dispute of right not to be discriminated and not as a dispute of interest in support of a collective bargaining demand for equal or better conditions of employment. Framed in this way, the dispute falls within the jurisdiction of the Court.

26. All the objections *in limine* are accordingly dismissed.

27. At the end of the evidence and argument, neither party had made any reference to international labour law and foreign law. The Court found that the essential content of the right not to be discriminated on the grounds of family responsibilities had not been properly ventilated. It directed the parties to investigate the genesis of the inclusion of our family responsibilities as a prohibited ground of discrimination in section 6 of the EEA, by reference to, amongst other things, the International Labour Organisation (ILO) instruments and case law both local, foreign and international. The matter was adjourned to the next morning for that purpose.

Further submissions for the first respondent on points *in limine*:

28. When the matter resumed, Mr Ntsebeza raised as an additional point *in limine* that the second applicant had no standing because its numbers could not validly claim the right not to be discriminated on grounds of family responsibility, because they had no family responsibility.

29. The issue of standing is distinct from the question as to whether the second applicant's members have an enforceable right. Standing refers to the power, authority, mandate or legal capacity to institute proceedings. It is about whether the person who approaches the court is a proper party to present the matter. The focus is on the party bringing the matter to court and not the issue to be adjudicated. (Chaskalson, *Constitutional Law of South Africa*: Juta Publication, updated 2005) The second applicant as a registered trade union has standing to institute proceedings on behalf of its members. Its standing was not challenged until the last day of the hearing.

30. Mr Ntsebeza's second addition to his points *in limine* was that the

second applicant's statement of claim had disclosed no cause of action because its members did not have family responsibilities. This point also has no merit. The second respondent did not except to the pleadings on those grounds. Pleading a cause of action means setting out the legal and factual basis of the claim. Whether the claim has any merit is a separate question determined when the pleadings close. Thus if an applicant is unsuccessful in proving its claim, that does not render its pleadings excipiable because it does not disclose a cause of action. If the pleading does not set out sufficient facts or disclose a legal basis for the claim, the pleading would be *excipiable.* The Supreme Court of Appeal in *Klokow v Sullivan 2006 (1) SA 259 (SCA)* paragraph 24, cautioned against pleadings being approached in an overly technical and formalistic way. Cases which are fact bound or which involve considerations of where the equities lie, should not be decided by exception.

31. These supplementary submissions that Mr Ntsebeza raised did not take the points *in limine* regarding jurisdiction any further.

Submissions for the second applicant on the merits

32. The first respondent's remuneration policy discriminates unfairly against the second applicant's members based on family responsibilities and their health status or similar grounds. The two-stage test for unfair discrimination developed in *Harksen v Lane NO & Others 1998(1) SA 300 CC* apply. The first respondent's remuneration policy affects single and married employees with no dependants in a serious manner as it has a serious detrimental effect on their remuneration packages. It affects their dignity in that they are not valued financially on the same basis as those with dependants.

33. As family responsibility as a ground of discrimination is listed, the fairness is presumed. The second applicant's reliance on health status is on an unspecified ground and is therefore not presumed. The perjorative element of the differentiation is that the unequal treatment is based on personal attributes and characteristics (*Harksen* above; Carol Cooper, The Boundaries of Equality in Labour Law 2004 ILJ 813 at 819). The measures affected vital interests of the employees' professional lives (*Larbi-Oadam & Others v Members of the Executive Council for Education & Others v Members of the Executive Council for Education (North-West Province & another 1997(1) SA 745 CC).*

34. Neither motive nor a negotiated outcome are defences to discrimination. (*Leonard Dingler Employees Representative Council and Others v Leonard Dingler (Pty) Ltd 1998 (19) ILJ 285 LC)* Unfairness is assessed on the basis of its impact on the person allegedly discriminated (*Hoffman v South African Airways 2000(21) ILJ 2357 CC*). Once discrimination is proved, the onus shifts to the employer to prove that it was fair. (*Ntai & Others v S A Breweries Limited 2001(22) ILJ 214 LC*.)

35. Petrol S A has shown that it has differentiated and discriminated. Even if there were commercial reasons of practicality which compelled the first respondent to consolidate the medical aid contribution, they did not outweigh the discrimination against the single employees with no dependants. (*Kadiaka v Amalgamated Beverage Industries 1999 (20) ILJ 373 LC*)

Submissions for the first respondent on the merits

36. The definition of family responsibility makes it clear that only

workers with dependants can legitimately invoke the provisions of section 6(1) of the EEA. Single employees are legitimately not entitled to invoke the provisions of section 6(1). Hence the submissions discussed above that the applicants had no standing in court. For these reasons too the claim should be dismissed on the merits. ILO convention number 156 on Workers with Family Responsibilities of 1981, identified the target group as people with family responsibilities who must be reasonably accommodated (Employment Equity Law Service Issue 6, 2006 P 7-52). The differentiation is justifiable "unfair discrimination," (Pretorius et al. *Employment Equity Law* Issue 6 P 7-53.) Furthermore, a measure that is challenged as violating the principle of equality would be valid if it promoted the achievement of equality and was designed to protect and advance persons disadvantaged by unfair discrimination. (*Minister of Finance & Another v Van Heerden 2004(6) SA 121 CC*.)

The essential content of the right.

37. Internationally, the family is an institution that is highly valued. The United Nations Declaration of Human rights (the Declaration) acknowledges the right to "found a family", which it describes as:

> ‘‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". (Article 16(1) and (3))

38. Article 23 of the Declaration recognises that:

> "(2) Everyone, without any discrimination, has the right to equal pay for equal work."

39. Sub-clause (3) of article 23 links the right of everyone to:

> "just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection."

40. Article 16 the European Social Charter, 1996 (the charter) recognises the right of the family to social, legal and economic protection in the following terms:

> "With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means."

41. Many decisions of the Constitutional Court of South Africa emphasise the important status of the family. (*Dawood & Another v Minister of Home Affairs & Others, Shalabi & Another v Minister of Home Affairs & Others, Thomas & Another v Minister of Home Affairs & others 2000(1) SA 997 (CC); Daniels v Campbell NO & Others 2004(5) SA 331 (CC); Minister of Home Affairs v Fourie (Doctors for life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs 2006 (1) SA 524 (CC); National Coalition For Gay & Lesbian Equality & Other v Minister of Justice & others 1999(1) SA 6 (CC)*)

42. The family is subject to the pressures of modern life and the struggle for resources. As a result the international community has come to recognise workers with family responsibilities as a

vulnerable category of people deserving special protection.

43. Article 23(d) of the charter declares the termination of employment on the grounds of family responsibility as invalid. The ILO adopted the Convention on Workers with Family Responsibilities, Convention No 156 of 1981, and Recommendation 165 of 1981.

44. The preamble to the Convention and Recommendation motivates for workers with family responsibilities to be targeted for special treatment, not those without such responsibilities.

45. Article 5 of Convention 111, the Discrimination in respect of Employment and Occupation Convention of 1958) also recognises workers with family responsibilities as requiring special protection or assistance. The Recommendation 123 on Employment (Women with Family Responsibilities of 1965, was driven by the recognition of women as a vulnerable group of workers. That Recommendation has since been superseded by the 1981 instruments, which recognises today that both men and women have family responsibilities.

46. The convention applies to workers with family responsibilities and men and women who have dependant children and other members of the immediate family who need care and support, (Article 1 of Convention C156 of 1981). The EEA defines family responsibilities similarly to the ILO as:

> "the responsibility of employees in relation to their spouse or partner, their dependant children or other members of their immediate family who need their care or support and approach."

47. As Mr Ntsebeza correctly submitted, the definition is dispositive of

the question of who is protected. Furthermore, the EEA reinforces the aim of protecting workers with family responsibilities as a disadvantaged category in the preamble to the EEA read with section 6(1) by declaring as its purpose the achievement of equity in the work place by:

> "promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination." (section 2(a) of the EEA)

48. It is now trite that South African courts pursue a substantive and not a formal approach to equality. This approach resonates with Article 4 of ILO Convention 156 which requires :

> "…effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken –
>
> (a) to enable workers with family responsibilities to exercise their right to free choice of employment; and
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> (b) to take account of their needs in terms of conditions of employment and in social security."

49. More pertinently, Convention 111 on discrimination provides, at Article 5:

> "1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.
>
> 2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or

> cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination."

50. In the context of this case, the result is that special measures are applied to workers with family responsibilities to adjust for the hardships of having such responsibilities. Without affirmation of their special status, there can be no equality amongst the work force.

51. Responsibility for addressing the special needs of workers with family responsibilities, is not for the State to bear alone. In this case, Petrol S A is sharing this responsibility by providing additional remuneration for employees with dependants. The basis for the additional remuneration is not merely endorsed, but encouraged by national and international law.

52. The second applicant's claim that its members without dependants be paid the same additional component of their remuneration as their counterparts with dependants, is premised on a formal conception of equality at best. Its complaint that the difference in the additional components to the basic remuneration impairs the dignity of its members because they are not rewarded equally for work of equal value is not correct. The basis of the differentiation is unrelated to the work employees do or the quality of their performance. Nor is not having family responsibilities a disadvantaging difference. The converse can be true. The second respondent pays more to employees with dependants, not as a reward for performance. Nor is it an accolade for special achievement. It is a legal and moral response to the the social needs of a vulnerable group of employees. Whether the employees have or do not have dependants, has no impact on their intrinsic value and dignity as human beings. Their

remuneration, based on the number of dependants they have, cannot impact on their dignity. The impact of the differentiation on the dignity of employees without family responsibilities is not dissimilar to the impact of a municipality levying higher utility charges from property owners in areas that are predominately white.(*Pretoria City Council v Walker 1998 (2) SA 363 CC)*

53. Ms Barnard urged the Court to intervene in the collectively bargained agreement of the respondent. The Court accepts as a general proposition that it may do so to prevent unjustified discrimination. Having found that the collective agreement is not unfairly discriminatory, the Court has no need to intervene. The intervention is also unwise, firstly because it could upset the delicate balance of the bargaining partners struck in the course of merging three entities with different conditions of employment.

54. Secondly, the bargaining partners had to ensure that employees were not worse off after the merger. The second applicant's members are not disadvantaged relative to their position prior to the merger. The employees with family responsibilities retained their TGR except that it took a different form. They were advantaged relative to those without family responsibilities even before the merger and remained so thereafter.

55. Any attempt to denude them of benefits they had prior to the merger, purely for the sake of achieving formal equality, would be unlawful and counterproductive to the fundamental purpose of collective bargaining which is to secure the best deal for the greatest number of employees for the greater good of all. The applicant's members represent 2.5% of the work force. Of this number only a portion would not have family responsibilities. most employees in the work place have family responsibilities. Most employees therefore benefit from the new remuneration scheme.

56. Thirdly, the second applicant has not advanced a more credible formula or method of calculating remuneration, assuming that the current system of remuneration is in equitable.

57. In all the circumstances, the application must fail. With regard to cost, Ms Barnard urged the Court to make no order as to costs as both parties approached the Court in good faith with a legitimate dispute which deserved ventilation before an independent and impartial adjudicator. Mr Ntsebeza asked that costs follow the result. At a previous hearing costs were awarded against the first respondent and on that basis this Court should follow a similar course, he submitted.

58. The case for the second applicant was presented properly. Concessions were made appropriately. The second applicant and its members genuinely believed that they had a try-able cause. Applications under the Employment Equity Act are few and far between. A cost order could have the effect of discouraging the ventilation of disputes and stalling the development of the jurisprudence on equality. That would not help transformation. It could result in disputes simmering below the surface with the parties being reluctant and wary of cost orders if they assert their rights.

59. At the same time claims of discrimination should be thoroughly investigated and well researched with due regard being had to the essential content of the right before parties litigate. Frivolous or ill-considered claims should be discouraged. These considerations are, therefore, taken into account in making the cost order.

60. The order granted by the Court is the following:

a. The claim is dismissed.

b. The second applicant is ordered to pay 30% of Petrol SA's costs.

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PILLAY D, J

APPEARANCES:

For the 2nd applicant : Ms D Barnard
(Desiree Barnard Attorneys)

For the 1st respondent : Adv N.T Ntsebeza SC
(Instructed by Nalane Manaka Attorneys)