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LEONARD DINGLER EMPLOYEE REPRESENTATIVE COUNCIL & OTHERS v LEONARD DINGLER (PTY) LTD & OTHERS

Created by Jenny Erasmus [Administrator], last modified on Jul 04, 2013



YEAR: 2007

PLAINTIFF / APPLICANT / APPELLANT: FIRST APPLICANT: LEONARD DINGLER EMPLOYEE REPRESENTATIVE COUNCIL
SECOND APPLICANT: MR B NKUNA
THIRD APPLICANT: XXXXX
FOURTH APPLICANT: XXXXX

DEFENDANT / RESPONDENT: FIRST RESPONDENT: LEONARD DINGLER (PTY) LTD
SECOND RESPONDENT: LEONARD DINGLER (PTY) LTD STAFF BENEFIT FUND
THIRD RESPONDENT: LEONARD DINGLER (PTY) LTD PENSION FUND
FOURTH RESPONDENT: LEONARD DINGLER (PTY) LTD PROVIDENT FUND

COURT: LABOUR COURT

CITATION: (1997) 11 BLLR 1438 (LC)

POST / PRIOR ACTION: CCMA

JUDGE(S): SEADY AJ

GROUND(S) OF DISCRIMINATION: RACE, ARBITRARY GROUND

STATEMENT OF FACTS:

The first respondent is the employer of the applicant employees' (namely the second to fourth applicants). Three retirement funds operated between the first respondent and its employees, namely the:-

- Leonard Dingler (Pty) Ltd Staff Benefit Fund (" the Staff Benefit Fund"),
- Leonard Dingler (Pty) Ltd Pension Fund ("the Pension Fund"); and
- Leonard Dingler (Pty) Ltd Provident Fund ("the Provident Fund").

As admitted by the first respondent, all white employees were paid on a monthly basis, irrespective of their job title, rank or length of service. This was in contrast to black employees who were paid on a weekly basis, and only "promoted" to monthly pay depending on their length of service, job title and rank. Only a handful of black employees had been promoted to monthly pay.

The membership of the Staff Benefit Fund comprised of predominately white employees, paid on a monthly basis. Shortly prior to the commencement of court proceedings, the first respondent invited one black employee, who was paid on a monthly basis, to join the Staff Benefit Fund. The membership of the Pension Fund comprised only of black employees, all of which were paid weekly. The rules of each fund stipulated that membership was compulsory for all eligible employees. Furthermore the first respondent paid in different employer contributions to each fund. It made a 10% contribution to the Staff Benefit Fund, and only a 5% contribution to the Pension Fund and Provident Fund.

The applicant employees' were black employees, paid on a monthly basis. They were members of the Pension Fund. Prior to the establishment of the Pension Fund, they were members of the Provident Fund. A dispute arose following a letter sent by the applicant employees' representative to the first respondent requesting that the applicant employees' be allowed to join the Staff Benefit Fund. They included within an allegation that their exclusion amounted to direct and indirect discrimination based on race. The first

respondent denied their admission to the Staff Benefit Fund, and challenged the discrimination allegation. It stated that the Pension Fund was for black employees and the Staff Benefit Fund was for white employees. Despite attempts to resolve the matter, the dispute was referred to the CCMA however it remained unresolved.

Before the Labour Court the applicant argued that the first respondent's refusal to admit them into the Staff Benefit Fund amounted to unfair discrimination based on race.

The respondent denied that its conduct constituted direct unfair discrimination. It argued that the Staff Benefit Fund rules, as per its interpretation, limited membership to employees paid on a monthly basis. This argument was first raised during CCMA proceedings. (Notably the rules did not expressly stipulate such an admission criteria.) The applicant employees', paid on a monthly basis, were therefore in its opinion not eligible for membership.

The applicants disputed the genuineness of first respondent's distinction and eligibility criteria between monthly paid employees and weekly paid employees. In closing arguments the first respondent conceded that its criteria for membership eligibility amounted to indirect discrimination based on race, however such discrimination it argued was not unfair on the facts.

Law Applicable: At the time of proceedings, item 2(1)(a) of schedule 7, of the Transitional Arrangements of the Labour Relations Act 66 of 1995 (LRA) was applicable. It stated the following:-

2. Residual unfair labour practices

(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving-

(a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;...

It has since been repealed. Virtually identical wording is present within s 6 of the Employment Equity Act 55 of 1998.

ISSUE OF LAW:

Whether the conduct of the first respondent amounted to unfair discrimination? This required an examination as to:

- Whether there was direct racial discrimination?
- Whether there was indirect racial discrimination?
- Was there discrimination, either directly or indirectly, on any arbitrary ground?
- Was the discrimination unfair?
- Did an unfair labour practice exist?
- Could the Labour Court entertain claims against the retirement funds?
- If it was established that an unfair labour practice existed between the employer and its employees, what remedy should be granted?

DECISION, RATIO AND OUTCOME (including minority judgment where applicable):

The court held that the first respondent's interpretation and its application of the rules of the Staff Benefit Fund amounted to unfair discrimination based on race and on an arbitrary ground. The conduct of the company was regarded as unfair, and constituted an unfair labour practice with reference to item 2(1)(a) of schedule 7 of the LRA.

- Direct Racial Discrimination

The court found that exclusion of the applicant employees' from the Staff Benefit Fund amounted to direct racial discrimination.

The court assessed the first respondent's interpretation of the eligibility criteria to the Staff Benefit Fund, namely being a monthly paid employee. It noted that the wording in the Staff Benefit Fund rules, which the first respondent relied on in support of its eligibility interpretation, was also within the Pension Fund rules. Despite such similarity the Pension Fund's membership consisted of monthly paid employees and weekly paid employees. No explanation was provided to the court regarded this anomaly. Irrespective of whether the first respondent's construction of the time of payment criterion was genuine; the court held its conduct amounted to direct racial discrimination which affected the applicant employees' membership to the Staff Benefit Fund. It was discriminatory conduct:-

- to pay black employees on a weekly basis, with a possibility of monthly payment, while paying all white employees on a monthly basis without restriction; and
- not to require or offer black employees, who were being paid monthly, admission to the Staff Benefit Fund despite their apparent eligibility.

The court noted that the first respondent had invited the first black employee, who has being paid monthly for several years, to the Staff Benefit Fund shortly before the commencement of proceedings. Notably the said employee had been eligible for membership, as per the first respondent's criterion, for several years prior to actual membership. On the facts there were several other black employees who were being paid monthly, none of which were members of Staff Benefit Fund, and had never received a request to join such fund. The court refrained from commenting on the genuineness of the first respondent's acceptance of the first black employee to the contested fund. It determined that such facts supported the conclusion that the first respondent failed to consistently apply its eligibility criterion to all its employees, specifically black monthly paid employees. Therefore there existed direct racial discrimination against black monthly paid employees.

The court defined direct racial discrimination as when black people are treated differently due to their race or characteristics associated with their race. It noted that the intention of the alleged wrongdoer is irrelevant in the enquiry, and that discrimination is not equated with actual prejudice.

- Indirect Racial Discrimination

The first respondent conceded that the monthly paid criterion for membership to the Staff Benefit Fund amounted to indirect racial discrimination. However, it argued that such discrimination was fair.

The court defined the concept of indirect discrimination as an apparently neutral criterion, condition or policy that adversely affects "a disproportionate number of a certain racial group in circumstances where they are not justifiable". Motive or intention is irrelevant.

The court held that the restriction on membership to the Staff Benefit Fund to employees who were monthly paid had a "disparate impact on the company's black employees." The number of black employees who qualified for membership was "disproportionately low." The first respondent neglected to establish an objective justification for the monthly paid criterion or its application. As such the court held that the first respondent's exclusion of the applicant employees, and its admission of only monthly paid employees to the Staff Benefit Fund, indirectly discriminated against its black employees on the grounds of race.

The court noted that the first respondent paid a lower employer contribution to the Pension Fund and Provident Fund as compared to that of the Staff Benefit Fund. It held that the first respondent was required to make equal contributions to each fund, and its failure to do so discriminated against the members of the Pension Fund and Provident Fund.

- Is there discrimination on any arbitrary ground?

The court held that there was discrimination on an arbitrary ground. The monthly paid qualification was held to be an arbitrary ground for discrimination as contemplated in the then item 2(1)(a) of schedule 7 of the LRA.

On the facts there was no objective justification to permit only monthly paid employees to join the Staff Benefit Fund. The first respondent failed to advance any financial or business justifications.

- Is the discrimination unfair?

The court held that the discrimination was unfair.

It noted that the two defences to unfair discrimination, namely inherent job requirements and affirmative action were not applicable to the facts. The court defined discrimination to be unfair "if it is reprehensible in terms of the society's prevailing norms." It requires an examination of:-

- what is the object of the discrimination?;
- whether such object is legitimate?;
- what is the means to achieve the object?; and
- whether such means is proportional and rational?

By limiting the membership of the Staff Benefit Fund, the first respondent discriminated against black employees. It failed to provide the court with an explanation of the object of such conduct or proof that its objective was legitimate. Accordingly the discrimination was unfair.

The court dismissed the first respondent's argument that any possible discrimination was fair as it had shown a willingness to establish a new non-racial fund, which it argued countered any unfair discrimination.

- Does an unfair labour practice exist?

The court held that the conduct of the first respondent amounted to an unfair labour practice, as provided for in item 2(1) of Schedule 7 of the LRA. There existed unfair conduct by the first respondent as it perpetuated a fund for white employees and another for black employees

- Onus of Proof

The court held that once the complainant established a case of discrimination, the onus shifts to the employer to prove such discrimination was not unfair. It noted that it would be burdensome to expect the complainant to establish the unfairness of the discrimination. In the event that such a determination was regarded as incorrect, the court was satisfied that on the facts the applicants had established unfair discrimination.

- Can the Labour Court entertain claims against the retirement funds?

The court held that it had jurisdiction over retirement funds under the unfair labour practice provisions of the LRA. It determined that an unfair labour practice does not require there to be an act or omission committed by the employer itself. Such an act or omission can be committed by a third party provided it has an effect on the employment relationship between the employer and employee. The existence of the close link between the retirement's funds and the employer supported its determination.

Despite such finding the court did not regard the role of the retirement funds as important. On the facts the rules of the retirement funds did not give rise to an unfair labour practice. It was rather the employer's interpretation of such rules.

- Remedy

The applicants sought an order requesting the applicant employees' admission into the Staff Benefit Fund with immediate effect, and an order for compensation for the reduced contribution made by the first respondent to the Pension Fund and Provident Fund.

The court ordered that the parties be permitted an opportunity to devise their own remedy. It reasoned that the effect of the requested order will have a financial implication on the Staff Benefit Fund which the court has not in a position to assess. Neither party had provided the court with evidence as to the financial consequences of the requested order. Failing a suitable remedy within 10 weeks, the court would intervene.

LINK TO FULL DECISION: UNAVAILABLE ON SAFLII

LABELS: