



Collaboration Space / UCT Equality Law Database / 2001

# NTAI AND OTHERS V SA BREWERIES LTD

Created by Jenny Erasmus [Administrator], last modified on Jun 25, 2013

YEAR: 2001PLAINTIFF / APPLICANT / APPELLANT: APPLICANTS: DANIEL NTAI & 2 OTHERSDEFENDANT / RESPONDENT: RESPONDENT: SA BREWERIES LTDCOURT: LABOUR COURTCITATION: (2001) 22 ILJ 214 (LC)POST / PRIOR ACTION: N/AJUDGE(S): BASSON JGROUND(S) OF DISCRIMINATION: RACE, UNSPECIFIED UNLISTED GROUNDSSTATEMENT OF FACTS:

The three applicants were employed by the respondent as training officers. The comparable white employees of the respondent received higher salaries than the applicants. The applicants alleged that the pay differentiation amounted to unfair discrimination against the applicants by the respondent on the ground of race, alternatively on arbitrary grounds. The applicants sought an order declaring the aforesaid. The applicants further sought an order that the respondent pay the applicants 'a salary equal to that of their white counterparts, retrospective to a date to be determined by the court.'

Note to reader: The applicants relied on item 2 (1)(a) (entitled "Residual Unfair Labour Practices") of schedule 7 of the Labour Relations Act 66 of 1995 (LRA) as the applicable law which formed the basis for their allegations. This item has since been repealed and the comparable clause is contained within s 6 (1) of the Employment Equity Act 55 of 1998, as noted by the court. Also see comparable wording in s 187(1)(f) of the LRA (automatically unfair dismissals)

ISSUE OF LAW:

Whether the employer's conduct in paying white employees a higher salary than the black counterpart employees, who perform similar work or work of equal value, amounts to unfair discrimination based on race or arbitrary grounds?

DECISION, RATIO AND OUTCOME (including minority judgment):

The court dismissed the applicants application.

The court dismissed the applicants contention that the conduct of the respondent amounted to unfair discrimination based on race. It held that while the applicants had established a prima facie case of racial discrimination, the employer had adduced sufficient evidence to satisfy the court that the pay differentiation between white and black employees, which the respondent acknowledged to be excessive, was based not on the race of the applicants but on the outcomes of a series of performance based pay increments, and the experience and length of service of the respective employees.

In reaching such a determination the court discussed the onus of proof in discrimination cases. The onus rested on the applicants to prove a prima facie case that the alleged discrimination occurred. A mere allegation of discrimination was insufficient. It noted the causation test required in proving that the lower pay was linked to the race of the applicants. A mere differentiation in pay between employees who do similar work or work of equal value does not automatically mean that an act of discrimination has occurred. The differentiation in pay must be linked to and due to the race of the applicants. Once the applicants establish a prima facie discrimination case, the onus shifted to the respondent to prove that the discrimination was fair. On the facts the court accepted that the applicants could only establish a prima facie case based on inferences. The following facts, which were common cause, resulted in a strong inference that the pay differentiation was due to race, namely:-the similarity of the jobs, the differences in race between the applicants

and the said white colleagues, and the actual pay differentiation. The court accepted that the applicants had established a prima facie case of racial discrimination based on unequal pay for similar work or work of equal value.

The respondent provided detailed evidence as to its pay policy, the fairness of which was not disputed by the applicants, and the history and basis for the respective salaries of the applicants and their white colleagues. The respondent admitted that the pay differential between the respective contested salaries was excessive. It satisfied the court that it was taking active steps to reduce the pay differentiation, over time, by decreasing the pay increases of the white colleagues and increasing the pay increases of the applicants. The court accepted that the operational requirements of the respondent supported the process it had adopted, namely in not immediately reducing the pay of the white colleagues in an effort to ensure the respondent retained their services and skill. However such operational requirements could never serve as a justification for racial discrimination. On the facts such operational requirements was advanced to reflect how the pay differentiation was being addressed by the respondent. The court did not regard it as desirable to interfere with such a decision of the employer, considering that the applicants had failed to show the respondent was unwilling an/or evasive in rectifying the differentiation.

The court dismissed the applicants allegation that the 'pay differentiation' conduct of the respondent constituted unfair discrimination based on 'arbitrary' grounds. An 'arbitrary' ground is an unlisted ground of discrimination (such terminology used within item 2(1)(a) of Schedule 7 of the LRA). Citing the case of *Harksen v Lane*, in establishing an unlisted ground it must be proven that "the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or affect them adversely in a comparable serious manner." The applicants failed to specify the ground/s (unlisted ground/s) upon which the alleged discrimination was based. This omission was fatal to its application in this regard. Without an identified ground of discrimination the court was unable to assess the alleged "arbitrary" discrimination. It was insufficient for the applicants to merely allege arbitrary conduct by the respondent.

The court briefly referred to the elements required to establish indirect discrimination, and its application to the facts. It refrained from determining the issue as the applicants did not raise such allegation.

The court noted 'for sake of completeness' that the respondent had no legal obligation to apply the principle of affirmative action and 'somehow' increase the pay of the applicants. The application of affirmative action was a shield or a defence for an employer and no employee had a right to affirmative action.

LINK TO FULL DECISION: <http://www.saflii.org.za/za/cases/ZALC/2000/134.html>

LABELS: