THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 461/06

In the matter between :

RAOL INVESTMENTS (PTY) LTD
t/a THEKWINI TOYOTA Appellant

- and -

ZWELINJANE MADLALA Respondent

Before: **SCOTT, FARLAM, NUGENT, JAFTA & MAYA JJA**

Heard: **10 SEPTEMBER 2007**

Delivered: **27 SEPTEMBER 2007**

Summary: **Dismissal of employee – automatic unfairness – differentiation in treatment not necessarily racial discrimination.**

Neutral citation: **This judgment may be referred to as *Raol Investments v Madlala* [2007] SCA 120 (RSA)**

NUGENT JA

NUGENT JA:

[1] The respondent, who was employed by the appellant (the company) for about 15 years, was dismissed for assaulting his immediate supervisor. After protracted proceedings brought by the respondent to contest the fairness of his dismissal his claim was upheld by the Labour Court, which ordered that he be reinstated. An appeal by the company to the Labour Appeal Court (Zondo JP, Nkabinde and Davis AJJA) was not successful (except in a limited respect that is not material for present purposes). The company now applies for leave to appeal to this court. The judges who considered the petition referred it for oral argument[1] with directions that the parties prepare to argue the merits of the appeal if called upon to do so. The respondent, apparently for lack of funds, was not represented before us.

[2] There is some dispute concerning the details of the incident that gave rise to this matter but for present purposes I will accept the evidence that was tendered on behalf of the company. One afternoon the service manager, Mr van Rooyen, who was the respondent's immediate supervisor, while driving onto the premises of the company, accidentally drove over the respondent's foot. Van Rooyen proceeded to drive a further twenty or so metres where he parked his vehicle. He alighted, called out an apology to the respondent, and proceeded to his office. He sent another staff member to enquire whether the respondent had been injured and it was reported to him that he had not.

[3] The respondent was aggrieved at what he thought to be Van Rooyen's indifference to what had occurred. The following morning Van Rooyen was walking to the service department when he encountered the respondent and another employee. He greeted the respondent who responded with a vulgarity. Van Rooyen replied 'the same to you' and turned away to walk to his office.

[1] See s 21(3)(c)(ii) of the Supreme Court Act 1959.

The respondent approached Van Rooyen from behind and kicked him in the small of his back, whereupon Van Rooyen turned around, and the respondent threw a punch in his direction that grazed him on the shoulder. Van Rooyen reported the matter to one of his seniors, a disciplinary enquiry was held, and the respondent was dismissed.

[4] Had that been all that occurred the dismissal of the respondent ought not to have been exceptionable. Assaults at the workplace are unacceptable and will generally justify immediate dismissal.[2] (The company's disciplinary code expressly provided for that sanction.) However, some two years earlier the respondent had himself been the victim of an assault, which had not resulted in his assailant being dismissed, and he was aggrieved at what he considered to be unequal treatment.

[5] According to the respondent the earlier assault occurred after Mr Ferreira, who was at the time a salesman employed by the company, accidentally struck the respondent on the elbow with a metal pipe. The respondent reacted with a vulgarity whereupon Ferreira punched him. The two then came to grips and wrestled until the respondent slipped and fell to the floor. Ferreira struck the respondent's head on the floor, breaking his teeth, and the two were then separated by another employee.

[6] It is not disputed that the respondent did not lodge a formal complaint to management in consequence of the assault upon him by Ferreira and accordingly no disciplinary enquiry was held. (Why the respondent failed to do so is in dispute but that is not material.) Instead it was Ferreira who complained. He wrote to Van Rooyen lodging what he called a 'formal complaint against [the respondent] for verbal and racial abuse'. The matter

[2] John Grogan: *Dismissal, Discrimination and Unfair Labour Practices* 241

was not investigated further but Ferreira was given a warning and there the matter ended.

[7] The Labour Appeal Court found that the disparate treatment of Ferreira and the respondent respectively was unjustified, which, by itself, would ordinarily have justified a finding that the dismissal of the respondent was unfair.[3] However the court (in separate judgments of Nkabinde AJA with whom the remaining members concurred, and of Zondo JP with whom Nkabinde AJA concurred) went on to find that the dismissal of the respondent was automatically unfair (as contemplated by s 187(1)(f) of the Labour Relations Act 1995) because the disparate treatment was racially based.[4]

[8] Discrimination against an employee on the grounds of race or other arbitrary grounds clearly has no place in employment practices,[5] quite apart from being unlawful. But while a court must be vigilant to ensure that that does not occur, equally it must be wary of concluding too hastily that an employee has been discriminated against on grounds of race merely because disparity of treatment coincides with racial disparity.

[9] There seems to be some uncertainty in the labour courts as to where the burden lies of establishing that the reason for a dismissal either was or was not discriminatory[6] but it is not necessary to resolve that question in the

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[3] See the discussion of disparity of treatment in *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC) para 29; *Cape Town City Council v Masitho* (2000) 21 ILJ 1957 (LAC) paras 11-14; *Chemical Energy Paper Printing Wood & Allied Workers Union v Metrofile (Pty) Ltd* (2004) 25 ILJ 231 (LAC) paras 35-38.

[4] That subsection provides that a dismissal is automatically unfair if the reason for the dismissal is
'that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race …'

[5] See the judicial attitude to racial discrimination as it was expressed in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* (2002) 23 ILJ 863 (LAC).

[6] *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) para 57; *Mashava v Cuzen & Woods Attorneys* (2000) 21 ILJ 402 (LC); *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) para 28; *Janda v First National Bank* (2006) 27 ILJ 2627 (LC) paras 13-23. See, too, Martin Brassey: *Commentary on the Labour Relations Act* (Rev. Ser. 2 2006) A8-142; John Grogan: *Workplace Law* 9 ed p. 148; John Grogan: *Dismissal, Discrimination and Unfair Labour Practices* p. 202.

present case. In the present case the Labour Appeal Court reached its conclusion as a matter of inference from the established facts. Quite simply, it reasoned that because there was disparity of treatment that was not justified it followed axiomatically that the company discriminated against the respondent on the grounds of race.[7]

[10] That reasoning is unsound. Whether an employer has discriminated against an employee on the grounds of race (or on any other arbitrary ground) is a question of fact (whether the discrimination was unfair is a separate question). Where the evidence establishes, as it does in this case, that the employer treated employees differently on grounds other than race, there is simply no scope to infer that the employee was discriminated against on the grounds of race, because the reason for the disparate treatment has been established to be something else. That the differential treatment was not justified is immaterial to the factual enquiry as to the reason that it occurred.[8] In this case the company said that its disparate treatment of the two employees (Ferreira was white and the respondent is black) was because a formal complaint was lodged by the victim of the assault in one case but not in the other. Unless that explanation is rejected as no more than a smokescreen to conceal a more sinister motive (and in my view there are no proper grounds for doing so) there is simply no scope for an inference to be drawn that conflicts with that explanation.

[11] Had the order that was made by the Labour Appeal Court been dependent only upon that finding of racial discrimination it might well have constituted sufficient reason for this court to interfere. But I think it is

[7] See Nkabinde AJA para 24, apparently on the concession of counsel, and Zondo JP para 54.
[8] I do not agree with the suggestion in *Mafomane v Rustenburg Platinum Mines Ltd*, above, at para 57.3, that in the absence of a 'rational and justifiable basis for differentiation' an inference arises that the differentiation was made on the ground of race. If it is established as a fact that the differentiation was not made on the grounds of race then that fact is not altered by the additional finding that the grounds upon which the employer differentiated were either not rational or not justifiable.

apparent from the reasoning of that court that even had it not found that the dismissal was automatically unfair (on the grounds of racial discrimination) the Labour Appeal Court would in any event have found that the disparity of treatment alone rendered the dismissal unfair. Bearing in mind the test for leave to appeal to this court as it was articulated in *Fry's Metals*,[9] I do not think that good grounds have been shown for this court to entertain an appeal from that value judgment, which is peculiar to the particular circumstances, and raises no matter that is 'objectively of such importance to the parties or the public that special leave should be granted'.[10]

[12] Accordingly the application for leave to appeal to this court is refused.

R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

SCOTT JA)

FARLAM JA)

JAFTA JA)

MAYA JA)

[9] *NUMSA v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) paras 42 and 43.
[10] *Fry's Metals*, above, para 43.