

**IN THE EQUALITY COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Not Reportable Not of interest to other judges

15 June 2022	Vally J
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CASE NO: EQ 3/2021

In the matter between:

Paul Pinto

Complainant

and

Dimension Data

First Respondent

Dimension Data Group Provident Fund

Second Respondent

Old Mutual

Third Respondent

Judgment

Vally J

[1] The complainant, Mr Pinto, has approached this Court for relief against a grievance he has with the first respondent, Dimension Data (DD). He was an employee of DD from 1 April 2002 to 26 April 2018. He approaches this Court for relief against DD for unfairly discriminating against him on the grounds of disability.

[2] DD owned two insurance policies with the second respondent, Old Mutual. In terms of these insurance policies employees of DD stood to be compensated for loss of income as a result of an occurrence of a certain event, such as becoming permanently unable to work, which is referred to as a 'disability event'. Thus, in terms of the policies each employee was classified as a 'beneficial owner' while DD was classified as the 'policy owner'.

[3] It is his contention that his employment should have been terminated on the ground that he became 'permanently unable to work'. As such a 'disability event', as defined in the Long Term Insurance Act 52 of 1998, would have occurred and he would have become eligible to apply for certain benefits and/or compensation from Old Mutual in terms of one or both of the policies. The benefits and compensation would be a lump-sum payment upon being declared 'permanently unable to work' (disability event) and future monthly payments (income payments) thereafter for loss of income. For him to receive these, Old Mutual had to be notified of the disability event and an application for the benefits had to be lodged with Old Mutual. This was not done and he has lost out on the benefits. He is of the view that it was supposed to have been done by DD and it omitted to do so. Its omission has prejudiced him. He claims further that Old Mutual would have paid these amounts simply because he was eligible for them.

[4] The application is brought in terms of s 20(1)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Pepuda), 'in terms of contract and in terms of delict', and in terms of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution). More particularly, he claims that the omission by DD: (i) constitutes unfair discrimination as envisaged in s 1(xxii)(a) of Pepuda; (ii) caused him to lose a disability income benefit in the amount of R8 562 366.00; (iii) caused him to lose a disability lump sum benefit of R731123.04; (iv) caused him to lose his life savings of R752 449.26 which was for his retirement but has now been used to meet his day-to-day expenses; and (v) infringed his right to inherent dignity as expressed in s 10 of the Constitution and s 2 of Pepuda. Thus he seeks damages

for claims (i), (ii), (iii), (iv), and an apology for claim (v) the alleged breach of his right to dignity. The provisions of Pepuda are referred to in claims (i) and (v) only.

[5] DD opposes his claim for relief. It contends that the Equality Court is not jurisdictionally empowered to entertain the claims, as they all fall outside the ambit of Pepuda.

The jurisdiction of the Equality Court

[6] This court is established by s 16 of Pepuda, which states that every High Court 'is an equality court for the area of its jurisdiction.' At the same time it provides, in terms of s 23, for the High Court to sit in appeal against any decision of the Equality Court. Thus, the High Court is superior to the Equality Court. The powers and functions of the Equality Court are restricted to those conferred upon it by Pepuda.

[7] Pepuda prohibits unfair discrimination on a number of identified grounds such as, amongst others, race, gender, sex, sexual orientation, disability or age (identified grounds). It allows a person who claims to be a victim of such discrimination to approach the Equality Court for relief. The Employment Equity Act, 55 of 1998 (EEA) also prohibits unfair discrimination on the basis of the same identified grounds. The EEA is focused on the employment contract and is therefore applicable to employers such as DD, and employees such as Mr Pinto. The EEA provides for employees who allege discrimination on the grounds of, *inter alia*, disability to approach the Commission for Conciliation and Arbitration (CCMA) for relief through the process of

conciliation. If the employee fails to secure relief at the CCMA, s/he has the option to approach the Labour Court for relief.¹

[8] This overlap in the two statutes has made it necessary for the legislature to provide some clarity as to where an employee aggrieved for allegedly being unfairly discriminated against should go for relief. This it has done. In terms of s 5(3) of Pepuda, Pepuda 'does not apply to any person to whom and to the extent to which the [EEA] applies.' Such a person is to utilise the procedures and the *fora* set out in the EEA to secure relief for the alleged unfair discrimination. At the same time the Labour Relations Act 66 of 1995 (LRA) also ensures that the overlap is addressed. Section 157(1) of LRA provides that:

'Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.'

Hence, the EEA confers jurisdiction for a claim for unfair discrimination on the Labour Court and the LRA ensures that no other court has jurisdiction over such matters.

[9] Thus, Pepuda prevents the Equality Court from having jurisdiction over the claim, while the EEA read with the LRA ensures that the Labour Court is empowered to attend to the claim. A claim that, absent an employment relationship, should have been brought in terms of the provision of Pepuda can now, because of the employment relationship, be brought in terms of the EEA. In the former case, the aggrieved person has to approach the Equality Court and in the latter case, the

¹ The Labour Court is court of equivalent status to that of the High Court. Hence, the Labour Court enjoys a status higher than that of the Equality Court.

Labour Court. The aggrieved person is therefore able to secure relief from a competent court of law.

[10] Mr Pinto says that he brings most of his claims in terms of contract and delict. The contract he relies upon is a contract of employment. For that the EEA and the LRA apply. They therefore have to bring it in the Labour Court. Insofar as relying on the law of delict, his claims must still be brought in the Labour Court, for his employment contract is relied upon to prove one of the elements of the delict: the unlawfulness of the alleged omission by DD.

[11] Mr Pinto contends that the EEA does not apply to his claim because he was dismissed before he brought his claim. The error in this contention is that his claims arise from his employment relationship. That the employment relationship ended does not detract from the fact that his rights to the disability benefits and disability lump-sum payment arose during his employment relationship and are part of his employment contract. The demise of that contract did not result in the destruction of his rights against unfair discrimination on the grounds of disability as an employee. Those rights remained intact and their infringement gave him a right to seek relief in terms of the EEA and the LRA. His contention is that he became medically unfit to perform his duties as an employee of DD, and as a result qualified to be medically boarded and be accordingly compensated in terms of the insurance policies that were available to him as an employee of DD. The termination of this employment contract did not eviscerate his right to claim for the harm caused to him – the unfair discrimination he was subjected to – while he was an employee.

[12] The Equality Court therefore is not jurisdictionally empowered to entertain his dispute.

[13] Order

- a. It is declared that the Equality Court is not jurisdictionally empowered to entertain the applicant's complaint.

Vally J