



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case No:P246/10

In the matter between:-

DALUXOLO NICHOLAS SALI

Applicant

and

NATIONAL COMMISSIONER OF THE

SOUTH AFRICAN POLICE SERVICES

1ST Respondent

PROVINCIAL COMMISSIONER OF THE

SOUTH AFRICAN POLICE SERVICES

2ND Respondent

MINISTER OF SAFETY AND SECURITY

3RD Respondent

Heard: 17-19 September 2012

Delivered: 21 May 2013

Summary: An employee claiming to have been discriminated against needs to prove the existence of an employment policy or practice discriminating against him or her. He or she may not seek to rely on age limitation he or she co-determined in proving discrimination based on age.

JUDGMENT

LALLIE J:

Introduction

- [1] The applicant is a police reservist since 2006. He referred a discrimination dispute against the Respondents to the CCMA in terms of Section 10 of the Employment Equity Act, 55 of 1998 the CEEA. After it was not resolved at conciliation, he referred it to this Court for adjudication.
- [2] The applicant's dispute is based on age discrimination. Because of a number of misunderstandings which came to the fore during the course of the trial, the factual background to this dispute is necessary. The applicant's case was that in September 2009, he was informed of vacancies for permanent positions at the South African Police Service (SAPS) and applied for categories A2 and D2 as instructed. He was required to be between 41 and 45 years old. In October 2009, he was informed by Inspector Pyne in an interview that his application had been successful and was required to subject himself to medical examination and other required tests. It was on being successful in those tests that he would be given a contract of employment. He passed all the tests, but never received a contract of employment. The outcome of his enquiry about his contract of employment was that he had not been appointed as he was over age. No response was received on his application for condonation of his age. It is for the above reasons that the applicant claimed to have been unfairly discriminated against on the grounds of age by the respondents.
- [3] The respondents denied discriminating against the applicant. Their defence was that at the time the applicant applied to be a member of the SAPS he had to fulfill two requirements namely, he should not have been older than 40 years and he needed 3 years' experience as a reservist. The respondents submitted that he fulfilled neither and was therefore not eligible for appointment. The applicant

conceded that he did not fulfill the age requirement. He denied ever being informed of the requirement of being a reservist for 3 years. He, however, argued that at the time of his enlistment he fulfilled the experience requirement.

- [4] The respondents' evidence which is either common cause or not contested, is that on 2 and 23 February 2009, police reservists marched on the ANC head quarters demanding to be integrated in the SAPS. A reservists' summit, attended by 500 representatives of reservists from all 9 provinces was held on 23 March 2009 in Midrand. All these effort culminated in the formation of a task team which looked into the appointment of reservists. Amongst the proposals of the task team was the amendment of the regulations governing the appointment of members of SAPS by increasing the maximum required age from 30 to 40 years and introducing a requirement that reservists needed at least 3 years' experience to qualify for appointment as members of SAPS.
- [5] The proposals regarding the enlistment criteria for the recruitment of reservists as permanent members of SAPS were approved by the National Commissioner of SAPS on 29 May 2009.
- [6] It is common cause that the applicant was born on 10 November 1967. He became a police reservist on 10 August 2006. He submitted his application form for enlistment as a permanent member of SAPS on 21 July 2009. He was therefore 41 years 8 months and had been a reservist for 2 years 11 months when he submitted his application form.
- [7] In terms of the pre-trial minute, the parties agreed that I am required to decide firstly whether the applicant met the requirements for appointment as a permanent member of SAPS. Secondly, whether the respondents discriminated against the applicant on the basis of age and, if so, whether such discrimination was unfair and lastly, whether the applicant is entitled to relief.
- [8] Discrimination at the workplace is prohibited by section 6(1) of the EEA which provides as follows:

‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.’

- [9] The applicant, as the employee had the onus of proving the existence of a policy or practice which discriminated against him. The respondents, as the employer had to prove that the discrimination, if it existed, was fair.
- [10] I now turn my attention to the first issue I need to determine in terms of the pre-trial minute: whether the applicant met the requirements for appointment as a permanent member of SAPS. The starting point is the source of the requirements. The respondents’ unchallenged evidence is that as a result of recommendations of a task team with representatives of reservists from all 9 provinces, the National Commissioner of SAPS exercised his discretion in terms of Regulation 11(2) of the Regulations promulgated by Government Notice No R203 of 14 February 1964 as amended by Government Notice R519 of 27 December 2009 and amend the age of reservists to be enlisted as permanent members of SAPS from between 18 and 30 years to between 18 and 40 years. In addition the reservists were required to have 3 years’ experience as reservists.
- [11] The applicant denied having been informed of these requirements. Brigadier Le Roux testified that she addressed reservists in Port Elizabeth at a sports field in July 2009 and told them all the requirements for enlistment. She also confirmed the history of the regulations governing the enlistment requirements of reservists. Brigadier Govender corroborated Brigadier Le Roux’s evidence regarding the history of the requirements.
- [12] An assessment of probabilities on this issue points to the conclusion that the applicant was aware of the requirements and their history. His version that he changed television channels when the news of the reservists march was aired is improbable. He could not avoid watching fellow employees who were fighting his own cause of becoming a member of SAPS. He was in the privacy of his home

out of sight of the officers who had warned him against associating himself with the march. When applying for enlistment, the applicant stated that he was 40 years old when he was in fact 41 years 8 months. The only plausible inference that can be drawn from his conduct of reducing his age is that he wanted to fall within the required age. I therefore have to reject the applicant's submission that there were only rumours of the minimum requirements when he was signing the preliminary application forms.

- [13] It was Brigadier Le Roux's evidence that the applicant had to meet the 3 years' experience as a reservist on the date of the application. She explained that they told reservists that they had to have 3 years' experience in order to apply. It was her further evidence that one gets enlisted after the whole process is finalized.
- [14] Brigadier Govender also testified that the Applicant's application was rejected because on the date he completed the application form he did not meet both requirements.
- [15] The applicant presented an elaborate version on not being informed of the 3 years' experience requirement. He sought to rely on statements made to him by SAPS officials, which suggested that the requirement did not exist. He submitted that he got to know of the requirement for the first time when his attorney brought it to his attention, having read it from the respondents' answering affidavit. The test to determine the existence of the requirement is objective. The requirement either existed or it did not exist. The respondents' evidence which the applicant did not gainsay is that a task team in which he was represented recommended the requirements for enlistment of reservists which included the two requirements referred to in these proceedings. The recommendations were made regulations. The only reason a 40 year old reservist could qualify for enlistment as a member of SAPS was by operation of the regulation. The applicant cannot cherry pick requirements which are binding on him. A requirement that a reservist had to have 3 years' experience to qualify to be enlisted as a permanent member of SAPS existed. It is a legal requirement which had to be fulfilled by all reservists who sought to be enlisted.

- [16] The applicant was deeply hurt by the tests he was made to undergo, statements made by SAPS officials and not being informed on time that he did not fulfill the 3 years' experience requirement. There was a duty on the respondents to inform the applicant as soon as possible that he did not meet the requirements and not raise his hopes. Hurting the applicant's feelings by the tardy manner in which his application was handled does not alter the legal requirements.
- [17] I have already accepted Brigadier Le Roux's version that she told the reservists about the experience requirement as her version was more probable than the applicant's. She was also a credible witness who stuck to her version on this part of her evidence even under cross-examination. The same cannot be said about the applicant whose version was obviously untrue.
- [18] Having made the finding that the experience requirement existed I will consider whether the applicant fulfilled it. It is common cause that on 21 July 2009, when the applicant completed the preliminary application form, he did not fulfill the experience requirement. On 14 September 2009, when he was interviewed, he had the required 3 years' experience. The first question of the interview report form reads as follows:

'The Reservist conform/does not conform to the National Commissioner's instruction and criteria as per letter 3/3/8/191 dated 2009-06-10 and 5/3/1 (Dv Comm J K Phahlane) dated 2009-08-27 – paragraph 5'.

The letter of 10 June 2009 deals with the criteria, including age and experience as a reservist. As the question is phrased in the present tense I will give it its literal meaning that the applicant was required to have 3 years' experience on the date of the interview, 14 September 2009 and he had it. I therefore find that the applicant fulfilled the requirement of 3 years' experience as a reservist.

- [19] It is common cause that the applicant did not meet the age requirement as he was 41 years and 10 months on the date of his interview. The answer to the first issue I had to determine in terms of the pre-trial minute is that the applicant did not meet the requirements set by SAPS for appointment as its permanent

member as he had exceeded the required age. It is appropriate to bring this issue to its logical conclusion by considering the legal implications of my finding.

- [20] The consequences of an appointment in contravention of the regulatory framework was expressed as follows in *Khanyile v Minister of Education and Culture, KwaZulu-Natal and Another*.¹

‘The purported appointment of the applicant to a senior management service post in the public service was flawed in at least three major aspects...I therefore hold that the purported appointment by the first respondent was not a valid appointment in terms of the relevant sections of the Public Service Act read with the regulations thereto. It is therefore of no force and effect.’

- [21] The second issue I need to determine in terms of the pre-trial minute is whether the applicant was discriminated against. The respondents denied having discriminated against the applicant and explained that the reason for his non-appointment was based on the law. The applicant was over the 40 year age limit stipulated in the regulation.
- [22] The applicant submitted that his non-appointment was direct discrimination based on age as envisaged in section 6(1) of the EEA. The respondents argued that the applicant failed to prove that they contravened section 6 of the EEA as the age limitation in question was determined not by its policy or practice, but by a regulation.
- [23] Section 6(1) of the EEA prohibits direct or indirect unfair discrimination based on age against an employee in any employment policy or practice. Employment policy or practice is defined in section 1 of the EEA to include:

- ‘(a) recruitment procedures, advertising and selection criteria;
- (b) appointments and the appointment process;
- (c) job classification and grading;

¹(2006) 27 ILJ 769 (N) at 778B - C

- (d) remuneration, employment benefits and terms and conditions of employment;
- (e) job assignments;
- (f) the working environment and facilities;
- (g) training and development;
- (h) performance evaluation systems;
- (i) promotion;
- (j) transfer;
- (k) demotion;
- (l) disciplinary measures other than dismissal; and
- (m) dismissal.'

Legislation is excluded from the definition. Although the list of what constitutes employment policy or practice is not closed, exclusion of legislation is deliberate. The applicant, whether he based his case on employment policy or practice, had a duty to state all the grounds he relied upon in his case. I have already accepted the respondents' evidence that the age restriction was introduced by a regulation. It is noteworthy that the regulation is the culmination of discussions on employment of reservists in which the applicant, through his representatives consented to the age restriction which forms part of the contents of the regulation. He cannot claim that the age restriction he co-determined discriminates against him.

[24] I have considered the respondents' argument that the regulation is a collective agreement. I disagree as it falls outside the realm of the definition of a collective agreement in section 213 of the LRA. The applicant was therefore not discriminated against on the basis of age.

- [25] On the question whether the applicant is entitled to the relief he is seeking, it is clear that the applicant did not make out a case for such relief. The applicant had to meet two requirements, namely the age and the experience requirements. It is common cause that he did not meet the age requirement as he was over 40 years old when he applied to be enlisted as a permanent member of SAPS. He met the second requirement. In terms of the regulation he was required to meet both requirements. As he did not comply with the requirements, he has no basis to claim to be appointed to the position he applied for.
- [26] The applicant cannot require that he be granted relief by being appointed in breach of the regulation. An appointment in breach of regulatory framework is null and void.² The respondents cannot be restrained from enforcing the age restriction determined by a regulation as no one may renounce a right contrary to law.³ Before the respondents can exercise the power to enlist permanent members of SAPS, facts must first exist, in an objective sense, that such power may be exercised. Absent the facts, the purported exercise of power will be declared invalid.⁴
- [27] For these reasons I find that the respondents did not discriminate against the applicant by not enlisting him as a permanent member of SAPS.
- [28] The respondents sought a cost order against the applicant. Section 162 requires this court to consider the law and fairness in determining the issue of costs. The officials of SAPS played a leading role in the referral of the dispute by the applicant by their failure to provide him, timeously, with the correct information. To that end even the applicant testified that had he been aware of the true facts he would not have challenged his non-appointment. Granting a cost order against him will, in the circumstances, not be fair.

Order.

²See: *Khanyile (supra)*.

³See: *South African Co-Operative Citrus Exchange Ltd v Director-General Trade and Industry* 1997 (3) SA 237 (SCA).

⁴See: *Democratic Alliance v President of the RSA and Others*, 2013 (1) SA 248 CC

[29] In the circumstances the following order is made:

29.1 The applicant's claim is dismissed.

Lallie, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mrs. Van Staden of Justice Centre

For the Respondents: Advocate Bloem SC and Advocate Richards

Instructed by: State Attorney

LABOUR COURT