REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 1122/2019
REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED
DATE: 15/8/2023

In the matter between:

MATLALA MATOME SAMUEL **PLAINTIFF**

And

LIMPOPO PROVINCIAL COMMISSIONER – SAPS **FIRST DEFENDANT**

MINISTER OF POLICE **SECOND DEFENDANT**

JUDGEMENT

KGANYAGO J

[1] The plaintiff during the period 1980 to 1985 was a permanent member of the South African Police. From 2006 up to 31st December 2020 the plaintiff was a police reservist at Maake Police Station. During 2016 the first defendant advertised the posts for the enlistment of former members of the police services from the ranks of constable to colonel. The plaintiff applied for the position of constable with a salary package of R152 943.00 per annum. The plaintiff was not shortlisted for the post, and was notified per letter dated 1st November 2016 that the reason for his disqualification for re-enlistment was due to the dishonourable discharge from employment.

[2] Aggrieved by not being shortlisted, on 5th February 2018 and 17th April 2018 the plaintiff through his legal representatives addressed a letter to the first defendant challenging his exclusion from re-enlistment. The first defendant responded to the plaintiff's letter per its letter dated 15th May 2018 wherein the plaintiff was notified that according to their records, he was dishonourably discharged from service on 11th April 1985. Further that applications of members who were terminated from their services as a result of dishonourable discharge were disqualified.

[3] The plaintiff disputed that he was dishonourably discharged from service as a police member. That led to the plaintiff instituting an action against the defendants alleging that he was unfairly disqualified for re-enlistment. The plaintiff is claiming from the defendants the amount of R8 105 979.00 which he alleges that it is the amount he would have been paid from the date of his re-enlistment to date of retirement. The defendants are defending the plaintiff's action.

[4] The plaintiff was the only witness to testify for his case. He testified that from 1980 to 1985 he was employed as a police officer in the former South African Police stationed at Bramley police station in Johannesburg. He resigned as a police officer during 1985. His certificate of discharge from service has no negative comments which means he was discharged from service without any wrongdoings. He had resigned from service in order to further his studies. In those days one had to pay R50.00 to be discharged from service, which he had duly paid.

[5] During his employment as a police officer he was never subjected to any disciplinary hearing or found guilty of any offence. He was never charged for any dishonesty. After resigning from employment as a police officer, he worked for Toyota in Sandton. Toyota assisted him with a bursary to further his studies. During 2006 he moved to Tzaneen where he worked for BP garage. In May 2006 he joined Maake SAPS as a police reservist until 31st December 2020.

[6] Before he was appointed as a police reservist he was screened and his fingerprints were also taken. If he had any criminal record or disciplinary record, he would not have been appointed as a police reservist. He was called time and again to come and assist police in his capacity as a police reservist. On 8th June 2015 the

commander detectives of the SAPS Tzaneen wrote a letter to the station commander SAPS Tzaneen recommending that he be re-employed permanently in the SAPS due to the diligent services he was rendering.

[7] After the posts of re-enlistment were advertised, he applied for the position of constable. After the closing date he was called for psychometric tests which he passed. Later he was called for physical training which he had completed successfully. After that training, he saw that the people he was training with have been employed whilst he was not notified of anything. He phoned the provincial head office of the SAPS to find out what was happening and was given a letter which shows that he was dishonourably discharged from service, hence his application for re-enlistment was unsuccessful.

[8] On receipt of the reasons for being unsuccessful in his re-enlistment application, he contacted the criminal record centre in Pretoria. The criminal record centre informed him that according to their records, he did not have a criminal record. The criminal record centre also sent him a letter stating that his criminal record has been expunged and that no conviction will appear on his clearance certificate. By the time he receives this letter from the criminal record centre, he was already working as a police reservist. If he was dishonourable, his previous employer would not have allowed him to pay the R50.00, but would have dismissed him.

[9] The first call-up for re-enlistment was during the world cup in 2010. He applied but was not successful, and he did not do a follow-up on that one. It was only in 2016 when his application was declined that he did a follow-up. When he applied for re-enlistment in 2016 the station commander of Maake SAPS has written a letter recommending that he be permanently appointed. On 23rd May 2006 when he was appointed as a police reservist, he did not encounter any problems. Every year he was renewing his public licence, and every 5 years he was renewing his firearm licence without any problems. Mr Mohlala his commander at SAPS Maake has filed a report on 14th June 2016 stating that he was having a clean record.

[10] He had an expectation that he will be permanently appointed as a constable within SAPS. He was going to retire in 2020 when he reaches 60 years if he was

appointed in 2016. Had he been appointed, he would have earned R152 943.00 per annum. He could also have received bonuses every December as it is his birthday month. He denies that he was dishonourable. The first defendant had employed a few of those who have applied and not all of them.

[11] The plaintiff was cross examined and he conceded that he was never called for an interview after the closing date of the applications. The plaintiff also conceded that he was never shortlisted. The plaintiff also conceded that in his particulars of claim to the summons, he did not raise the issue of legitimate expectation, but that he expected to be permanently employed as a member of the SAPS. The plaintiff also conceded that on the advertisement it was stated that if a candidate was shortlisted he/she will be expected to undergo a personal interview, and that the SAPS was under no obligation to fill a post after the advertisement. The plaintiff further conceded that on the application form for re-enlistment, he had signed a certificate agreeing that he was applying for re-enlistment realising that there were limited number of posts and that participation in the process does not constitute any right to be appointed. Further that the national commissioner was under no obligation to appoint him based on the fact that he had previously served as a member of the service.

[12] Under re-examination, the plaintiff stated that he had received the letter dated 16th June 2011 that notified him that his previous conviction has been expunged during 2011 after he had made enquiries. That concluded the plaintiff's evidence and he closed his case. The defendant at this stage applied for absolution from the instance.

[13] Counsel for the defendant in applying for absolution has submitted that the plaintiff's particulars of claim make no reference of legitimate expectation and the plaintiff has conceded to that. The issue of legitimate expectation was raised by counsel for the plaintiff for the first time during his opening address. It is trite that you stand and fall by your papers. Given that the plaintiff agrees that his papers do not make out a case for legitimate expectation, the matter must end there and the defendant be absolved from the instance.

[14] Counsel for the defendant further submitted that if the court was to accept that the plaintiff in his papers raised a case for legitimate expectation, in his evidence the plaintiff had agreed that the advertisement read together with the application form explicitly provided that the defendant was under no obligation to employ prospective applicants. Therefore, by the plaintiff's own admission there could not have been any expectation made by the defendant.

[15] Counsel for the defendant has further submitted that the plaintiff has conceded that the details that appears on SAP 96 marked annexure "M" are his. In the SAP 96 it has been recorded that the reason for the plaintiff's resignation from employment was "dishonourable discharge", and that it was a disqualifying factor in terms of the advertisement.

[16] Counsel for the defendant has also submitted that it is trite that when a party is dissatisfied with the decision of a public body/institution, they should attack that decision in terms of the Promotion of Administrative Justice Act (PAJA). That if the plaintiff's version is to be believed, it becomes clear that the decision by the defendant is tantamount to an administrative action, and the plaintiff should have brought a review application.

[17] The plaintiff's counsel in addressing the court on absolution, has submitted that the plaintiff has testified that he was unfairly excluded from the post for re-enlistment as a former member of the SAPS as he was never dishonourably discharged from service. The plaintiff's certificate of discharge does not state that the plaintiff has been dishonourably discharged from service, and further that the plaintiff has been a reservist of the SAPS from 2006 until 2020. That if he was dishonourably discharged from service, he would not have qualified to be appointed as a reservist.

[18] Counsel for the plaintiff has further submitted that the plaintiff had an expectation to be re-enlisted as he had met all the requirements of the advertisement by the SAPS. That although the advertisement and his application state that SAPS was under no obligation to fill a post, his exclusion from re-enlistment was purely based on the false statement. The letter of expungement which the plaintiff has received from the criminal record centre clearly state that no conviction will appear

on the plaintiff's clearance certificate. The only reason the defendant excluded the plaintiff from appointment was that he was dishonourably discharged upon his resignation in 1985.

[19] Counsel for the plaintiff further submitted that the defendant wanted former members to be re-enlisted, of which the plaintiff was one of them and has been working with SAPS since 2006. The plaintiff was therefore working for the SAPS on a part-time basis on a lower salary, but sought a higher position of a constable in the police service. The plaintiff's legitimate expectation stems from the fact that he was at the time employed by SAPS from 2006 until the date of the advertisement, and that at no point was the plaintiff considered not to be eligible to be in the employment of SAPS. Therefore, the plaintiff was eligible for re-enlistment.

[20] Counsel for the plaintiff has also submitted that the right to 'just administrative action' is contained in section 33 of the Constitution, read together with item 23(2)(b) of Schedule 6. The plaintiff's legitimate expectation is not a mere decision that he should have reviewed the defendant's decision for his exclusion for re-enlistment, but rather that the basis upon which the plaintiff was excluded was unfair and not in the interest of justice.

[21] It is trite that the test in an absolution stage is whether at the close of the case for the plaintiff there is evidence upon which a court applying its mind reasonably to the evidence at hand, might find for the plaintiff, or if the defendant does not present any evidence, but close his/her case immediately, is there such evidence upon which the court may give judgment in favour of the plaintiff.

[22] In *Gordon Lloyd Page & Associates v Rivera and Another*[1] Harms JA said:

> "The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

[1] 2001 (1) SA 88 (SCA) at 92E-H

> '…(w)hen absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought) find for the plaintiff…'
>
> This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff".

[23] The plaintiff's cause of action as stated in his particulars of claim is that he was disregarded for re-enlistment unfairly despite meeting the criteria in the advertisement for the position he had applied for. However, when the plaintiff testified before court he stated that he had an expectation that he will be appointed as he has been working as a reservist since 2006 and further that his commanders have given him positive recommendations to be permanently employed. Even the plaintiff's counsel when addressing the court on the defendant's absolution application, has based his submission on the principles of legitimate expectation. The plaintiff and his counsel have conceded that in the pleadings they did not plead that the plaintiff's case was based on legitimate expectation, but that the plaintiff's legitimate expectation stems from the fact that he has been working as a reservist from 2006 until the date of the advertisement, and that at no point was the plaintiff considered not to be eligible to be in the employment of SAPS.

[24] In *Molusi v Voges*[2] Nkabinde J said:

> "The purpose of pleadings is to define the issues for the other party and court. And it is for the court to adjudicate upon the disputes and those disputes alone. Of course there are instances where the court may of its own accord (mero motu) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on

[2] 2016 (3) SA 370 (CC) at para 28

appeal involves no unfairness to the other party against whom it is directed. In Slabbert the Supreme Court of Appeal held:

> 'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case".

[25] The issue of legitimate expectation was raised by the plaintiff's counsel for the first time in his opening address at the commencement of the trial. The plaintiff's testimony before court was entirely based on the alleged legitimate expectation. Basically, the defendant has been ambushed as it was not an issue that they expected to meet when they prepared for trial. The plaintiff has pleaded a particular case, but now during the trial is seeking to base his case on different particulars which were never pleaded. On the particulars which the plaintiff has pleaded, during his testimony he did not raise any issue which the defendant is required to rebut.

[26] It is trite that the requirements for legitimate expectation are that (i) the representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification; (ii) the expectation must be reasonable; (iii) the representation must have been induced by the decision-maker; and the representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. The law does not protect every expectation but only those which are legitimate. (See *South African Veterinary Council and Another v Szymanski*[3]*).*

[27] Even if this court was accept that the plaintiff's particulars of claim read in its totality establishes the alleged legitimate expectation, that will not assist the plaintiff to succeed with his claim. In *President of the RSA v South African Rugby Football Union*[4] the Court said:

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[3] [2003] ZASCA 11 (14 March 2003)
[4] 2000 (1) SA 1 (CC) 94B-C

> "In Administrator, Transvaal, and Others v Traub and Others, Corbett CJ considered the concept of 'legitimate expectation' and its development in English law. In considering what conduct would give rise to a legitimate expectation, he cited the speech of Lord Fraser of Tullybelton in Council of Civil Service Unions and Others v Minister for the Civil Service:
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> 'Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue'."

[28] The plaintiff has testified that he is the one who had signed the certificate on the application form in respond to the advertisement in which he gives an undertaking that he is aware that (i) he is applying for re-enlistment realising that there were limited number of posts; (ii) that the National Commissioner was under no obligation to appoint him based on the fact that he previously served as a member of the Service; (iii) that participation in that process does not constitute any right to be appointed; and (iv) that no promises have been made to him about an appointment or posting in the SAPS.

[29] In the case at hand there is no suggestion that the legitimate expectation arose from a regular practice, or that the plaintiff was promised that as a police reservist he automatically qualifies to be permanently appointed. Counsel for the plaintiff has submitted that plaintiff's legitimate expectation arose from the fact that he has been a police reservist from 2006 until the date of the advertisement. This argument does not take the plaintiff's case any further in that he had signed a certificate in his application acknowledging that the National Commissioner was under no obligation to appoint him based on the fact that he previously served as a member of the Service.

[30] It has been stated in the advertisement as a requirement that members who have left the Service for been dishonourably discharged or dismissed are disqualified for re-enlistment. The plaintiff has conceded that the information on the SAP 96 are his. On the SAP 96 it has been recorded that the reason for the plaintiff's resignation

from the service was dishonourable discharge, which on its own is a ground for disqualification.

[31] Based on what I have alluded to above, if the defendant closes its case immediately without leading any evidence, there is no evidence upon which a court applying its mind reasonably might find in favour of the plaintiff. The plaintiff has therefore failed to make out a prima facie case to survive absolution.

[32] In the result I make the following order:

32.1 Absolution from the instance is granted with costs.

KGANYAGO ADJP
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the plaintiff	**: Adv Mawela Raphela GM**
Instructed by	**: Michael Raphela Attorneys**
Counsel for the defendant	**: Masete TA**
Instructed by	**: Office of State Attorney Polokwane**
Date heard	**: 8th June 2023**
Electronically circulated on	**: 15th August 2023**