

SOUTH AFRICA / JUDGMENT

Vass v South African Police Services (C 747/2009) [2013]

ZALCCT 27 (22 August 2013)

[2013] ZALCCT 27

COURT

Labour Court Cape Town

BEFORE

Steenkamp

CASE / FILE NUMBER

C 747/2009

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C747/2009

JUDGMENT

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IN THE LABOUR COURT OF SOUTH AFRICA

(CAPE TOWN)

CASE NUMBER: C747/2009

DATE: 22 AUGUST 2013

In the matter between:

VICTOR VASSApplicant

and

SOUTH AFRICAN POLICE SERVICESRespondent

J U D G M E N T

STEENKAMP, J:

The applicant in this case, Warrant Officer Victor Vass, has approached the Court seeking the following relief in trial proceedings:

An order declaring that the respondent, the South African Police Services, unfairly discriminated against him in failing to allow him to undergo an explosives training course and failing to allow him to apply for secret security clearance status.

An order directing SAPS to allow him to undergo the secret security clearance status application and to undergo the explosives training course and, if successful, prayer 3 comes into play which is –

An order that he be appointed as a bomb technician.

It must be stated at the outset that following a grievance procedure, the SAPS did offer the applicant the opportunity to undergo the vetting process to obtain secret security clearance status. He turned that down on the basis that it would take too long. His testimony was that it could take up to four years and that other candidates were given the opportunity to undergo the explosives training course while they were awaiting their results of security clearance.

The background to the trial is very briefly that Warrant Officer Vass, who has been employed by the Police Services for the past 22 years, applied to be transferred to the explosives unit, commonly referred to as the Bomb Squad. After having undergone psychometric

and fitness testing and passing those, he was informed by his superior, Colonel Posthumus, that his application would not be further considered because he had a previous conviction for attempted murder.

That he does have such a conviction is common cause. His complaint is that the failure to allow him to undergo explosives training and to appoint him to the bomb squad, constitutes unfair discrimination. The ground for discrimination that he relies upon, is the fact that he has a previous conviction for attempted murder.

At the end of Mr Vass's evidence, Ms Manqu-Lockwood, who appears for SAPS, applied for absolution from the instance. This Court discussed the requirements for such an application to succeed in the fairly recent case of *Mouton v Boy Burger* (2011) 32 ILJ 2703 (LC).

In that case the Court referred to the test as set out in *Erasmus*, Superior Court Practice at page B-1292:

“When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence on which a Court applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff”.

In that case, that dealt with discrimination in the context of an alleged automatically unfair dismissal, this Court referred to one of the cases to which Mr May referred today, that is *Ntai v South African Breweries Ltd* [2001] 2 BLLR 186 (LC) where the Court noted:

“The mere allegation of discrimination is not sufficient to establish a prima facie case. In the final analysis an inference of discrimination could only be proved if it was consistent with all the proven facts and was the most probable (in the sense of the most plausible, acceptable, suitable, or credible) inference to be drawn.”

The Court in Ntai also referred back to the well established legal principles set out in Harksen v Lane [1997] ZACC 12; 1998

- (1) SA 300 (CC) at paragraph [53] where the first enquiry in discrimination litigation was formulated as follows by the Constitutional Court:

“Firstly, does the differentiation amount to discrimination? If it is on a specified ground then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.”

Those listed grounds appear in Section 6 (1) of the Employment Equity Act 55 of 1998 which specifies that:

“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.”

Those are the listed grounds. Warrant Officer Vass does not rely on any of those grounds. Instead he relies, as ironic as it may sound, on a previous conviction for attempted murder as an analogous ground. This, it must be borne in mind, is a police officer who alleges that the fact that he is not being given the opportunity to train as an officer in the Bomb Squad, means that he is being discriminated against because he has a previous conviction for attempted murder.

The question then is whether that is a ground for discrimination analogous to the listed grounds. As Basson J noted in Ntai (supra) at paragraph [72]:

“In the absence of an identified, unlisted ground it is impossible to determine whether the ground that is relied upon is comparable to the listed grounds such as race, in that it is based upon attributes and characteristics which have the potential to impair the fundamental human dignity of the applicants as human beings.”

And the learned judge goes on to say:

“Litigants who bring discrimination cases to the Labour Court and simply allege that there was discrimination on some or other arbitrary ground without identifying such ground would be well advised to take note that the mere arbitrary actions of an employer do not as such amount to discrimination within the accepted legal definition of the concept.”

In the case before me it is common cause that the reason why Mr Vass was not given the opportunity to undergo further training was because of his previous conviction. That is the basis of the differentiation. The question then is whether that amounts to discrimination. Firstly, he does not identify any comparator; he does not allege that he was treated differently from other similarly situated applicants, i.e. other members of the SAPS, who also have previous convictions. I will nevertheless consider whether the differentiation from those who do not have previous

convictions could possibly constitute discrimination.

Does a previous conviction for attempted murder equate to an attribute or characteristic that impairs the fundamental dignity of

people as human beings? The question need only be asked to point out its inherent absurdity. The policy of excluding police members of the SAPS from certain positions because they have serious criminal convictions cannot conceivably amount to discrimination. It does not impair the fundamental human dignity of an employee because of that person's inherent attributes or characteristics as a human being.

As Pillay J pointed out in one of the cases that Mr May referred me to, *Stojce v University of Kwazulu-Natal* [2007] 3 BLLR 247 (LC) at paragraph [26]:

“Not every attribute or characteristic qualifies for protection against discrimination. Smokers, thugs, rapists, hunters of endangered wildlife and millionaires as a class do not qualify for protection.”

To that I would add criminals.

“What distinguishes these groups from those who deserve protection? The element of injustice arising from oppression, exploitation, marginalisation, powerless [sic], cultural imperialism, violence and harm done to it by particular groups or the worth and value of their attributes are qualifying

characteristics that distinguish differentiation from unfair discrimination. An employee who relies on an unlisted ground as being

discriminatory must establish a difference; show that it defines a group or a class of persons and that the difference is worthy of protection. To warrant protection the applicant must show that the conduct complained of impacts on him as a class or group of vulnerable persons such as persons with disabilities or family responsibility or that the conduct is inherently pejorative as a racist or sexist utterance may be.”

In the case before me I am quite frankly astounded that the applicant seeks to establish that having a criminal conviction for attempted murder and therefore being excluded from a position in the SAPS, impairs his fundamental dignity as a human being because of an inherent attribute or characteristic. Engaging in criminal activity is not an attribute or a characteristic. It is a wilful and unlawful act. The Police Services should quite frankly be commended rather than penalised for excluding criminals from senior positions within its ranks.

This is a case similar to the one dealt with by Pillay, J in *Stojce* where she noted at paragraph [28]:

“The applicant’s defining characteristic does not classify him as a member of a group, let alone one worthy of protection”.

Neither does being a convicted criminal amount to a characteristic that defines Mr Vass as a human being worthy of protection and worthy of further progression within the ranks of the South African Police Services. The applicant does not come close to establishing a prima facie case and in those circumstances absolution from the instance must be granted.

The only question that remains is for that of costs. Ms Manqcu-Lockwood argued that the application is vexatious, inter alia because Mr Vass had the opportunity to undergo the security clearance test and he turned that invitation down. Tempted as I am to accept that argument, I will not go that far, for at the time when the applicant launched his application he was not legally represented. I accept, albeit it with some difficulty, that he may have formed the opinion in his own mind that he was being treated

unfairly and that he somehow supposed that that treatment amounted to discrimination.

With regard to him not accepting the invitation to undergo the the security vetting, again that does not seem to me to be a reasonable

route for an employee to follow, but I do accept that he had some misgivings about the time delay. That in itself does not in my mind warrant an adverse costs order. I make no order as to costs.

THE RESPONDENT IS GRANTED ABSOLUTION FROM THE INSTANCE.

STEENKAMP, J

APPEARANCES

APPLICANT: CJ May of Adams & May attorneys.

RESPONDENT: N Mangcu-Lockwood

Instructed by the state attorney.

/RG /...

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