



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
PORT ELIZABETH
JUDGMENT**

Case no: P 476/09

In the matter between:

VAN DYK, JOHAN

Applicant

And

KOUGA MUNICIPALITY

Respondent

Heard: 14 March 2012

Delivered: 10 April 2012

Summary: (Unfair discrimination – race/sex- failure to appoint – Employment Equity applied to short-listing but not to interview ratings – unfair discrimination in appointment not proven)

JUDGMENT

LAGRANGE, J

Introduction

- 1] The applicant claims that he was unfairly discriminated against on grounds of his race or sex when he was not appointed to the post of a platoon officer in the fire department of the respondent, the Kouga municipality in 2009.

Material facts emerging from the evidence

- 2] The applicant is a white male who worked in the capacity of a firefighter and subsequently a platoon officer in the Uitenhage Fire Department from 1989 to 2003. He held the latter position for nearly 6 years before he resigned in 2003. In 2009 the post of platoon officer in the fire department of the first respondent, Kouga municipality, fell vacant again and he applied for it. Because he was no longer employed by the municipality at the time he was an external candidate.
- 3] The post was previously advertised internally but no appointment was made. It was then advertised twice externally. No appointment was again made the first time the post was advertised externally. The applicant says he was advised by the human resource manager, Mr Faulkner that if he applied for the job the municipality would have to appoint him as he was the only person with the necessary qualifications. He was naturally confident that he would get the job.
- 4] However, when he attended the interviews he found two other candidates had been short-listed for interviews apart from him. One of these candidates was Ms A Rossouw, a coloured woman who was then employed by the respondent in the fire department as a senior fireman. One of the requirements for the job listed in the advertisement was a graduate certificate issued by the South African Fire Services Institute. Of all the candidates short-listed, only the applicant had this qualification when the interviews took place.

- 5] The interviews were conducted by a panel of three persons, namely the Manager of Protection Services, Mr S Baartman, the manager of legal services-, Mr S Fadi, and the Station Officer: Fire services, Mr D Barnard. Each panellist rated the three candidates according to their answers to a predetermined set of questions. At the end of the interviews the respective aggregate scores of each candidate were as follows:

5.1 J Van Dyk - 86%

5.2 A Rossouw – 88 %

5.3 H Mintoer – 74 %

- 6] The minutes of the discussion by the panel, which took place after the interviews, record that both Baartman and Barnard expressed the view that the candidate to be appointed should be able to start the work from the time of the appointment. Fadi responding to these statements said that in terms of section 20 (3) of the Employment Equity Act the candidates to be appointed would have to get training and a reasonable time must be given for them to acquire the necessary skills. The minutes confirm that it was agreed that the candidate with the highest score should be recommended for the post and the union observers who attended the interviews apparently concurred with this recommendation, even though their opinion was not deliberative. As the appointment was made on the basis of the recommendation of the candidate with the highest interview score, Rossouw was appointed. It appears that Barnard was unhappy with the recommendation and his disappointment was minuted.
- 7] The applicant was also dismayed by the outcome. In his view, neither of the other two applicants for the post should have been short-listed in the first place because they did not have one of the important listed qualifications for the post, namely the SAESI Graduate Certificate. Had Rossouw not been interviewed he was certain to have got the appointment. He also contested that she did not have the same amount of experience he had. On this basis, the applicant felt that, objectively speaking, he was the best candidate and ought to have been appointed.

- 8] In identifying why he had failed and Rossouw had succeeded, the applicant concluded that either his race or sex, or both, had been a decisive factor counting against him. This, he contended amounted to unfair discrimination in terms of the Employment Equity Act 55 of 1998 ('the EEA'). He also argued that the only person with the necessary knowledge to evaluate the candidates properly was Barnard. Neither Baartman nor Fadi was qualified to assess candidates as they did not have any fire service training or qualifications. Moreover, Barnard had the experience as Fire Station Officer and had worked with both himself and Rossouw so he was best able to evaluate them.
- 9] At this juncture it is useful to provide a breakdown of the panellists' aggregate scoring of the interviewees, viz:

	Panellists	Baartman	Barnard	Fadi	Total
Candidates					
Rossouw		52	49	54	155
Van Dyk		48	55	48	151
Mintoor		48	43	44	135

- 10] A few observations on the contents of the table can be made. Barnard gave Rossouw a rating equivalent to nearly 90 % of his rating of Van Dyk. Fadi, by contrast, gave Van Dyk a rating equivalent to 89 % of Rossouw's score whereas Baartman gave Van Dyk nearly 93 % of Rossouw's score. In relation to the scoring it should also be mentioned that the applicant conceded under cross-examination, that there were instances where Barnard had awarded Rossouw more points for her response to a question than he had awarded to the applicant. Likewise, Baartman had not always awarded higher points to Rossouw relative to the applicant.
- 11] Quite apart from the short-listing of candidates, the applicant believed that he was also unfairly discriminated against because Baartman had told him during a chance encounter the previous year in December that as long as he (Baartman) was the executive manager of the Protection Services

Department of the respondent, he would not appoint a white person in the post. On that occasion, the applicant had asked Baartman about the post because he had heard that the previous incumbent had resigned in September or October 2008, and he wanted to find out if a replacement had been found. Since Baartman was also the chairperson of the interview panel, the applicant was convinced that he had deliberately underrated him relative to Rossouw and that he had improperly influenced the scoring of the rest of the panel consisting of Fadi and Barnard.

- 12] Baartman admitted that it was possible he had met the applicant, as they encountered each other fairly regularly, but denied that he would ever have made such a statement, as a senior official of the respondent. Under cross-examination, Van Dyk further claimed that Baartman had spoken strongly on the question of Barnard being in charge of the fire department. According to the applicant Baartman had said that if he had had his way he would not have had a white person in charge of the department. However, the applicant could not dispute that Barnard had been appointed notwithstanding this alleged statement by Baartman, and furthermore that Baartman had recommended Barnard for the post. The respondent challenged the applicant's credibility because this important allegation was only made under cross-examination. Certainly, it seems strange he would not have mentioned it earlier in his evidence because it was clearly relevant to demonstrate racial bias on Baartman's part.

Evaluation

- 13] Obviously, the applicant is correct that if the other two candidates had not been short-listed, in all probability he would have been appointed. The respondent's explanation for short-listing the other two candidates was that in terms of clause 4.4 of its Recruitment Selection and Retention Policy of June 2008, the provisions of section 20 (3) of the Employment Equity Act 55 of 1998 ('the EEA') should be taken into account when the recruitment and selection process is undertaken. Section 20 (3) of the EEA states:

“20(3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person’s-

- (a) formal qualifications;*
- (b) prior learning;*
- (c) relevant experience; or*
- (d) capacity to acquire, within a reasonable time, the ability to do the job.”*

- 14] Accordingly, the respondent’s explanation for short listing Rossouw was that even though she did not hold the graduate certificate qualification required by the post it was believed that she had the capacity to acquire the ability to do the job within a reasonable time. According to the evidence of Baartman, Rossouw has obtained the graduate certificate since her appointment.
- 15] Although the respondent relied on employment equity considerations in drawing up a short-list of candidates, it maintains that when it came to the assessment of the short-listed candidates by the interview panel, the recommendation was made purely on the basis of the overall score achieved by the three candidates. Hence, Rossouw was recommended for appointment not because of affirmative action considerations but because she was found to be the best candidate by the panel from amongst the short-listed candidates. The applicant queried the short-listing of Rossouw on the basis of her potential to be able to do the job at the time of the interviews. He reasoned that since she had been working in the fire department for several years without obtaining the certificate qualification, there was no reason to suppose at the time of the short-listing that she would do so within a reasonable time if she was appointed.
- 16] However, an implication of following the provisions of section 20 (3)(b),(c) and (d) of the EEA, was that the selectors compiling the short-list only

needed to be satisfied that the candidates had the capacity to acquire the ability to do the job, which does not necessarily mean attaining a formal qualification. In a case where the post in question, by definition, requires a candidate to have a particular qualification, then the employer's reliance on the provisions of section 20(b)-(d) to short-list a candidate would probably not be possible, for example, in the case of filling of a doctor's post. However, in this instance, although the qualification was listed as one of the requirements of the post, I was not referred to any legal requirements stating that a person may only be appointed to a platoon officer's post if they already have the graduate certificate qualification.

- 17] The applicant argued that because Barnard was the only person qualified to assess the candidates' skills and capability, his scoring should have been accepted. However, it will probably happen more often than not that an interview panel will not consist only of specialists in the relevant field of expertise. It cannot be expected that every interview outcome will only be determined by persons who have the same or greater level of specialist knowledge and expertise required of the candidate. It may be advisable that a specialist's knowledge would be given more weight particularly in relation to the minimum competencies a candidate must demonstrate, but the views of non-experts on an interview panel are not irrelevant. Appropriate expertise is vitally important, but other factors such as interpersonal and communication abilities may also play a roll in selecting the most appropriate candidate. If Barnard's scoring of Rossouw is considered, it is clear that despite her lack of a graduate certificate, he rated her highly relative to Van Dyk. On the face of it, it cannot be said that Barnard thought she could not do the job.
- 18] If the deviation in the scoring between the candidates was much more pronounced and if the pattern of scoring on individual questions was more uniform it might be possible to infer some bias in operation, but it cannot be said on the scores obtained in this case that racial bias is self evident, or that the pattern is so clear that a good explanation would be required to dispel the appearance of bias. I certainly cannot be confident that the applicant has established a prima facie case of differential treatment

based on race or sex.

- 19] In so far as the applicant tendered evidence of the improper motives of Baartman, I am unable to say he tendered sufficient evidence to persuade me that his version was more probably true than Baartman's. Moreover, his belated reference to Baartman's alleged comments about Barnard raises a doubt about the authenticity of his evidence about Baartman's alleged utterances.
- 20] It is true that Rossouw would not have been appointed if she had not been short-listed. It is also true that, at the time of the interviews, the applicant was the best qualified candidate. However, Rossouw's short-listing was done on the basis that she had the capacity to acquire the minimum qualification, and in the interviews even Barnard clearly did not regard her as unsuitable. The reason for her short-listing in terms of the criteria under section 20 (3)(b),(c) and (d) of the EEA was legitimate, in the absence of any legal pre-requisite that she had to have the graduation certificate to perform the platoon officer's job.
- 21] In the circumstances, I am not satisfied that the applicant has succeeded in establishing a prima facie case of unfair discrimination based on race or sex arising from the respondent failing to employ him as a platoon officer and appointing Rossouw instead.
- 22] On the issue of costs, I accept that the applicant did not act frivolously in referring this matter, and even though there is no employment relationship between him and the respondent, I do not believe he should pay the respondent's costs.

Order

- 23] The applicant's claim of unfair discrimination arising out of the respondent's failure to appoint him as a platoon officer in the fire department of the Kouga Municipality 2009 is dismissed.
- 24] No order is made as to costs.



R Lagrange, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: TD Potgieter of TD Potgieter Attorneys.

FIRST RESPONDENT: M Grobler instructed by Van der Walt Attorneys.