



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case No: P 539/10

In the matter between:

VUYANI ARMSTRONG DLABANTU

APPLICANT

and

DEPARTMENT OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

RESPONDENT

Heard: 12 November 2012

Delivered: 12 December 2013

Summary: In a claim for discrimination based on a listed ground the applicant is required to prove a link between differentiation and the listed ground of discrimination.

Discrimination for participating in trade union activities-Section 6 of the Employment Equity Act 55 of 1998.

JUDGMENT

LALLIE, J

Introduction

- [1] The Applicant approached this Court for relief on the basis that he was discriminated against by the respondent as envisaged in section 9 of the Constitution of the Republic of South Africa of 1996 (the Constitution). He claimed that he was not appointed as a Court Clerk because of his trade union activities which included exposing and challenging corruption and nepotism in the Eastern Cape Offices of the Respondent. His claim is challenged by the respondent on the grounds that the applicant's non appointment had nothing to do with discrimination but resulted from his failure to meet the requirements for the position of a Court Clerk.

Factual Background

- [2] The applicant was employed by the respondent on different fixed term contracts as an Administration Clerk at the Port Elizabeth Magistrates' Court from 13 February 2004. In 2008, the respondent advertised 63 Administration Clerks' posts for the Port Elizabeth Magistrates' Court. These posts were different from the one held by the applicant in that they were not of fixed term duration. One of the crucial duties the clerks were required to perform was to operate the Digital Court Recording System (DCRS) to ensure the generation of clear and concise court records. The applicant was trained and assessed on the operation of the DCRS. He was on a fixed term contract at the time of recruitment for the 63 posts. He received a letter dated 19 March 2007 in which the respondent informed him of the termination of his temporary employment in that his contract ending on 30 March 2007 would not be renewed. The reason furnished was that he did not meet the requirements for the assessment by Rino Personnel which would have qualified him for appointment as a Court Clerk.

Relevant law against discrimination

- [3] Section 23 (2) (b) of the Constitution guarantees every worker the right to participate in union activities. A right which is guaranteed as follows in section 5 of the Labour Relations Act 66 of 1995 (the LRA):

- (1) 'No person may discriminate against an employee for exercising any right conferred by this Act.
- (2) Without limiting the general protection conferred by section (1) no person may do, or threaten to do, any of the following
 - (c) Prejudice an employee or a person seeking employment because of past, present or anticipated-
 - (i) ...
 - (ii) ...
 - (iii) Participating in the lawful activities of a trade union, federation of trade unions or workplace forum'.

[4] Section 6 (1) of the Employment Equity Act 55 of 1998 (the EEA) prohibits direct or indirect discrimination against employees in any employment policy or practice. Section 11 of the EEA provides that whenever unfair discrimination is alleged the employer against whom the allegation is made must establish its fairness. In *Lewis v Madia 24 Ltd*¹ it was held that the essential elements to prove contravention of section 6 (1) of the EEA are:

'there must be discrimination differential treatment based on a listed or analogous ground;

The discrimination must be sourced in an employment policy or practice;

It must be against an employee; and

It must be unfair'.

The court included different treatment of an employee because of trade union victimization in illustrating difference in treatment. As the applicant alleged that the reason for his non-appointment was his participation in union activities his claim is based on direct discrimination. Non-appointment falls within the purview of recruitment of employment

¹ (2010) 31 ILJ 2416 (LC) at para 35.

policies and practices. He also alleged that he was given less training time than the other candidates. The onus of proving the existence of discrimination was on the applicant.

- [5] The discrimination the applicant seeks to rely on constitutes a listed ground of discrimination as it is listed or specified in the LRA. The applicant needs to establish a connection between the differentiation and his trade union activities, to be successful in proving discrimination. In this regard see *Woolworth (Pty) Ltd v Whitehead*². In an effort to prove discrimination the applicant testified that there were many allegations of nepotism at the Port Elizabeth Magistrates' Court which he was vocal in challenging. As employees they signed a petition and brought the scourge of nepotism to the attention of both the Minister and Director General of the Respondent. At some stage a delegation led by Messrs Mtombeni and Banjwa from the respondent's East London regional office arrived in Port Elizabeth in 2005 to attend to the problem. In their discussion they could not agree on whether the commission of enquiry to probe the allegations of nepotism should be conducted by internal or external officials.
- [6] A week after the meeting, the applicant received a letter from Mr Mqalo, the director legal resources which required him to give reason for disciplinary action not to be taken against him on 3 charges which included putting the respondent's name into disrepute and holding unauthorised meetings during office hours. He furnished his reply within two days but he never heard from Mr Mqalo until the termination of his services on 31 March 2007. In 2005, in a meeting between shop stewards and the Court Manager in which he was late, the applicant was labelled an instigator before his arrival.
- [7] In his evidence of the events closer to the date he was informed of his non- appointment, the applicant stated that he did not attend the full DCRS training scheduled for temporary clerks between the end of February and beginning of March 2007 because he was performing his

² (2000) 21 ILJ 571 (LAC).

court duties. The training was conducted on a Friday and between 09H00 and 16h00 and the following Monday from 9h00 to 13h00. They were assessed at 14h00 by a recruitment agent known as Rino Personnel. He later in March 2007 received the letter informing him of his non-appointment because he did not meet the requirements which would qualify him for appointment as a Court Clerk. Pursuant to the applicant receiving the letter he referred a dispute to the General Public Service Sectorial Bargaining Council. Before the dispute was arbitrated the applicant was informed on 16 September 2008 that officials from the regional office were conducting an investigation about him. The parties settled the dispute in terms of which the applicant was to be re-trained and re-assessed. Training was scheduled to start at 09H00. It instead started at 09H05 and ended at 12H55. The applicant expressed the view that he was treated differently from his colleagues who were trained over a day and a half. The respondent also failed to consider his competence and three years' experience. He sought retrospective appointment with effect 1 August 2008.

- [8] The respondent submitted that the applicant failed to prove that he had been discriminated against. It sought to rely on the following test in *Harksen v Lane NO and Others*³. Firstly, does the differentiation amount to 'discrimination'? if it is on a specified ground, then the 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 person as human beings or to affect them adversely in a comparably serious manner.
- [9] Although *Harksen (supra)* is based on section 22 of the Interim Constitution it is of relevance as the said section is identical to section 9 of the current Constitution. I have deliberately included the applicant's evidence in detail to determine whether it proves a link between the differentiation and his trade union activities. The respondent is a

³ 1998 (1) SA 300(CC) at 325 A

government department and acts through its officials. The applicant did not disclose the names of the officials through which the respondent discriminated against him. He made reference to Mr Mqalo who in 2005 asked him in a letter to give reasons for disciplinary action not to be taken against him. No disciplinary action was taken against him. He also testified that the Court Manager called him an instigator in his absence. He led no evidence to link the comment to his non-appointment. He also mentioned that he was told on 16 September 2008 that officials from the regional office were investigating him. He provided no link between the investigation, his union activities and his non-appointment. Mqalo testified that the reason for the applicant's non-appointment was that he could not perform the key function of a Court Clerk which is the keeping of court records. He did not acquire the required points on both chances he was given and he therefore did not qualify. The applicant did not challenge the truthfulness of Mqalo's evidence regarding the reason for his non-appointment. He did not put his discrimination version to Mqalo but put it to him that he was not given the same training time as his colleagues. The respondent's reason for the applicant's non-appointment was uncontroverted. The applicant did not, either in his evidence in chief or in cross-examining Mqalo link him to his trade union activities.

- [10] In his evidence in chief, the applicant testified that he challenged nepotism in the course of his union activities as a member of delegations. He was one of a number of union members. Even at the meeting he claims to have been referred to as an instigator in his absence, an allegation which constitutes inadmissible hearsay evidence, he was with other shop stewards who had arrived at the meeting earlier. Other than stating that he was vocal, he gave no reasons for the respondent to target him of all the other trade union members he was challenging the irregularities and nepotism with.
- [11] The applicant testified that he joined the initial DCRS training late as he was busy with his court duties. The parties agreed that he be given a second opportunity of being trained and assessed. It was the respondent's version that the duration of the training should have been

three hours. The version was not challenged by the applicant who complained that it was short by ten minutes. He further added that it was shorter than the training received by his colleagues. He however, led no evidence to link the duration of his training to his union activities. Malunga was the co-ordinator of the DCRS and was present at the applicant's second training. He testified that three hours were sufficient for the training. The applicant did not put his discrimination version to Malunga.

- [12] The applicant failed to lead evidence linking the duration of his training and his union activities to his non-appointment. He has therefore not proved that he was discriminated against by the respondent as a result of his union activities.
- [13] In the circumstances the applicant's claim is dismissed

Lallie, J

Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT: In Person

FOR THE RESPONDENT: Advocate Gqamana

INSTRUCTED BY: The State Attorney

LABOUR COURT