



Collaboration Space / UCT Equality Law Database / 2007

PUBLIC SERVANTS ASSOCIATION on behalf of KARRIEM v SA POLICE SERVICES AND ANOTHER

Created by Jenny Erasmus [Administrator], last modified on May 28, 2013



YEAR: 2007

PLAINTIFF / APPLICANT / APPELLANT: PUBLIC SERVANTS ASSOCIATION ("PSA") on behalf of KARRIEM

DEFENDANT / RESPONDENT: FIRST RESPONDENT: SA POLICE SERVICES ("SAPS")
SECOND RESPONDENT: BERNADETTE KOTZE

COURT: LABOUR COURT

CITATION: (2007) ILJ 158 (LC)

POST / PRIOR ACTION:

- Safety and Security Sectoral Bargaining Council
- CCMA

JUDGE(S): NEL AJ

GROUND(S) OF DISCRIMINATION: RACE

STATEMENT OF FACTS:

Ms Karriem, a coloured female employee of SAPS applied for advertised job vacancy within SAPS. Her application was unsuccessful. A white female, namely Ms Kotze, the second respondent, was appointed. Ms Karriem contested her non-appointment. She alleged that she had been unfairly discriminated against on the basis of race, and that SAPS had failed to apply its employment equity plan. Following an unsuccessful application to the Safety and Security Bargaining Council, PSA (the applicant) acting on her behalf of Ms Karriem, referred the matter to the CCMA. The CCMA issued a certificate of outcome recording that the dispute was unresolved. The dispute proceeded to the Labour Court.

PSA made application to the Labour Court. It claimed that SAPS, in appointing Ms Kotze, a white female, instead of Ms Karriem, a coloured female, had unfairly discriminated against Ms Karriem on the grounds of race, in contravention of s 6 of the Employment Equity Act (EEA), alternatively, SAPS had breached s 20(5) the EEA in that it unfairly discriminated against the said employee on the grounds of her lack of experience. In the alternative the applicant alleged that SAPS had failed to implement affirmative action measures as required in chapter III of the EEA and as per its Employment Equity Plan. In the further alternative the applicant contended that SAPS had infringed a number of Ms Karriem's constitutional rights, namely:-

- "her constitutional right to equality, and the right not to be unfairly discriminated against on the ground of race, with reference to s 9 (4) read with s 9 (3) of the Constitution",
- her right to fair labour practices as provided for in s 23 of the Constitution; and
- her constitutional right to dignity provided for in s 23(1) of the Constitution.

SAPS (the first respondent) disputed the applicant's allegations.

The following material evidence was presented to the court: Ms Kotze, the successful candidate, scored the highest mark by the selection panel. Ms Karriem scored two points lower than Ms Kotze. At no time did the applicant dispute the panel's scoring. Ms Karriem had no previous experience in performing the functions of the contested post. At the time of the appointment Ms Kotze had prior experience in the functions of the contested post. It would take anytime between 16-36 months for Ms Karriem to attain the skills required for the contested post. Minutes of SAPS panel meetings indicated that during the selection process the sub-panel and head-panel were cognisant of and considered the employment equity goals of SAPS. The nature of the work to be performed by the incumbent of the contested post required such incumbent to be able to immediately perform the functions at "an acceptable level".

ISSUE OF LAW:

In the context of the recruitment and selection of a candidate for an advertised vacancy which states that the post is a designated one:-

When a white female candidate outscored a coloured female based on objective criteria, and the final selection is determined by the operational requirements of the employer which necessitates that the successful candidate be immediately proficient in performing the job functions; does the recruitment and selection of the white female candidate amount to:

- an employer unfairly discriminating against the unsuccessful candidate on any basis whatsoever (i.e race or experience);
- an infringement of the unsuccessful coloured female candidate's right to equality and/or dignity and/or right to fair labour practices' and/or
- a breach of an employer's obligations under chapter III of the EEA and its employment equity goals.

DECISION, RATIO AND OUTCOME (including minority judgment):

The Labour Court dismissed the application.

As to whether the appointment of Ms Kotze amounted to unfair discrimination based on race, alternatively, relevant experience, against Ms Karriem:-

The court dismissed the applicant's allegation that the appointment of Ms Kotze unfairly discriminated against Ms Karriem on the ground of race or any other ground.

The court referred to the two stage analysis, as set out in the Constitutional Court case of *Harksen v Lane*, in determining "whether a differentiation amounts to unfair discrimination." It identified the first question as whether there was differentiation "amounting to discrimination between people or categories of people". The court held that applicant failed to adduce evidence of differentiation or discrimination. The court regarded it insufficient for the applicant to merely allege that the appointment of a white candidate over a coloured candidate amounted to differentiation or discrimination. The court determined that in order for there to be a differentiation it required, for example, evidence of conduct which differed "in, of or between the two parties"; the presence of no objective criterion on which the selection of the successful candidate was based; the application of an irrelevant criteria in selecting the candidate or the treatment of a candidate in a way that offends their right to dignity. On the facts SAPS had appointed a white female based on objective scoring, and the considered outcome of minutes debate by the sub and head selection panel regarding the requirements of the position and SAPS employment equity goals. On the facts the applicant was not treated differently or less favourably.

The court repeatedly confirmed its determination that the applicant had failed to adduce any evidence that there had been differentiation amounting to discrimination on the basis of race. The court approved the objectivity and thoroughness of the recruitment and selection process of SAPS on the facts of the case. SAPS had complied with s 20(3) of the EEA. The court held that Ms Karriem was not selected due to the inherent requirements of the contested position. The operational requirements of SAPS had outweighed its employment equity goals. The court accepted the evidence of SAPS that the nature of the contested position required the successful candidate to be immediately skilled in the required functions, failing which it would negatively impact on the operations of SAPS. The inherent requirements of the job necessitated the appointment of a candidate such as Ms Kotze.

The court noted that its above determinations would remain unchanged assuming that there existed evidence to establish that SAPS differentiation between Ms Karriem and Ms Kotze. The differentiation would not have amounted to unfair discrimination. The panel's scoring was objective and Ms Kotze was the most suitable candidate for the position.

With reference to SAPS alleged breach of chapter III of the EEA and its employment equity plan:

The court approved the reasoning in *Dudley v The City of Cape Town*, and held that the applicant could not directly approach the Labour Court alleging that SAPS had breached chapter III. Relying on *Dudley v The City of Cape Town*, the enforcement provisions of chapter III are contained in Chapter V of the EEA. It noted that in the event that its interpretation of *Dudley v The City of Cape Town* was incorrect, the fact that the evidence reflected that the selection panels at SAPS had thoroughly applied their minds to the employment equity concerns associated with filling the vacancy was sufficient to confirm its finding that the applicant had no claim against SAPS for its alleged breach of its obligations in terms of chapter III of the EEA. The court was satisfied that SAPS was actively working towards and achieving its employment equity goals.

With reference to the alleged infringement of Ms Karriem's constitutional rights:

With respect to Ms Karriem's constitutional right to dignity and the right to equality, the court held that the applicant had failed to adduce evidence to prove that the conduct of SAPS had infringed such rights. The court stressed that the fact that Ms Kotze was appointed rather than Ms Karriem was not sufficient to prove that Ms Karriem's right to equality had been infringed. With respect to her constitutional right to not be unfairly discriminated against, the court reiterated its earlier finding that no discrimination had been established. With respect to her constitutional right to fair labour practices, the court, relying on the case of *National Entitled Workers Union v Commission for Conciliation, Mediation and Arbitration*, held that the applicant was not permitted to rely directly on s 23 (1) of the Constitution. The applicant should have requested appropriate relief in terms of s 186 (2) of the LRA. Despite same the court noted it not regard an unfair labour practice to exist on the facts.

LINK TO FULL DECISION: <http://www.saflii.org.za/za/cases/ZALC/2006/39.html>

LABELS: