

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

Reportable

CASE NO **D31/05**

DATE HEARD AND DELIVERED 2006/09/07

EDITED 2006/09/16

In the matter between

ILCEV DIMOV STOJCE

Applicant

and

UNIVERSITY OF KZN-NATAL

1st Respondent

PROFESSOR NELSON IJUMBA

2nd Respondent

**JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE
ON 7 SEPTEMBER 2006**

ON BEHALF OF APPLICANT:

MR A NGCONGO
(Durban Justice Centre)

ON BEHALF OF RESPONDENT:

MR C W PEMBERTON
(Garlicke & Bousfiled Inc)

JUDGMENT7 SEPTEMBER 2006PILLAY D, J

- [1] The applicant's claim is brought in terms of section 6(1) of the Employment Equity Act No 55 of 1998. He alleges that he was discriminated against when the respondents failed to appoint him to the post of lecturer in the engineering faculty of the first respondent.
- [2] The grounds on which he relies are, firstly, that he was discriminated against on the basis of his race. He is white and he alleges that the respondents preferred candidates of African, not necessarily South African, origin. Secondly, he alleges that he was discriminated against on the grounds of language because English is not his first language. Thirdly, he was discriminated against on the unlisted ground of his qualification and tertiary teaching and research experience which had not been taken into account or seriously and responsibly assessed.
- [3] The *onus* in a discrimination dispute rests on the applicant to prove the discrimination. Thereafter the respondents bear the burden of proving that the discrimination is fair. If the discrimination is on a listed ground, once the applicant proves the discrimination then it is presumed to be unfair.

- [4] The usual defences to a complaint of discrimination in a non-appointment dispute is grounded in considerations of affirmative action, alternatively, that the applicant did not meet an inherent requirement of the job. Affirmative action is not an issue canvassed in this case. The question of inherent requirement of the job also does not arise as the applicant did not put the requirement of speaking English sufficiently coherently as an issue in dispute. His case was that his English was good enough for the purposes of filling the post and that the respondents did not assess him correctly in this regard.
- [5] The material requirements for the post, as advertised, were that candidates had to have considerable industrial and teaching experience in their respective areas of specialisation. Publication and research output was an advantage. Successful candidates were required to teach and help in the management of the department. Experience in one or more areas of specialisation was required. In the applicant's case his area of specialisation was telecommunications. For the post of lecturer, the candidate had to have a Masters Degree and three years of tertiary teaching/research experience, or a Doctorate.
- [6] The applicant testified that he had a doctorate. This is not in dispute. However, he also testified that he had five years' teaching experience. The

relevance of that experience is in issue. The applicant met the requirements stipulated in the advertisement. As a result, like everyone else who met the advertised requirements, he was short-listed for an interview.

[7] Like all the other candidates, the applicant was interviewed for about 20 minutes. He was unsuccessful in his application for the post for the following reasons, set out in a letter addressed to him by Professor Ijumba, the second respondent, on 25 May 2004:

"Further to your application and interview for the abovementioned position, I regret to inform you that you were not successful for the following reasons:

1. your areas of specialization is insufficient for the requirements of the position.
2. The committee was of the view that you do not have the capacity to teach at tertiary level as you have insufficient tertiary teaching and research experience.
3. The Committee also felt that you have inadequate communication skills in the English language."

[8] With regard to the first reason for non-appointment, the applicant's case was that he had sufficient experience; that his field of specialisation was telecommunications; and that he rejected the respondents' opinion that his specialisation in marine telecommunications was too narrow.

[9] The respondents' reason for finding that the applicant's specialisation was insufficient was based on information in his *curriculum vitae*. He specialised mainly in maritime telecommunication. That field of specialisation was

sufficient for post-graduate teaching purposes but not for under-graduate teaching, which is the post that the applicant was required to fill.

[10] As regards the second ground for the non-appointment, the respondents were of the view that, based on the information and the manner in which the applicant presented at the interview, he lacked the capacity to teach large groups of students, numbering sometimes in excess of 100, as his experience was confined to small groups of about 30. He gave no indication at the interview of what techniques he might use to teach such large groups, and whether he would use tools such as projectors and slides.

[11] Although the applicant's tertiary teaching experience was stated as being five years, it was not appropriate for South African circumstances for, apart from the classes being large, most of the students came from disadvantaged backgrounds and did not have English as their first language. His under-graduate teaching experience was in his home country, Bulgaria, between 1991 and 1995. His experience in South Africa was limited to one month of teaching two Masters students at the first respondent. His evidence in court was that it made no difference whether the classes had 30 students or 100 students as he would be able to teach irrespective of the size of the class.

[12] The second respondent, who is also now the Dean of the Faculty of Engineering and who held that position at the time of the interview, considered that special skills would be required for teaching large groups of undergraduate students who did not have English as their first language and who came from disadvantaged backgrounds. It is not for this Court to second-guess that opinion which is presented on behalf of the first respondent both as the employer and in the professional capacity of a specialist.

[13] With regard to the third reason for non-appointment, notwithstanding the applicant's ability to communicate in English and his commendable effort at speaking a foreign language and conducting research and his under-graduate degree in English, his ability to speak the language was not coherent. That was the opinion of the committee who interviewed him.

[14] It is also the opinion of this Court. The applicant did not communicate clearly. His grammar was not sufficiently good at times for even the Court to understand him. Significantly, he did not respond to questions put to him. That could have been because he was being deliberately evasive. It is more likely that he did not understand the questions. For instance, it was put to him by his attorney on about three occasions whether he knew what a threat was

and, at the end of the series of questions, he had still not indicated to the Court that he understood the meaning of "threat".

[15] His language difficulty was evident in an e-mail that he wrote and which was presented to the Court as part of the agreed bundle. From that it should have been clear to those representing the applicant that there was a manifest weakness in his case. The applicant might well have written a book in English. However, books are edited. His e-mail was not edited. The post for which he was being assessed was not to teach English, but it did require such a level of fluency that enabled him to communicate effectively.

[16] The respondents, therefore, were entirely justified in refusing to appoint the applicant to the post of lecturer.

[17] The applicant's evidence regarding racism was that the panel interviewing him was not white and that the first respondent employed more Africans than whites. The undisputed fact is that the most-preferred candidate for the post was a white male South African. He was offered the position but he refused it in favour of a better offer elsewhere.

[18] The applicant also conceded that engineering skills were in short supply. The

second respondent testified that whenever and wherever these skills could be sourced they would be engaged, irrespective of the colour or origin of the candidate. Four posts had to be filled but only one was filled.

[19] With regard to language as a ground of discrimination, the applicant elaborated that members of the panel who interviewed him, namely the second respondent and the head of department, Professor A M Chol, were themselves unable to speak English sufficiently coherently as they were not South Africans.

[20] Having heard the second respondent's testimony, the court is satisfied that the second respondent spoke English fluently and coherently. He understood the questions and responded to them. He was not evasive. In fact, the second respondent communicated in English far better than the applicant.

[21] Mr *Ngcongo*, for the applicant, persisted with the third unlisted ground of discrimination. The Court invited him to produce authority for his proposition. Apart from informing the Court that the authority is to be found in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1(CC), Mr *Ngcongo* was unable to assist the Court.

[22] The ground of discrimination referred to in that case was sex or gender. Both of these are listed grounds of discrimination. However, of relevance to this case is the following point made in that judgment, namely:

"At the heart of the prohibition of unfair discrimination lay a recognition that the purpose of our new constitutional and democratic order was the establishment of a society in which all human beings would be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past would not be easy but that that was the goal of the Constitution should not be forgotten or overlooked."

[23] The unlisted ground of discrimination does not impact on the dignity or respect accorded to the applicant. It is the duty of the respondent to evaluate candidates for appointment and to refuse appointments when candidates fail to meet the requirements.

[24] Mr *Pemberton*, citing *Grogan*, 8th edition, chapter 15, "Employment Equity" at page 285, submitted that a claim for unfair discrimination arises when two or more similarly-situated employees are treated differently. There is no other employee against whom the applicant compares himself. He conceded, however, that racism or any of the grounds of discrimination can still be proved if it turns out to be a subversive reason for prejudicial action against

an employee.

[25] The Constitutional Court and the Labour Court have considered unlisted grounds as acts of discrimination if they are analogous to the listed grounds. *Harksen v Lane NO and others* 1998(1) SA 300 (CC) at para 47 - 48; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) (1997 (6) BCLR 759); *Ntai and others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC) at para 72 – 73; *National Union of Metalworkers of SA & others v Gabriels (Pty) LTD* (2002) 23 ILJ 2088 (LC) at para 12, para 16-20; *Aarons v University of Stellenbosch* (2003) 24 ILJ 1123 (LC) at para 16-17; *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (LC) at para 89 – 90 pages 1435- 1436).

[26] The test is that the differentiation must impair the fundamental dignity of people as human beings because of attributes or characteristics attached to them. 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. What distinguishes these groups from those who deserve protection? The element of injustice arising from oppression, exploitation, marginalisation, powerless, cultural imperialism, violence and harm endured by particular groups or the worth and value of

their attributes are qualifying characteristics that distinguish differentiation from unfair discrimination. (Davina Cooper *Challenging Diversity* 2004:3 and Iris Marion Young *Justice and Politics of Difference* (1990) 15 - 44)

[27] An employee who relies on an unlisted ground as being discriminatory must establish the 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 might be.

[28] In this case, the applicant's defining characteristic do not classify him as a member of a group let alone one worthy of protection. He did not satisfy the requirements for the post. The respondents were simply doing their job of evaluating him. The evaluation of the interviewing committee was unanimous and the applicant has not provided any evidence to warrant this Court disturbing the committee's finding or the respondent's refusal to appoint him.

[29] In the circumstances, the applicant has failed to prove that his non-appointment was discriminatory on any of the grounds alleged. He has not come close to even showing that there was any differentiation whatsoever based on any of the listed or unlisted grounds of discrimination. If there was any differentiation at all it was to compare the requirements of the jobs with

the suitability of the applicant to fulfil them. That is the essence of the process of filling posts. Without such a process suitable candidates cannot be sifted from unsuitable candidates.

[30] The applicant failed to cross the first base of the two-stage procedure of proving his claim for discrimination. This is a material factor as regards costs. Last week the Court granted an order in the Labour Court in Cape Town where it was common cause that the applicants had been differentiated and the question that had to be determined was whether the differentiation amounted to discrimination on the grounds of family responsibility. In that case, questions of policy arose as to what constitutes discrimination worthy of protection. From that perspective the Court granted a limited costs order against the applicants.

[31] Here, the applicant's case was fact-bound. It had little to do with policy or principles. He had to cross the first threshold of proving, at the very least, that there was differentiation and, in terms of section 11, the differentiation amounted to discrimination. He failed to establish sufficient facts for the first leg of the enquiry. Those advising him should have alerted him to the difficulties in his case purely on the basis of his own written communication which showed that at least on one ground for his non-appointment, namely his language and communication capabilities, he was sure to fail.

[32] In the circumstances, the claim is dismissed with costs.

Judge D Pillay
Date: 16 September 2006
