

**IN THE LABOUR COURT OF SOUTH AFRICA HELD IN
JOHANNESBURG**

Case no: JS 452\05

In the matter between:

JOHANNES TOMMY MOTHOA

Applicant

and

SOUTH AFRICAN POLICE SERVICES

Respondent

JUDGMENT

MOSHOANA AJ

Introduction

- [1] In this matter; the parties agreed to dispense with the leading of evidence and agreed on the set of common cause facts to advance each other's argument. The parties signed Supplementary Pre-Trial minute on 17 April 2007, being the day on which the matter was enrolled for trial. In that minute the parties agreed as follows:

“The parties agreed that they would argue their case on the basis of the common cause facts unless the Judge directs otherwise”.

Having listened to the argument and having perused the documents, I had no reason not to sanction the agreement of the parties.

Common cause facts

[2] The following facts were agreed upon to be common cause

- 2.1. Contents of all the documents contained in bundle B (Respondent’s bundle)
- 2.2. During September 2004, the SAPS advertised a newly created post 1743 seeking to recruit a Divisional Commissioner: Criminal Record and Forensic Sciences Services. The initial advertisement stipulated that *“Applicants must have an appropriate recognised degree or equivalent qualification, at least five years proven managerial experience in the Dactiloscropy (and criminal record administration) and Forensic Science environment, excellent planning, problem solving and strategic thinking abilities, sound knowledge of relevant SAPS policies and procedures”.*
- 2.3. The advertisement also set out the core functions of the post essentially involving the effective and efficient management

of the SAPS Criminal Record and Forensic Science Services.

- 2.4. that the post is a senior post and that the incumbent would report to the Deputy National Commissioner whose senior was the National Commissioner.
- 2.5. In response to the advertisement the Applicant and seven others applied for the post. The SAPS compiled a list of the applicants and summarised their applications (RB, Exhibition D). The Applicants' qualifications and experience were recorded in this list. Of the eight persons who applied, two were Assistant Commissioners, two were Directors including the Applicant, one was a captain. (RB, Exhibit C).
- 2.6. A committee was established which included the most senior officials in the SAPS (The National Commissioner and five of his deputies) to consider the applications. The committee met on 10 November 2004 to consider the applications of the eight people. The committee resolved "*to re-advertise the post due to the fact that not enough candidates with appropriate managerial experience applied in order for the panel to take an informed decision regarding the compilation of a possible shortlist*". The committee also resolved to restructure the advertisement "*to ensure large pool of candidates with adequate and appropriate managerial experience*" (RB, Exhibit B). The committee

approved a new advertisement which provided that the requirements of the post would be “*senior managers at the level of at least Assistant Commissioner\Chief Director*”. It was again stressed that applicants should have “*excellent managerial planning, problem solving, and strategic thinking abilities*” (RB, Exhibit F)

- 2.7. In terms of National Instruction 3\2000, a promotion policy applicable to salary levels 11 to 15; it is specifically provided “*that the National Commissioner is not under any obligation to fill an advertised post. In the event that an advertised post is, for whatever reason, not filled, the post may be withdrawn, re-advertised...where this is deemed to be in the interest of service delivery*”. (RB, Exhibit N, clause 7 (3)). The advertisement itself contains a proviso that “*the South African Police Service is under no obligation to fill a post after the advertisement thereof*”. (RB, Exhibit A para 10)
- 2.8. In consequence thereof and on 15 November 2004 all personnel in the SAPS were informed about the withdrawal of the initial advertised posts. (RB, Exhibit E)
- 2.9. The post was re-advertised on 5 December 2004 with a new advertisement which was approved by the panel which stipulated the requirement that the incumbent be a senior manager at the level of “*at least Assistant*

Commissioner\Chief Director". It is common cause that this is a level 14 position. (RB, Exhibit G)

2.10. Fifteen people applied including the Applicant. Their applications were summarised including that of the Applicant (RB, Exhibit I and J).

2.11. On 24 January 2005 the panel consisting of the National Commissioner and four of the Deputy National Commissioners met to screen the applications. The minutes of the meeting record that "*all applications were considered by the panel*". An initial long list was compiled after which a shortlist was compiled both of which lists excluded the Applicant. From the shortlist two white males and two African males were shortlisted. It was noted in the minute that "*it was again emphasised by the panel that this is a very high profile post in a demanding and challenging environment and that the selection of a strong manager and the correct candidate would be of the utmost importance. Hence preference was given to the shortlisting of candidates already performing managerial functions on salary level 14*". (RB Exhibit H)

2.12. This minute identifies the reason for the requirement in clear and unambiguous terms. The SAPS were looking to recruit a person with appropriate material experience.

- 2.13. The shortlist was approved by the panel including the National Commissioner (RB, Exhibit K)
- 2.14. On 9 February 2005; the committee met with the Deputy Minister who stood in for the National Commissioner who was unavailable due to unforeseen circumstances to attend the meeting.
- 2.15. The shortlist of candidates were interviewed and scored. It was decided to recommend the appointment of Assistant Commissioner Du Toit, the Third Respondent in this matter. He was chosen specially because he was the most knowledgeable, displayed good performance in the environment, was very experienced and was thought to strategically be the best candidate for the post. It was also believed that he would be a strong and decisive manager that could effectively address and improve service delivery at the new division (RB, Exhibit M).
- 2.16. The committee approved the appointment of Du Toit noting that it had taken into account the specific environment. (RB, Exhibit L). The National Commissioner also approved such appointment (AB, p.50).
- 2.17. In consequence the Third Respondent was appointed into the post. The Third Respondent's curriculum vitae is enclosed

and has been introduced as Exhibit O and lists his extensive experience and history.

2.18. The Applicant was not satisfied and lodged a grievance in terms of the Grievance Policy (RB, Exhibit P and Q). He wanted to know why he was not shortlisted (RB, Exhibit Q). He stated therein that he thought the requirements of the advertisement that the applicant *“must be at the level of Assistant Commissioner\Chief Director is unfair to black people and effectively eliminates competition and is also against the Employment Equity Act and does not promote representivity”*. He also stated that the requirements imply that *“only white people will meet all the requirements”*. He demanded to be shortlisted and demanded reasons why he was not shortlisted.

2.19. His grievance was dealt with and he was informed why he was not shortlisted. (RB, Q p.9). He was specifically informed that he was not shortlisted because there were applicants *“with longer experience at a higher level of senior management”*. The Applicant indicated that he would withdraw his grievance if a black person was appointed to the post.

2.20. In these proceedings the Applicant conceded that there were two black candidates who were shortlisted and interviewed (Pre-Trial minute para 2.5).He has not persisted with the

allegation that there was discrimination based on racial grounds and as is evident from his Supplementary Statement of Case, it is his contention that “*this type of unfair discrimination does not fall within the listed grounds in terms of the Employment Equity Act (EEA) but falls within the ground which are not listed*”. The Applicant was not on level 14, the Third Respondent was.

Issues to be decided by the Court

[3] In the Pre-Trial minute filed by the parties on 01 February 2007, the following was identified as issues to be decided by the Court:

- 3.1. The validity of the special pleas
- 3.2. If the special pleas are not upheld whether the discrimination more particularly whether there was setting of a minimum requirement that the prospective applicant for a post be on level 14 was discriminatory.
- 3.3. What was the grounds of discrimination
- 3.4. If so was such discrimination fair and or justifiable

Suffice to mention that the special pleas taken were in the following form:

First Special Plea

“3.5. The Applicant alleges in paragraph 8 of the handwritten Statement of Claim that the legal question is whether a requirement that the person applying for the post in issue must be on level 14 (Assistant Commissioner) before he\she be considered for shortlisting discriminates against competent Applicants who meet all the requirements except not being on level 14.

3.6. The Applicant has failed to aver sufficient facts to indicate a basis for discrimination in terms of Employment Equity Act. The Employment Equity Act creates certain listed grounds of discrimination. Insofar as an applicant for employment may rely on grounds not listed, it requires proof of sufficient facts that the inconsistency is discriminatory in a pejorative sense.

3.7. The Applicant sets out no facts and\or legal basis for the conclusion that the requirement that applicants must be on level 14 is discriminatory on any basis in law or in fact.

3.8. Furthermore the re-advertisement about which the Applicant complains is set out on page 2 of Annexure “A3” to the Applicant’s Statement of Claim. The fact that the post sets certain minimum requirements is not

directly or indirectly discriminatory and no factual and/or legal basis is set out in the Applicant's Statement of Claim for the contention that this is discriminatory.

3.9. In consequence the Applicant's Claim should be dismissed.

Second Special Plea

3.10. Furthermore, the Applicant's complaint seems to be one that relates simply to an alleged unfair promotion dispute and in that respect the Applicant ought to have referred his dispute in terms of Section 191 to the CCMA alternatively a bargaining council such as the SSSBC which has jurisdiction.

3.11. The CCMA as an organ of State is empowered to apply the Constitution including the right to equality in any assessment about a dispute concerning an alleged unfair labour practice relating to promotion.

Arguments and Submissions

[4] Mr Mabaso appearing for the Applicant filed Heads of Argument on 01 February 2007. He did not file further Heads in the light of the Supplementary minutes referred to earlier. I shall revert to his

oral submissions later. Effectively his argument went as follows in the written Heads:

“The requirement that candidate applying for this post must be at level 14 is discriminatory because it is a known fact that the South African Police Services (SAPS) because of apartheid have never promoted any black member within the Criminal Record Centre (CRC) and Forensic Service Laboratory (FSL) components up to level 14, and that the only black senior managers who meets the requirement are only at level 13. It is therefore the Applicants’ contention that the requirement was intended to bar him from contesting the position since he is on level 13 and give an unfair advantage to members on level 14”.

- [5] In Court, Mr Mabaso further argued that the post was tailor made for the Third Respondent (Mr Petrus Jacobs Lourens Du Toit). He contended that the Applicant lodged a grievance once he realised that he was not shortlisted. The contention of course suggests that had he been shortlisted he would not have had any basis to claim discrimination. In fact he emphasised that by not being shortlisted, the Applicant was denied right to be heard. In conclusion, he argued that the Court must grant the Applicant the following relief:

“Promoting the Applicant to a similar position, alternatively promoting him to the position of the Third Respondent”.

In fashioning the relief as he did, he emphasised the fact that the Applicant stipulated in his grievance that the Respondents shall bear the consequences.

[6] Mr Boda, appearing for the First and Second Respondents, submitted detailed Heads of Arguments, which were very helpful to the Court. I do not wish to repeat the contents of his Heads, but wish to stipulate that his argument was twofold: Firstly, he argued that there was no discrimination at all. Secondly, he argued that should the Court find there was discrimination, then the Respondents shall contend that the requirement of level 14 is inherent to the post to which the Applicant was to operate should he have been successful. It was common cause that the Applicant is not a level 14.

[7] Further he argued that on the facts as presented the dispute is effectively about unfair conduct in relation to promotion and therefore the Court lacks jurisdiction to entertain the dispute. He referred the Court to **Dudley v City of Cape Town and another (2004) 5 BLLR 43 (LC)** and **Department of Justice v CCMA & Others (2004) 4 BLLR 297 (LAC)**, in substantiation of that submission.

Coupled to the inherent job requirement argument, he argued that the SAPS has a Constitutional obligation to deliver service (**section 205—8 of the Constitution of the Republic of South Africa 108 of 1996, section 11—15 of the South African Police Services Act 68 of 1995, Coetzer & Others v Minister of Safety and Security and Another (2003) 24 ILJ 163 (LC)**)

[8] He also argued that the Applicant has failed to identify and or plead and or prove sufficient facts to show:

- 8.1. that discrimination exists
- 8.2. that he had been discriminated upon on one or more or all of the grounds mentioned in the Employment Equity Act 55 of 1998, particularly on any of the listed grounds contained in s 6(1) of the Act.
- 8.3. what the Applicant must demonstrate is some pejorative basis for differentiating between him and others which affects his dignity. The Statement of Claim manifestly fails to intensify the grounds upon which the alleged discrimination has occurred.

In conclusion, he prayed for dismissal of the claim with costs.

Analysis of the facts and submissions

[9] At the core of this matter, lies the fact that by requiring level 14, did the Respondents discriminate against the Applicant?

In my judgment, I shall not pay any attention to the withdrawn advert and or reason for its withdrawal. I choose not to decide whether the advert was withdrawn for the reasons advanced by the Applicant or by the Respondents, since that is academic. I shall concentrate on the subsequent advert issued on 26 November 2004.

It is important to quote in full the requirements and core functions.
Those were:

“Requirements:

*Senior managers at the level of **at least** Assistant Commissioner\ (Chief Directors are invited to apply for the advertised post. A recognised degree or equivalent qualification, which is applicable to the post, will be a recommendation. Applicants should have excellent managerial, planning, problem solving and strategic thinking abilities, sound knowledge of the relevant SAPS policies and procedures, be fluent in at least two of the official languages, of which one must be English and have a valid light motor vehicle driver’s licence.*

Core Functions:

The appointee will be responsible to ensure the management of an effective and efficient Dactiloscropy (including criminal records) and forensic science related support service within SAPS effectively manage Criminal Record Centre\Local Criminal Record Centra-services pertaining to expert evidence handling, crime scene management, processing and the provision of criminal history and related information, ensure an effective national laboratory service regarding the application of forensic science (i.e. ballistic, questioned documents, biology, chemistry, inorganic materials, polygraphy, photography and explosives) in the investigation of crime (including the collection of physical evidence at crime scenes by means of forensic techniques), ensure an effective specialized (i.e. quality management,

crime scene co-ordination, case\exhibit reception, case\exhibit registration and case\exhibit security) and management support (i.e. human resource management, financial support, logistical support and auxiliary support) service, manage and utilize all resources allocated to the immediate post environment in accordance with relevant directives and legislation”.

[10] Strange enough, knowing fully well that he is not a level 14; the Applicant chose to apply for the post as advertised. From the documents, it is apparent that the Applicant is a holder of a National Diploma, B-Tech policing, Presidential Strategic leadership programme, advanced programme in Forensic Criminalistic and various additional internal courses. The Third Respondent holds a BA, National Diploma Police Administration, B juris, Certificate management systems and Certificate organisation and work study.

[11] From Du Toit’s Curriculum Vitae appears a commendable career record and the fact that he has more than 14 years managerial experience with 10 years thereof as a senior manager.

No evidence was placed before the Court on the credentials of the Applicant other than those cited earlier.

[12] On 24 January 2004, the SAPS provided a shortlist which had the following people:

12.1. P J L Du Toit

12.2. G G Lebeya

12.3. J A Jones

12.4. RW Mdluli

The Applicant was aggrieved by this and decided to lodge a formal grievance against his non-shortlisting. This he did on 31 January 2005. De Beers dealt with the grievance first.

- [13] The Applicant was not satisfied. Then the grievance was handled by the Deputy National Commissioner T C Williams. Mr Williams stated the following:

“I also indicated that his application was considered and he was not shortlisted in that applicants with longer experience at a higher level of senior management were shortlisted”.

This he stated on 16 March 2005. The Applicant was not satisfied thereby. After all that he referred the matter to the CCMA. In his referral form, Form 7 11 he stated the following:

“I want to be appointed to the post level 14 which is equivalent to post no 04\09\1743: Divisional Comm: Criminal Record and Forensic Science”.

- [14] Having analysed the facts above, I come to the conclusion that there is nothing discriminatory in the advertisement. I agree with Mr Boda that there is nothing discriminatory in the advertisement, nor is there any basis for the Court to interfere with the Criteria set out by the SAPS. It does appear to the Court that the assertion that

the minimum requirement of being Assistant Commissioner\Chief Director (level 14) is discriminatory is opportunistic.

The Applicant only noted that after he was not shortlisted.

- [15] Besides the Court was not informed of the basis upon which the minimum requirements were discriminatory. It appears to be the Applicant's case that employers should not set minimum requirements for positions they advertised. I agree with Mr Boda that it is not the duty of this Court to set minimum requirements for employers (**Lagadien v University of Cape Town (2001) 1 BLLR 76 (LC). Kganare v Motheo District Municipality & Others (Case no JS 941\04 unreported)**)

- [16] The Applicant's case as argued is premised on unlisted grounds of discrimination. In **Prinsloo v Van Der Linde 1997 (3) SA 1012 (CC)** at paragraph 31; the Court stated the following:

"The proscribed activity is not stated to be unfair "differentiation" but stated to be "unfair discrimination". Given the history of this country we are of the view that discrimination has acquired a particular pejorative meaning in relation to the unequal treatment of people based on the attributes and characteristics attaching to them".

I am in respectful agreement therewith.

- [17] The Applicant did not either by way of evidence or oral submissions satisfy the Court why the fact that the minimum requirement is level 14 affects his human dignity. (**TGWU and**

Another v Buyela Security Holdings (1999) 4 BLLR 401 (LC).
Scallan v Cadbury (Pty) Ltd (2006) 8 BLLR 811 (SE)

I agree with Waglay J when he said the following in the matter of **Ntai and Others v SA Breweries and Others (2001) 22 ILJ 214 (LC)**:

“Where the differential treatment is not based on a listed ground, it is not sufficient merely to allege that the employment policy or practice in question is arbitrary; the complainant must allege and prove that the policy and practice is based on an analogous ground to the listed ground. What therefore is required is that a complainant must clearly identify the ground relied upon and illustrate that it shares the common form of listed grounds, namely that it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparable manner”.

On the issue of discrimination, it is not sufficient for a litigant to just allege discrimination. It is required of a litigant to substantiate that, that which he or she sees as treating him different from others amount to discrimination legally defined.

- [18] Section 5 of the Employment Equity Act 55 of 1998, places an obligation on the part of every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. The section

does not place an obligation to eliminate discrimination in general, which loosely defined might mean any form of discrimination.

Although section 6 of the Employment Equity Act, does not provide a close list of grounds, that in my view is not licence to bring in all and everything that appears to be different from the other.

- [19] Although the Applicant did not pitch his case to the level that the policy or practice by the SAPS to require a proven managerial experience to positions as senior as that of Divisional Commissioner, is per se discriminatory, it can be inferred from the submissions made in Court and the grievance lodged that such is the case. To that end, it is the view of the Court that no evidence was led in any event to suggest such. Secondly, there is nothing wrong in an employer requiring proven managerial experience in filling of senior posts. For as long as that practice is not capricious all is in order. (**Ntai** supra at paragraph 74 page 198)

- [20] Mr Mabaso relied on **City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC)**. That judgment dealt with the provision of section 8 of the Interim Constitution. The Court stated the following:

“This Court has consistently held that differentiation on one of the specific grounds referred to in section 8 (2) gives rise to a presumption of unfair discrimination. The presumption which flows from section 8 (4) applies to all differentiation

on such grounds. There may possibly be cases where the differentiation cannot conceivably result in discrimination and for that reason does not cross the threshold of section 8 (2). According to Sachs J, however section 8 (2) is triggered only by differentiation which imposes identifiable disabilities or threatens to touch on or reinforce patterns of disadvantage or in some proximate and concrete manner threatens the dignity or equal concern or worth of the persons affected and in the absence of such consequences, the presumption under section 8 (4) does not arise”.

Accordingly, I am of the view that the Applicant’s case as pleaded and as agreed on common cause facts does not cross the threshold. By applying the test espoused by Sachs J, the differentiation alleged by the Applicant is far from being identified as such.

[21] In **Stojce v University of KZN (Natal) and Another 2007 (3) BLLR 246 (LC)**, Pillay J said the following:

“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 difference is worthy of protection. To warrant protection, the Applicant must show that the conduct complained of impairs on him as a class or group of vulnerable persons, such as persons with disabilities or family responsibilities, or that conduct is inherently pejorative as a racist or sexist utterance might be. In this case, the Applicants’ 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 evidence to warrant this Court disturbing the committee's finding or the Respondent's refusal to appoint him".

I fully agree with the sentiments expressed in that judgment and same confirms the principles espoused by Sachs J. The matter before me is in all fours with the **Stojce** case. I find no reason to deviate from the principle set out above.

- [22] It does appear that the initial stance of the Applicant was that the minimum requirement was meant to exclude blacks. Accordingly, he seemed to have relied on one of the listed grounds. However, this position was discarded after an exception was taken.

Traces of this ground appear strongly from the grievance lodged. It is obvious that there was no merit in that stance, because about 12 (twelve) blacks applied for the position, this included the Applicant who did not even meet the minimum requirement. About 2 (two) black males were shortlisted.

- [23] Mr Mabaso made a submission which in my view was not supported by any facts, to the effect that because of apartheid the

SAPS has never promoted any black member to level 14 within CRC (Criminal Record Centre) and FSL (Forensic Scheme Laboratory). Mr Boda did not take issue with the submission but the Court is not certain whether it was so that by 2004, there were no black employees at that level.

[24] In any event the basis for alleged discrimination is not race. I traversed this point simply to see whether referring to **Ntai** decision would there be any basis to compare the level 14 with the racial discrimination. I do not find any basis. Even if I wanted to give serious consideration to the possible analogy no sufficient facts had been presented to me to do so.

Issue of Costs

[25] Both counsels argued that costs should follow the results. I have no reason not to give effect to that argument.

Order

Having considered the common cause facts, the undisputed documents, the oral submissions and the written submissions, I come to the following conclusion, and accordingly make the following order:

1. The Application falls to be dismissed with costs.

G N MOSHOANA

Acting Judge of the Labour Court
Johannesburg

Appearances

For the Applicant	: Adv Mabaso
Instructed by	: Mateme Makgahlele & Attorneys
For the Respondent	: Adv Boda
Instructed by the	: State Attorney
Date of hearing	: 17 April 2007
Date of Judgment	: