CONSTITUTIONAL COURT OF SOUTH AFRICA

Sali v National Commissioner of the South African Police Service and Others

CCT 164/13

Date of hearing: 10 March 2014
Date of judgment: 19 June 2014

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the Labour Court. The application concerns alleged age discrimination in the recruitment policy of the South African Police Service (SAPS).

The applicant, Mr Sali, was 41 years old and had worked for about three years as a police reservist when he applied for a permanent position in the SAPS. The SAPS refused to appoint him on the basis of his age. This was because the National Commissioner of the SAPS, purportedly acting in terms of SAPS Regulations, had set an age limit of 40 years for reservists applying for permanent appointment. In doing so, the National Commissioner had created an exception for reservists by extending the age limit of 30 years in the Regulations.

Mr Sali applied to the Labour Court alleging that, contrary to the Employment Equity Act, the SAPS had unfairly discriminated against him on the basis of his age. He sought compensation or permanent appointment to the SAPS; as well as an order requiring the SAPS to eliminate unfair discrimination on the basis of age in its employment practice. The Labour Court dismissed Mr Sali's application. It held that the 40-year age limit is contained in a Regulation and is therefore excluded from the ambit of the Employment Equity Act's definition of an "employment policy or practice".

Mr Sali applied to the Constitutional Court for leave to appeal. He argued that the Labour Court's interpretation of "employment policy or practice" was unduly narrow.

He also contended that the SAPS's age limit is unfairly discriminatory and sought an order that the relevant provisions of the Regulations be declared invalid.

The SAPS argued that because Mr Sali raised the constitutionality of the Regulations for the first time on appeal, the challenge should not be entertained. It defended the Labour Court's interpretation of "employment policy or practice" and argued that, in any event, the 40-year age limit is not unfairly discriminatory.

In a majority judgment written by Cameron J (and concurred in by Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J) the Constitutional Court denied Mr Sali leave to appeal. It agreed with the SAPS that Mr Sali had not clearly raised his constitutional challenge to the Regulations in the Labour Court and that he could not be allowed to raise it on appeal. The SAPS seemed to have had no inkling that they were called upon to defend the constitutional validity of a service-wide recruitment age bar. It would thus be lamentable justice in these circumstances to determine the validity of the age bar. Consequently, even if Mr Sali succeeded in showing that the SAPS's applying the 40-year limit to him was unfairly discriminatory, this Court could give him no relief, because any relief would be at odds with the existing statutory requirement of the generally applicable 30-year limit. Indeed, this 30-year limit would be even more unfavourable to Mr Sali than the 40-year limit. For these reasons, the Court held that it was not in the interests of justice to decide Mr Sali's appeal.

Jafta J, in a dissenting judgment, held that the 40-year age limit was introduced by a waiver rather than an amendment to the Regulations. Contrary to the Labour Court's finding, therefore, the age limit is an "employment policy or practice" reviewable under the Employment Equity Act. Jafta J proceeded to scrutinise the age limit and agreed with Mr Sali that it was unfairly discriminatory. Jafta J would therefore have granted leave to appeal, upheld the appeal, and remitted the matter to the Labour Court to determine appropriate relief.