IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: JS338/06

In the matter between:

G HATTINGH First Applicant

F K VAN SCHALKWYK Second Applicant

and

SOUTH AFRICAN AIRWAYS Respondent

JUDGMENT

FRANCIS J

Introduction

1. The first applicant, Gerhard Hattingh is employed by the respondent, the South African Airways as a pilot. The second respondent, Frederick van Schalkwyk is also employed by the respondent as a pilot. The first applicant applied to be employed as a pilot in February 1996 and the second applicant in April 1997. They were not employed because the respondent had in policy not to employ qualified pilots who were above 35 years. After the said policy was abolished, they applied and were duly appointed as pilots. They lodged a grievance in 2005 and after that referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. After conciliation failed, they brought an application for a declarator that the respondent's conduct constitute unfair discrimination, alternatively an unfair labour practice. They are also seeking an order to adjust their seniority to the dates when they had applied to be appointed as pilots and compensation and/or damages in the sum of R1 044 844.00 and

R947 404.00 respectively.

2. The respondent conceded that it had a policy not to employ qualified pilots who were over 35 years old. This policy was abolished. It opposed the application on the grounds that this Court does no have jurisdiction to entertain the dispute because the act or omission constituting the discrimination occurred in February 1996 and April 1997 which was more than six months before the referral to the CCMA. The dispute was referred to the CCMA on 23 December 2005. Since the act which constitutes the discrimination occurred before the Employment Equity Act, 1998 (the EEA) came into operation, the dispute should have been referred in terms of Item 2(1)(a) of Schedule 7 of the Labour Relations Act 66 of 1995 (the LRA) as it was prior to its repeal by section 64 of the EEA, read with Schedule 2 of the LRA.

The evidence led

3. The first applicant testified that he was born on 6 July 1962 and is a pilot with the respondent. He knows the second applicant. Towards the end of 1995 - beginning of 1996, he applied to the respondent to be employed as a pilot. He was 33 years old at the time and was aware that the respondent had a policy only to appoint qualified pilots who were below 35 years of age. This was also stated in the advertisements for the posts that are at B19 to 21. In 1996, he was invited to attend an interview. It was cancelled and he was told that there were no intakes of pilots for that year and that he should apply again. In 1997 an advertisement was placed in the Sunday Times. He applied again on 24 March 1997 as seen from B7 but received no response. He assumed that he was not appointed in 1997 since he was turning 35. During 2004 he became aware that the seniority list of

Zimasa Mwanda a co-pilot was adjusted because of discrimination on the basis of age and race. There was at the time nothing official. The official seniority list was published in 2005. He lodged a complaint on 5 May 2005 in terms of the respondent's grievance procedure alleging that he was discriminated against on the basis of his age. He received a response from the respondent on 31 May 2005 stating that the seniority would not be adjusted. In June 2005 he referred the grievance to stage 2. There was no response to it. According to the first applicant, he was in dispute with the respondent and in June 2005 approached his attorney who referred the dispute to the CCMA. B49 is the pilot seniority adjustments in terms of the EEA and is dated 2001 before he had joined the respondent. He only became aware of the adjustments in preparations for the trial after their statement of claim was filed. He did not declare a dispute earlier since he was not aware of the exact time period that was needed to be followed. He was aware of the grievance procedure. He was employed by the respondent in September 2001 and between this period and 2005, did nothing because he was not aware that the respondent was addressing past discrimination. He only became aware of Mwanda's case after it was referred to the CCMA. He compiled B46 - 48 which is what he and the second applicant were earning and would have earned. The second applicant's schedule is at B46 which is from the date of his appointment and is correct. His is at B47 from the date of appointment to August 2009.

4. During cross examination the first applicant said that he first applied for a position in 1996 and was told about the moratorium. He was 33 years old in 1996 and 34 years in 1997. He was asked if he had any proof that he applied in 1997. He said that he had a letter that was sent to the respondent and letters with the change of his address. The letters were

sent by ordinary mail but has no proof that it was received by the respondent. It was put to him that it was only speculations. He said that the previous year, he was invited to apply. He assumed that they were interested in him because of his qualifications but did not respond due to his age. He could not say if his application reached the respondent but he thought that he had sent it by registered mail. He waited so long because he was not aware that the respondent had addressed the past discrimination and it was only when they had addressed the past discrimination. He is a member of the South African Airways Pilot Association (SAAPA) and they did not take up Mwanda's case. He was aware of the Interim and Final Constitution that outlawed discrimination. The respondent is a prestigious company to work for and felt that it was above the law. He did not want to rock the boat. He said that it was a perception that they were above the law. It was accepted that the respondent would not employ people above the age of 35. When he joined the respondent, the seniority listing was based on the date when a person joined the respondent. There were no age barriers when the matter was referred to the CCMA. Most of the pilots are above the age of 35. Since 1998/1999 people were employed, who were above 35. During re-examination, he said that he would have turned 35 in July 1997. Many pilots joined in 1997 and he is aware of the pilot system seniority list dated 5 April 2005. He thought that Mwanda's seniority was backdated to 1989 or 1990.

5. The second applicant testified that he was born on 27 October 1961. He first applied for employment with the respondent as a pilot in February 1996. He was aware that the respondent had a policy not to employ qualified pilots if they were above 35 years. The policy was general knowledge in the industry. The advertisements that appeared in the

Sunday Times on 9 January 1994, 2 October 1994 and 17 December 1995 all contained the age requirement. When he applied in February 1996, he was 34 years old and would have turned 35. He was interviewed in February 1996 by a committee who after discovering that he was going to be turning 35 at the end of the year, told him that his age had disqualified him for appointment. He was told that he should reapply later since the age barrier was going to be moved to 38 years. He applied again in 2000 after he was told that the age restriction had been lifted completely. He was appointed as a pilot on 1 August 2000. B49 is a list of names of employees whose seniority positions were adjusted based either on race and gender. He knew about this when it happened. He had already been employed by the respondent. When the brief came out, he did not think that it dealt with age but only gender and race and would not have affected him. Mwanda is his colleague. The respondent has a seniority list published every April. It is of interest to all of them. It is updated due to resignations or people going on pension. B35 is the seniority list of 1 April 2004. It shows that Mwanda was on position 607. His date of birth is 28 September 1958 and he joined the respondent on 1 September 2000. He was employed during the second applicant's intake. The first applicant is on 592 and was 15 positions above Mwanda. B40 is a pilot system seniority list for 5 April 2005. Mwanda is on 349 and the second applicant on 567. Mwanda was about 200 positions above him. When he, the second applicant, first applied, he was below the age of 35 and would not have applied if he was above 35. Mwanda had declared a dispute based on race and age discrimination. After the second applicant saw this, he saw that many of them were in the same situation. The first applicant lodged a grievance with the respondent on 5 May 2005 and he signed as a grievant. They contended that they were discriminated against in the past based on age, which resulted in them being deprived of a status of seniority which

they should have enjoined had they not been discriminated against. The first applicant stated that his seniority listing should be adjusted to number 462 in the group intake of June 1997 from 674 and the second applicant's from 567 to 457. The respondent responded on 31 May 2005 (B4) stating that they had investigated the grievance and that the respondent had applied the rules of seniority in terms of the Regulating agreement and that their seniority would not be adjusted. On 17 June 2005 the applicants filed a step two grievance with the senior manager and the chief pilot. There was no response to this. They consulted their union which refused to take on the matter. They consulted an attorney who referred the dispute to the CCMA on 23 December 2005. The second applicant said that his dispute arose in his mind when the respondent did not respond to their grievance. The calculations about what they are being owed were done by the first applicant and this appears at B456 - 46. It is a conservative amount and is correct. It is without interest and is from the date of their appointment to the Court date in August 2009.

6. During cross examination the second applicant said that Mwanda is a black male. He had referred a dispute based on his race and age and the matter was settled when his seniority was adjusted. He agreed that in his referral to the CCMA he the second applicant stated in paragraph five that the date when the dispute arose is 30 September 2005. He wants relief from the date of his appointment in 2000. He went for an interview in February 1996 and was 34 years old. He knew in 1996 that discrimination was outlawed and about his rights to equality in the Constitution. It was put to him that in February 1996 he was told that he could not be appointed as a trainee and was asked why he did not challenge it.

He said that he did not know about age discrimination. It was the norm that he had to be below 35 years. He was asked why he did not go to a lawyer and say that it was discrimination. He said that he believed that the limit was 35 years and was not aware that he could challenge it. It was put to him that he was senior pilot. He said that he did not know that it was age discrimination. He had a belief system up to the time and realised that Mwanda was promoted. He agreed that the barrier was uplifted and he applied and was appointed. The discrimination was corrected. The seniority list came out in April of each year and was placed on the notice boards. There were applicants who were discriminated on the basis of their race and gender. He saw the seniority list from 2000 to 2005 and did not complain. Mwanda was promoted on the seniority list and this prompted them to object. The seniority list has relevance to benefits like pensions etc. and is based on entry into the service and not age. B49 was signed on behalf of the respondent and SAAPA and he is a member of SAAPA. The dispute was based on race and gender and not age. The matter was settled in terms of B49. He agreed that there were no barriers for him to be appointed as a pilot before he reached 35 years. He was asked why he did not apply. He said that he was happy with flying the police and air force. Mwanda had such opportunities under Apartheid but is black and he is white. He had lived in Transkei in 1994 and not in South Africa. He knew that race and gender was addressed and did not bother about it until he heard that Mwanda was adjusted based on age and race. He has no documents supporting this. B45 goes back to August 2002. He was asked why he had not referred the dispute in 2000. He said that Mwanda came late with his case and followed it. The age part of Mwanda's dispute made them to take up the matter further. He agreed that nothing stopped them from challenging it. They did not challenge it because it was based on race and gender and Mwanda's one was based on

race. He agreed that the respondent stopped the policy on age in 1998. There were no barriers to be appointed as pilots. Most of the pilots employed by the respondent currently are above 35 years. Presently anyone can apply to be trained as pilots even if they are above 35 years. In 2005 when he referred the dispute to the CCMA there was no discrimination based on age. During re-examination he said that he did not know to what date Mwanda was backdated and could not say if it was determined earlier but they used the date when he joined the service.

Analysis of the evidence and arguments raised

7. The applicants are seeking an order declaring the respondent's conduct to constitute unfair discrimination, *alternatively* an unfair labour practice. This Court may issue a declarator in terms of section 158(1)(a)(iv) of the LRA. This Court has a discretion to do so. There is no time limit stipulated in the section within which such an application may be brought to Court. Since an object of the LRA is that labour disputes should be dealt with speedily, an application for a declarator should be brought within a reasonable period. The policy that the applicants want to be declared as unfair discrimination was abolished by the respondent in 1997. I will revert to this aspect later in this judgment. Both applicants knew about this policy in 1996 and 1997 when they had applied to be appointed as qualified pilots by the respondent. They had testified that this barrier was well known in the industry. There is no longer an age barrier to any pilot who wants to be employed by the respondent. The declaratory relief that the applicants are seeking is not only academic but was brought some nine years after it was abolished. The position would have been different if the policy continued to exist. This is not so. The second applicant testified during cross examination that after he was informed in 1996 that there

was a moratorium he did not apply again earlier because he was happy flying the airforce and police. By seeking the declarator order, the applicants are rather opportunistic and want to overcome the insurmountable hurdles that they are confronted with which relates to the time limits specified in the EEA. This Court is not prepared to grant a declarator since the policy that they are complaining about was abolished in 1997. The order for a declarator is an abuse of the court process and would allow applicants to seek relief that they could not obtain through the back door.

8. The application for a declarator is refused.

9. This Court deems it necessary to deal with some of the issues that were raised. Before dealing with the issue about whether this Court has jurisdiction to consider the discrimination claim, it is necessary to deal with the consider the first applicant's claim. The applicant had applied for the position of a qualified pilot on 15 January 1996 as seen in his letter dated 13 June 1996 (B24) in which he was providing his update. He was notified in a telex that appears at B22 that he had to attend an interview on 18 March 2006 at 11h15. In a letter dated 26 March 1996 (B23) he was informed by the respondent that the recruitment of pilots had been postponed and that his application would be waitlisted until interviews were again conducted. He was advised that it was essential for him to keep the office informed of any changes in his address and telephone number. In a letter dated 5 August 1996 which is at B25 he was informed that the recruitment of first officers had been postponed and his application could not be favourably entertained and that he had to apply again when positions for first officers were advertised. The first applicant in his statement of claim contends that he was discriminated against on the basis

of his age. He had first applied for employment with the respondent during April 1997 and was only appointed on 3 September 2001 as a first officer. He is seeking an order adjusting his seniority to June 1997. An issue in dispute is whether the first applicant had applied for employment with the respondent during April 1997. It is not entirely clear when the respondent had abolished the age barrier. The pleadings are also not helpful on this issue. It is pleaded in paragraph 2.1 of the statement of claim that before 1999, the respondent rejected all applications for employment as qualified pilots by persons who were over the age of 35 and in so doing, discriminated directly against such applicants based on their age. In the statement of response the respondent pleaded that it does not admit the content of the said paragraph and put the applicants to the proof thereof.

10. The respondent denied that the first applicant applied for the position of a pilot in 1997. During cross examination the first applicant was asked how he had sent his application. He said that it was sent by ordinary post. He later said that he thought that it was sent by registered post. He assumed that because he had received no response it was as a result of the age barrier. The parties had prepared a bundle of documents. It is clear that on 23 March 1997, the respondent had placed an advertisement in the Sunday Times for qualified pilots which is at B6. The advertisement sets out what the requirements are for the position. Age was no longer a barrier unlike the previous advertisements published in the Sunday Times on 9 January 1994 (B19), 2 October 1994 (B20) and 17 December 1995 (B21) which all had the age barrier. It is surprising that both parties overlooked B6 which is such a crucial document. The first applicant's application for a position as a first officer is dated 24 March 1997 and appears at B7. The following appears in the first paragraph:

"I herewith apply for a position as First Officer at SOUTH AFRICAN AIRWAYS as advertised in Sunday Times on March 23, 1997. I have enclosed a resume, of my career history and qualifications."

11. The first applicant did not receive any response to his application and gave notice on 7 May 1997 of change of his address as seen on B8. The letter from the respondent dated 17 January 1997 which is at B26 relates to his June 2006 application and not the 1997 application. It is quite possible that the respondent did not receive the letter. Even if they had received the letter, it did not discriminate against the first applicant since there no longer was an age barrier in place. The first applicant applied again for a position as a pilot on 10 November 1999 as seen on B27 and was eventually appointed on 1 September 2001.

12. When the first applicant applied on 15 January 1996 as a pilot he was 33 years old. The age barrier did not apply to him. No pilots were appointed for that year and he was informed to reapply. When he applied on 24 March 1997 he knew that there no longer existed an age barrier. He was therefore not discriminated against. Even if this Court has jurisdiction to hear the matter, the first applicant's application would be dismissed on the merits.

13. This brings me to the issue of jurisdiction. In deciding this issue it is important to determine when the dispute arose. The applicants have stated in their referral to the CCMA that the dispute arose on 30 September 2005. They are seeking an order adjusting

them to the date when they were discriminated against in 1996 and 1997 respectively. In deciding when a dispute arose, this must be analysed objectively and not when the applicants say so. The danger will arise that an applicant may decide when a dispute arose even if it might have arisen some years before. The position is of course different if there was a continuing wrong or ongoing discrimination like in *SABC Ltd vs CCMA* [2010] 3 (BLLR) 251 (LAC) where the following is stated at paragraph 27 of the judgment:

"The discrimination, in the latter case, has no end and is, therefore, ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other, he is evidencing continued discrimination. Hence in the present matter, the date of dispute does not have to coincide with the date upon which the unfair labour practice/unfair discrimination commenced because it is not a single act of discrimination, but one which is repeated monthly".

14. In the present case, there is no evidence that there was a monthly or yearly continuing wrong. This is not a pay discrimination case because the source of the complaints has its roots in the pre-employment phase. Their complaints are sourced in one act, namely that in 1996 and 1997 respectively, they were denied employment because of their age. No other act suggested itself or manifested itself thereafter. This is not a case where the applicants were existing employees and had suffered differential wages pursuant to a discriminatory policy which still subsists.

15. In the present matter objectively viewed, the dispute occurred when the applicants' application for employment was rejected. This is the act or omission that is the source of

all the controversy in this matter. It was a single isolated act. Since the dispute arose in 1996 and 1997 respectively and is an isolated act, the claim should have been filed in terms of Schedule 7 of the LRA within a reasonable period which is not the case and not in terms of the EEA. I have noted that when the matter was initially referred to the CCMA for arbitration reference is made to "Schedule 7 item 3(1)(b)".

16. Even if this matter could be referred in terms of the EEA, it stands to be dismissed since the referral was not made within six months when the dispute arose.

17. The application stands to be dismissed.

18. I do not think that this is a matter where costs should follow the result. I have taken into account that the parties do have an ongoing relationship.

19. In the circumstances the following order is made:

19.1 The application is dismissed.

19.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS : R G BEATON INSTRUCTED BY HELENA STRYDOM ATTORNEYS

FOR RESPONDENT	:	F A BODA INSTRUCTED BY DENEYS REITZ ATTORNEYS
DATE OF HEARING	:	10 MAY 2010
DATE OF JUDGMENT	:	21 MAY 2010