THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 252/2019

In the matter between:

SOUTH AFRICAN NAVY **FIRST APPELLANT**

MINISTER OF DEFENCE **SECOND APPELLANT**

and

TEBEILA INSTITUTE OF LEADERSHIP, EDUCATION, GOVERNANCE AND TRAINING **RESPONDENT**

Neutral citation: *South African Navy and Another v Tebeila Institute of Leadership, Education, Governance and Training* (252/2019) [2021] ZASCA 23 (19 March 2021)

Coram: PETSE AP, MBHA, MBATHA JJA and GOOSEN and UNTERHALTER AJJA

Heard: 26 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 19 March 2021.

Summary: Age requirements for recruitment to the defence force – equality challenge in terms of s 9 of the Constitution – whether age requirements constituted unfair discrimination – challenge under s 29(1)*(b)* of the Constitution – right to further education and the obligations of the State – held that age requirements do not constitute unfair discrimination – held further that no case made out to establish infringement of s 29(1)*(b)* of the Constitution – appeal upheld.

ORDER

On appeal from: The High Court, Limpopo Division, Polokwane (Mokgohloa DJP, sitting as court of first instance):

1 The appeal is reinstated.

2 The appeal is upheld.

3 The order of the court below is set aside and replaced with the following order:

The application is dismissed.

JUDGMENT

Unterhalter AJA (Petse AP, Mbha and Mbatha JJA, and Goosen AJA concurring)

Introduction

[1] The first appellant, the South African Navy (the Navy), has implemented the military skills development system (MSDS). The MSDS is used by the South African National Defence Force (the defence force), of which the Navy forms part, to select persons who enlist in the defence force, to undergo training. They are then deployed for a period of two years, so as to determine whether such recruits are suitable for continued service, in the regular force or in the reserves.

[2] The respondent, the Tebeila Institute of Leadership, Education, Governance and Training (Tebeila), challenged the age requirements for admission to the MSDS. Tebeila is an organisation that works to ensure access to further education, post-matric, for persons from poor communities. Under the MSDS, applicants, who would serve in a combat

role, are required to be between 18 and 22 years of age, having completed Grade 12, with mathematics and physical science, and with at least level 3 in both subjects. Graduate applicants are required to be between 18 and 26 years of age, having completed Grade 12 and holding a degree, national diploma or a trade test certificate in mechanical, marine or electrical engineering (the age requirements).

[3] Tebeila challenged the age requirements, not on the basis of the educational requirements, but rather on the basis of the stipulations as to age eligibility. It did so in the interests of those excluded by the age requirements from applying for admission to the MSDS, and also in the public interest. Tebeila's challenge was based on three grounds. First, Tebeila contended that the age requirements constitute unfair discrimination contrary to s 9 of the Constitution. Second, the age requirements fail to accord to post-matric students the right to further education, which the State, through reasonable measures, must make progressively available, as required by s 29(1)*(b)* of the Constitution. Third, the Navy has failed to respect, protect, promote and fulfil the rights in the Bill of Rights in terms of s 7(2) of the Constitution by stipulating for the age requirements.

[4] In the high court, Tebeila's challenge prevailed. Mokgohloa DJP held that the age requirements constitute unfair discrimination. The high court found that the educational history of our country has left most young people in the position where they battle to finish their degrees or diplomas between the ages of 18 and 26. The age requirements deprive these persons of the opportunity to be trained as soldiers or military personnel under the MSDS. That is unfair discrimination. The right to equality cannot be sacrificed, so it was reasoned, upon the altar of the recruitment objectives of the Navy. The high court declared the Navy's

policy concerning the admission of applicants under the MSDS to be invalid. The declaration of invalidity was suspended for 12 months to enable the Navy to revise its policy. With the leave of the court below, the Navy and the second appellant, the Minister of Defence, appeal to this court. The appellants failed to file the record timeously, and the appeal lapsed. The appellants sought condonation and explained their delay. The delay occasioned Tebeila no prejudice, and we granted condonation and reinstated the appeal.

Unfair discrimination

[5] The appellants contended that the age requirements do not constitute unfair discrimination. Relying upon the markers of unfair discrimination enunciated in *Harksen*,[1] the appellants submitted that persons above the age of 26, rendered ineligible for admission to the MSDS by reason of the age requirements, are not a vulnerable class; the MSDS forms part of a recruitment policy that seeks to ensure age-appropriate recruitment to the defence force; and the class affected by the age requirements have suffered no impairment to their dignity. No infringement of s 9 of the Constitution, as a result, was proven.

[6] Nor, urged the appellants, do the age requirements constitute measures taken by the Navy that retard the State's duty progressively to make further education available and accessible. The MSDS has recruited significant numbers of members who have successfully completed their training. That fulfils the duty resting upon the State in terms of s 29(1)*(b)* of the Constitution. Furthermore, the MSDS does not give rise to any failure by the State to respect, protect, promote or fulfil the rights in the Bill of Rights, as required by s 7(2) of the Constitution.

---

[1] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 51.

[7] Tebeila contended otherwise. It submitted that the age requirements are arbitrary and irrational because they exclude the majority of young people, that is, those aged 26 to 35. This class of young people should not be denied their right to equality and further education simply on the basis of their age. Persons falling within this class may enjoy the attributes necessary to serve in the military. Their wholesale exclusion constitutes unfair discrimination. Furthermore, to deny young persons over the age of 26 the opportunity to enter the military exacerbates the problem of youth unemployment in the country. The age requirements, it was argued, were thus properly determined by the high court to constitute unfair discrimination. For similar reasons, Tebeila maintained that the MSDS violates the right to further education protected in terms of s 29(1)*(b)* of the Constitution. In consequence, the MSDS failed to comply with the State's duties under s 7(2) of the Constitution.

[8] The parties, rightly, located their submissions in the durable framework set out in *Harksen*[2] for the consideration of challenges brought under s 9 of the Constitution. Section 9(3) provides that the State may not unfairly discriminate against anyone on one or more grounds, including specified grounds. Among the specified grounds in s 9(3) is age. Following *Harksen*, if the differentiation that is challenged is on a specified ground, then discrimination will have been established. Despite criticism of this somewhat mechanical approach to the identification of discrimination, *Harksen* remains the authoritative interpretation of s 9(3). Since the age requirements specify an age limit to determine eligibility for participation in the MSDS, that limit amounts to discrimination because it excludes persons from participation in the MSDS on the

[2] Paragraph 53.

grounds of age, a specified ground. In particular, the challenge brought by Tebeila was made on the basis of the upper age limits specified by the policy of the Navy to be considered for participation in the MSDS.

[9] Once discrimination has been established, following *Harksen*, the question is whether such discrimination is unfair. Section 9(5) of the Constitution directs that discrimination on a specified ground is unfair, unless it is established that the discrimination is fair. This constitutional presumption requires the appellants to satisfy us that the age requirements are fair. If that burden of persuasion is not met by the appellants, then the age requirements constitute unfair discrimination in terms of s 9(3).

[10] *Harksen* makes it plain that the constitutional prohibition of unfair discrimination is a protection against impairments of human dignity, judged on the basis of the impact of the discriminatory measure upon the complainant or, as in this case, the group that the complainant represents. That impact is assessed on the basis of the following: the position in society of those impacted by the discriminatory measure and whether they have suffered past patterns of discrimination; the power that has been exercised and the purpose served thereby; and the effect of the discriminatory measure upon the rights and interests of those affected. These considerations are not necessarily exhaustive of the enquiry.

[11] The appellants set out in some detail the basis upon which the age requirements came to form an integral part of the MSDS. Section 200 of the Constitution requires that the defence force must be a disciplined military force that defends and protects the Republic. To do this, s 63(4) of the Defence Act 42 of 2002 requires that the training of members of the defence force is an essential part of the force's preparation.

[12] The Department of Defence has adopted a policy, entitled 'the policy for the implementation of inherent rank-age requirements for the South African Defence Force' (the policy). The policy, though expressed in sometimes arcane language, explains that the defence force requires young, fit and healthy members who are able to adapt to change. The defence force runs the risk of rank-age imbalance. The essential difficulty is that the age profile of members of the defence force, within and between the different ranks, exceeds international norms. This can hamper the readiness and capability of the defence force. It can also give rise to the difficulty that older soldiers holding more junior ranks are commanded by younger soldiers holding more senior ranks. Put simply, too many members of the defence force within the ranks, and especially within the junior ranks, are, on average, too old. Recruitment policy must therefore seek to redress this imbalance.

[13] The MSDS is the primary programme used to recruit regular and reserve forces. Those enlisted undergo training and serve for a period of two years. Thereafter, members may serve in the reserve or in the regular force, if vacancies arise. The MSDS imposes the age requirements so as to train recruits who are young, fit and healthy. Such recruits may be deployed with less concern for family commitments. The age requirements also permit of recruitment that allows for the correction of the sub-optimal age profile of the junior ranks.

[14] This corrective function appears to have met with some success. In 2002, before the implementation of the MSDS, only 8% of regular privates and equivalent ranks were aged between 18 and 24 years, compared with 57% in 2011.

[15] Tebeila, in its replying affidavit, accepted that it is a legitimate purpose for the defence force to recruit persons into the defence force who are young, fit and healthy. Tebeila contended however that these attributes are also to be found in people up to the age of 35, and, to exclude them from consideration solely on the grounds that they are older than 26 years is arbitrary and unfair. The MSDS exacerbates the problem of youth unemployment because it denies young people over the age of 26, who are studying for a degree or a diploma, the opportunity to pursue a military career, to which they may well be suited. Tebeila also asserted that in South Africa people aged 16-35 are considered young.

[16] The analysis must commence with the consideration of those persons aged 27 to 35 who are fit and healthy, wish to be considered for the MSDS to pursue a military career, but are excluded by reason of their age. The essence of the challenge is that the imposition of the age requirements renders the opportunity to be considered for recruitment through the MSDS under-inclusive because people who are still young are thereby excluded.

[17] While it might be considered arbitrary to exclude some young people from the valuable opportunity of applying for admission to the defence force, this position fails adequately to appreciate the rationale for the age requirements.

[18] First, the constitutional duty of the defence force is to defend and protect the Republic. To do so, it must be combat ready. That requires, as the deponent to the answering affidavit, Major General Sitshongave, explained, soldiers who may readily be deployed. Older recruits have young families, with attendant responsibilities. They are more area bound

and less amenable to lengthy, stressful, deployments away from home. This consideration supports the age requirements.

[19] Second, the challenge fails properly to reckon with the age profile of the ranks making up the defence force. The MSDS is the programme through which the defence force recruits people, trains and deploys them, and ultimately selects soldiers for the reserves and the regular force. The older persons are when first recruited, the shorter will be the time that they may serve as soldiers who are combat ready – the core competence that the defence force must have. That was precisely the problem that the MSDS was intended to address. Too many serving soldiers in the junior ranks were simply getting too old, which compromised the capacity of the defence force to protect and defend. Younger recruits were the answer to this problem. So too, the requirement that the command structure of the ranks should be age appropriate was a further reason for the development and implementation of the MSDS.

[20] Tebeila sought to answer these justifications for the age requirements by recourse to an argument of individual assessment. Rather than impose the age requirements, the Navy should assess whether applicants over the age of 26 have the attributes necessary to meet the needs of the defence force. If an applicant is fit, unattached, willing to be subjected to unpredictable deployment, and otherwise qualified, why should the fact that they are aged 27-35 preclude them from consideration?

[21] This argument is unavailing. First, the age requirements are predicated upon a reasonable delineation of the attributes that generally correlate with age. Whenever a maximum threshold is specified, persons may be excluded who, with some relaxation of the threshold, would be

well qualified to enjoy a benefit. In this case, there may be persons older than 26 who would make good soldiers. This, however, does not render the threshold arbitrary or unfair. As long as the age requirements are imposed for reasons that bear rational scrutiny, then the requirements are not arbitrary or unfair merely because there are persons of merit who are excluded. This case is a good illustration of this principle. The attributes of fitness for combat, unencumbered relationships, and a willingness to be subject to a command structure are meaningfully correlated with age. Where precisely the threshold should be set may be a matter for debate. But the specification of an age requirement so as to attract applicants most likely to have the attributes required is not unfair to those excluded, because it is a delineation predicated upon a rational judgment as to where the best applicants, in aggregate, are most likely to be found.

[22] Second, the age requirements do not stand impugned as unfair discrimination simply because it is possible to imagine other thresholds or other means by which the functional requirements of recruitment for the defence force could be met. That the maximum age might have been set at 25 or 27, does not render the specified maximum of 26 unfair. The implementation of a policy always requires that a limit is set. As long as the limit falls within the range of reasoned substantiation, it is not unfair. Nor is unfair discrimination determined by conceiving of another way in which recruitment for the defence force could take place. That Tebeila would determine recruitment policy in a different and more expansive way is irrelevant to the question as to whether the age requirements are unfair. The proper enquiry concerns whether the age requirements that have been decided upon withstand scrutiny under the constitutional standard of unfair discrimination.

[23] I am, thus, of the view that the age requirements, forming part of the MSDS, have a rational basis that serves the functional requirements of the defence force so as to permit the force to carry out its constitutional mandate.

[24] Tebeila also contended that the age requirements constituted unfair discrimination because these requirements exclude a significant number of young people from applying for employment with the defence force. The age requirements, as a result, serve to limit the impact of the MSDS in reducing youth unemployment.

[25] I recognise that youth unemployment is one of the country's gravest problems. In a youthful country, unemployment denies to many the multi-faceted goods that come with a job, both material and by way of personal fulfilment. However, the age requirements make no difference to the number of young people recruited to the defence force. The age requirements simply limit which young people secure the employment opportunities created by recruitment under the MSDS, on Tebeila's premise that persons aged 27-35 are young. On the evidence before us, there is no basis to contend that more young people would be employed if the age requirements were eliminated or changed. And because the defence force can only accommodate a predetermined number of recruits for each intake, extending the age to 35, as Tebeila would have it, would have no impact whatsoever on the country's youth unemployment problem.

[26] Tebeila's case amounted, then, to its central claim that it is unfair discrimination to exclude a class of young people from the prospective benefit of recruitment into the defence force. However, Tebeila made out no case that those excluded from recruitment under the MSDS have in the

past suffered from patterns of discrimination. Whether or not young people have been historically disadvantaged by limited opportunities to gain employment was not Tebeila's case. Nor was there any showing that young people aged 27-35 are especially vulnerable as a class, whether in comparison to older age groups or whether in comparison to young people aged 18-26. Tebeila's complaint was simply that the opportunities created by the MSDS for youth employment should be more widely available to an excluded class of young people.

[27] That complaint does not amount to unfair discrimination. Recruitment under the MSDS provides employment for young people. That this benefit is limited by the age requirements to a restricted class of young people has been adequately explained. Those excluded, on the evidence before us, have not been made especially vulnerable to past discriminatory practices. Nor is their exclusion actuated by any assault upon their dignity. The age requirements are not imposed to demean the respect that is due to young people aged 27-35. Rather, the age requirements ration a limited and valuable resource, recruitment into the defence force, for reasons of functional efficacy. The exclusion of young people aged 27-35 from recruitment into the defence force is based upon a rational calculus as the attributes of value to the defence force that are more likely to be found in one class of young people over another. Aging brings both benefits and detriments. That the defence force considers certain attributes of one class of young people to have special utility for the purpose of recruitment entails no judgment that demeans another class of young people. As long as there is a proper basis for distinguishing these two classes in relation to the recruitment needs of the defence force (as I have found), the age requirements do not constitute unfair discrimination.

[28] There remains one further issue that warrants mention. The high court found that the Navy's admission policy amounted to unfair discrimination on the grounds of age. The consideration that weighed with the court was that the educational history of our country meant that most of the youth between the ages of 18 and 26 have not yet graduated, battle to complete their degrees by the age of 26, and yet these are the very young people who need to be trained to become soldiers. The high court reasoned that rights of young people who would become soldiers cannot be sacrificed 'at the altar of the respondent's (the Navy's) HR concepts'.

[29] This line of reasoning cannot assist Tebeila. First, there is no evidence before us that appreciable numbers of young people are not able to complete their degrees or diplomas by the age of 26. Second, as I have observed, Tebeila made no challenge to the educational requirements of the MSDS, nor did it posit any relationship between the educational and age requirements of the MSDS as the basis of its case that the Navy's recruitment amounted to unfair discrimination. The high court's decision rested upon a case that was not made. Tebeila has no entitlement to sustain that holding on appeal.

[30] For these reasons, although the age requirements constitute discrimination under s 9 of the Constitution, the appellants have established that the age requirements do not amount to unfair discrimination, and hence, the right to equality has not been infringed.

The right to further education

[31] Tebeila contended that the age requirements denied potential recruits above the age of 26 the right to further education, as provided for in s 29(1)*(b)* of the Constitution. Section 29(1)*(b)* accords everyone the

right to further education, which the State, through reasonable measures, must make progressively available and accessible.

[32] Recruitment into the defence force provides an opportunity for training, and that training may include study at institutions of tertiary education. I shall assume, without deciding, that military training within or under the auspices of the defence force constitutes further education within the remit of s 29(1)*(b)*. The right to further education, in terms of s 29(1)*(b)*, is a claim against the State to make further education, through reasonable measures, progressively available and accessible. In order to sustain such a challenge, a complainant must set out what the State has done and failed to do in the measures it has taken to make further education available and accessible.

[33] Tebeila has not made out such a challenge. Even on the premise, adopted in its favour, that recruitment into the defence force forms part of what the State does to provide further education, Tebeila's papers do not explain what the State has done to provide further education in furtherance of its constitutional obligations under s 29(1)*(b)*. Nor does Tebeila make any attempt to show what opportunities for further education the State has provided to young people excluded from recruitment into the defence force by the age requirements. Absent some such showing by Tebeila, it is impossible to say in what way, if any, exclusion from the training opportunities of recruitment into the defence force constitutes a derogation by the State of its duty to make further education progressively available and accessible. Tebeila's challenge cannot prevail.

Section 7(2)

[34] Tebeila also advanced the contention that the appellants had failed to uphold their obligation to respect, protect, promote and fulfil the rights in the Bill of Rights, as required by s 7(2) of the Constitution.

[35] Counsel for Tebeila accepted that if its challenges under ss 9 and 29(1)*(b)* did not prevail, then it had no independent case to advance under s 7(2). Since, for the reasons given, these two challenges cannot be sustained, Tebeila's s 7(2) case must also fail.

Conclusion

[36] For these reasons, the appeal succeeds. The appellants, rightly, recognised that this litigation was initiated and pursued in the public interest. As a result, no costs are sought by the appellants, and no adverse cost order is made against Tebeila. The following order is made:

1 The appeal is reinstated.

2 The appeal is upheld.

3 The order of the court below is set aside and replaced with an order as follows:

The application is dismissed.

D UNTERHALTER

ACTING JUDGE OF APPEAL

Appearances:

For appellants: B Makola SC (with him O Motlhasedi, M Lengane and F Mnisi)
Instructed by:
The State Attorney, Polokwane
The State Attorney, Bloemfontein

For respondent: S Tebeila (with him TA Makola and S Makoasha)
Instructed by:
Maponya Attorneys, Polokwane
Fixane Attorneys, Bloenfontein