CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 164/13

In the matter between:

DALUXOLO NICHOLAS SALI Applicant

and

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE First Respondent

PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE Second Respondent

MINISTER OF SAFETY AND SECURITY Third Respondent

Neutral citation:	*Sali v National Commissioner of the South African Police Service and Others* [2014] ZACC 19
Coram:	Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J
Heard on:	10 March 2014
Decided on:	19 June 2014
Summary:	Section 9 of the Constitution — unfair discrimination — age discrimination South African Police Service Regulations — Regulation 11 — age limit for employment of reservists — whether age limit is unfairly discriminatory

Leave to appeal — constitutional challenge must be clearly and properly raised in the court of first instance — not in the interests of justice to grant leave where the Court cannot give effective relief

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ORDER

On appeal from the Labour Court, Port Elizabeth (Lallie J):

1. The application for leave to appeal is refused.

2. There is no order as to costs.

JUDGMENT

JAFTA J:

Introduction

[1] Our Constitution forbids unfair discrimination regardless of the context in which it occurs and irrespective of whether the perpetrator is the state or a private person. This case concerns alleged unfair discrimination in the setting of employment where the employer is the state.

[2] The case is brought before this Court as an application for leave to appeal against the order of the Labour Court in terms of which the applicant's claim was

dismissed. Both the Labour Court and the Labour Appeal Court refused him leave to appeal. He contended that it was not necessary for him to approach the Supreme Court of Appeal before coming to this Court because, as from 23 August 2013, the Supreme Court of Appeal no longer has the competence to decide appeals from the Labour Courts.

[3] The applicant is Mr Daluxolo Nicholas Sali who, at the time the present dispute arose, was a police reservist and stationed at Humewood Police Station in Port Elizabeth. He cites the National Commissioner of Police, the Provincial Commissioner and the Minister of Safety and Security as respondents.

Constitutional and legislative background

[4] For a better appreciation of the applicant's claim, it is necessary to outline the relevant legal framework. He has instituted an equality claim contending that the decision of the South African Police Service (SAPS) not to appoint him constituted unfair discrimination, proscribed by section 6 of the Employment Equity Act[1] (Equity Act). The applicant based his claim on the Equity Act because it was passed to give effect to the constitutional right to equality in the workplace. Where there is legislation giving effect to a right in the Bill of Rights, a claimant is not permitted to rely directly on the Constitution.[2]

[1] 55 of 1998.

[2] This is known as the principle of constitutional subsidiarity, as discussed below in [72].

[5] However, this does not mean that in determining such claim reference cannot be made to the Constitution. The relevant legislation must be interpreted in the context of the Constitution. Moreover, the scope and content of the right sought to be enforced by a claimant may be determined with reference to the Constitution. Therefore the Constitution is a good point at which the outline of the legal framework must begin.

[6] Section 9 of the Constitution provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[7] It is significant to note that the Constitution lists a number of grounds on which the state is precluded from discriminating unfairly against anyone. And those grounds include age. Notably the Constitution does not rank discrimination on the basis of

race or gender higher than discrimination on any of the other listed grounds. This means that discrimination on any of the listed grounds must be treated seriously.

[8] It is apparent from section 9(5) that discrimination based on any of the listed grounds is presumed to be unfair. A claimant need not prove unfairness. Instead, it is the person who wishes to defend the discrimination who must show that it is fair.

[9] The test for determining whether a claim based on unfair discrimination should succeed was laid down by this Court in *Harksen*.[3] In that case this Court said:

> "At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:
>
> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
>
> (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

[3] *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."[4]

[10] Although the test was formulated with reference to a claim in which the constitutional validity of legislation was impugned, with the necessary adjustment, it may be applied where the attack is directed at conduct, policy or practice. What needs to be established at the commencement of the enquiry is whether the policy or practice on which the challenged decision was based, differentiates between people. If it does, whether the differentiation bears a rational connection to a legitimate government purpose. If it does, the policy or practice may or may not, depending on the circumstances of a particular case, violate section 9(3) of the Constitution.

[11] Where there is a rational connection between the impugned policy or practice and a legitimate government purpose, it is necessary to enquire whether the differentiation concerned amounts to discrimination. If the differentiation was based on one of the grounds listed in section 9(3), it is presumed to constitute discrimination

[4] Id at para 54.

which is further presumed to be unfair. This means that an applicant needs only to show that the differentiation complained of was based on a listed ground for the double presumption to be triggered.

[12] In the employment setting the right not to be discriminated against unfairly is given effect to by section 6 of the Equity Act. Section 6(1) provides:

> "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth."

[13] It is important to note that the section lists all the grounds contained in section 9(3) of the Constitution and adds three more, namely, family responsibility, HIV status and political opinion. But unlike section 9 of the Constitution, section 6(1) of the Equity Act does not deal separately with discrimination by the state and by a private person. The latter section prohibits unfair discrimination by all employers.

[14] Section 11 of the Equity Act places the burden of proof on an employer in every case where unfair discrimination based on the Equity Act is alleged. In order to discharge the onus, the employer must establish that the discrimination was fair. Significantly, the employer's onus is triggered by a mere allegation of unfair discrimination based on the Equity Act.

[15] At first blush, the reading of section 6(1) may suggest that it prohibits unfair discrimination contained in an employment policy or practice. On this reading the reach of the section may appear to be narrower. But this assumption is dispelled by the wide definition of "employment policy or practice".[5] The definitional meaning of employment policy or practice includes recruitment procedures and selection criteria.

[16] However, it appears that the employment policy or practice envisaged in the Equity Act does not cover legislation. If the unfair discrimination complained of is authorised by legislation, the claimant must challenge the constitutional validity of the legislation in question. This is the legal framework within which the applicant's claim must be assessed.

[5] In the context of the Act:

> "'[E]mployment policy or practice' includes, but is not limited to—
>
> (a) recruitment procedures, advertising and selection criteria;
>
> (b) appointments and the appointment process;
>
> (c) job classification and grading;
>
> (d) remuneration, employment benefits and terms and conditions of employment;
>
> (e) job assignments;
>
> (f) the working environment and facilities;
>
> (g) training and development;
>
> (h) performance evaluation systems;
>
> (i) promotion;
>
> (j) transfer;
>
> (k) demotion;
>
> (l) disciplinary measures other than dismissal; and
>
> (m) dismissal."

Factual background

[17] In 2006 the applicant joined the SAPS as a reservist and was stationed at Humewood Police Station in Port Elizabeth. He was appointed as a constable reservist. At the hearing of the matter in the Labour Court, Brigadier Govender, who testified on behalf of the SAPS, confirmed that reservists performed the functions of police officers, such as investigating crime and arresting criminals. They were not only given the powers of police officers but they were also allowed to carry firearms supplied by the SAPS when they were on duty. The only material difference between reservists and members of the SAPS was that the reservists were not employees of the SAPS and as a result they were not paid for their services. They were taken as volunteers who performed police functions for no reward.

[18] In order to enable them to carry out police functions, reservists undergo training on appointment. The applicant received that training.

[19] At some point the reservists country-wide were dissatisfied with their status. They wanted to be appointed as members of the SAPS. In order to exert pressure on the SAPS to agree to their demand, reservists held protest marches in February 2009. The first demonstration was held in Johannesburg at the headquarters of the African National Congress, the ruling party. The second demonstration was held on 23 February 2009. By then the reservists had attracted the attention of the Minister of Safety and Security who went to address the demonstrators.

[20] In his address the Minister informed the reservists that their demand would be considered at a summit to be held before the end of March 2009. He advised them to elect representatives to attend the summit. Indeed, on 23 March 2009 the summit was held. It was attended by representatives of reservists from all nine provinces, representatives of the SAPS, community policing fora and the Department of Public Service and Administration.

[21] The demand made by the reservists was considered and discussed. Apparently the complaint by reservists was that many of them were above 30 years of age and in terms of the relevant Regulation they did not qualify to be appointed as members of the SAPS. Regulation 11(1) of the Regulations for the South African Police Service[6] stipulates that in order to become a member of the SAPS, an applicant must be above 18 years of age and not over 30 years.

[22] A Task Team comprising members from each stakeholder was formed to find a solution to the problem. The Task Team proposed that Regulation 11 be amended by adding two requirements which would apply to the appointment of reservists only. With regard to age, the proposal was that the requirement be altered to reflect a 40-year age limit for appointment. This meant that reservists who wished to become members of the SAPS had to be above 18 years but not over 40 years old. The second requirement was that they should have three years' experience as reservists.

[6] Regulations for the South African Police Service, under GN R203, *Government Gazette* 719, promulgated on 14 February 1964 (Regulations).

[23] The proposal for amendment was submitted to the National Commissioner for his consideration. On 29 May 2009, the National Commissioner approved the proposal and, as shown below, purported to amend the Regulations by adding those two requirements.

[24] Meanwhile, in September 2009 and having been notified of vacancies, the applicant applied for two vacancies in different categories. One vacancy was in category A2 and the other in category D2. One of the requirements for the category A2 vacancy was that an applicant's age had to be between 41 and 45 years. At that time the applicant was 41 years and 10 months old.

[25] Following his application, he was required to take various tests, including a medical examination to determine his state of health. He was successful in all tests. He also passed a physical fitness assessment. During an interview with one of the SAPS officials, he was told that he would be appointed as a member and that he should expect an employment contract which would be dispatched to him for signing. However, no contract came until he enquired about the appointment in January 2010.

[26] He was informed of the decision not to appoint him to any of the vacancies for which he had applied. The reason for not appointing him, he was told, was that he was above the age of 40 years. This decision prompted the Station Commissioner of Humewood Police Station to address a letter to the Provincial Commissioner. The

Station Commissioner requested that the age requirement be waived in favour of the applicant.

[27] In motivating his request the Station Commissioner stated:

> "I hereby request the condonation regarding enlistment for abovementioned reservists. The member has been an active reservist since 2006 and received the necessary training regarding the reservist basic training. The member falls under category A, sub-category A2, age 40-45 which was one of the requirements that was set out during the recruitment drive for permanent enlistment. The member is currently 42 years of age. The member has passed all the necessary required tests and his age has no effect on any of the tests that were successfully passed. I hope this application will be successful."

[28] The request elicited no response.

[29] Dissatisfied with the decision not to appoint him, and acting in terms of section 10 of the Equity Act, the applicant referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA). Conciliation was unsuccessful and the CCMA issued a certificate confirming this on 23 March 2010.

Labour Court

[30] In April 2010 the applicant instituted action in the Labour Court. He cited the National Commissioner, the Provincial Commissioner and the Minister of Safety and Security as respondents. These parties defended the action.

[31] In the statement of case the applicant pleaded his claim in these terms:

> "The Station Commissioner addressed a facsimile to the respondent, requesting condonation regarding the applicant's age. The letter is attached hereto, marked Annexure C.
>
> Until date hereof, the applicant received no further correspondence from the respondent and it is submitted that the reason for his non-appointment was as a direct result of his age.
>
> The abovementioned direct discrimination based on age is unfair and the applicant referred a dispute to the CCMA in terms of section 10 of the [Equity Act]. The applicant was a successful candidate and the sole reason for his non-appointment was as a direct result of his age, which is clearly unjustifiable and discriminatory. Due to the non-appointment, the applicant has failed to secure permanent employment, a permanent income and benefits and is prejudiced in this regard."

[32] From these facts and in the same statement of case, the applicant drew the legal issue that the Labour Court was asked to determine. On this aspect the statement reads:

> "The reason for non-appointment of the applicant, based on his age, amounts to direct unfair discrimination on a listed ground as provided for in section 6 of the [Equity Act]."

[33] Invoking section 50(2) of the Equity Act, the applicant requested compensation in the amount of R500 000 or a sum equal to a salary of two years he would have received had he been appointed. In addition he asked that he be appointed to one of the posts he had applied for and that the respondents be ordered to eliminate unfair discrimination on the basis of age in their recruitment policies.

[34] The respondents raised two defences to the claim. First, they contended that the applicant was not appointed because he was above 40 years of age and that he did not have three years' experience as a reservist. They argued that the requirements were set by the relevant Regulation as amended by the National Commissioner in May 2009. Consequently, they pointed out that the impugned decision fell outside the scope of section 6 of the Equity Act because it was based on legislation. They argued that the Regulations in terms of which the decision not to appoint was made do not constitute "an employment policy or practice".

[35] Second, the respondents contended that in the event of the Court holding that the definition of policy in the Equity Act includes the relevant Regulations, the discrimination was fair.

[36] Having heard evidence, the Labour Court held that the applicant had met only one of the requirements. The Court found that the applicant had three years' experience but that he was above 40 years of age when he applied for appointment. Proceeding from the premise that these requirements were part of the Regulations, the Court held that section 6 of the Equity Act did not apply because an employment policy or practice envisaged in that section does not cover legislation. As a result the Labour Court did not find it necessary to determine whether the respondents had established that the discrimination was fair. The applicant's claim was dismissed.

In this Court

[37] The applicant does not only persist in the issues raised in the Labour Court but also seeks an order declaring Regulation 11(1) inconsistent with the Constitution and invalid. The issues arising are—

(a) whether leave to appeal must be granted;

(b) whether Regulation 11(1) should be declared invalid;

(c) whether the decision not to appoint the applicant was based on a Regulation;

(d) if so, whether that Regulation falls outside the scope of section 6 of the Equity Act; and

(e) if the decision was not based on a Regulation, whether the respondents have established that the discrimination complained of was fair.

Leave to appeal

[38] It cannot be gainsaid that this matter raises a constitutional issue. The applicant's claim is for the enforcement of a right contained in section 9(3) of the Constitution and given effect to by section 6 of the Equity Act. The applicant contended that his right not to be discriminated against on a ground listed in these provisions was violated. This is a constitutional issue of importance.

[39] A question that arises on this aspect of the case is whether it is in the interests of justice to grant leave. The issue is whether the applicant should be allowed to bypass the Supreme Court of Appeal and come directly to this Court. Ordinarily the

Supreme Court of Appeal ought not to be denied the opportunity to hear matters where the Constitution grants it power to do so. But this factor is not decisive. The enquiry involves weighing up various factors, none of which is decisive.

[40] The applicant's financial resources must be taken into account. From the Labour Court up to this Court, the prosecution of his claim has been funded by Legal Aid South Africa, an organ of state that uses public funds to provide legal representation to indigent persons. Full argument on the matter was presented to this Court and there are prospects of success on the merits.

[41] The matter does not raise an issue in respect of which the Supreme Court of Appeal has special expertise. Instead, it raises a constitutional issue in the employment setting. Moreover, the applicant did not approach this Court directly from the Labour Court. He went to the Labour Appeal Court which denied him leave to appeal. The Labour Court and the Labour Appeal Court are specialist courts established to decide labour matters. Those are the courts in which our labour law jurisprudence is developed.

[42] In any event the Seventeenth Amendment to the Constitution suggests that in appropriate cases appeals from the Labour Appeal Court may come directly to this Court.[7] However, it is not necessary to determine whether this case falls within the

[7] Constitution Seventeenth Amendment Act 72 of 2012.

ambit of the Seventeenth Amendment. In the view I take, leave to appeal must be granted.

Declaration of invalidity

[43] A reading of the applicant's statement of case shows that he did not raise the constitutional challenge to Regulation 11. As a matter of principle, a party is not permitted to raise a constitutional challenge for the first time in this Court, except in exceptional circumstances.[8] Those circumstances have not been established in this case. This means that the applicant cannot be allowed to seek the declaration of invalidity from this Court unless he can show that the claim for declaring Regulation 11(1) invalid was raised in the Labour Court.

[44] The applicant contended that although his statement of case made no reference to this claim, it was included in the issues contained in the pre-trial minute which was signed by the parties before the trial commenced. A copy of the minute was furnished to this Court. An examination of the minute reveals that the Labour Court was asked to determine whether:

(a) the applicant met the requirements set by the SAPS for appointment as a permanent member of the SAPS;

(b) the SAPS has discriminated against the applicant on the basis of age, and if so, whether such discrimination was unfair; and

[8] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) and *Lane and Fey NNO v Dabelstein and Others* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC).

(c) the applicant was entitled to relief sought or any relief.

[45] In addition to compensation for damages, the minute reflects the relief claimed by the applicant in these terms:

> "That the Honourable Court grants the following order in terms of section 50(2)(c) of the [Equity Act]:
>
> 5.2.1 That the Court order the respondents to appoint the applicant permanently in the position applied for with retrospective effect; and/or
>
> 5.2.2 Directing the respondents from eliminating unfair discrimination on the basis of age in respect of the respondents' recruitment policies; and/or
>
> 5.2.3 Issuing a declaratory order that the provisions of the *Government Gazette* in relation to a minimum age requirement in respect of permanent employment at the respondents are discriminatory in nature and without any justification."

[46] It cannot be disputed that the declaratory order referred to in the minute is framed in vague terms which are incapable of being interpreted as referring to Regulation 11(1). In the first place, the impugned provisions are those of an unidentified *Government Gazette*. No reference is made to Regulation 11 at all. Secondly, the provisions challenged relate to a minimum age requirement for permanent employment. Yet the applicant's complaint was directed at the maximum age which the SAPS had said he had exceeded.

[47] It is a fundamental principle of constitutional litigation to require accuracy in the identification of the provision of legislation that is challenged on the basis that it is inconsistent with the Constitution.[9] In *Phillips* this Court stated:

> "The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that the correct order is made; that all interested parties have an opportunity to make representations; that the relevant evidence can, if necessary, be led; and that the requirements of the separation of powers are respected."[10] (Footnotes omitted.)

[48] Since the constitutional challenge was not properly raised, that claim must fail.

[49] But the failure of the constitutional challenge does not lead automatically to the dismissal of the entire claim. The claim that was pleaded and pursued in the Labour Court was that the decision not to appoint the applicant amounted to unfair discrimination in terms of section 6(1) of the Equity Act. The Labour Court's decision addresses this claim and since the appeal lies against that decision, this Court must consider the unfair discrimination claim. This is because the determination of the latter claim does not depend on the viability of the constitutional challenge. In fact, the constitutional challenge is irrelevant to the assessment of whether the impugned decision constitutes unfair discrimination.

[9] *Shaik v Minister of Justice and Constitutional Development and Others* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 25.

[10] *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 43.

[50] It follows that I disagree with Cameron J (majority judgment) that leave to appeal should be refused because "if the Commissioner's waiver under Regulation 11(2) is knocked out, but the age limit of 30 in Regulation 11(1) stands, Mr Sali is in an even worse position".[11] This reasoning overlooks and conflates two different acts into one. It treats the act of waiver and the purported amendment of the Regulations as one act. They are not. Waiver and amendments are different concepts. It is apparent from the facts on record that acting in terms of Regulation 11(2), the National Commissioner waived the 30-year age limit in respect of all reservists, including the applicant. This was consistent with the recommendation of the Task Team. It will be recalled that the Task Team had recommended that the age limit in respect of reservists be raised to 40 years and that they must have three years' experience in order to be eligible for appointment.

[51] Furthermore, the Task Team had recommended that these requirements be introduced into the Regulations by means of an amendment. The SAPS contended in the Labour Court that by endorsing the recommendation, the National Commissioner amended the Regulations and the Labour Court upheld this argument, hence its finding that the Regulations were amended and that the decision not to appoint the applicant was based on the amended Regulations. Consequently, the Labour Court held that the applicant's claim based on section 6(1) of the Equity Act could not succeed because the discrimination complained of arose from legislation and not an employment policy or practice.

[11] Majority judgment at [94].

[52] In our law the concepts of waiver and amendment of legislation differ and the power to waive does not include the power to amend. Take for example the waiver of a right conferred by statute. The right-holder has the power to waive the right or benefits flowing from it.[12] The fact that the right-holder may waive a right does not mean that he or she has the power to amend the statute conferring the right. The same reasoning applies here. The power to waive requirements in Regulation 11(1), which sits in Regulation 11(2), does not authorise the National Commissioner to amend the Regulations.

[53] Waiver takes place where a right or remedy or privilege or power or an interest or benefit is not asserted. Here, waiver occurred when the National Commissioner decided to exempt all reservists from the 30-year age limit. That waiver does not incorporate the power to put in place different and new requirements such as the age limit of 40 years and the minimum experience of three years. The waiver by the National Commissioner was limited to exempting all reservists from complying with the 30-year age limit. The National Commissioner did not amend Regulation 11(1) insofar as it laid down the age limit of 30 years. That Regulation remained intact but it was its application to reservists which was relaxed.

[12] *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC); *Road Accident Fund v Smith* [2006] ZASCA 172; 2007 (1) SA 172 (SCA); *Road Accident Fund v Thugwana* [2003] ZASCA 139; 2004 (3) SA 169 (SCA); and *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA).

[54] This relaxation meant that for as long as the decision to waive stood, the 30-year age limit could not be applied to reservists. It is therefore incorrect to assume that the National Commissioner's waiver here involves putting in place the new requirements and that if those requirements are "knocked out" the 30-year age limit stands in the way of the relief sought by the applicant. Instead, the question that arises is whether the new age limit of 40 years set by the National Commissioner forms part of the Regulations. For if it does, the applicant's claim based on section 6(1) of the Equity Act may not succeed for the reason that the discrimination raised would have arisen from legislation and not an employment policy or practice.

Was the decision not to appoint based on the Regulations?

[55] It will be remembered that the reason the applicant was not appointed was that he was above the age of 40 years and that he did not have the experience of three years as a reservist. The Labour Court held that, although he did not meet the age requirement, he had the necessary experience.[13]

[56] These findings were preceded by an enquiry whether the two requirements were introduced by the Regulations. It will be remembered that this issue was raised as part of the respondents' defence that the discrimination was authorised by the Regulations and not an employment policy or practice.

[13] *Sali v National Commissioner of the South African Police Service and Others* [2013] ZALCPE 12 (Labour Court judgment) at para 18.

[57] In determining whether the requirements in question were part of the Regulations, the Labour Court stated:

> "I now turn my attention to the first issue I need to determine in terms of the pre-trial minute: whether the applicant met the requirements for appointment as a permanent member of SAPS. The starting point is the source of the requirements. *The respondents' unchallenged evidence is that as a result of recommendations of a Task Team with representatives of reservists from all nine provinces, the National Commissioner of SAPS exercised his discretion in terms of Regulation 11(2) of the Regulations* promulgated by Government Notice No R203 of 14 February 1964 as amended by Government Notice R519 of 27 December 2009 *and amended the age of reservists to be enlisted as permanent members of SAPS from between 18 and 30 years to between 18 and 40 years*. In addition the reservists were required to have three years' experience as reservists."[14] (Emphasis added.)

[58] Proceeding from the premise that the National Commissioner amended the Regulations by introducing two requirements, the Labour Court held that the discrimination complained of was not based on a policy or practice but on legislation. The Court said:

> "I have already accepted the respondents' evidence that the age restriction was introduced by a Regulation. It is noteworthy that the Regulation is the culmination of discussions on employment of reservists in which the applicant, through his representatives consented to the age restriction which forms part of the contents of the Regulation."[15]

[59] What emerges from the statement quoted in [57] is that the respondents' evidence before the Labour Court was to the effect that the National Commissioner

[14] Id at para 10.

[15] Id at para 23.

"amended the age of reservists to be enlisted as permanent members of SAPS from between 18 and 30 years to between 18 and 40 years". This evidence was accepted as correct by the Labour Court. This appears from the statement taken from that Court's judgment and quoted in [58]. That the Labour Court held that the National Commissioner amended the Regulations is supported further by the following statement:

> "The respondents' evidence which the applicant did not gainsay is that a Task Team in which he was represented recommended the requirements for enlistment of reservists which included the two requirements referred to in these proceedings. *The recommendations were made Regulations*. The only reason a 40-year-old reservist could qualify for enlistment as a member of SAPS was by operation of the Regulation."[16] (Emphasis added.)

[60] The facts recorded in the judgment of the Labour Court show that the authority to apply the 40-year age limit came from the National Commissioner and not from the Minister. Consequently when the Labour Court says the Task Team's "recommendations were made Regulations", it refers to the National Commissioner having made those recommendations part of the Regulations. Yet, as indicated below, the power to make or amend the Regulations vests in the Minister.

[61] In my respectful view, the reasoning of the Labour Court is flawed in a number of respects. First, the Court departed from the premise that Regulation 11(2) empowers the National Commissioner to amend the Regulations. Regulation 11(2) does not vest the power to amend in the National Commissioner. It provides:

[16] Id at para 15.

> "Notwithstanding the provisions of subregulation (1), the National Commissioner may in his or her discretion and in exceptional circumstances, waive any of the requirements where and if such a waiver will be in the interest of the Service."

[62] What emerges from the text of Regulation 11(2) is that the National Commissioner is vested with a discretionary power to waive the requirements in Regulation 11(1). One of those requirements is that a person who applies to be appointed as a member must "be at least eighteen (18) and under thirty (30) years of age of which documentary proof must be furnished."[17] But the exercise of the discretion by the National Commissioner is subject to two conditions. There must be exceptional circumstances justifying the waiver and it must be in the interest of the SAPS that a particular requirement be waived.

[63] Consistent with this reading of Regulation 11(2) and in the affidavit filed in this Court in opposing leave, the respondents averred:

> "As pointed out above, Regulation 11(2) provides that the National Commissioner may in his or her discretion and in exceptional circumstances, waive any of the requirements where and if such waiver will be in the interest of the SAPS. The history of this matter shows that it was in the interest of the SAPS that reservists be appointed as permanent members of the SAPS."

[64] In the same affidavit SAPS conclude by stating:

> "The National Commissioner of the SAPS did not unilaterally decide to waive compliance with the provisions of Regulation 11(1)(a)(iii). The evidence revealed

[17] Regulation 11(1)(a)(iii).

> that the waiver was the result of negotiations between the SAPS and the trade unions who represented the reservists who wanted to be employed as members of the SAPS."[18]

[65] It is apparent from the record that the Labour Court did not itself interpret Regulation 11(2) to determine the nature and scope of the powers it conferred on the National Commissioner. The Court merely accepted as correct what was said by SAPS. In this regard the Labour Court erred. The question whether the requirements concerned constituted an amendment of the Regulations was not a matter of evidence but an issue of interpretation of the empowering provision. The interpretation must have been done by the Court itself. Had it done this, the Court would have realised that Regulation 11(2) did not empower the National Commissioner to amend the relevant Regulations.

[66] Regulation 11(2) presupposes that before reaching the opinion that it will be in the interest of SAPS to waive a requirement, the National Commissioner will take into account all relevant factors, including whether the candidate in respect of whom the waiver is granted would qualify to be appointed, once the waiver is given. It cannot be in the interest of SAPS to waive an appointment requirement if the candidate does not qualify for appointment. It seems doubtful that once the National Commissioner waives a particular requirement, he or she can fix another requirement that would disqualify from appointment a candidate in whose benefit the waiver was granted.

[18] Regulation 11(1)(a)(iii) refers to the age requirement quoted in [62].

This would be inconsistent with the objects of Regulation 11(2). However, in the view I take it is not necessary to reach a finding on this issue.

[67] The purpose of Regulation 11(1) is to provide the SAPS with criteria for selecting suitable candidates for appointment as members of the Service. Sometimes strict adherence to those criteria may deny the SAPS acquisition of scarce skills necessary for the performance of its constitutional mandate "to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."[19]

[68] In granting the National Commissioner the discretion to waive the requirements, Regulation 11(2) affords the SAPS flexibility in the application of the recruitment criteria. For as long as the conditions for the exercise of that discretion exist, the National Commissioner has a wide discretion to waive any of the requirements, including the one on age. If, for example, the SAPS needs helicopter pilots or forensic analysts and the applicants who possess these skills are 50 years old, the National Commissioner may waive the age requirement and appoint them. This power has nothing to do with the amendment of the Regulations.

[69] In terms of the South African Police Service Act[20], the power to amend the Regulations vests in the Minister and not the National Commissioner.[21] During the

[19] Section 205(3) of the Constitution.

[20] 68 of 1995.

[21] Id section 24(1)(b).

hearing in this Court counsel for the respondents conceded, correctly so, that the National Commissioner did not have the power to amend the Regulations. Therefore the purported amendment could not result in the two requirements being part of the Regulations. This finding destroys the foundation for the conclusion reached by the Labour Court to the effect that the discrimination raised by the applicant was not based on a policy or practice, but arose from legislation.

Does the discrimination fall within section 6(1)?

[70] Since the decision not to appoint the applicant was based on the requirements set by the National Commissioner and assuming that he had power to do so, the question is whether, in the context of the Equity Act, those requirements constitute an employment policy or practice. The Act states that these words include "recruitment procedures, advertising and selection criteria". It is apparent therefore that the requirements which influenced the decision not to appoint the applicant constitute an employment policy or practice. Consequently, the conduct complained of falls within the ambit of section 6(1) of the Act.

Was the discrimination unfair?

[71] This enquiry commences with the determination of whether there was differentiation which amounted to discrimination. The facts on record show that the age requirement which fixed the maximum age for appointment as a member of the SAPS at 30 years was an obstacle to the appointment of many reservists. This obstacle was removed by waiving that requirement in respect of all reservists. But the

limit was raised to 40 years. This enabled reservists who were over 30 years of age but not above 40 years to be appointed.

[72] But the applicant was not appointed on the ground that he was over the age of 40 years. Although he was covered by the waiver of the age requirement, he was treated differently from other reservists when the SAPS declined to appoint him on the ground of age. A differentiation was established. Because the differentiation was based on a ground listed in section 9(3) of the Constitution it must be presumed to amount to discrimination which is unfair unless the SAPS shows that it was fair. The fact that the applicant based his claim on section 6(1) of the Equity Act and not section 9(3) of the Constitution is immaterial. This is so because section 6(1) gives effect to section 9(3) and consequently the principle of constitutional subsidiarity dictates that the applicant was not permitted to rely directly on the Constitution.[22]

[73] In any event because the applicant alleged that the unfair discrimination was based on section 6(1) of the Equity Act, the onus fell on the SAPS to show that the discrimination was fair. The determination of this issue requires us to examine the explanation furnished to justify the discrimination. In an attempt to show that the discrimination was fair, the SAPS relied on the evidence of Brigadier Govender.

[22] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) and *MEC for Education, KwaZulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

[74] Brigadier Govender testified that recruits who are 25 years old and older perform poorly in academic studies and physical training at the college. His testimony on this issue went as follows:

> "The generic requirement of 18 to 30, when we send people to the college the academic as well as the fitness requirements are quite demanding, and one would find that when you are reaching the age of 25/26 that there is a challenge in the college for people in that category to meet the academic as well as the physical fitness requirements that is in the college."

[75] The explanation is without merit. If indeed the recruits of 25 to 26 years of age battled with physical training and academic studies, it is inconceivable that the National Commissioner could increase the maximum age limit from 30 to 40 years. Logic dictates that the age limit should have been reduced from 30 instead of increasing it. The explanation does not support the decision of the National Commissioner to increase the age to 40 years. On the contrary, it shows that fixing the age at 40 years was unsound.

[76] However, under cross-examination, it turned out that the explanation was based on hearsay evidence. Therefore the evidence tendered on why the age was fixed at 40 has little, if any, probative value. In this regard the exchange between the applicant's attorney and Brigadier Govender went as follows:

> "Question: You testified that you are not actually in training, so when you testified as to the problems that you guys get when they are 25/26/27 is that then hearsay evidence?

Answer: It could be hearsay, but it is also information that was shared by us. You know like I said we have a relationship on our station at head office in Pretoria between our Human Resources Development Department and the Personnel Management Department because we sort of relate to each other in terms of we supply the trainees for training and they try to train those trainees, and if they are having challenges then they come back to us."

[77] But apart from the fact that the explanation was based on hearsay evidence and that it was at variance with the National Commissioner's decision, the explanation overlooked the applicant's ability. The record illustrates that the applicant passed all the necessary tests and the fitness assessment.

[78] On this issue Brigadier Govender's evidence went thus:

"Question: I can put it to you the applicant scored fairly high in the fitness test, but the fact is if they pass the fitness test in the recruitment process surely that, what does that mean?

Answer: It means that the person is fit, that he met the standards and the norms of the prescribed fitness test for the South African Police Service.

Question: And what is the reason then that he will not be able to then continue with this level of fitness if he then enters into the Service?

Answer: I think for me what was important was that he had not met the age requirement initially when he submitted his application already, so whatever requirements he met after that was, it is immaterial to me because he had not met the requirement of the age together with the prescribed number of years of service initially.

Question: But let us forget about the age and the three years. Say for example he did meet the three years and he did meet the age, what does it

mean if they need this fitness test at this level? Does that okay them that you are fit enough to actually go to the college?

Answer: Yes, that is the intention of the fitness test.

Question: I am understanding you correct that your version is, as far as you know, the applicant did not get the position because of the age requirement, and secondly because he did not meet the three years?

Answer: That is correct."

[79] It is apparent from the record that the applicant's age had no impact on his academic ability and his physical fitness, yet the decision not to appoint him was based on age. This was the case despite the fact that one of the positions he had applied for required that candidates be between 41 and 45 years of age. At the relevant time the applicant was almost 42 years old. Moreover, the applicant's Station Commander, who supported the applicant's appointment, had also requested that the age requirement be waived. During the trial Brigadier Govender conceded that a candidate who, like the applicant, passes the fitness test does well in training at the college.

[80] In the circumstances, the respondents have failed to show that the discrimination was fair. It follows that the applicant's constitutional right not to be discriminated against by the state was violated.

[81] With regard to the requirement that a reservist must have three years' experience and assuming that the National Commissioner had authority to set the requirement, the Labour Court held that the applicant had met this requirement. This

finding was not challenged in this Court and there is no justification to interfere with it. What remains is the determination of the appropriate remedy.

Remedy

[82] The determination of remedy must commence with reference to the Constitution because a constitutional right was violated. The Constitution imposes a duty on a competent court to grant "appropriate relief" for the violation of any right in the Bill of Rights.[23] In *Fose*, this Court said:

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."[24] (Footnote omitted.)

[83] In that case the Court went further to hold that in suitable cases "appropriate relief" would include an award for damages. The Court reasoned thus:

> "[I]t seems to me that there is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce Chapter 3 rights [of the interim Constitution]. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's

[23] Section 38 of the Constitution, in relevant part, provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

[24] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 19.

> intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed."[25] (Footnotes omitted.)

[84] But happily in this case the Equity Act, which gives effect to the infringed constitutional right, proposes various remedies. The Labour Court is empowered to make "any appropriate order" including "awarding compensation in any circumstances contemplated in this Act" and "awarding damages in any circumstances contemplated in this Act".[26]

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[25] Id at para 60.

[26] Section 50(1) of the Act provides:

> "Except where this Act provides otherwise, the Labour Court may make any appropriate order including—
>
> (a) on application by the Director-General in terms of section 37(6) or 39(6) making a compliance order an order of the Labour Court;
>
> (b) subject to the provisions of this Act, condoning the late filing of any document with or the late referral of any dispute to, the Labour Court;
>
> (c) directing the CCMA to conduct an investigation to assist the Court and to submit a report to the Court;
>
> (d) awarding compensation in any circumstances contemplated in this Act;
>
> (e) awarding damages in any circumstances contemplated in this Act;
>
> (f) ordering compliance with any provision of this Act, including a request made by the Director-General in terms of section 43(2) or a recommendation made by the Director-General in terms of section 44(b);
>
> (g) imposing a fine in accordance with Schedule 1 for a contravention of certain provisions of this Act;
>
> (h) reviewing the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law;
>
> (i) in an appeal under section 40, confirming, varying or setting aside all or part of an order made by the Director-General in terms of section 39; and
>
> (j) dealing with any matter necessary or incidental to performing its functions in terms of this Act."

[85] It is significant to note that the Labour Court is granted a wide remedial power which extends beyond the remedies listed in section 50(1). Where there is a violation of the Act, the Labour Court enjoys the power to make "any appropriate order". Flowing from this construction, the orders requested by the applicant fell within the remedial power of the Labour Court. It will be recalled that the applicant asked the Court to order that he be appointed on a permanent basis and that he be paid compensation. But in view of the Labour Court's finding on whether he met the requirements, that Court did not consider the issue of remedy.

[86] The record filed in this Court does not shed any light on the posts applied for by the applicant. We do not have information on whether those posts were filled or not. Nor do we have evidence supporting the amount of compensation sought by the applicant. Consequently, this Court is not in a position to determine the appropriate remedy which ought to have been granted by the Labour Court. In these circumstances, the matter must be remitted to the Labour Court for the determination of the appropriate relief, after allowing the parties to present the relevant evidence.

[87] For these reasons I would uphold the appeal, set aside the Labour Court's order and remit the matter to that Court.

CAMERON J (Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J concurring):

[88] The issue the applicant brings is large and important: age discrimination. May the South African Police Service (SAPS), acting conformably with the Constitution and the Employment Equity Act,[27] refuse to employ job applicants because they are too old? The particular barrier Mr Sali challenges is the 40-year age limit the SAPS places in the path of police reservists who want to enter the service as permanent members.[28] The SAPS applies an even lower bar of 30 years to entirely new recruits. Other public-sector employers also impose age cut-offs. So the answer to the question has significant implications for public-sector employment generally and indeed for all employers.

[89] But should we answer the question for Mr Sali? In the main judgment, Jafta J says Yes. He finds that leave to appeal should be granted. And on the substance of Mr Sali's case, even though he finds that Mr Sali did not properly challenge the statutory source for the 30-year age bar, Regulation 11(1),[29] he concludes that the 40-year age limit applied against Mr Sali cannot stand. The Labour Court found that the 40-year bar was "introduced by a regulation",[30] and hence did not constitute an

[27] 55 of 1998.

[28] Section 9 of the Employment Equity Act provides that, for the purposes of, inter alia, the prohibition on unfair discrimination in section 6, "'employee' includes an applicant for employment."

[29] Regulation 11(1)(a) of the SAPS Regulations above n 6 sets out 13 requirements with which an applicant for employment in the SAPS has to comply, including that he or she must be "at least eighteen (18) and under thirty (30) years of age".

[30] Labour Court judgment above n 13 at para 23.

"employment policy or practice"[31] over which it had jurisdiction. The main judgment faults this on the basis that only the Minister of Police, and not the National Commissioner of the SAPS (Commissioner), is empowered to amend the Regulations. The 40-year bar that kept Mr Sali out did not derive from Regulation 11(1). Instead, the Commissioner purported to impose the 40-year bar by a waiver under Regulation 11(2).[32] The waiver constituted a policy or practice, which the Labour Court, contrary to its approach, was entitled to review. And, the main judgment finds, once the age-discriminatory policy or practice is scrutinised, it cannot stand. This is because the burden rested on the SAPS to establish that the 40-plus age bar it applied against Mr Sali was fair[33] – and it failed to do so.

[90] But the main judgment finds for Mr Sali on a basis he never argued. He did not attack the Commissioner's power to waive the 30-year age limit conditionally. Nor did any party suggest that that power of waiver amounted to an amendment of the Regulations.[34] For this and other reasons, I do not agree with the main judgment's outcome, or its reasoning for it. However, I gratefully adopt its exposition of the facts

[31] Section 6(1) of the Employment Equity Act (quoted above at [12] of the main judgment) prohibits unfair discrimination against employees or job applicants "in any employment policy or practice" on one or more grounds, including age. Section 1 of the Act (set out above at n 5 of the main judgment) defines "employment policy or practice" extensively.

[32] Regulation 11(2) is set out at [61] of the main judgment.

[33] Section 11 of the Employment Equity Act provides: "Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair."

[34] The Labour Court stated that the Commissioner "amended" the age limit for the enlistment of reservists from 30 to 40 years. See the Labour Court judgment above n 13 at para 10, quoted in the main judgment at [57]. This statement does not mean that *the Regulations themselves* were amended – and appropriately so, for I can find no suggestion by the Commissioner, the Task Team, the trial witnesses, counsel for the SAPS or counsel for Mr Sali that the Commissioner had amended the Regulations. In this Court, too, no party suggested that the Commissioner had introduced the 40-year age limit by amendment. The suggestion was canvassed from the Bench – and counsel for the SAPS in response expressly disavowed the suggestion. The SAPS's case was that the Commissioner had waived, rather than amended, the 30-year age limit, but that the waiver was limited in extent: it allowed reservists over the age of 30 to be permanently appointed, but only if they were no older than 40 and had at least three years' experience.

and litigation history, save that I do not accept that in setting the age limit of 40 the Commissioner purported to amend the Regulations.[35] Like the main judgment, I am prepared to assume, without deciding, that Mr Sali was entitled to bypass the Supreme Court of Appeal.[36]

[91] And I agree with the main judgment's conclusion that Mr Sali cannot be allowed to initiate an attack on Regulation 11(1) in this Court. The parties' pre-trial minute in the Labour Court alluded to the Regulations: Mr Sali recorded that he sought a declaration that "the provisions of the *Government Gazette* in relation to a minimum age" are "discriminatory in nature and without any justification". But this did not spell out the attack or what it sought to achieve. Neither the parties nor the judge addressed the constitutional validity of the Regulations during the trial. At no time before applying for leave to appeal against the Labour Court's adverse judgment did Mr Sali say the Regulations should be declared void. He does now. The question is whether his belated attempt to impugn the Regulations can be countenanced.

[92] For reasons of both form and substance, I agree with the main judgment that he cannot. Litigants must give clear notice when they attack legislation on constitutional grounds.[37] This allows their opponents to mount the best defence possible. That in turn enables the Court to decide properly, with full information and argument, whether

[35] See the main judgment at [22] to [23], saying that the Task Team proposed that the Regulations be "amended" and that in approving this proposal the Commissioner "purported to amend" the Regulations. I find no indication that the Task Team or the Commissioner understood themselves to be "amending" the Regulations. Nor, despite the main judgment at [34], did the SAPS argue that they did.

[36] See the main judgment at [42].

[37] See the main judgment at [47].

the attack should be upheld. This plainly did not happen here. The SAPS seem to have had no inkling that they were called upon to defend the constitutional validity of a service-wide recruitment age bar. Nor, on the pleadings in the trial court, were they. Their witness set out to defend the particular application of the 40-year bar to Mr Sali. As a result, the evidence on the necessity or justification for a service-wide bar was equivocal and patchy. It would be lamentable justice in these circumstances to determine its validity.

[93] This conclusion has damaging implications for Mr Sali's entire claim to relief. If Regulation 11(1) stands, where does it leave him? It leaves him nowhere. It makes it impossible to answer the main question in his favour. It is true that Mr Sali's main focus is not a direct attack on Regulation 11(1). His grievance is against the Commissioner's exercise of the Regulation 11(2) power to waive the requirements in Regulation 11(1). The Commissioner, in exercising that power, set an age limit of 40, which is the focus of Mr Sali's grievance. But, in setting that limit, the Commissioner's waiver is premised on, and derives from, the validity of the 30-year age restriction in Regulation 11(1). It departs from the 30-year limit only to the extent that it grants certain job applicants, namely experienced police reservists, an extra 10 years.

[94] If the Commissioner's waiver under Regulation 11(2) is knocked out, but the age limit of 30 in Regulation 11(1) stands, Mr Sali is in an even worse position: he would not be marginally over, but totally beyond, the age limit. For so long as

Regulation 11(1) stands, Mr Sali cannot coherently or justly – or indeed lawfully – be granted relief. This is because any relief would be at odds with an extant statutory requirement with legal force.

[95] So there is no escape. A job-seeker – reservist or non-reservist – seeking to challenge the age requirements the SAPS applies must frontally attack Regulation 11(1). And his attack on the validity of the waiver the Commissioner granted is driven back to the question of the validity of the main restriction in Regulation 11(1).

[96] It follows from this that it is not necessary to enquire into the nature of the discretion Regulation 11(2) affords the Commissioner to waive the job requirements. Mr Sali should be refused leave to appeal, because his challenge does not tackle the biggest question in it: the validity of the Regulation that is the ultimate source of his grievance. It is not in the interests of justice to decide his appeal. The Court could not grant him effective relief, and indeed could only make him and those in his position worse off.

Costs

[97] Though Mr Sali fails at the leave to appeal hurdle, the issue he has raised is important. According to the usual rule applied in constitutional litigation against state parties,[38] there should be no costs order against him.

[38] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21-3.

Order

[98] I therefore make the following order:

1. The application for leave to appeal is refused.

2. There is no order as to costs.

For the Applicant:	Advocate L Crouse, instructed by Legal Aid South Africa.
For the Respondents:	Advocate G Bloem SC and Advocate P Kroon, instructed by the State Attorney.