



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**Adam Damons v City of Cape Town**

**CCT 278/20**

**Date of judgment: 30 March 2022**

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### MEDIA SUMMARY

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

On Wednesday 30 March 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order made by the Labour Appeal Court of South Africa, Cape Town. The applicant is Mr Adam Damons (Mr Damons) and the respondent is the City of Cape Town (the City). The application is about whether the inherent requirement of a job constitutes a justifiable defence to the duty not to discriminate against, but to reasonably accommodate people with disabilities.

In 2010, while employed as a firefighter by the City, Mr Damons was permanently injured during a fire drill. The injury occurred because the City, his employer, disregarded safety measures during the fire drill. The accident permanently disabled Mr Damons from undertaking strenuous physical activity. Physical fitness is an inherent requirement of the job of an operational firefighter. Consequently, he cannot successfully complete a physical assessment.

Mr Damons commenced his employment as a firefighter on 1 February 2001. By 2008, he was eligible to apply for advancement to the position of senior firefighter. On 1 April

2009, the City introduced its Fire and Rescue Advancement Policy (Policy), which was applicable to its operational Fire and Rescue Service. In 2010, Mr Damons applied for promotion. But for his disability, he might have been promoted in 2011.

On 22 May 2012, the City held an incapacity hearing for Mr Damons. The purpose of the hearing was to assess whether Mr Damons suffered from incapacity related to ill-health or injury, and if so, the nature and extent of his incapacity. The incapacity hearing concluded on the basis that Mr Damons could be accommodated within the Fire and Life Safety Section and, following negotiations with Mr Damons' trade union, the South African Municipal Workers' Union (SAMWU), Mr Damons was transferred to alternative employment on 23 January 2013 to do administrative and educational work. He retained his designation as a firefighter and salary level, although he was unable to perform the operational function of fighting fires. Mr Damons agreed to the transfer if his current remuneration package as well as future promotions remained applicable.

Mr Damons then applied for advancement to the position of senior firefighter and requested the City to relax the physical fitness requirement. The City refused Mr Damon's application for advancement and has not advanced or promoted him to any position since his transfer in 2013.

Mr Damons referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. Conciliation was unsuccessful. Subsequently, he referred the dispute for arbitration before the South African Local Government Bargaining Council (SALGBC) in 2014. The arbitrator remarked that to confine Mr Damons to one position for such a long time affects one's dignity and status. However, because the City raised the defence of the inherent requirements of a job, the arbitrator concluded that the bargaining council lacked the jurisdiction to determine this aspect of the dispute.

Mr Damons referred the dispute to the Labour Court. The Labour Court had to determine two primary issues - first, whether the inherent requirement of physical fitness for a firefighter precluded Mr Damon's advancement to the position of senior firefighter.

Second, regarding discrimination, whether the City's Policy constituted justifiable and fair discrimination in as much as it distinguished between persons on the basis of an inherent requirement of a job; and whether the application of the Policy to Mr Damons constituted unfair direct, alternatively indirect, discrimination as contemplated by section 6 of the Employment Equity Act (EEA).

The Labour Court declared that applying the Policy to Mr Damons in a way that prevented him from advancing due to his disability amounted to unfair discrimination in terms of section 6(1) of the EEA. This was then followed by an appeal in the Labour Appeal Court.

The Labour Appeal Court focused on the City's defence of the inherent requirements of a job to resist Mr Damon's claim for advancement to the position of senior firefighter. It endorsed *TDF Network Africa (Pty) Ltd v Faris* which held that a requirement is inherent if it is rationally connected to the performance of the job and necessary for the fulfilment of a legitimate work-related purpose. It overturned the judgment of the Labour Court and held that to the extent that there is a differentiation between Mr Damons and active firefighters, who are considered for promotion, this is justified both by the rational requirements contained in the Policy and by the inherent requirements for the position of a senior firefighter.

Mr Damons now finds himself before this Court. The Court granted leave to appeal. However, the appeal was ultimately dismissed in the majority judgment.

Before this Court, Mr Damons posits the question whether there is any justification for refusing him opportunities for advancement based on his disability, when the injury was occasioned by the City. Mr Damons asserts that the City is discriminating against him unfairly by refusing to waive the physical fitness requirement and to promote and advance him in his job as a firefighter. To this claim, the City raises the defence that physical fitness is an inherent requirement of the job of firefighters. This defence, it argues, absolves it from any duty to reasonably accommodate Mr Damons.

The first judgment (minority), penned by Pillay AJ, regards the City's defence as a call for a probe into the co-existence of the principles pertaining to the inherent requirement of a job and the duty not to discriminate against but to reasonably accommodate people with disabilities, in accordance with section 5 and 6(1) of the EEA. With reference to international law, the judgment notes that mainstreaming disability issues is integral to strategies for sustainable development.

The minority judgment holds that sections 5, 6(1) and 11(1) of the EEA, places a positive duty on the employer to eliminate discrimination. Furthermore, there is also an onus on the employer to prove that the discrimination is not unfair and unjustifiable.

The minority judgment agrees with the findings of the Labour Court and Labour Appeal Court that physical fitness is an inherent requirement of the job of operational firefighters. It rejected the Labour Appeal Court's decision to set aside the Labour Court's order directing the City to re-consider Mr Damon's advancement application. It holds that accommodating persons with disabilities is not welfarism and granting gratuitous advantage or preference. Rather, reasonable accommodation is about human rights and sustainable development. As such, it must be a genuine effort to remedy disadvantage so as to enable equality of opportunity and remuneration, and parity of participation. Accordingly, the principle of reasonable accommodation imposes a positive duty on the City to apply the Employment Code to Mr Damons to explore ways of accommodating him beyond his current position. Pillay AJ held that the defence of the inherent requirement of a job was justifiable for not advancing or promoting Mr Damons to the position of an active firefighter but unjustifiable as a defence against its positive duty to reasonably accommodate him in other lines of employment, especially as the City was responsible for the accident that resulted in his injuries and permanent disability. If the only question on appeal was whether the Policy discriminated unfairly against Mr Damons, she held that she would not have set the appeal down for hearing as that question was uncontroversial and settled in the Labour Appeal Court.

The second judgment (majority), penned by Majiedt J (Madlanga J, Madondo AJ, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring), disagreed with the first judgment on the outcome and its underlying reasoning. It agreed with the first judgment that leave to appeal must be granted however, the second judgment dismissed the appeal. As a starting point, the second judgment cautioned against the use of reasoning which attempts to persuade solely by evoking feelings of sympathy which are irrelevant to the legal question raised on appeal. It explained that the only question relevant for the purpose of this appeal is whether the Policy discriminates unfairly against the applicant.

The second judgment reiterated the importance of pleadings as a central element of the rule of law. It looked closely at the pleadings and found that the central issue is very narrow, being whether the respondent had unfairly discriminated against the applicant by not waiving the requirement of physical assessment in the Policy and thus failing to promote him. Furthermore, the second judgment disagreed with the first judgment's approach to reasonable accommodation as it is based on the misunderstanding of the role of, and the interplay between, reasonable accommodation in a position and the inherent requirements of that position. By referencing the Code on Disabilities, the second judgment interpreted the principle of reasonable accommodation as placing the employee with disabilities on an equal footing with non-disabled employees insofar as the operational requirements and performance of the job are concerned. The second judgment found that the obligation to reasonably accommodate only applies if such reasonable accommodation will make it possible for the employee to fulfil the inherent requirements of the job.

The second judgment further explained that any accommodation beyond this would cease to be reasonable, because it would effectively require an employer to employ someone who cannot possibly perform the inherent requirements of the job. Once the respondent has successfully raised the defence that physical fitness is an inherent requirement of the post of a senior firefighter, the question of reasonable accommodation falls away. Section 6(2)(a) of the EEA would thus not avail the applicant since, at most, it would require the respondent to reasonably accommodate him, which differs from the first judgment's understanding of section 6(2). The second judgment found that the first judgment, in this

regard, is incompatible with the very nature and purpose of reasonable accommodation, which is to enable a disabled employee to perform in accordance with the inherent requirements of the job.

Like the first judgment, the second judgment upheld the respondent's section 6(2)(b) of the EEA defence to the pleaded case. Where the second judgment differs from the first, is the latter's finding for the applicant on his unfair discrimination claim on a basis which was not pleaded namely, the respondent's failure to establish a policy for advancement for non-operational firefighters. This, the second judgment found to be impermissible. In the result, the majority of the Constitutional Court ordered that leave to appeal be granted, but that the appeal must fail with no order as to costs.