




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No.: 44033/19

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED
 Date: <u>17/07/2023</u>	

In the matter between:

LIZETTE ANTOINETTE LABUSCHAGNE

Applicant

and

THE MINISTER OF STATE SECURITY AGENCY

First Respondent

THE CHAIRPERSON OF THE GRIEVANCE PANEL NO.

Second Respondent

PULANE MOLEFE

THE ACTING DIRECTOR- GENERAL:

Third Respondent

STATE SECURITY AGENCY

Date of hearing:

07/06/2023

JUDGMENT

MTEMBU AJ

Introduction

[1] This is an application whereby the applicant challenges the first respondent's decision or conduct in removing her from the position of unit head, which had been vacated by her superior to whom she was then reporting. The applicant strongly feels that upon the departure of her superior, Mr Christo Strydom, she was a perfect candidate to fill the post. This position, she contends, was wrongfully filled by Ms Maletswa. In addition to this, the applicant challenges the first respondent's decision to adjust her Individual Performance Measurement System's ratings ("IPMS") from level 4 to level 3 for the years 2013/2014 and 2014/2015.

[2] In the amended notice of motion which, in my view, is crafted in a convoluted manner, the applicant sought an order, *inter alia*, in the following terms:

- "1. That the recommendation by the second respondent and the approval thereof by the first respondent that applicant be transferred laterally from the Directorate Telecommunications to another directorate of the State Security Agency be reviewed and set aside:
2. An order that the applicant be retrospectively appointed on a level commensurate to that of unit head (now P2) from 1 October 2002, alternatively from June 2015;
3. An order that applicant's remuneration be retrospectively recalculated by first respondent, alternatively third respondent from 1 October 2002, alternatively June 2015 commensurate with that of a unit head (Level2) and that the difference between what applicant is entitled to and what she was

actually paid, be paid to applicant within 30 court days from this order being made;

4. *An order that the respondents make available to the Honourable Court and the applicant the details of the respective remuneration packages, now G3 and P2, to enable the applicant and the Honourable Court calculate the amount retrospectively payable to applicant.*
5. *That the decision of the third respondent confirming applicant's Individual Performance Measurement System's rating of 3 for the years 2013/2014 and 2014/2015 be reviewed and set aside and adjusted to a category rating of 4;*
6. *An order that applicant's performance bonus be recalculated by first, alternatively third respondent, based on a performance rating of 4 for the years 2013/2014 and 2014/2015 and that the difference between the recalculated bonus and the bonus actually paid for the two years be paid to the applicant within 30 court days of this order being made;"*

- [3] During the hearing, it became abundantly clear that the application centres on two issues: first, whether the applicant should have been appointed or promoted to the position of unit head rather than Ms. Maletswa. Second, whether the applicant's IPMS ratings for 2013/2014 and 2014/2015 should be adjusted from 3 out of 5 to 4 out of 5.

Summary of the facts

- [4] The applicant commenced employment with the State Security Agency with effect from 1 April 2002 as an administrative officer in the telecommunication division responsible for mobile telephone services.
- [5] The applicant was reporting to Mr Christo Strydom, who was then Deputy Divisional Head. Apparently, Mr Strydom left the organisation in the same, 2002. The applicant admits that it was explained to her that she could not act in the post previously occupied by Mr Strydom on the basis that this post

no longer existed in the division and for this reason, the post was never advertised.

- [6] After that the applicant reported to a certain Mr Steyn who in August 2003, after the departure of Mr Strydom, made submissions and recommendations that there should be a creation of two-unit head posts in the division. These recommendations were however not approved.
- [7] Two years later, on 01 February 2006, the Acting Manager: Information Systems at the time, Mr Bernard, also made submissions and recommendations that the applicant be appointed as the unit head. However, these recommendations too were not approved. The applicant contends that she performed the functions of the unit head. However, she admits that she was never formally appointed to that position, and neither was she remunerated in accordance with the post level of a unit head and or in accordance with the functions and responsibilities she executed. Again in May 2006, three months later, the General Manager: Human Resources, Mr Masango, attempted to have the applicant's post re-evaluated. This attempt too failed.
- [8] In 2012, six years later, the State Security Agency merged two branches of National intelligence. As a consequence of these changes, the applicant, therefore, requested a promotion. Mr Bam who was then the applicant's Acting Manager declined the request for promotion. Aggrieved by this, the applicant escalated her issues to the then Director-General, Mr Dlomo. Mr Dlomo undertook to investigate. He however came back to the applicant and informed her that she could not be appointed as the unit head because she did not have an NQF6 qualification which is equivalent to a degree. She subsequently enrolled for a BA Criminology Degree at the University of South Africa, apparently upon the advice from Mr Dlomo.
- [9] The applicant also submitted a formal grievance against Mr Bam because she felt victimised. According to the applicant, her grievance was never investigated. For the periods of 2013/2014 – 2014/2015 Integrated

Performance Measurement System, the applicant rated her performance on a level 4 out of 5. Mr Bam reduced the ratings to a level 3. Dissatisfied with Mr Bam's ratings, the applicant appealed. According to the applicant, she never received an outcome in her appeal. Mr Bam was later replaced by a certain Mr Shariff.

- [10] In June 2015, the applicant was invited to a meeting wherein she was informed by Mr Shariff that Ms Maletswa had been appointed as the unit head and she would report to her.
- [11] The applicant was aggrieved by this as she felt that her functions and responsibilities were taken away from her and consequently requested that she should be transferred to another division as she could not cope working under Ms Maletswa in the same division. The approval was granted.

The applicant was transferred to the IT Stock Department where she worked in an open space with other colleagues. According to the applicant, this was a demotion. As a result, she submitted another grievance with respect to the appointment of Ms Maletswa. Her grievance was only entertained three years later, after a series of demands. A grievance panel was convened in October 2018. The following year, on 17 January 2019, the applicant received an outcome of her grievance, however, not the entire report. It was conveyed to the applicant that Ms Maletswa was unlawfully appointed to the unit head post. The reasons being, the post had been scrapped and no longer existed. The applicant was further advised that a consultation process would be undertaken with her regarding a possible transfer to another directorate.

- [12] Regarding the outcome with respect to her performance scoring, the applicant, through a letter from Mr Jafta dated 18 March 2019, the then Acting Director-General, was advised that Mr Jafta considered the appeal and supported the rating of level 3.

Grounds of review

- [13] The grounds of review are premised upon the contention that the first respondent's decision is reviewable in terms of the Promotion of Administrative Act 3 of 2000, ("PAJA"), alternatively in terms of the principles of legality, and or in terms of section 23 of the Constitution Act 108 of 1996. However, there is no specific reference to the provisions of PAJA which the applicant relies on. The reference thereto is amorphous.
- [14] In sum, the grounds of review are that for the past 13 years, the applicant had been performing the functions of the unit head, from 2002 to 2015. It is on this basis that the applicant contends that the appointment of Ms Maletswa to the position of the unit head is unfair. The IPMS ratings were lowered by Mr Bam for malicious reasons. According to her this amounted to victimisation. Her previous ratings, two years prior, had not changed. There was no reason to justify a decrease in her ratings. Her duties were taken away from her without a hearing. The applicant further contended that the failure to promote her and her demotion was discrimination on the ground of race.
- [15] The respondent opposed the review application and contended that the applicant never performed the functions of a unit head. Had she done so, she would have invoked the benefits of payment for acting in terms of the Ministerial Delegation of Powers and Direction ("MPD"), and clauses 3.2 and 7.8 of the Human Resource Directive Remuneration Management. It is inconceivable that the applicant would have been acting in the position of unit head for a period of thirteen years (13) without receiving any acting allowance and not lodging any grievance regarding payment for acting in the position of unit head. The applicant did not possess the necessary qualifications to act in such a position.

- [16] According to the respondent, the unit head position was managerial in nature not administrative. The position was disestablished and no longer existed. The applicant was only performing administrative functions. The applicant was transferred to another division based on her own request. The appointment of Ms Maletswa was set aside as it was established that she was unlawfully appointed.

Submissions

- [17] The applicant submitted that although she was formally appointed as an administrative officer, she from October 2002 until 2015 performed the duties of a Deputy Divisional Head and that she is entitled to be remunerated on the level of a Deputy Divisional Head (unit head). In support of this contention, it was submitted that there can be no doubt that working as a unit head, fulfilling the tasks and functions of a unit head, and having the status of a unit head for many years resulted in a situation where the applicant was effectively in the same position as being promoted.
- [18] In addition to this aspect, the applicant's further contention is that when, during 2015, Ms Maletswa was appointed as unit head in the division where the applicant was functioning, she was then demoted. In support of this submission, it was contended that even if she did not have a vested right in the position, she certainly had a right to be heard when the respondent decided to appoint Ms Maletswa.

The applicant's counsel, relying on **Eskom v Marshal and Others**¹, submitted that working for many years as unit head and studying further on advice of her superiors, created a legitimate expectation that she would be appointed to the position of unit head. Therefore, the applicant was demoted, the submission goes. On the second issue pertaining to IPMS, it was argued that the applicant's IPMS rating prior to 2014 was always at level

¹ [2003] 1 BLLR 12 (LC) at paras [20] to [21]

4 for two consecutive years, and that a decrease from level 4 to level 3 for the years 2013/2014 and 2014/2015 was irrational.

- [19] On the other hand, it was submitted, on behalf of the respondents, that the applicant was neither appointed nor remunerated on the level of a unit head. Consistent with this, the applicant never challenged why she was not remunerated for the acting position as she alleged. The applicant was transferred based on her request to another division. Ms Maletswa's appointment was set aside. The applicant therefore should not rely on Ms Maletswa's appointment since it was set aside. It was submitted that even though the first respondent admits that Ms Maletswa ought to not have been appointed, and she is not supposed to occupy the unit head post, that does not mean that the applicant qualifies for any promotion. The applicant's contention that the court should grant her promotion without following due process cannot be countenanced.

Analysis

- [20] As I have already stated, the grounds of review are predicated on the contention that the first respondent's decision is reviewable in terms of the Promotion of Administrative Act 3 of 2000, alternatively in terms of legality principles, and or in terms of section 23 of the Constitution Act 108 of 1996. The issues revolve around the failure to promote the applicant and an unreasonable decrease in her IPMS ratings.

In **Gcaba v Minister of Safety & Security**² and **Mkumatela v Nelson Mandela Metropolitan Municipality**³, the Constitutional Court and the Supreme Court of Appeal respectively ruled that promotion in the public sector does not constitute an administrative action. This principle was applied in **City of Cape Town v SAMWU obo Sylvester, Mongomeni and**

² [2009] 12 BLLR 1145 (CC) at para 64

³ [2010] 2 BLLR 115 (SCA)

Akiemdien⁴ where a bargaining council award ordering the promotion of the applicant employee was on review. Such matters, the Labour Court found, should not be treated as akin to a judicial review of administrative decisions since employment decisions that do not affect the public at large are not administrative decisions. The proper yardstick, Rabkin-Naiker J noted, is fairness to both parties. 'Irrationality' remains relevant only insofar as it demonstrates unfairness.

- [21] In this matter before me, it is common cause that the applicant as an employee of the State Security Agency does not enjoy any protection under Labour Relations Act 66 of 1995 ("the LRA) and the Employment Equity Act 55 of 1998 ("the EEA"). In terms of section 2, the LRA does not apply to members of the National Defence Force; and the State Security Agency. The LRA expressly excludes members of the State Security Agency from its operation. Its expansive protections therefore do not cover the parties such as the applicant in her employment with the first respondent. However, section 23(1) of the Bill of Rights (of which the LRA is the principal legislative off-shoot) provides that "Everyone has the right to fair labour practices". This includes members of the defence force.⁵ The SCA in **Murray v Minister of Defence** held that:

*"In 1995, the LRA expressly codified unfair employer-instigated resignation as a dismissal. Even though that does not apply here, the constitutional guarantee of fair labour practices continues to cover a non-LRA employee who resigns because of intolerable conduct by the employer, and to offer protection through the constitutionally developed common-law."*⁶

⁴ [2013] 3 BLLR 267 (LC)

⁵ *Murray v Minister of Defence* [2008] 3 All SA 66 (SCA) at para [5]

⁶ *Ibid* at para [9]

- [22] It is manifest from the SCA decision in *Murray* that even though the provisions of the LRA do not apply to litigants such as the applicant, but the Constitution guarantees them a right to fair labour practices.
- [23] The Constitutional Court in **Pretorius & Another v Transnet Pension Fund and Others**⁷ further suggested that a person who is not defined as an employee under the LRA but who is engaged in an employee-employer relationship may rely on such a relationship to assert their constitutional right to fair labour practices. It stated that “More and more people find themselves in the “twilight zone” of employment”.
- [24] I now turn to address the controversy about promotion or appointment, which was the basis for the applicant’s case. In the case of promotion, there is generally no right to be promoted. The decision to promote ultimately falls within the employer’s managerial prerogative. The exercise of managerial prerogative has to be no more than good faith and rational.⁸ I would merely emphasise, as cautioned by Corbett CJ in **Administrator, Transvaal & others v Traub & others 1989 (4) SA 731 (A)**, that the need to avoid undue judicial interference in the administration of public authorities must always be placed in the balance. Indeed, as I have already stated, the promotion of an employee is a privilege, bestowed at the discretion of the employer when deemed appropriate. It is not a right to which an employee is entitled unless, of course, his employment contract so provides.
- [25] The applicant’s contention that she performed the functions of the unit head, from 2002 to 2015 and therefore she deserved promotion is susceptible to criticism. The intriguing part, firstly, is that the applicant admits that she was never formally appointed to the position, and neither was she remunerated

⁷ [2018] 7 BLLR 633 (CC) at para [48]

⁸ See *SAPS v SSSBC* [2010] 8 BLLR 892 (LC) at para 15; See also *SAPS v PSA* [2007] 5 BLLR 383 (CC), with reference to *Van Rooyen v the State* [2002] 8 BCLR 810 (CC)

in accordance with the post level of a unit head and/or in accordance with the functions and responsibilities she executed.

[26] The second part is that she admits that it was explained to her that she could not act in the post previously occupied by Mr Strydom on the basis that this post no longer existed in the division and for this reason, the post was never advertised. This, in my view, defeats the applicant's contention that she was an acting unit head upon the departure of Mr Strydom. I agree with the respondent's contention that had she performed the duties of a unit head or acted in such a capacity, surely, she would have invoked the benefits of payment for acting in such a position. It is common cause that the first respondent has policies that permit employees to claim acting allowance and benefits, in particular, the Ministerial Delegation of Powers and Direction, and Human Resource Directive Remuneration Management policy. It defies logic that the applicant would have been acting in the position of unit head for a period of thirteen years (13) without receiving any acting allowance and without lodging any grievance regarding payment for acting in the position of unit head. The applicant was notorious for lodging grievances but for strange reasons, never challenged the nonpayment of acting allowance.

[27] The question of whether the applicant should have been promoted to the position of unit head rather than Ms. Maletswa also does not take the applicant's case further. The applicant, in her own concession, submits that the appointment of Ms Maletswa became a shock to her because she was aware that there was no approved unit head post. In addition to this, she agrees, the post was never advertised. This was further confirmed by the grievance panel which found that Ms Maletswa was unlawfully appointed to the unit head post. The reasons being, the post had been scrapped and that it no longer existed. I digress at this juncture to observe that the grievance panel recommended as follows:

“9.1.1 The creation of the current Unit Head position in Division IO32 be declared null and void as due process was not followed and no formal approval by the Director-General is reflected on the submission.

9.1.2 A Business Analysis be concluded in Division IO32 to determine the functional need for a Unit Head position as well as the post establishment and to follow due process to create a formal Unit Head position.

9.1.3 If the Business Analysis outcome result in the creation and approval of a Unit Head position, the position be filled in accordance with Chapter V of the Intelligence Services Regulations, 2014 and SSA Directive HRD.OS (Human Resource Directive on Recruitment, Selection, Appointment and Termination of Service).

...

8.1 The process followed in appointing Ms AM Maletswa in the Division Services Administration (IO32) by the Agency was in contravention of Chapter II (Organisation and Structures), IV (Job Evaluation) & V (Recruitment, Selection, Appointment and Termination) of the Intelligence Services Regulations, 2014.”

[28] This, in my view, seems to suggest that, indeed, there was no unit head post position. It was never approved, hence the appointment of Ms Maletswa was also declared *null and void*. In addition to this, the grievance panel recommended that a Business Analysis should be concluded in Division IO32 to determine the functional need for a unit head position. Now, the critical question is, how can the applicant be promoted to a position that does not exist? Surely, she cannot. This, too, defeats any suggestion of legitimate expectation.

[29] In **Mathibeli v Minister of Labour**⁹, a recommendation that the appellant’s post be upgraded was not approved because it was in conflict with a collective agreement. The appellant then referred an unfair labour practice

⁹ [2015] 3 BLLR 267 (LAC)

dispute concerning promotion for arbitration. On review, the Labour Court found that the bargaining council lacked jurisdiction to arbitrate because the dispute was one of interest. On appeal, the Labour Appeal Court did not agree with this finding but found that, because the upgrading had not been authorized, the appellant had no right to be upgraded and, therefore, the respondent had not committed an unfair labor practice.

[30] Another applicant's contention which deserves consideration is what she calls demotion. Regrettably, the applicant speaks in paradox, firstly she contends, she was not promoted or appointed to the position of unit head. While trying to follow her logic of reasoning, she, in the process changes tune and contends that she was demoted in that she was transferred to another division. Let me deal with the issue of demotion which arises out of a transfer or appointment of Ms Maletswa. It is common cause that she requested a transfer to another division which was duly granted. It is common cause that her salary was never reduced. It is common cause that she was never formally appointed to an acting position. It is further common cause that she was never remunerated for the alleged acting post. It is trite that demotion lies in a diminution of remuneration levels, fringe benefits, status, different levels of responsibility or authority, or power. Therefore, the issue of demotion does not arise under these circumstances.

[31] The applicant also brought in the issue of discrimination that she was discriminated against on the basis of race. This was just a bold statement with no substantiation. In support of this contention, it was simply that the applicant is white and Ms Maletswa is black. I must emphasize that the allegations of racism should not be made frivolously. This country has a painful historical past. Issues pertaining to racism should be genuine, not for cheap politicking. The applicant was, in this regard, clutching at straws.

[32] The last issue, as raised by the applicant, is the IPMS ratings. The contention on the issue relating to IPMS was that the applicant's IPMS rating

prior to 2014 was always at level 4, for two consecutive years, and a decrease from 4 to 3 category was irrational for the periods 2013/2014 and 2014/2015. I must say that there was no further information placed before court for consideration. This court was not appraised as to how the IPMS rating works. No information was provided about the policy governing IPMS ratings, if there is any. No information was provided as to how the first respondent stumbled vis-à-vis the existing policy. The applicant's counsel correctly conceded that there was no sufficient record before court in relation to the IPMS.

[33] I must also say that this court was urged to determine the matter fully and not remit it back for consideration *de novo*. Indeed, I agree. Where the applicant has failed to establish her case, it axiomatically follows that her application must fail.

[34] Perhaps, a few issues warrant consideration based on what is available before court. The applicant rated herself by giving herself the score she subjectively wanted. As already stated, one is not appraised of the policy in this regard, but what baffles my mind is, how a person can rate himself or herself to the highest point, when reduced to a lower point, then question the rationality of the other, while his or her rationality is left unquestioned. In my view, previous work performance cannot be used as a yardstick. Otherwise, there will be no need for an annual performance evaluation.

[35] Regrettably, the applicant has not made a convincing case to this court on all fronts.

Costs

[36] What remains is the question of costs. The general rule is that the successful party should be given his costs, and this rule should not be departed from,

except where there are good grounds for doing so. In this matter, there is nothing that warrants deviation from the general rule.

Order

[37] In the result, the following order is made:

- (i) The application is dismissed with costs.

A.M. MTEMBU AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

"This judgment was prepared and authored by the Judge whose name is reflected herein, duly signed, and is submitted electronically to the Parties/their legal representatives by email. This judgment is further uploaded to the electronic file of this matter on Case Lines by the Judge or his Secretary. The date of this judgment is deemed to be 17 July 2023."

Counsel for the Applicant: Adv G L Van Der Westhuizen

Instructed by: DDP Attorneys, Rosebank

Counsel for the Respondent: Adv LJ Mboweni

Instructed by: State Attorney, Pretoria