

**REPORTABLE  
IN THE LABOUR COURT OF SOUTH AFRICA  
(HELD AT JOHANNESBURG)**

**CASE NO: JR15/06**

In the matter between:

**MEC FOR ROADS AND TRANSPORT:  
LIMPOPO PROVINCE**

Applicant

and

**NAKAPEDI JAMES MASETE**

First Respondent

**SAMUEL NEGOTA N.O.**

Second Respondent

**GENERAL PUBLIC SERVICE SECTORAL  
BARGAINING COUNCIL (“GPSSBC”)**

Third Respondent

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**JUDGEMENT**

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Mayet A J

***INTRODUCTION***

1] This is an application to review and set aside the ruling of the second respondent (“the commissioner”) issued under case number DSGA485/05/06 under the auspices of the General Public Service Sectoral Bargaining Council

("the bargaining council") on an unspecified date.

2] The application was opposed.

### ***BACKGROUND***

3] During August 2001 the first respondent applied for the position of senior manager at managerial level 13 with the applicant. The interview was conducted in June 2002. One month prior to being appointed to the position as advertised, the second respondent was informed telephonically that the position of senior manager had been downgraded to level 11 to that of Manager. The first respondent accepted the appointment at the lower level in writing. manager, which the first respondent had initially applied for, was re-advertised. The first respondent applied for the post but his application was unsuccessful.

4] During sometime in 2005, the post of two deputy managers in other municipal districts were upgraded and the incumbents of the upgraded posts were absorbed into those posts while that of the first respondent remained unchanged.

5] The first respondent felt aggrieved by the fact that he was not elevated to the rank of senior manager and referred an unfair labour practice dispute to the relevant bargaining council.

- 6] The commissioner found that the applicant had committed an unfair labour practice against the first respondent and made the following award.

*"I order the Department to appoint the employee to the position of Director Regional Services with full back-pay and benefits with effect from July 2004 when the post was filled again after it was re-advertised. The payment should be effected with immediate interest at the rate of 15,5% per annum reckoned from July 2004 until payment of the above back-pay."*

- 7] It is this award which the applicant seeks to review and set aside.

### **GROUND FOR REVIEW**

- 8] The applicant raised the following grounds for review:-

[8.1] The award is not justifiable in relation to the reasons for it, having regard to the evidence presented; alternatively there is no rational connection between the material placed before the commissioner and the ultimate conclusion reached by him.

[8.2] The commissioner committed a gross irregularity in that he failed to apply his mind to the evidence, misunderstood the evidence and ultimately issued an award without appreciating the true nature of the issues in dispute.

[8.3] The commissioner committed misconduct in relation to his duties

as arbitrator in that he disregarded relevant evidence and issued an award that indicates that he failed to apply his mind to the issues.

### ***BACKGROUND***

9] The applicant filed an application for condonation for the late filing of its review application. The review application had to be filed by 16<sup>th</sup> January 2002, but it was only filed on the 20<sup>th</sup> of January 2002, some three days late.

10] However, the applicant amended its notice of motion by adding that the review application was being brought not only in terms of section 145 of the Labour Relations Act, No. 66 of 1995 as amended, (“the Act”), but also in terms of section 158(1) of the Act.

11] The first respondent was of the view that he should have been appointed senior manager at level 13 when he first applied for the position as advertised by the applicant.

12] It was his argument that he had been misled into believing that the advertised post for senior manager had been downgraded to level 11. Had it not been for the fraudulent misrepresentation, he would not have accepted the post at the lower level.

13]It was further argued by the first respondent that in view of the fraudulent misrepresentation, the applicant should be estopped from claiming that the position was downgraded, when in fact the post had never been formally downgraded.

14]The applicant was of the view that the first respondent was not in any way coerced or misled into accepting the position of manager at level 11. The first respondent was informed of the downgrading of the advertised post before his appointment. The first respondent did not raise any objections to the downgrading of the advertised post and accepted the applicant's explanation that the Bohlabele District was not big enough to warrant the appointment of a senior manager at level 13.

### ***EVALUATION***

15]The first respondent occupied the position of manager at level 11 from the date of his appointment sometime in July 2002, without raising any objections. During July 2004, the post of senior manager at Bohlabele District, which the first respondent had applied for was re-advertised.

16]The first respondent applied for the position, but his application was not successful.

17]In 2005, the post of deputy managers at other districts were upgraded and the incumbents of the upgraded managerial posts were absorbed into the

higher level.

18]The first respondent was aggrieved by the fact that he was not similarly elevated to the position of senior manager, level 13 as the other two deputy managers were.

19]With regard to the condonation application, the first respondent was of the view that the the application for condonation should fail because of the inordinate delay occasioned solely by the applicant's tardiness in referring the matter within the prescribed time limits and the late filing of the arbitration record.

20]The applicant dealt extensively with the reasons for the delay as well as with its prospects of success in the main application. The reasons furnished by the applicant set out in detail the procedure to be followed by an administrative body seeking legal opinion and legal representation.

21]I am satisfied that the applicant had every intention of pursuing this matter and has made out a good case for condonation for the late referral and late filing of the arbitration record.

22]The first respondent furthermore alleged that his acceptance of the post at the lower level of manager was premised on a misrepresentation by the applicant that the post advertised at the level of senior manager had been downgraded.

23] It was the third respondent's argument that the advertised post had not been downgraded at all and that the applicant should be estopped from saying that the advertised post was downgraded.

24] In **Arts Enterprises (Finances) (Pty) Ltd v Protea Assurance Co. Ltd 1981**

**(3) SA 275 (A)** Corbett JA held: *"The essence of the doctrine of estoppel by representation is that a person is precluded from denying the truth of a representation previously made by him to another person, if the latter, believing in the truth of the representation, acted thereon to his prejudice. The representation may be made in words, i.e., expressly, or it may be made by conduct including silence or in action and in general must relate to the existing fact."*

25] The applicant at all times maintained that the advertised post of senior manager was downgraded to that of manager because the district of Bohlabela did not warrant the appointment of a senior manager. This was conveyed to the first respondent prior to him accepting the post at the lower level.

26] The applicant in downgrading the advertised post did so on the basis of information pertaining to the district of Bohlabela. The applicant being the repository of such information was best placed to assess the needs of the Bohlabela district and came to the conclusion that it did not warrant the

appointment of a senior manager.

27] During 2004, the applicant reassessed the situation in Bohlabela district and came to the conclusion that the Bohlabela district needed a senior manager. The applicant advertised the post of senior manager for Bohlabela and other districts as well. In so doing the applicant was exercising its managerial prerogative

28] The situation referred to above is clearly distinguishable from the situation referred to in the judgement of Corbett AJ. The first respondent's reliance on the doctrine of estoppel is misplaced and without merit.

29] The applicant was of the view that the commissioner had misconstrued the nature of his inquiry when he conflated two distinct and separate issues when he concluded that the first respondent became "*a willing victim and participant*" in the department's irregular and arbitrary actions, when he initially accepted the post of manager at the downgraded level.

30] The situation of the first respondent was not the same as that of the other two managers whose posts were elevated to that of senior managers at level 13. The commissioner failed to take into account that the first respondent was not the only applicant for the post when it was re-advertised in July 2004. There were other applicants who were interviewed for the advertised post of senior manager at level 13. The first respondent was interviewed, but his application



was not successful.

31] His situation was different that of the other employees who did not have to compete for the position of senior manager in their respective districts with other applicants.

32] Of significance is the fact that the first respondent does not allege that he was unfairly treated in the interview process or that his qualifications were such that the other applicants were not suitable for the advertised post at senior manager level.

33] No mention was made of the other applicants' qualifications or that the other applicants were given preferential treatment by the applicant.

34] In the absence of any such averments, the commissioner could not have concluded that the applicant had committed an unfair labour practice in appointing someone other than the first respondent to the position of senior manager at level 13 at Bohlabela district.

35] The first respondent had the opportunity of challenging the downgrading of the advertised post when it was offered to him in 2002. However, the first respondent elected to accept the position of manager at level 11 and not that of senior manager at level 13, without lodging a grievance. In the matter of **Provincial Administration Western Cape (Department of Health and Social Services) v/s Bikwani and Others [2002] 23 ILJ 761 (LC) at page**

**763, paragraphs F to G**, the Court held that “*there is considerable judicial authority supporting the principle that Courts will be reluctant, in the absence of good cause, to interfere with the managerial prerogative of employers in the employment selection and process. Section 11 of the Public Service Act, (Proclamations 103 of 1994), confers a discretion in the repository of power in the appointment process and Courts will be reluctant to usurp those powers and functions and to make decisions which have the effect of appointing applicants to posts in the public service.*”

36] In the matter of **Ndlovu v/s CCMA and Others [2000] 21 ILJ 165 (LC) at 1462**, Wallis A J held that:

*“It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical qualifications, such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed.*

*The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided a decision by the employer to appoint one in preference to the other is rational, it seems to me that no*

*question of unfairness can arise.”*

37]The first respondent has failed to discharge the onus of establishing the unfairness he has complained of on either legal or evidential grounds.

38]The commissioner’s ruling that the applicant had committed an unfair labour practice against the first respondent when it failed to elevate his position to that of senior manager is irrational in relation to the evidence placed before him. The first respondent was not entitled as of right to be absorbed into the position of senior manager without going through the interview process with other applicants who had applied for the same position.

39]The commissioner misconstrued the nature of the inquiry when he failed to distinguish between the situation of the first respondent, who had to compete with other applicants for the post of senior manager, and the other managers who were promoted to the position of senior manager and did not have to compete with other applicants.

40]In so doing, the Commissioner committed a gross irregularity of the kind that renders his award reviewable.

41]I see no reason why costs should not follow the result.

42]In the premises I make the following order:

1. The award issued by the second respondent, commissioner Negota of

the General Public Service Sectoral Bargaining Council under case number DSGA485/05/00 is hereby reviewed and set aside.

2. The matter is referred back to the General Public Service Sectoral Bargaining Council for hearing *de novo* before a commissioner other than the second respondent.

3. The first respondent to pay the costs.

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Mayet A J  
Judge of the Labour Court of SA

**FOR THE APPLICANT** : ADVOCATE M. B. MATLEJONE  
INSTRUCTED BY STATE ATTORNEY

**FOR THE RESPONDENT** : K MAHLASE ATTORNEYS

**DATE OF HEARING** : 26 SEPTEMBER 2007

**DATE OF JUDGMENT** : 25 2008