IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JR 53/05

In the matter between:

NATIONAL COMMISSIONER	
SOUTH AFRICAN POLICE SERVICE	1st Applicant
SOUTH AFRICAN POLICE SERVICE	2nd Applicant
and	
COHEN, PHILLIP N.O.	1st Respondent
SAFETY AND SECURITY	
SECTORAL BARGAINING COUNCIL	2nd Respondent
BHENGU N.	3rd Respondent

JUDGMENT

Molahlehi J

Introduction

[1] This is an application in terms of which the applicant seeks an order to review and set aside the arbitration award issued by the first respondent (the commissioner) under case number PSSS 18-04/05 dated 27 November 2004. In terms of the award the commissioner found that the applicant had committed an unfair labour practice

in not translating the position of the third respondent, who is, in this judgment is referred to as "the employee."

Background facts

[2] The employee who at the time the dispute in this matter arose was employed as a senior administrative clerk applied to have her position translated into provisioning administrative officer. Because of a number of problems that arose in the manner in which the applicant handled the application the employee ended up having to file two grievances.

The first grievance

[3] The applicant's application was supported by the unit commander who in a letter to the Area Commissioner, Human Resource Management, indicated that the employee was doing the work of provisioning administration officer and that the translation, if granted, would merely align the legal position with the factual position. This application seems to have had the support of the Provincial Commissioner because on 26 April 2002 he addressed a letter to the Provincial Head of Management Services advising him to *"create a post to accommodate the official's translation"*. The post was created and reserved for the employee.

[4] Arising from this the employee was of the impression that she was successful in attaining a higher post and that nothing further would be required. She was however, informed later on 13 May 2002, by the Area Head, Management Services that the post which she requested to be translated into was not available at the Hillbrow Police Station and that she should apply for translation elsewhere. This was incorrect as the employee was never stationed at the Hillbrow Police Station,

but at a sub-component of Hillbrow FCS Investigation Unit, based in Braamfontein where the post she applied for was based.

[5] Subsequent, to the above advice the employee lodge a grievance during September 2002. The outcome of the grievance was that the employee was informed that her position could not be translated because the post was never advertised and that her job description was not suitable for the post she had applied for.

The second grievance

[6] The employee filed the second grievance during October 2003 and the outcome thereof was that her application for rank translation would not be forwarded to National Office for consideration because *"the rank translation was closed in December 2002"*. The employee disputed this and contended that this was incorrect because the letter of the Provincial Head, Management Services, dated 26 February 2003, indicated that the post was reserved for her.

[7] On 12 January 2004, the Section Head, Promotions and Awards, National Office addressed a letter to the Provincial Commissioner in which it was pointed out that the policy applicable within the second respondent made it compulsory to advertise posts before they could be filled. This policy was according to the employee produced and given to her for the first time at the step 4 (four) meeting which dealt with her grievance.

[8] The grievance meeting having failed to resolve the issue raised, the employee referred the unfair labour practice to the second respondent for conciliation. The dispute was then arbitrated, the conciliation having failed to reach a settlement of the dispute.

The grounds for review and the arbitration award

[9] The commissioner found that in failing to translate the post of the employee to that of provisioning administrative clerk retrospective to 09 January 2002, the applicant failed to apply its mind to the employee's application and accordingly committed an unfair labour. The commissioner then directed that the applicant be given the translation retrospectively.

[10] The applicant contended that the award of the commissioner exceeded his powers in reviewing the decision of the applicant not to translate the post of the employee. This contention is based on the finding of the commissioner that the applicant *"failed to apply its mind"* in not granting the employee the translation she had applied for.

[11] The applicant further contended that the decision of the commissioner was reviewable because he failed to take into account the statutory regime that governed the process of translating posts. In this regard the applicant relied on the provisions of section 28(1) of the South African Police Service Act 68 OF 1995 (the Police Act) which gives the power to determine uniform recruitment policy to the National Commissioner. The power to appoint staff is in terms of section 28(2) of the Police Act the responsibility of the National Police Commissioner (the national commissioner). To this extent regulation 17 of the south African Police Service Employment Regulations Gazzette 21088 of 14 April 2000 (the employment regulation) as amended provides:

> *"Before creating a post for any newly defined job, or filling any vacancy, the National Commissioner must -*

(a) satisfy herself or himself that she or he requires the post to meet the objectives of the Service;

(b) in the case of a newly defined job, evaluate the job in terms of the job evaluation system;

(c) in the case of a vacant post linked to salary range 9 and higher, evaluate the job unless the specific job has been evaluated previously; and

(d) ensure that sufficient budgeted funds, including funds for the remaining period of the medium-term expenditure framework, are available for filling the post."

[12]The applicant in further support of its argument contended that the national commissioner was obliged to advertise all positions before they could be filled. The conditions upon which the national commissioner may create a post are set out in the employment regulations.

[13]In the supplementary affidavit the applicant contended that the commissioner failed to determine whether he had jurisdiction in that he does not in his award deal with whether the alleged unfair labour practice fell within the provisions of section 186(2) (a) of the Labour Relations Act 66 of 1995 (the Act). The applicant contended that there is no indication in the award whether the alleged unfair labour practice related to promotion, demotion, probation or training.

[14]The last complain of the applicant relates to the relief granted by he commissioner. The applicant contended that the commissioner was obliged to follow the provisions of both sections 193(4) and 194(4) of the Act.

Evaluation of the award

[15]The applicant's complaint that the rank translation is not analogous to promotion bears no merit in that, translation by its very nature entailed promoting a person from one level to the next and this included invariably an increase in salary. In this instance had the translation been effected the employee would have moved from level 3 (three) to level 7 (seven). In my view this is in line with the authorities and in particular, *Mashegoane & Another v The University of the North (1998) 1 BLLR 73 (LC) at 73,* where the court held that promotion is *"advance, or preferment, raise to a higher rank or position, advancement in position or preferment."* See also *Jele v Premier of the Province of KwaZulu- Natal & others (2003) 7BLLR 723 (LC) (2002) 3 Bllr 222 (LC).*

[16]In the heads of argument the applicant seems to have abandoned the complaint that the commissioner exceeded his power by reviewing the decision of the applicant relating to the issue of translation of the employee's post. In any case even if this point was to be pursued, I do not, with due respect, agree with the interpretation given by the applicant that the commissioner conducted a review, for which he did not have the power to do, arising from the conclusion that the applicant *"failed to apply its mind."* This phrase was used in the context where the commissioner was drawing a conclusion on the facts and the circumstances relating to the conduct of the applicant concerning the manner in which it dealt with the issue of translating the position of the employee. This conclusion was in the proper keeping of the exercise

of the powers and function s of the commissioner in the determination of whether or not an unfair labour practice had been committed.

[17]The commissioner's conclusion in relation to the provisions of the resolution 7 of the Public Service Coordinating Bargaining (PSCBC) cannot be faulted. The commissioner reasoned that the provisions of resolution 7 came into effect after the applicant had already submitted her application. It would seem that even if it was to be concluded that the provisions of resolution 7 was already operative or may be applied retrospectively (which ordinarily would be unfair) they would not apply to the facts of the present case.

[18]The third respondent argued that resolution 7 could not have been a bar to the application of the employee because that resolution envisages a different situation to that of the employee. The situation envisaged under resolution 7 relates to "the filling posts under normal circumstances." Resolution 7 envisages a situation where a post is advertised and either external or internal (employee of the applicant) candidates who whish to be considered for the post apply. In the present instance the employee applied to have rank translated to a post which was not advertised. It is apparent from the reading of the arbitration that the commissioner did not apply his mind to the provisions of the employment regulations, in particular regulation 17.

[19]It is apparent from the reading of the award that the commissioner did not apply his mind the provisions of regulations 17 and 38 of the employment regulations. Unlike resolution 7 of the PSCBC, the employment regulations were already operational at

that time the application for translation was made by the employee. The regulations which were amended in August 2001 and June, 2002, were promulgated on the 14 April 2000.

[20]I do not accept the argument of counsel for the respondent that the commissioner cannot be faulted in as far as the regulations were concerned because no evidence was lead during the arbitration hearing regarding their existence. The interpretation and application of the regulations is a legal rather than a pure factual issue. It is a duty of the commissioners to familiarize and equip themselves with a full understanding and appreciation of the legal framework within which they consider disputes.

[21]Failure to consider the provisions of the employment regulations by the commissioner amounted to failure on his part to apply his mind to the issues before him and in the result he committed a mistake of law. I am aware of the authorities that have held that a mistake of law is not necessarily an irregularity to attract interference by the Court. It is only when the mistake is so gross that the affected party is denied a full and fair determination of the issues that the Court would be entitled to interfere. See *Goldfields and Another v City of Johannesburg and another 1938 TPD 551*.

[22]In the present instance, it is my view that by failing to consider the implication of the employment regulations which also forms part of the legal frame-work governing employment issues, the commissioner committed a gross irregularity resulting in the applicant being denied a full and fair determination of whether or

not the refusal to translate the post of the employee was conduct which constituted an unfair labour practice.

[23]In relation to the relief, the commissioner, contrary to the provisions of section 194(4) of the Act, awarded compensation in excess of the maximum of twelve months. In granting compensation as he did the commissioner exceeded the maximum prescribed by section 194 [4] of the Act, and thereby exceeded his powers and also committed gross irregularity.

[24]In the circumstances of this case it was not unreasonable for the respondent to have opposed the review application. It would therefore not be fair to allow the costs to follow the results.

[25]In the premises the following order is made:

a. The arbitration award issued by the first respondent is reviewed and set aside.

b. The matter is remitted back to the second respondent to be considered by a commissioner other than the first respondent.

c. There is no order as to costs.

Molahlehi J

Date of Hearing : 13th March 2008

Date of Judgment : 23rd October 2008

Appearances

For the Applicant : Adv Hulley

Instructed by : The State Attorney

For the Respondent: Adv Mooki

Instructed by : Cheadle Thompson & Haysom Inc