1. IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR 1128/07

2. In the matter between:

MINISTER OF HOME AFFAIRS **Applicant**

and

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **1st Respondent**

NOMAGCISA CAWE N.O. **2nd Respondent**

PUBLIC SERVANTS ASSOCIATION obo LUNGILE SITOLE **3rd Respondent**

LERATO SHARON MORE-AFILAKA **4th Respondent**

2.1.1.1 JUDGMENT

JAMMY, AJ

3. The Third Respondent's answering affidavit in this matter was filed approximately twenty-one days late. An application before this Court for condonation of that late filing was not opposed and good cause having been shown, condonation was granted.
4. This is an application for the reviewing and setting aside of an arbitration award dated 30 March 2007, issued by the Second Respondent ("the Arbitrator") acting under the auspices of the First Respondent. The dispute which was referred to arbitration was declared by the Third Respondent (hereinafter referred to as Ms Sitole) represented by her trade union, the

Public Servants Association of SA, arising from her non-promotion to a position advertised by the First Respondent and to which the Fourth Respondent (hereinafter referred to as Ms More-Afilaka) was appointed in her stead. The Arbitrator found that non-appointment to have constituted an unfair labour practice and in his award, ordered the Applicant in these proceedings, the Minister of Home Affairs, to appoint Ms Sitole to the position in question, that of Area Manager – Gauteng West and to pay her "the retrospective amount the Applicant would have earned in the position had she been rightfully appointed". That amount, he determined, would be based on the difference between what Ms Sitole currently earned and the salary applicable to the position in question.

5. The advertised requirements for appointment to that post, Area Manager – Gauteng West, were the following -

6. " 1. An appropriate recognised post-matric or equivalent qualification.

2. Solid knowledge in the fields of immigration, asylum and civic service matters.

3. Programme and project management.

4. Financial management within the framework of the Public Finance Management Act No. 1 of 1999

5. Problem solving and analysis, people management and empowerment".

7. The evidence before the Arbitrator indicated that both Ms Sitole and Ms More-Afilaka were amongst candidates short-listed for the position. Each was evaluated by the interviewing panel and applying criteria considered by it to accord broadly with the requirements advertised, Ms More- Afilaka was appointed to the designated post.

8. It was that appointment, the Arbitrator found, that was unfair. Ms Sitole in her evidence before him, had testified that she held at the time a position of

Deputy-Director for Soweto and that she held a Senior Education Diploma. Her management functions and experience included civic services, migration and the budget. She had, the award records, extensive experience in handling refugees and had actually attended a conference in that regard.

9. She had, furthermore, acted in the advertised post from February 2004 to March 2006 and in that context had acquired knowledge of immigration and asylum.

10. Evidence adduced on behalf of the Department of Home Affairs by a Chief Director who had sat on the interviewing panel, was to the effect that the concept of "appropriate qualification" meant "any qualification that would make a candidate suitable for the position applied for". Notwithstanding the substance of the advertisement, educational qualifications, it was stated, were not of primary importance to the panel. Other criteria were crucial and Ms More-Afilaka's curriculum vitae was considered to be appropriate to the appointment in question. She was, according to the evidence "a cut above the rest" whilst, for reasons apparently not elaborated upon, Ms Sitole had not impressed the panel in the course of the interview.

11. In reaching his conclusion, the Arbitrator defined the main issue as being whether Ms Sitole was a better qualified candidate for the job than Ms More-Afilaka. That, he opined, hinged on "whether the appointed candidate has an appropriate recognised post-matriculation or equivalent qualification plus appropriate experience as set out in the advertisement". Proceeding to review the interviewing panel's evaluation of the respective candidates, the Arbitrator concluded that "it is clear that the incumbent appointee (i.e. Ms More-Afilaka at that stage) has no post-matriculation qualification at all". Ms Sitole on the other hand, held a teacher's diploma – most certainly, in the ordinary course, a post-matriculation qualification. At the time of the interview however, it was apparent that Ms More-Afilaka held no such qualification.

12. Taking into account what he considered to be the further comprehensive

evidence before him relating to the degree of experience appropriate to the position in question attributable to the respective candidates, and the applicability to each of them of the advertised criteria for appointment, the arbitrator concluded that Ms Sitole was manifestly more suited to the position in question than Ms More-Afrlika. Hence therefore his determination that the department's failure to appoint her as opposed to Ms More-Afilaka constituted an unfair labour practice entitling her to the redress defined in his award.

13. What emerges from this saga, was submitted by Counsel for the Third Respondent as an indication that the Applicant employer had flouted its own policy and acted irregularly by appointing someone who did not meet the advertised requirements and in identifying another person, the Fourth Respondent, as the appropriate appointee.

14. The submission by Counsel for the Applicant on the other hand, borders, with due respect, on the simplistic - all that the interviewing panel was required to determine, irrespective, by inference, of the precise wording of the advertisement, was whether the successful candidate held *appropriate* post-matric qualifications. In an assessment of such qualifications as the Fourth Respondent held (and these do not appear clearly defined either in the papers before me or in the award), together with her indicated experience, she was determined to be the best person for the job and having regard to the discretion vested in her employer, there was nothing irregular, improper or unfair in that conclusion.

15. An assessment of the propriety or otherwise of the arbitration award in this matter requires a brief examination of the situation which prevailed before the principles governing the review of arbitration awards were defined, as I will indicate later, with what appears to be finality by the Constitutional Court. In -

Arries v CCMA and Others (2006) 27 ILJ 2324

16. the Labour Court defined as trite law, three basic requirements for a fair appointment or promotion. The procedure must have been fair, there must

have been no discrimination, and the decision must not have been grossly unreasonable. What constitutes the last of these criteria has been examined in a line of cases from which there appears the consistent conclusion, confirmed in *Arries* (*supra*), that –

> "… an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based on any wrong principle or in a biased manner".

17. It is apparent to me that the Arbitrator in the instant case, in reaching his conclusion, determined that, of those three factors, that of "insubstantial reasons" characterised the decision reached by the interviewing panel in appointing Ms More-Afilaka, rather than Ms Sitole, to the position in question.
18. In so doing, his conduct was within the ambit of the unanimous view of the Constitutional Court in -

Sidumo and Congress of South African Trade Unions v Rustenburg Platinum Mines Ltd, CCMA and Moropa N.O. 2008(2)BCLR 158

19. that, in deciding a dismissal dispute, a Commissioner/Arbitrator is not required to defer to the decision of the employer. The Commissioner is, however, not given the power to consider afresh what he or she would do but to decide whether what the employer did was fair. Stated differently, the Court concluded, the question to be determined is whether the decision reached by the Commissioner was one that a reasonable decision-maker could not reach.
20. On the conspectus of the papers before me and the respective submissions by Counsel for the parties in this matter, I have no hesitation in concluding that that is not an evaluation which can fairly be applied to the Arbitrator's determination here in question. I am satisfied that he conducted a rational

and responsible analysis of the evidence before him, and that in assessing its persuasive and probative value, he reached a reasonable conclusion, whether or not it was one which might have attracted unreserved affirmation.

21. I turn finally to deal with the submission by Counsel for the Applicant that the Arbitrator had no authority to make the order that he did for the reason that power to appoint and promote employees in the department involved is vested in the Executing Authority, who, in this case, is the Applicant Minister.

22. That submission is without substance in the face of the provisions of Sections 209 and 210 of the Labour Relations Act 66 of 1995, respectively providing that that Act binds the State and that in the event of any conflict between the Act and the provisions of any other law, save for the Constitution or any other enactment specially amending this Act, its provisions will prevail.

23. For these reasons, the order that I make is the following:

23.1 The application is dismissed.

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B M JAMMY
ACTING JUDGE OF THE LABOUR COURT

26 March 2008