NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN, JOHANNESBURG

CASE NO: JR 1217/08

In the matter between:

SESINYI ABEDNEGO MATI Applicant

and

DISPUTE RESOLUTION CENTRE-MIBCO First Respondent
ADV PAUL KIRSTEIN Second Respondent
AUTO PEDIGREE Third Respondent

JUDGMENT

DE SWARDT, A J:

The applicant applied for the review of an arbitration award delivered by the second respondent, an arbitrator acting under the auspices of the first respondent. In terms of the award, the applicant's claim, which was based on an alleged unfair labour practice committed by the third respondent ('Auto Pedigree'), was dismissed.

The applicant was the only witness at the hearing conducted by the second respondent. According to the applicant's evidence, he was employed by Auto Pedigree on 4 September 2005 as a sales executive. On 31 August 2007, he applied for the post of sales manager at the Fourways branch. Pursuant to such

application, he was interviewed by a Mr H Cronje on 5 September 2007. At such interview, Mr Cronje offered him a position as Branch Manager at Roodepoort instead. The latter position was more senior than the position of sales manager which the applicant had applied for.

The applicant testified that during the course of the interview Mr Cronje repeatedly told him that he was number one on the list. Mr Cronje also said that he would speak to the applicant's regional manager for his early release, so that he could take up the position at Roodepoort by 10 September 2007. The applicant was given profiles of the persons who would be his subordinates and Mr Cronje also discussed the salary that he would be paid. In the latter regard, the applicant's evidence was that Mr Cronje said '*he can pay me a basic of twelve per month, if Head Office, Head Office approves it, otherwise it will be nothing less, less than nine thousand per month'*. Agreement was also arrived at in regard to the payment of commission.

The applicant stated that he had asked Mr Cronje how many candidates there were for the position at Roodepoort and that Mr Cronje indicated that there were two - the applicant and one other person. Mr Cronje undertook to revert to the applicant the next day, after he had interviewed the other candidate, but stated that the applicant was number one on his list.

The applicant telephoned Mr Cronje on 6, 7 and 8 September to enquire about his appointment. On each occasion, Mr Cronje said that he was undecided and

eventually Mr Cronje informed the applicant that the position at Roodepoort was no longer available, inasmuch as the Branch Manager there had withdrawn his resignation. The applicant was also not appointed to the position of Sales Manager which he had originally applied for.

The applicant thereupon launched grievance proceedings on the basis that if he had been deemed suitable for the appointment as Branch Manager, he was suited to the more junior position of Sales Manager and ought to have been so appointed. Although Auto Pedigree appointed an investigator to look into the grievance, the investigator never spoke to, or consulted with, the applicant.

The applicant subsequently launched unfair labour practice proceedings before the first respondent Bargaining Council and claimed remuneration in accordance with the agreement that he alleged had been reached between himself and Mr Cronje.

In cross-examination, the applicant conceded that the agreement which he alleged in regard to his remuneration, was subject to the approval of Head Office and that nothing was accordingly final until such approval was obtained. He also conceded, inter alia, that the fact that Mr Cronje was undecided about the appointment, after the other candidate for the position at Roodepoort had been interviewed, indicated that there was no finality as regards his appointment. As the arbitrator correctly pointed out, the applicant also conceded that the requirements for the position of sales manager differed from those required for a branch manager's position.

The applicant accepted that the position at Roodepoort was no longer available once the Branch Manager had withdrawn his resignation. He was, however, aggrieved about the fact that he was not appointed to the more junior position as Sales Manager at Fourways and alleged that this constituted unfair discrimination and an unfair labour practice. The applicant's entire case rested on the argument that if he qualified for the more senior position at Roodepoort, he qualified for the position of Sales Manager and that he accordingly ought to have been appointed to the latter post. The applicant, however, advanced no evidence whatsoever in regard to the identity, qualifications, experience or suitability of the person who was appointed to the position of Sales Manager.

In these circumstances, the arbitrator found that it could not be determined whether or not the applicant was in fact the superior candidate for the position of Sales Manager. For the same reason, the arbitrator found that it could not be determined that the employer acted capriciously, or in bad faith, or that the applicant was unfairly discriminated against, when he was not appointed as Sales Manager at Fourways. Consequently, the arbitrator dismissed the applicant's case.

It may well be that Mr Cronje was imprudent in indicating to the applicant that he was the prime candidate for the position at Roodepoort. It may also be that the applicant was a suitable candidate for appointment to the position of Sales Manager at Fourways. There is, however, nothing on record to show that the applicant was

unfairly discriminated against, or that he was unfairly treated by his employer when he was not promoted.

The Labour Relations Act No 66 of 1995 ('the LRA') defines an unfair labour practice, inter alia, as '*any unfair act or omission that arises between an employer and an employee involving (a) unfair conduct by the employer relating to the promotion, demotion, probation ... or training of an employee'*. In preferring an alleged unfair labour practice dispute to the Bargaining Council, the applicant accordingly had to establish some unfair conduct on the part of Auto Pedigree in failing to promote him to the position in question. That means that the applicant had to provide evidence which indicated that the failure to promote him was unfair. Only once such evidence has been provided, does the employer have to persuade the court that the failure to promote the applicant was indeed fair.

In order to establish conduct on the part of the employer which is *prima facie* unfair, it is not sufficient for the applicant to make the bald allegation that he ought to have been appointed to the position of Sales Manager at Fourways. The employer, in the exercise of managerial prerogative, has a discretion to appoint or to promote the person who is deemed to be most suitable for the position in question. An arbitrator is not empowered to interfere with the exercise of that discretion unless it can be demonstrated that the discretion was not properly exercised. That would be the case, for example, if an employer exercised his discretion capriciously,

unreasonably, for insubstantial reasons, on the grounds of wrong principles, in a biased manner, or in bad faith (see *Arries v Commission for Conciliation Mediation & Arbitration & Others (2006) 27 ILJ 2324 (LC) at 2330*-2331).

In the instant case, there is not a jot or tittle of evidence that Auto Pedigree acted in bad faith, or failed to exercise its discretion in an appropriate manner. The applicant has merely made the bald allegation that he was unfairly treated, without providing any evidence of unfairness. The fact that he was considered for the position of Branch Manager in Roodepoort, does not mean that he was the best candidate for the position of Sales Manager at Fourways. The fact that another candidate was appointed at Fourways also does not mean that the applicant has been unfairly treated. In the final analysis, one is only left with the applicant's suspicious conjecture that he was discriminated against. Neither a court nor an arbitrator is entitled to interfere with the exercise of the employer's prerogative on the basis of conjecture or suspicion.

In these circumstances, it is clear that the applicant failed to bring his application within the framework of section 186(2)(a) of the LRA and there is accordingly no reason to interfere with the arbitration award.

The applicant's application for the review of the first respondent's arbitration award is accordingly dismissed, with costs.

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A M DE SWARDT, A J

Applicant in person
For Third Respondent: Adv J N W Botha
Date of Hearing: 21 Jan 2010
Date of Judgment: