REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case No: D437/09

In the matter between:-

CAPTAIN M. MUNSAMY	**Applicant**
and	
SSSBC	**First Respondent**
A. DEYZEL N.O.	**Second Respondent**
COMMISSIONER OF THE SAPS	**Third Respondent**
SUPERINTENDENT J D BROWN	**Fourth Respondent**
SUPERINTENDENT D M DUBAZANE	**Fifth Respondent**
SUPERINTENDENT D M NGCOBO	**Sixth Respondent**

Heard on: **6 September 2011**

Delivered on: **25 May 2012**

Summary: Review of award – in an application for promotion the best rated candidate replaced on the basis of the employment equity plan. Supplementary affidavit not filed. Applicant took extracts from the record and placed them in his heads of argument and added more grounds for review. Practice not allowed.

JUDGMENT

CELE J

Introduction

[1] This is an application in terms of section 158 (1) (g) of the Act[1] to review and set aside an arbitration award dated 20 April 2009 issued by the second respondent under the auspices of the first respondent. The application was opposed by the third respondent as the employer of the applicant in whose favour the award was issued.

Factual Background

[2] The third respondent advertised various posts in its establishment that became vacant and funded in 2004. The applicant, a captain on level 8, being eligible to apply for promotion, applied *inter alia* for post 1838 which consisted of 3 posts, Superintendent level 9/10, SAPS Pinetown Community Service Centre, (CSC) Kwa-Zulu Natal. The applicant was at the time stationed at the Durban South Area Inspectorate, Durban, Kwa-Zulu Natal as Captain Level 8, responsible for inspections and in service training of *inter alia* CSC personnel at police stations in the Durban South area, including Pinetown. He was short listed and eventually the number one preferred candidate, evaluated by an area evaluation panel under the chairperson Area Commissioner Ramsaroop in terms of promotion policy National Instruction 1/2004, which was peremptory in nature.

1 The Labour Relations Act Number 66 of 1995.

[3] The Area Promotion Panel (the panel) preferred three candidates, the applicant, the fourth and sixth respondents for the three advertised posts and recommended the three to the next panel at a Provincial Panel, referred to as a Provincial Ratification Committee (Provincial committee).

[4] The panel had to consider the demographical needs of the Durban South Area Business Unit Employment Equity Plan as well as the mini business unit at SAPS Pinetown, whereby it had to balance representivity with service delivery, and keeping in mind the critical nature and importance of the post. In its recommendation for appointment, the panel stated that:-

> 'Pinetown has 1 African male as Relief Commander. Now Indian male, African male, White male will complete representation of diverse community in Pinetown.'

[5] The panel submitted its recommendation to the Provincial Committee. The recommendation was sent back to the panel which resubmitted it without alterations to the Provincial Committee. The Provincial Committee considered the recommendation and issued a remark in the following terms:

> 'Post no. 1838: Captain Munsamy (Applicant) has 14 years as an officer. Pinetown has a high crime rate and the community are complaining. Captain Munsamy replaced by No. 607817-6 Captain D.M Dubazane in order to address representivity of African males on level 9 in the Pinetown station.'

[6] The Provincial Committee submitted its recommendation, which then excluded the applicant, to the third respondent and appointments were made in terms of that recommendation. The applicant felt aggrieved and he submitted a grievance in terms of the South African Police Service's Grievance Policy and the dispute was eventually arbitrated by the second respondent on or about first October 2006. He issued an award in the following terms:

> a) 'The Respondent, the South African Police is ordered to compensate the Applicant, Captain M. Munsamy, for not

following a fair procedure in failing to promote him, by paying him an amount of R10 000.00.

b) The amount of R10 000.00 referred to in paragraph (a) above is to be paid to the Applicant within 14 days of the Respondent being notified of this award.

c) No order as to costs is made.'

[7] The applicant initiated the present application. Later he joined the three successful candidates and amended the order sought, in the event the review application is successful in the following terms:

> ' • Promotion to the rank of superintendent with fiscal and benefits retrospective to 2006/08/01 in a post advantageous to both the Applicant and the 3rd Respondent after fair and reasonable consultation. Fiscal to the amount equivalent to the difference in salary between Applicant's level 8 salary and that of Superintendent on the 1st of August 2006.
>
> • Should this not materialize, Applicant prays that the appointment post 1838 of superintendent Dubazane, Brown or Ngcobo be set aside and that Applicant be promoted to post 1838.
>
> • In the event of only procedural unfairness, compensation of 12 months salary scale.'

Grounds for review

[8] The applicant said that the second respondent erred, misdirected himself or came to an indifferent conclusion which a reasonable decision-maker could not have come to in relation to the evidence properly before him. He failed to apply his mind objectively and appropriately, misconducted himself, committed a gross irregularity, handed down a finding which is not a finding of an objective and reasonable decision-maker or exceeded his powers by acting unreasonably and unjustifiably, in that he:

a) afforded the third respondent to search during the arbitration proceedings for an employment equity plan which was not considered by the Provincial Committee, in changing and substituting the applicant with another candidate. This conduct by the second respondent was not only improper but grossly and materially irregular.

b) admitted *viva voce* evidence of the Provincial Committee wherein it was clear that the written records were not only silent but reflected no reasoning or justification for such drastic intervention, *ultra vires* and contrary to the National Instruction 1/2004.

c) failed to ascertain that the third respondent failed to comply with its own Promotion Policy National Instruction 1/2004 regarding written records as no due process documents, save for the arbitration bundle of the panel, were discovered. It remained unclear therefore how the Provincial Committee applied its mind, evaluated, scored, justified or provided rational reasoning and how it substituted the recommendation of the panel. The above decisions were not those decisions reached by a reasonable decision-maker, assessing whether the third respondent's conduct was according to its own peremptory National Instruction 1/2004. In doing so the second respondent committed a reviewable irregularity.

d) failed to consider whether referring the matter

back to the panel was empowered by the Instruction 1/2004, and therefore whether doing so was lawful, reasonable and procedurally fair.

e) failed to consider the inconsistent application of the employment equity plan of the third respondent.

f) failed to attach any weight to a PEP rating of 4 while the fourth, fifth and sixth respondents only received a rating of 3. Nowhere did the second respondent evaluate or attach any weight thereto, despite that being part of the peremptory criteria to be considered by the panel.

g) failed to consider that post 1838 was a non-designated post as advertised and therefore anybody could apply for it. The second respondent exceeded his powers by deciding that a practice superseded a national instruction.

h) failed to consider the inherent core requirements of post 1838, namely detaining suspects and prisoners and responding to complaints dispatched *via* 10111 telephone number and the CSC operating a police vehicle, which needed an able person. The disability of the fourth respondent was documented by the panel as amputation of the right shoulder down. The Provincial Committee did not refer anywhere to the fourth and sixth respondent and there was no indication why

the applicant was substituted and not the fourth or sixth respondents.

i) failed to see that no reference to any substantial discussions in regard to service delivery balanced with employment equity was evident from the written minutes. There was no reference made to any macro, micro, or mini employment plan.

j) failed to apply his mind to the fact that the Provincial Committee considered the recommendations on 03 to 05 July 2006 and yet signed their minutes on 30 November 2006, long after the appointments were made. Such a discrepancy tainted a due process and is riddled with suspicions on whether the process was objectively fair, reasonable and rational.

The chief findings of the second respondent

[9] In his comprehensive award which has 18 pages, the second respondent, *inter alia,* made the following findings:

> '[40] Even where service delivery is of critical importance it would not necessarily be unfair to place weight on the advancement of employment equity and to promote a less meritorious candidate. The difference between the competences of the candidates might be relatively small; so small that the appointment of a less meritorious candidate from a targeted group would not impact significantly on service delivery and such circumstances it would not be unfair if the advancement of employment equity plays a role.
>
> [41] On the evidence of Commissioner Ngidi the promotion of employment equity and the advancement of service delivery were of equal importance when the appointments to Post 1838 were considered. There was a drastic

need to address the under-representation of African males on levels 9 and 10 in the relevant business unit i.e. the province and there was likewise a need to address service delivery at the Pinetown police station where the crime rate was high and where the community was complaining. In such cases it would in my view not be unfair to appoint a less meritorious candidate from a targeted group even if there is a substantial difference in the scores awarded if such candidate can satisfactorily perform the functions applicable to the post.

[42] As I indicated in *Inspector S. Govender v South Police Service and others* (Case No.PSSS 803-05/06 unreported) different factual findings in different cases may be the result of different evidence led in the cases. An example of this is different evidence as to how the first respondent applies its promotion policy and particularly under what circumstances more weight is attached on employment equity considerations than on service delivery and the merits of the candidates. Another example is the different evidence given by representatives of the first respondent in response to allegations that posts were either advertised as designated or non-designated during the era governed by the National Instruction.

[43] Despite different factual findings in previous cases, in the *Govender* case I found on the evidence presented in that case, that the practice to advertise posts as designated or non-designated ceased even before the National Instruction was issued. In the present case Commissioner Ngidi testified that the practice was stopped in 2002 or 2003 and posts were last advertised as designated posts at that time. There was no evidence gainsaying his version and the applicant`s case that the practice still continued was only based on the fact of clause 5 (3) of National Instruction still provided that post may be advertised as designated or non-designated and that the advertisement referred to Post 1838 as a non-designated post.

[45] The issues that arose in the present matter in relation to the substantive fairness of the decision not to appoint the applicant to Post 1838 are:-

(a) Given the need to promote employment equity as well as to advance service delivery and having particular regard to the extent of the needs and

whether the appointed candidates could perform the functions applicable to the posts whether it was unfair not to appoint the applicant and to appoint two African males and a disabled white male to the three posts; and

(b) Whether the first respondent acted inconsistently when it appointed Indian males to other posts during the same promotion phase.

[46] It was not possible to come to definite conclusions regarding the ability of Ngcobo, Brown and Dubazana to perform the functions applicable to the posts. This was mainly due to the non-disclosure or non-availability of their applications, any record of the interviews held with them and any record of any findings by either the Area Evaluation Panel or the Provincial Ratification Committee relating to their ability to perform the functions applicable to the post.

[47] It was common cause that the Area Evaluation Panel, at least initially, recommended the applicant as the most preferred candidate for appointment to the posts. This was however not due to a finding that Dubazana would not be able to perform the functions applicable to the posts. It was probably based on a finding that the applicant was the most meritorious candidate by reference to competence, prior learning training and development, and experience as well as on a finding that his appointment would promote employment equity.

[48] The applicant did not dispute the findings of the Area Evaluation Panel to the effect that he was the most meritorious candidate but contended that the difference in scores awarded should have been higher because he had more experience than the other candidates and more suitably qualified than them. It is not possible for me to find that the applicant`s opinion in this regard is correct because I did not have insight in the applications of Ngcobo, Brown and Dubazana or the record of the interviews held with them.

[49] Commissioner Ngidi did not accept that the applicant was the most suitable candidate by reference to competence, prior learning training and development, and experience. He had some knowledge that Dubazana was from the Pinetown CSC and that Ngcobo and Brown were from a CSC environment and that this favoured their appointment irrespective of

employment equity considerations. The applicant was a CSC commander for a three year period immediately prior to him becoming an inspection officer whose duties inter alia entailed the inspection of CSC`s.There is no record any deliberations of the Provincial Ratification Committee relating to the merit of the candidates recommended for appointment to the three posts and no mention is made in the minutes that any doubt was expressed about the correctness of the scoring of the Area Evaluation Panel. The only reason given for substituting the applicant with Dubazana was that it was done in order to address the representivity of African males on the relevant post level. Commissioner Ngidi signed the minutes and one would have expected it to be corrected if it conveyed an incorrect impression. There was no indication that the Provincial Ratification Committee perused the applications of the candidates or any record of the interviews conducted by the Area Evaluation Panel. Despite Commissioner Ngidi`s evidence to the contrary I find that is more probable than not that Provincial Ratification Committee did not take issue with the finding that the applicant was the most meritorious candidate and that it only interfered because they disagreed with the finding that the applicant `s appointment would promote employment equity as the minutes of the Provincial Ratification Committee reflects. The Area Evaluation Panel having sight of the applications and having interviewed the candidates was in a position to make findings regarding the merits of the candidates. There was no reliable evidence placed before me to indicate that the findings of the Area Evaluation Panel regarding the merits of the candidates as reflected in the scores were wrong and I find that the applicant was a significantly more meritorious candidate than Dubazana.

[50] In terms of Clause 12(1) (d) of the National Instruction the selection of a candidate had to be based on employment equity in line with the Employment Equity Plan of the relevant business unit. The relevant business unit was the province and the national demographics had to be reflected amongst employees employed in the province .The approach adopted by the Area Evaluation Panel implied that it would sufficiently promote employment equity if race groups were equally represented amongst the employees functioning as SCS relief commanders. Adopting such an approach would mean that the Employment Equity Plan would never be achieved as it required that the national demographics to be reflected in the province.

[51] As provided in Clause 13 of the National Instruction the Provincial Commissioner has to be satisfied that the promotion process took place in accordance with the instruction and if he approves a recommendation which does not address representivity he must motivate it fully. Commissioner Ngidi was therefore obligated to interfere when it became apparent that the Area Evaluation Panel had adopted an incorrect approach representivity.

[52] On the probabilities it was the intervention of the Provincial Ratification Panel that caused the applicant to be substituted by Dubazana. On the evidence of Commissioner Ngidi as supported by the document that he referred to which contained the numerical targets for the Kwazulu-Natal business unit, African males were vastly under represented on the relevant posts levels. African males were to such an extent under-represented and Indian males were to such an extent over-represented that it was one of those cases where it was not unfair to appoint a less meritorious African male provided that such African male could satisfactorily perform the functions applicable to the post. Commissioner Ngidi gave evidence to the effect that Dubazana was from a CSC environment and that he could perform the function of CSC relief commander. There was no evidence that Dubazana could not satisfactorily perform the functions of CSC relief commander.

[53] If the scores awarded to candidates are considered Ngcobo and Brown were more meritorious candidates than Dubazana. Ngcobo was also an African male and what was said about the representivity of African males also applied in his case. Brown was a disabled person and there was a drastic need to address the representivity of the disabled. There was no suggestion that Ngcobo and Brown could not perform the functions of a CSC relief commander satisfactorily.

[54] In my view Commissioner Ngidi satisfactorily explained why discretion was exercised in regard to Posts Nos. 1836 and 1814 to attached greater weight on service delivery and appointing Indians males to the said posts did not constitute inconsistent application of the promotion policy.

[55] Clause 9 (4) of the National Instruction provided that the chairperson of an evaluation panel must ensure that written records are kept of all the proceedings during the evaluation process. Such records as were kept

indicated that the Area Evaluation Panel recommended the applicant as the first preferred candidate and that he was substituted by Dubazana in order to promote representivity. No record was kept of the reasons why the promotion of representivity titled (sic - should read: "tilted") the scales in favour of appointing Dubazana. No record was kept of reasons why Ngcobo and particularly Brown was in the end preferred above applicant. There was no record kept that Brown was disabled. The failure to keep a record of such reasons probably created the impression in the applicant's mind that his promotion was not properly and fairly considered and caused him to spent time, effort and to incur expenses to pursue the dispute. The failure to keep proper records was contrary to specific instructions and in my consisted and (sic - should read: "in my view constituted an") unfair labour practice relating to promotion.'

Grounds in opposition to the review application

[10] The submission was that the applicant filed a confused and defective amended notice of motion where neither the founding nor supporting supplementary affidavits made out a case for the relief sought more specifically the promotion to the rank of Superintendent.

[11] It was, *inter alia,* submitted further that the second respondent:-

i. insofar as failure to keep a proper records of reasons are concerned, did in fact apply his mind and consider such failure. This was clearly evident from a reading of paragraph 55 of the arbitration award where the arbitrator noted as follows:-

'the failure to keep proper records was contrary to specific instructions and in my mind (sic) consisted an unfair labour practise relating to promotion'.

ii. It is accordingly clear from the award that the second respondent considered that the third respondent did not follow a fair procedure in failing to promote the applicant. In this regard, evidence was provided during the

arbitration proceedings, which documentary evidence, the second respondent did properly consider, and which related to the National Instruction 1/2004 relating to the promotion of employees of the service. In that regard, the second respondent correctly had recourse to clause 13 of the National Instruction, mores specifically clause 13(5) which states that the national, provincial or divisional commissioner may accept or reject the findings and recommendations of an evaluation panel. When the national, provincial or divisional commissioner does not approve a recommendation of an evaluation panel, she/he must record the reason for her/his decision in writing.

iii. had correctly found that Commissioner Ngidi was obliged to interfere when it became apparent that the panel had adopted an incorrect approach to representivity. It is clear from a proper conspectus of the second respondent's award, that the second respondent had properly applied his mind to the National Instruction insofar as the employment equity plan of the relevant business unit was concerned. The second respondent had correctly applied the provisions of the National Instruction, and in that regard clause 12 (1) (d) of the said National Instruction, stated that the selection of a candidate had to be based on an employment equity in line with the employment equity plan of the relevant business unit. The relevant business unit was the province and the national demographics had to be reflected amongst employees employed in the province.

iv. had found that the approach adopted by the panel meant that the employment equity plan would never be achieved as it required that the national demographics be reflected

in the province.

v. had accepted the evidence of Commissioner Ngidi and the document which Commissioner Ngidi referred to, revealed that the numerical targets for KwaZulu-Natal business were vastly under represented on the relevant post levels. His evidence supported by the document presented indicated that African males were to such an extent under represented and Indian males were to such an extent over represented that it was one of those cases where it was not unfair to appoint a less meritorious African male provided that such African male could satisfactorily perform the functions applicable to the post. In this regard the second respondent found that there was no evidence that the fifth respondent could not satisfactorily perform the functions of a CSC Relief Commander.

vi. the second respondent had made a finding on the evidence of Commissioner Ngidi stating that Commissioner Ngidi had satisfactorily explained why a discretion was exercised in regard to post numbers 1836 and 1814 and why greater weight was attached on service delivery and that appointing Indian males to the said post did not constitute inconsistent application of the promotion policy.

vii. the only other issue that arose related to the issue surrounding the employment equity plan and the documentation in the form of the employment equity plan. Commissioner Ngidi had in fact provided evidence that the national employment equity plan was in fact taken into consideration. The evidence during the arbitration proceedings had clearly revealed that at the very least,

that the Provincial Committee had in fact considered equity documents. This was confirmed by Commissioner Ngidi when it was put to him that his panel only focused on a specific aspect of the plan which was the equity documents.

viii. had correctly found that it was not possible to draw inferences regarding the weight to be attached to the advancement of employment equity from the manner in which the posts were advertised in the present case.

ix. In any event Commissioner Ngidi did not accept that the applicant was the most suitable candidate by reference to competence, prior learning training and development, and he confirmed that by virtue of the fifth respondent being in the Pinetown CSC environment, that such favoured his appointment irrespective of employment equity considerations. The applicant's claims regarding the procedural fairness or otherwise of his non appointment, and which related to the absence of records and documentary evidence in the form of employment equity plan, was in fact dealt with by the second respondent.

x. The second respondent had accordingly decided all issues raised by the applicant and the relevant facts in dispute. The fact that an arbitrator did not approach or analyse the matter in the manner contemplated by one of the parties does not serve to establish that the issue was not determined.

Evaluation

[12] The applicant averred that the second respondent erred, misdirected himself or came to an indifferent conclusion which a reasonable decision-maker could

not have come to in relation to the evidence properly before him. It was contended that he failed to apply his mind objectively and appropriately, misconducted himself, committed a gross irregularity, handed down a finding which was not of an objective and reasonable decision-maker or exceeded his powers by acting unreasonably and unjustifiably in various ways.

[13] To the extent applicable here, section 145 of the Act reads:

> '(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
>
> (2) A defect referred to in subsection (1), means-
>
> a) that the Commissioner-
>
> i. committed misconduct in relation to the duties of the commissioner as an arbitrator.
>
> ii. committed a gross irregularity in the conduct of the arbitration proceedings or
>
> iii. exceeded the commissioner's powers: or
>
> b) that an award has been improperly obtained.'

[14] While the applicant relied on various grounds of review, the main attacks appear to be premised on the allegations that the second respondent committed a gross irregularity and that the decision he reached was not one that a reasonable-decision maker could reach. As to a gross irregularity Ngcobo J, as he then was, had the following to say, *in Sidumo and Another v Rustenburg Platinum Mines LTD and Others*[2]:-

> 'The basic principle was laid down in the oft-quoted passage from *Ellis v*

2 [2007] 12 BLLR 1097 (CC) at para 262.

Morgan[3] where the court said:

> "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has *prevented the aggrieved party from having his case fully and fairly determined*."' (Emphasis added.)

[15] In the implementation of its equity policy, the third respondent as an employer had to comply with Section 20 of the Employment Equity Act 1998 which states *inter alia* that:-

1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's work force.

2) An employment equity plan prepared in terms of subsection (1) must state:-

(a) the objectives to be achieved for each year of the plan;

(b) the affirmative action measures to be implemented as required by section 15(2);

(c) where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitable qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved and the strategies intended to achieve those goals;

(d) the duration of the plan which may not be shorter than one year or longer than five years;

3 *Ellis v Morgan; Ellis v Desai* 1909 TS 576.

(e) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity.

(f) the internal procedures to resolve any dispute about the interpretation or implementation of the plan.

(g) the persons in the work force, including senior managers, responsible for monitoring and implementing the plan, and

(h) any other prescribed matter.

[16] The first ground of review is that the second respondent afforded the third respondent to search during the arbitration proceedings for an employment equity plan which was not considered by the Provincial Committee, in changing and substituting the applicant with another candidate. This conduct by the second respondent was not only improper but grossly and materially irregular. Throughout the arbitration hearing, it remained common cause between the parties that the third respondent had an employment equity plan. While the applicant complained about a failure to produce the plan, he did not challenge its existence and its implementation by the third respondent. He was effectively querying the compliance of the third respondent with section 20 of the Employment Equity Act. Allowing the third respondent to search for the plan, in my view, was within the powers of the commissioner in terms of section 138 (1) of the Act. It was neither a defect as defined nor unreasonable, in the circumstances. This case is distinguishable from the one where an employee challenged the actual existence and or the applicability of an employment equity plan. The evidence of Commissioner Ngidi was clearly intended to cure the defect in failing to produce the plan whose existence and application was not being challenged. How much of the contents of the plan he knew was a matter for evidence and effective cross-examination. Accordingly, this ground must fail.

[17] The second ground is that the second respondent admitted *viva voce*

evidence of the Provincial Committee wherein it was clear that the written records were not only silent but reflected no reasoning or justification for such drastic intervention, *ultra vires* and contrary to the National Instruction 1/2004. The applicant has, for a moment, forgotten that an arbitration hearing is a *de novo* hearing where parties are permitted to lead *viva voce* evidence, to the extent that such evidential material is relevant. No doubt, in this case such evidence was indeed relevant. The next step was then to assess it in light of all other evidence led. Accordingly, this ground has no merits at all.

[18] The next issue turns on the second respondent having allegedly failed to ascertain that the third respondent failed to comply with its own Promotion Policy National Instruction 1/2004 regarding written records as no due process documents, save for the arbitration bundle of the panel, were discovered. I am in agreement with the applicant when he said that it remained unclear therefore how the Provincial Committee applied its mind, evaluated, scored, justified or provided rational reasoning and how it substituted the recommendation of the panel. The matter could not end there though, as Commissioner Ngidi testified on this issue. The third respondent's submissions are here appropriate when it is said that insofar as failure to keep a proper record of reasons was concerned, the second respondent did in fact apply his mind and he considered such failure. That was clearly evident from a reading of paragraph 55 of the arbitration award where the second respondent noted as follows:-

> 'the failure to keep proper records was contrary to specific instructions and in my consisted (sic – should read: "in my view constituted") an unfair labour practise relating to promotion'.

[19] The third respondent correctly submitted that it was accordingly clear from the award that the second respondent found that the third respondent did not follow a fair procedure in failing to promote the applicant. Evidence was provided during the arbitration proceedings, which documentary evidence, the second respondent did properly consider, relative to the National Instruction 1/2004 in relation to the promotion of employees of the SAPS. The second

respondent, I find, correctly had recourse to clause 13 of the National Instruction, more specifically clause 13(5) which states that the national, provincial or divisional commissioner may accept or reject the findings and recommendations of an evaluation panel. When the national, provincial or divisional commissioner does not approve a recommendation of an evaluation panel, he or she must record the reason for his or her decision in writing.

[20] Whether referring the matter back to the panel was empowered by the Instruction 1/2004, and whether doing so was therefore lawful, reasonable and procedurally fair, now falls to be considered. Clause 13 (6) of Instruction 1/2004 reads:

> ' 13 (6) If the Provincial or Divisional Commissioner does not approve the promotion of a recommended candidate, she or he may consult with the relevant Deputy Provincial Commissioner, Area Commissioner and in the case of Head Office Divisions, with the relevant Head of the Component or the evaluation panel, if she or he deems it necessary and either promote another candidate of her or his choice from the preference list submitted by the evaluation panel, or direct that the post be re-advertised.'

[21] It is difficult to understand the submission of the applicant that this clause prohibits referring the matter back to the panel. Consultation reasonably accommodates the memorandum with the recommendation being remitted to the lower body whence it came, with a request to attend to any issue therein raised. A decision thereafter taken, if any, is then endorsed in the same document. This is to obviate two memoranda being generated in respect of the same issue with the risk that the original document may be compromised. No procedural unfairness has been shown by the applicant to exist in this regard.

[22] The next probe is whether the second respondent failed to consider the inconsistent application of the employment equity plan of the third respondent. This ground must similarly fail for lack of substance. As the third respondent correctly pointed out, Commissioner Ngidi had in fact provided evidence that the national employment equity plan was in fact taken into consideration. The

evidence during the arbitration proceedings had clearly revealed that at the very least, the Provincial Committee had in fact considered equity documents. This was confirmed by Commissioner Ngidi when it was put to him that his panel only focused on a specific aspect of the plan which was the equity documents. The second respondent dealt with it in paragraphs 50 to 52 of the award. Paragraph 52, in my view, properly dealt with the evidence adduced at the arbitration when he said:

> 'On the probabilities it was the intervention of the Provincial Ratification Panel that caused the applicant to be substituted by Dubazana. On the evidence of Commissioner Ngidi as supported by the document that he referred to which contained the numerical targets for the Kwazulu-Natal business unit, African males were vastly under represented on the relevant posts levels. African males were to such an extent under-represented and Indian males were to such an extent over-represented that it was one of those cases where it was not unfair to appoint a less meritorious African male provided that such African male could satisfactorily perform the functions applicable to the post. Commissioner Ngidi gave evidence to the effect that Dubazana was from a CSC environment and that he could perform the function of CSC relief commander. There was no evidence that Dubazana could not satisfactorily perform the functions of CSC relief commander."

[23] In *Stoman v Minister of Safety and Security et al*[4] court held that:-

> 'Some tension may in certain situations exist between ideals such as efficiency and representivity and a balance then was to be struck. Efficiency and representivity, or equality, should however, not be viewed as separate competing or even opposing arms. They are linked and often independent. To allow equality or affirmative action measures to play a role only where candidates otherwise have the same qualifications and merits, where there is virtually nothing to choose between them, will not advance the ideal of equality in the situation where a society emerges from a history of unfair discriminations. The advancement of equality is integrally part of the consideration of merits in such decision making process. The requirement of rationality remains however and the appointment of people who are wholly

4 2002 (3) SA 468(T) at 482 G-I.

unqualified or less than suitably qualified or incapable in responsible positions cannot be justified.'

[24] In *Public Service Association (PSA) o.b.o Karriem v. South African Police Service (SAPS) and Another*,[5] the court referred to Carole Coopers article in the Boundaries of Equality in Labour Law as follows:-

> 'It is not just any person from a designated group who may be the recipient of affirmative action measure, relating to appointment or promotion, the person must be suitably qualified.
>
> The suitably qualified requirement should stand as an answer to those critics who hold that affirmative action necessarily means that individuals will be preferred because of their race, gender or disability per se, without an assessment of their competencies. It is clear that the Act does not support tokenism, indeed the code says as much, but requires that the appointee has the requisite skills, knowledge and qualifications to do the job or could acquire these in a reasonable period. Nowhere does the Act state that person from designated groups have a pre-emptive right to appoint merely because they are from the designated group.'

[25] Mr Dubazana could not reasonably be described as a person who is wholly unqualified or less than suitably qualified or incapable in responsible positions and whose appointment could not be justified. Nor is he just any person from a designated group who might have been the recipient of affirmative action measure, relating to appointment or promotion. He is suitably qualified and even ranked number four after being similarly subjected to the same scrutiny as the applicant. He was not just picked up from nowhere.

[26] The second respondent is said to have failed to attach any weight to a PEP rating of 4 while the fourth, fifth and sixth respondents only received a rating of 3. Nowhere did the second respondent evaluate or attach any weight thereto, despite that being part of the peremptory criteria to be considered by the panel. The applicant appears not to have understood the award well. The second respondent made an unassailable finding in favour of the applicant in

5 (C435/04) (2006) ZALC 39 (23 February 2006) at para 104.

this regard when he said in paragraph 49:

> '...There was no indication that the Provincial Ratification Committee perused the applications of the candidates or any record of the interviews conducted by the Area Evaluation Panel. Despite Commissioner Ngidi`s evidence to the contrary I find that is more probable than not that Provincial Ratification Committee did not take issue with the finding that *the applicant was the most meritorious candidate*.... (My emphasis). There was no reliable evidence placed before me to indicate that the findings of the Area Evaluation Panel regarding the merits of the candidates as reflected in the scores were wrong and I find that *the applicant was a significantly more meritorious candidate than Dubazana*.' (My emphasis).

[27] It was contended that the second respondent failed to consider that post 1838 was a non-designated post as advertised and therefore anybody could apply for it. The second respondent exceeded his powers by deciding that a practice superseded a national instruction. Both parties led evidence in respect of this issue. The second respondent would have failed in his duties as a commissioner had he not made a finding in this regard. How it is said he exceeded his powers is beyond comprehension as this allegation was made boldly and without substantiation. The fact that the applicant did not agree with the finding made did not mean the second respondent exceeded his power. As already alluded to in respect of a gross irregularity, an irregularity in proceedings does not mean an incorrect judgment.

[28] The second respondent alleged to have failed to consider the inherent core requirements of post 1838, namely detaining suspects and prisoners and responding to complaints dispatched via telephone number 10111 and the CSC operating a police vehicle, which needed an able person. In a quest to be promoted the applicant seeks to undermine an action to bring about equal opportunity in a working environment by suggesting that disabled police officers may never acquire a post level 9, through post 1838 due to its inherent core requirement. Employers are obliged to accommodate disabled personnel by adapting their working environment accordingly. This ground accordingly fails.

[29] The applicant contended that the second respondent failed to see that no reference to any substantial discussions in regard to service delivery balanced with employment equity was evident from the written minutes. There was no reference made to any macro, micro, or mini employment plan. This ground has no merits. The second respondent aptly considered not only records but *viva voce* evidence led in this regard when he found in paragraph 54 that:

> 'In my view Commissioner Ngidi satisfactorily explained why discretion was exercised in regard to Posts Nos. 1836 and 1814 to attached greater weight on service delivery and appointing Indians males to the said posts did not constitute inconsistent application of the promotion policy.'

[30] The second respondent was said to have failed to apply his mind to the fact that the Provincial Committee considered the recommendations on 03 to 05 July 2006 and yet signed their minutes on 30 November 2006, long after the appointments were made. Such a discrepancy tainted a due process and is riddled with suspicions on whether the process was objectively fair, reasonable and rational. Admittedly this conduct on the part of the third respondent was irregular. The failure to sign the minutes tended to compromise the integrity of the minutes. There was however no suggestion that the minutes were probably interfered with. Accordingly this discrepancy has not been shown to have a prejudicial effect on the applicant. It needs to be borne in mind that only a gross irregularity and not any irregularity attracts reviewability.

[31] Instead of fling a supplementary affidavit and refer to those portions of the record which the applicant sought to rely on, the applicant elected to rely on the founding affidavit. He then took extracts from the record and placed them in his heads of argument and added more grounds for review, such as allegations of the second respondent being biased against him. This practice is not permissible as a case ought to be made in the pleadings and the heads of argument are not such pleadings.

[32] As to the amount of compensation the applicant was not compensated for his

replacement when a discretion was exercised in regard to posts 1838 and 1814, by attaching greater weight on service delivery and appointing Black officers but compensation was clearly directed at the failure of the third respondent to keep proper records, thus creating an impression in the mind of the applicant that the matter was worth spending money and time to pursue. The amount of compensation was in the circumstances reasonable. I have reflected on the law and fairness of the costs order and consequently the order to issue is in the following terms:

1. The review application in this matter is dismissed on all outlined grounds;

2. No costs order is made.

_____

Cele J

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:	Adv S van Vollenhoven instructed by Nirashika Bramdeo Attorneys.
FOR THE THIRD RESPONDENT:	Adv D Pillay instructed by the State Attorney, KwaZulu-Natal.