



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D1191/2011

In the matter between:

MINISTER OF POLICE

Applicant

and

THE GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

R. PATEL N.O.

Second Respondent

T. K. TOORAY

Third Respondent

Heard: 8 January 2014

Delivered: 26 august 2014

Summary: Review- arbitration award- unfair labour practice dispute – absence of complete record concerning decision to appoint does not render promotion decision substantively unfair without employee being able to establish that he was most suitable candidate. Arbitrator – error of law or fact not render the award unreasonable if result still sustainable as reasonable on evidence before arbitrator.

JUDGMENT

NEL, AJ

- [1] The Applicant in this matter seeks the review and setting aside or correction of the arbitration award handed down by the Second Respondent (“the arbitrator”), acting under the auspices of the First Respondent, dated 15 November 2011 and in terms of which the arbitrator found in favour of the Third Respondent in the matter of an unfair labour practice dispute referred by the Third Respondent against the Applicant to the First Respondent for resolution.
- [2] The dispute before the arbitrator was one in which the Third Respondent challenged the failure of the Applicant to promote the Third Respondent to the rank of Captain and in particular to one of three such posts. Those posts were post 1404, 1379 and 1409.
- [3] The Third Respondent had been shortlisted for consideration for appointment to all three posts. Pursuant to the interview process, he was placed on the preferred list in respect of all three posts. M. E. Khubeka and F. P. Fuller were appointed to post 1409 and 1404, respectively. Post 1379 was withdrawn after the interview process but before any appointment could be made. No explanation existed at the arbitration before the arbitrator as to why post 1379 was withdrawn.
- [4] It was common cause that insofar as post 1379 was concerned, Inspector Khubeka was appointed to the Captain’s post as aforesaid and accordingly that the Third Respondent was the next appointable candidate in respect of that post prior to it being withdrawn.
- [5] National Instruction 2 of 2008 required, *inter alia*, that where interviews were conducted, the secretary must ensure that all the application forms for the

shortlisted candidates and other relevant documentation was available at the interview and the secretary was further obliged to ensure that during the interview process a written record of the proceedings, decisions made and the reasons for such decisions were produced.

- [6] After the interview, the evaluation panellists were obliged to independently rate each candidate on the basis of the selection criteria without influencing one another and consider the ratings by the individual panellists and as far as possible, make a recommendation regarding the first, second and third preference for the post, citing the reasons for the decision of the panel.
- [7] The Chairperson of the divisional and provisional evaluation panels (depending on which were concerned) were obliged thereafter to submit the recommendations of the panel and any applicable reports to the relevant Divisional or Provincial Commissioner. Promotion of employees to level 8 or Band C and higher would be submitted to the National Commissioner for consideration with recommendations of the Divisional or Provincial Commissioner concerned.
- [8] Circular 8/1/1 of 3 August 2009 relating to post promotions for post levels 2 up to MMS band for SAPS for the 2009/2010 financial year provided, *inter alia*, that the entire selection process was to be conducted in accordance with National Instruction 2 of 2008 and, *inter alia*, in respect of post levels 8 to 12 where interviews were conducted, in addition to the abovementioned records (being the shortlist, preferred list and screening forms), the proceedings were required to be taped.
- [9] National Instruction 2 of 2008 further provided that the National Commissioner was under no obligation to fill an advertised post but if he or she decided not to fill an advertised post, the reasons were to be recorded (paragraph 4(2)(f) of National Instruction 2 of 2008 – pages 4 and 8 of the indexed record).
- [10] The posts in issue were level 8.

- [11] The record of the arbitration proceedings was incomplete and there had been a substantial delay between the delivery of the record (May 2012) and the filing of the Applicant's Rule 7A(8)(b) Notice (5 March 2013).
- [12] It appeared that no attempt had been made by the Applicant to reconstruct the record for the purpose of the review and no substantive application was delivered for the matter to be adjourned for the purposes of attending to the reconstruction of the record. A request for an adjournment was made from the bar at the hearing of the review application in order for the Applicant to attempt to reconstruct the record.
- [13] No substantive application, however, was made and no explanation was tendered as to why no steps had, prior to the review hearing, been taken in order to attempt to reconstruct the record or to adjourn the matter for that purpose (prior to the hearing). I, accordingly, refused the application for the postponement on that basis. It does not appear in any event given the reasons for my findings below, that any reconstruction of the record would have revealed evidence mitigating what I view to be the arbitrary conduct of the Commissioner in the appointment process, justifying relief in favour of the Third Respondent. There was no suggestion that any evidence had been led at the arbitration as to why the post was summarily withdrawn prior to an appointment being made.
- [14] The Applicant's chief complaint against the arbitrator's award is that he failed in his duties as an arbitrator in that the award was not one that a reasonable decision maker could have reached.
- [15] The Applicant contends that there was no evidence serving before the arbitrator to suggest that the interview process was conducted in an arbitrary, biased or capricious manner.
- [16] The Applicant contends furthermore, in essence, that its breach of the National Instruction which sets out the policies and procedures to be adhered to during the promotion process, and in particular the failure to keep a record of the evaluation processes to enable an aggrieved Applicant for the post to

challenge the fairness of the decision, amounts to no more than a procedural complaint, could affect only the procedural fairness of the promotion and did not entitle the Third Respondent to substantive relief, which was reserved for a candidate who could establish that he ought to have been appointed being the best candidate for the post.

- [17] In short, the contention was that procedural unfairness did not automatically translate into substantive unfairness justifying relief in the form of protected or personal promotion.
- [18] The Third Respondent suggested that the determination of the Applicant's review should be determined simply on the failure by the Applicant to expeditiously prosecute the review for want of an application for condonation in regard to the delays mentioned above.
- [19] The review was timeously instituted and the Rules of this Honourable Court make no provision for the court to *mero motu* consider the dismissal of an application for review simply on the grounds of non-compliance with the time periods prescribed by the Rules with regards to the finding of the Rule 7A(8) Notice or supplementary affidavit. The Third Respondent did not institute any proceeding for the dismissal of the review application on the grounds of such delay or non-compliance with the Rules.
- [20] I know of no authority which would entitle me to dismiss the application for review in the absence of such a substantive application by the Third Respondent for such relief. There is no automatic barrier in the Act or in the Rules which would preclude me from considering the substantive application for review simply as a consequence of a delay in observing any of the time periods relevant to the filing of further papers and in the absence of a litigant availing itself of the provisions of Rule 12 and invoking the Court's power to exercise its discretion on the basis of any such breach.
- [21] Accordingly, I do not propose to dismiss the application on the basis of the delay between delivery of the record and the late filing of the Rule 7A(8)(b) Notice. The Third Respondent was initially proactive in bringing an application

in terms of s158(1)(c) of the Act to enforce the award given the initial delay in delivery of the record, however, took no further steps to ensure the Applicant prosecuted the review timeously.

- [22] A correct approach would have been to place the Applicant on terms in terms of Rule 12 and thereafter to bring an application to dismiss the review for failure to file the Rule 7A(8) Notice timeously.
- [23] On reading the arbitrator's award, it is immediately apparent that he appeared to misconstrue the onus applicable in an unfair labour practice dispute. The onus rested at all times with the Third Respondent to establish that the Applicant had committed an unfair labour practice in not appointing him. Throughout the arbitration award, the arbitrator erred in determining that the Applicant bore an onus to establish that its failure to appoint the Third Respondent to any one of the three posts was substantially and procedurally fair.
- [24] The arbitrator found that the Applicant had failed to apply a transparent evaluation process, failed to keep proper records which were crucial for the protection of employees' rights and failed to provide a fair reason for decisions taken. The onus was on the Third Respondent to establish, at the arbitration, that the Applicant's failure to appoint him to one of the three posts constituted an unfair labour practice.
- [25] Whether the Third Respondent's ability to do so had been compromised by the Applicant's failure to keep a proper record of the interviews in addition to the shortlists, preferred list and recommendations, in the form of audible tape recordings and whether relief ought to be granted to an employee whose ability to challenge the fairness of the promotion is hindered by the breach of record keeping obligations, is a separate enquiry.
- [26] The question of the onus in determining unfair labour practice dispute has serious ramifications in circumstances where the evidence is not available at the arbitration hearing. To misconstrue the onus renders to the extent that he did, constitutes a reviewable irregularity within the parlance of *Toyota SA*

Motors (Pty) Ltd v Radebe and Others,¹ where the arbitrator misconceived the nature of the enquiry in *toto* and which *could* lead to an unreasonable result.

- [27] The arbitrator's consideration that the procedural irregularities in the interview process, to wit, failing to ensure that the tape recordings were audible and the balance of the available written records were properly preserved and available for any subsequent challenge, necessarily resulted in a finding of substantive unfairness, is not a decision which a reasonable decision maker would have made in the absence of other available evidence tendered at the arbitration to the effect that the Applicant in the unfair promotion dispute was in fact the most suitable candidate for promotion.
- [28] Independent evidence of the shortlisted or preferred candidates, work experience, qualifications and capabilities would be available irrespective of the absence of any written records pertaining to the actual interview process, however, how the candidate fared in the interview process would obviously have to be marshalled through the evidence of the panellists.
- [29] In this case, it does not appear that the Third Respondent tendered any evidence other than his own opinion at the hearing concerning the other competing candidate's ability to establish that he was the best candidate for promotion. He appeared to rely on the absence of the written records in terms of National Instruction 2 of 2008 to justify the conclusion that he ought to have been promoted.
- [30] That being said, however, it was objectively established and indeed common cause that in respect of post 1739 the Third Respondent was number three on the preferred candidates list. Inspector Ndlovu took up another post and Khubeka, who was ranked first, took up post 1409.
- [31] Accordingly, the Third Respondent was the next appointable candidate to the post. Had it not been withdrawn, the evidence appeared to be that the Third Respondent would have been appointed to that post.

¹ (2000) 21 ILJ 340 (LAC).

- [32] The evidence before the arbitrator was that the post was withdrawn without any reasons being given by the National Commissioner. National Instruction 2 of 2008 provides that whilst the National Commissioner is entitled to withdraw the post, the reasons therefore should be recorded. The Third Respondent could not establish that he was the best candidate for posts 1404 and 1409 and accordingly that he ought to have been promoted to such posts on the evidence. Protective promotion accordingly would not have been available as a remedy to the Third Respondent in respect of those posts in the absence of him establishing that he was the best candidate for the post.
- [33] The question remains is, is the absence of a reason for the withdrawal of post 1379, in the circumstances, sufficient to render the Third Respondent's non-appointment to that post an unfair labour practice, when it is common cause, barring the withdrawal, he probably would have been appointed thereto.
- [34] It appears that in the absence of any reason for the withdrawal of that post (there was no evidence before the arbitrator in that regard or a suggestion that there was indeed any reason) that the withdrawal had been arbitrary and had deprived the Third Respondent of his almost certain appointment to post 1379.
- [35] This rendered his non-appointment substantively unfair and not the absence of a record of the proceedings in and of itself.
- [36] Accordingly, whilst I am of the view that the arbitrator's award is unsound for the reasons mentioned hereinbefore, I am not satisfied that the result should be any different on the available relevant and material evidence serving before the arbitrator, and accordingly, that his finding that the non-appointment of the Third Respondent constituted an unfair labour practice was unreasonable.
- [37] In the circumstances, I make the following order:
1. The Applicant's application for review is dismissed with costs.

Nel, AJ

Acting Judge of the Labour Court of the South Africa

Appearances:

For the Applicant: Adv D Pillay

Instructed by: State Attorney

For the Respondent: Adv L Naidoo

Instructed by: Allen Kelly Attorney