



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

CASE NO: D05/2012

In the matter between:

H. N. NCANE

Applicant

and

R. LYSTER N.O.

First Respondent

SAFETY & SECURITY SECTORAL BARGAINING

COUNCIL (SSSBC)

Second Respondent

THE NATIONAL COMMISSIONER FOR SOUTH

AFRICAN POLICE SERVICES

Third Respondent

S. KHAMBULE

Fourth Respondent

Heard: 8 January 2014

Delivered: 8 December 2014

JUDGMENT

NEL AJ

- [1] The Applicant seeks the review and correction of the arbitration award handed down by the Arbitrator (“the First Respondent”) dated 2 December 2011 but only handed down on or about 7 December 2011. The matter before the Arbitrator concerned the Applicant’s alleged unfair labour practice dispute relating to promotion as contemplated by the provisions of s186(2)(a) of the Labour Relations Act 66 of 1995.
- [2] The Applicant contended that the Third Respondent (the National Commissioner for the South African Police Services) had failed to promote the Applicant from the position of Warrant Officer to Captain (in respect of post 1337) being a Captain’s post at the Wentworth sub-component: Detective Services.
- [3] The Applicant joined the successful incumbent (“the Fourth Respondent” herein), S. Khambule, to the proceedings before the bargaining council.
- [4] The Applicant sought the review of the arbitration award and the correction thereof with the substitution of the findings of the Arbitrator with a finding that the Applicant’s non-promotion was both procedurally and substantively unfair and accordingly, that he ought to have been promoted to the post in issue together with remuneration and benefits he ought to have received had he been promoted, from the promotion date.
- [5] The Applicant’s complaints in the unfair promotion dispute concerned principally the failure by the Third Respondent to properly comply with the prescripts of National Instruction 2 of 2008 concerning promotion.
- [6] The Applicant complained further that the relevant functionaries engaged in the shortlisting and evaluation process erred, not only in the screening of his application by, *inter alia*, failing to recognise that the Applicant had a relevant degree, but failed accordingly to award him the appropriate scores for the degree, diplomas and courses he had and in particular, to recognise his LLB degree as an honours degree and according to the evidence of Chiliza, on behalf of the Commissioner, to award him a point for such a “bonus” degree.
- [7] The Applicant alleged that the functionaries in charge of the process had also failed to award the appropriate scores for the Applicant’s experience as a Warrant Officer, in particular considering that he had been promoted to level 7

a year prior to the successful incumbent (the Fourth Respondent).

- [8] The Applicant complained that the panel had been biased in that it had greeted Khambule in Zulu before the interview, failed to ask him similar questions and had only asked him one (1) question in respect of post 1337 as opposed to Khambule, who had been asked two (2) questions.
- [9] The Applicant complained that his challenge to the fairness of his non-promotion was severely prejudiced or compromised by the fact that the Third Respondent failed to comply with the National Instruction 2 of 2008 by, *inter alia*, failing to ensure that the Secretary to the interview panel kept a written record of the proceedings, decisions made and the reasons for every decision.
- [10] The Third Respondent never produced to the Applicant at the arbitration or at all, the criteria which was adopted by the interview panel, the scores to be allocated to each aspect of the relevant criteria used in assessing applicants for the post and the results of the interview panellists application of that criteria to the applicants for the post/s as well as the reasons for their scoring each applicant in the manner in which they did. There was no evidence of a standard criteria / questions or a model answer which had been applied. This did not necessarily mean that there was not one. The complaint at the arbitration was that the record was not provided due to non-compliance with the National Instruction, not that there had never been a standardised criteria / model answers and coherent points system to be applied by panellists. The Applicant contends instead that a negative inference should be drawn from the absence of the record, to wit, that the process was inherently arbitrary or unfair for want of the production of the scoring criteria, model answers and points allocated together with reasons therefor.
- [11] The absence of such a record cannot, in and of itself, result in the inference contended for, however, inviting that proposition may be. What it did do, however, was impact negatively upon the Applicant's right to ever challenge the question of his unfair promotion. At the very least, the failure of the relevant functionaries to comply with the provisions of National Instruction 2 of 2008 and in particular paragraph 4(10)(c) (ii) rendered the Applicant's non-promotion procedurally unfair. In the absence of the record, he could not mount a full and

proper challenge to the question of his non-promotion.

- [12] Insofar as the complaint regarding substantive unfairness is concerned, the evidence of Chiliza at volume 2 page 68 lines 10 to 25 support the Applicant's complaint that the incorrect number of marks were awarded (whatever criteria the panellists were in fact using which has not been established in evidence).
- [13] The Applicant ought to have been awarded at least eight (8) points. He would have obtained five (5) points for having matric, an additional point for having a national diploma, a further point for having his LLB and an additional point for the detective courses referenced by Chiliza at page 68 line 23.
- [14] It is also evident that, in all probability, the interview panellists did not correctly score the Applicant in respect of his promotion to level 7 in 1999 as opposed to the Fourth Respondent who was promoted in 2000 or consider his experience in respect of the field of the Captain's post.
- [15] I am not satisfied that the greeting of the Fourth Respondent in Zulu evidenced any biased on the part of the panel. I am also not satisfied that the questions asked were not similar. Although the Fourth Respondent was asked regarding the re-arrest procedures to be followed from a Captain's perspective and the Applicant those re-arrest procedures from a Detective's point of view, the difference in the vantage point from which those questions were to be answered is insufficient to result in a material non-compliance or a finding that the decision was arbitrary or irrational.
- [16] In relation to the question concerning changes Khambule or the Applicant would make in order to transform service delivery in the station, it is correct that the Applicant's question related to the FSC cases, but this again was not sufficient to render the entire decision of the panellists arbitrary on that ground.
- [17] In the absence of evidence concerning the criteria against which all applicants were assessed, the model answers which were expected by the panellists or the method of assessment insofar as points allocation was concerned, and how those points were allocated and the reasons therefor, which would have been available had the panellists complied with National Instruction 2 of 2008, there is no proper evidential basis capable of being established by the Applicant to prove that the decision of the panellists was arbitrary or capricious and

accordingly that, on a substantive basis, the Applicant ought to have been promoted above Khambule. This is not the Applicant's fault and notwithstanding the fact that he bears the onus, as the documentation was simply not available to him due to the Third Respondent's non-compliance.

- [18] The evidence available on the record, however, is sufficient to determine that the Applicant's promotion was procedurally unfair and given the clear incorrect application of the points (based on Chiliza's concessions), at the very least, the Applicant would have scored on a par with the Fourth Respondent.
- [19] It does not appear that he was thus on this basis afforded a fair opportunity to compete with the Fourth Respondent. The Applicant's non-promotion was accordingly also substantively unfair.
- [20] I am satisfied in accordance with the authority of *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA), the First Respondent failed to apply his mind properly to the evidence before him and in particular, by failing to have regard to the evidence which I have highlighted hereinbefore. Had the First Respondent properly applied his mind to that evidence, a reasonable decision maker would have come to no other conclusion other than that the process was procedurally unfair for want of compliance with National Instruction 2 of 2008, and was substantively unfair based on Chiliza's evidence concerning the allocation of points.
- [21] The finding by the First Respondent accordingly that there was no evidence that the points were not allocated correctly, does not accord with the evidence before him. I am satisfied accordingly, that the award is reviewable but that it should be substituted with a finding that the Applicant is entitled to compensation.
- [22] Given the fact that I am unable, on the evidence before me, to state that the Applicant ought to have been preferred to the Fourth Respondent, I cannot afford him relief in the form of the protected promotion he seeks. The only appropriate relief, in the circumstances, is compensation for the Applicant. In this regard, I consider it fair and equitable that the Applicant be awarded five (5) months compensation calculated at the rate of his remuneration as per the date of the arbitration award, being 11 December 2011.

[23] The Third Respondent is directed to pay the Applicant's costs.

NEL A J

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv S

For the Respondent: