IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN

CASE NO:D923/18

NOT REPORTABLE

In the matter between:

D. KEMRAJ	Applicant
and	
NATIONAL COMMISSIONER SOUTH AFRICAN POLICE SERVICE	First Respondent
MINISTER OF POLICE	Second Respondent
JJ ERASMUS N.O	Third Respondent
SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	Fourth Respondent
B.STEPHENS	Fifth Respondent

JUDGMENT

HEARD: 12 OCTOBER 2022

DELIVERED: 08 NOVEMBER 2022

GIBA AJ

Introduction

[1] This is a review application in terms of Section 145 of the Labour Relations Act seeking to review an arbitration award dated 15 February 2018 made by the third respondent under the auspices of the fourth respondent.

[2] The application finds its origin in a dispute pertaining to an unfair labour practice relating to promotion referred by the applicant to the fourth respondent and adjudicated upon by the third respondent wherein the applicant averred that the first and second respondents committed an unfair labour practice in failing to promote him. In the main, the applicant sought protected promotion.

[3] The application was heard on the 12th October 2022 and I delivered an ex tempore judgment dismissing the application for review. What follows herein-below are my reasons.

Background

[4] The applicant and the fifth respondent, amongst other candidates, applied for promotion into Post no 18/2013 HRD: Colonel-Deputy Director: Section Commander, Tactical Policing Development Coordination: Shorburg. [1]

[1] Record: Vol 6; Internal Advertisement page 34 & 36

[5] Both the applicant and the fifth respondent were short-listed and interviewed for the said post and the fifth respondent was a successful candidate.

Grounds of Review

[6] The applicant's main contention can be summarized as follows:

6.1.1 He qualified for the position as advertised and had experience in the core functions of the post. The total marks comprised of three criteria: firstly competency based on the interview questions and answers, secondly prior learning, training and development and thirdly record of previous experience.[2]

6.1.2 The panel did not apply its mind to all the core functions as they had omitted one of the core functions, *viz*, the panel did not consider prior learning, self-development or training but only considered qualifications. Resultantly this was not a fair way of scoring.

6.1.3 The promotion of the successful candidate was based solely on merit on the highest score, then he ought to have been promoted.[3]

[2] Supplementary Affidavit, page 57, para 7.1
[3] Supplementary Affidavit, page 55, para 6.1

6.1.4 The third respondent committed gross irregularity by misconstruing the evidence placed before him by making a finding that was not the evidence of the first and second respondents and in effect went beyond his powers and created a defense for the first and second respondents.[4]

6.1.5 The third respondent committed gross irregularity and only acknowledged concessions by Kwena in his evidence in chief that he should have scored the applicant a 9 and further concessions under cross-examination that he should have in fact scored a 10.[5]

6.1.6 The ultimate consequence of these concessions of underscoring the applicant can only lead to the inference that the first and second respondents acted in unfair, inconsistent, arbitrary and irrational conduct in failing to promote him.[6]

6.1.7 No written reasons existed why the panel collectively scored the fifth respondent an 8 and the applicant a 6 as required by the National Instruction, as there was no proof as to why the panelists scored the fifth

[4] Supplementary Affidavit, page 55, para 6.2
[5] Supplementary Affidavit, page 59, para 7.4: see also Award, para 38.12, page 45

[6] Supplementary Affidavit, page 59, para 7.5

respondent as they have done thereby not complying with Clause 7(3) and 8(4) of the National Instruction 6/2005.[7]

6.1.8 Consequently the first and second respondents failed to keep proper minutes/records and failed to record the reasons for their decisions.

6.1.9 Breytenbach scored the fifth respondent the highest from all the panelist and his scores differed vastly from other panelists and this was because the fifth respondent reflected Breytenbach as a reference on her CV and that Breytenbach conceded that he had intricate knowledge of the fifth respondent's work performance that he included in the panelist recommendation of the fifth respondent which was not reflected on her cv and could not have been obtained from the questions at the interview.[8]

6.1.10 The fifth respondent's application ought to have been rejected as directed in Clause 4(1)(a)(d)(e) in that it was not properly completed, it contained factually incorrect information and excluded documentary proof qualifications and relevant self-development and that the fifth respondent

[7] Supplementary Affidavit, page 61, para 8.2
[8] Supplementary Affidavit, page 67, para 8.7

left a blank space regarding the place of driver's licence issue which was conceded to render the application fatally defective.[9]

Arbitration Award and Analysis

[7] According to the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd & Others*[10] the question to be asked when reviewing awards is; was the decision reached by the commissioner one that a reasonable decision-maker could not reach?

[8] In *Herholdt v Nedbank Ltd*[11], the Supreme Court stated that material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

[9] Simply put even where the reasons of the arbitrator are wrong and there may have been an irregularity, such a decision may not be set aside if on the basis of

[9] Supplementary Affidavit, page 77, para 11.1 and 11.3

[10] 2007 12 BLLR 1097 (CC) at para 11

[11] (2013) 34 ILJ 2795 (SCA) at para 25; see also *NUMSA obo Thilivali v Fry's Metals (A division of Zimco Group) and Others* (JR2817/2009) [2014] ZALCJHB 115; (2015) 36 ILJ 232 (LC) (27 March 2014) at paras 16 and 17, discussed in para 40 herein-below.

the issues raised and the evidence presented to the commissioner, the outcome was a reasonable one.

[10] It is notable that that the third respondent dealt with each of the applicant's grounds of the dispute which the applicant repeated in his review application, and which are summarized herein-above [para 6]

[11] In respect of the failure to keep proper minutes/records and not recording the reasons for their decisions, the third respondent held that it was never the intention of the drafters of the National Instruction that the selection panel must record the reason for every decision that they make and motivate why each panel member had allocated a specific point to a specific candidate for a specific criteria. The National Instruction requires from the panel to record what criteria they agreed upon, how they applied the criteria and why they had come to their recommendations pertaining to their preferred candidate. [12]

[12] As a generic point allocated to all candidates for prior learning(qualifications) and previous experience according to the agreed criteria/formula, there was no reason why the panel had to again explain or motivate how they came to allocating these marks. In respect of the Competence criteria, this is a subjective mark given by

[12] Arbitration Award, page 39 para 36.6

each panelist based on his understanding and evaluation of the relevance and correctness of the answers, it would be very difficult to provide a proper motivation for giving such a mark.[13]

[13] I agree with the third respondent's reasoning in this regard. In my view failure to keep proper records/minutes of the interview process does not in itself amount to an unfair advantage accorded to one candidate. It only speaks to the procedural aspect of the entire interview process which in turn affects all the candidates who were interviewed.

[14] Without the records/minutes, the aggrieved candidate would have difficulties to demonstrate that he was the better candidate because the motivation for his scores would not be recorded. How does then one know how a candidate fared during the interviews?

[15] If the interview process was flawed in this respect, then the relief that would be appropriate is to set-aside the interview process and direct that it starts de novo at the short-listing stage.

[16] Perhaps the applicant's contention would have had some merit if he was able to demonstrate that the failure to comply with the National Instruction was solely

[13] Arbitration Award, page 40 para 36.8

designed to prejudice him in favour of the fifth respondent. However, this is not his contention. In my view, a material failure to comply with the National Instruction would render the interview process flawed, which in turn the only appropriate relief would be for that process to start afresh as it would have affected all the candidates who were subjected to the interview. However, in casu, there was no material failure to comply with the National Instruction

[17] Accordingly, I find no basis to interfere with the third respondent's reasoning in this regard.

[18] In respect of whether the fifth respondent's application should have been rejected as it was not properly completed, the third respondent held that the application form serves as a summary of a candidate's qualifications, language proficiency, disability status, health, possible conflict of interest, disciplinary and criminal record, career promotions and development, work experience and current duties.[14]

[19] The main contention of the applicant is that the fifth respondent failed or omitted to indicate where she had obtained her license. The third respondent made a distinction between a material and non-material omission. The third respondent

[14] Arbitration Award, page 41 para 37.8

stated that not indicating whether you have a criminal record is a material omission.[15]

[20] The fifth respondent attached a copy of the driver's license and the omission of the place where she obtained the license bear no material omission and by extension bear no material significance or purpose germane to the requirement of the post.

[21] It also worth mentioning that the applicant's application form was not properly completed in that he did not complete the last page where he had to delete, initial and date changes. Of significance is that these changes pertain to confirmation of an oath or an affirmation which was to be done before a commissioner of oaths.[16]

[22] The applicant's contention lies in the strict interpretation and or application of the National Instruction which does not come to his assistance because had the first and second respondents strictly applied the requirements of properly completing the form, the applicant's application form would have been rejected.

22.1 The improper completion of the form pertains to, *inter alia*, confirmation whether he had objection to taking the oath. For instance, the applicant, if he had no objection ought to have deleted the word "(no)" in the sentence

[15] Arbitration Award, page 41 para 37.9

[16] Record: Volume 6, page 75: Applicant's application form

which states: *"I have (no) objection to taking the prescribed oath"* and the following sentence states: "*I (do not) consider the prescribed oath to be binding on my conscience".*

22.2 If the applicant after having no objection, considered the prescribed oath to be binding on his conscience, he ought to have deleted the words *"(do not)"*. The instruction in the form states that the applicant must delete which is not applicable and initial and date. The applicant failed to do so. In fact, the applicant admitted that his form was incorrectly completed.

[23] This in my view is a fatal error on the part of the applicant. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[17] the SCA said:

'Interpretation is the process of attributing meaning to the words used in a document … having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads

[17] 2012 (4) SA 593 (SCA) at para 18.

to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[24] Accordingly, the third respondent was correct in applying a sensible or businesslike approach in interpreting the National Instruction. There is no clause in the National Instruction that specified a requirement to record every answer given by a candidate verbatim. This would render the interview laborious, a factor which was correctly contemplated by the drafters. If they intended it to be so, such would have been clearly defined and or specified. This is further true in respect of the proper completion of the form.

[25] In respect of the contention that the third respondent created defenses for the first and second respondents as reflected in paragraphs 38.10, 38.13 and 41.2 of the award[18], in para 38.10 the third respondent stated the following:

"It was argued that the formula used for qualification was not correct as a B.Tech Degree cannot be equal to a Honours Degree. I was referred to the SAQA qualification framework as well as the new NQF levels. In terms of the new NQF levels a Bachelor's degree (including a B.Tech degree) is on a level 7 whereas an Honours degree is on a level 8. However in their formula, the panel included both qualifications on the same level and awarded 8 marks for either of these qualifications. If the panel was aware of this amendment, it would have made

[18] Arbitration Award, pages 44, 45 and 40.1

sense to rather allocate 7 marks to a B.Tech degree and 6 marks to a National Diploma. It however seems that they was(sic) not aware of this and starting from a matric qualification awarded marks from 5 to 10 for a PHD."

[26] In paragraph 38.11 the respondent continued and stated that even if the fifth respondent was allocated 7 marks instead of 8 for her qualifications, she would have scored higher than the applicant and would have been the preferred candidate.

[27] The applicant did not dispute the marks [10] given to the fifth respondent, however he disputed the marks [8] uniformly given to him. The first and second respondents' witnesses conceded that they should in hindsight given the applicant 9 marks instead of the 8 they had awarded him.

[28] In paragraph 38.13, the third respondent stated that when this correction is done, the total marks awarded to the applicant is slightly higher than that of the fifth respondent, which means that if not for these mistakes, the applicant would have been the top scoring candidate and would probably have been the first recommended candidate for this position except if there were other considerations which still favoured the appointment of the fifth respondent.

[29] The third respondent held that these mistakes were not inconsistent as the same criteria was applied to all the candidates.[19] Furthermore, he held that there was no evidence to support that the mistakes were arbitrary as the selection panel had agreed on a specific formula and had applied this formula is assessing the applications of all the candidates. It was not done simply on a personal whim.[20] Moreover, the mistakes were not illogical or unreasonable as they simply assessed the applications before them and awarded marks based on their understanding of the contents of these applications.[21]

[30] The third respondent's finding that the panel was not aware of the amendment is supported by Brig Breytenbach's evidence that he believed that "it recently changed."[22] It was General Kwena's evidence that he did not know that BTech was intended not to be an undergraduate degree[23] and General Kwena testified that he believed there had been a change in the levels, but that they had approached it in line with the way it was before the change.[24]

[31] These conceded mistakes were applied consistently in respect of all the candidates. In other words, the criteria in its alleged impugned form was applied

[19] Arbitration Award, page 45, para 38.15
[20] Arbitration Award, page 45, para 38.16
[21] Arbitration Award, page 46, para 38.17
[22] Record to proceedings, volume 4, P 24 at 20
[23] Record to proceedings, volume 5, P 24 at 19 to P25 at 2
[24] Record to proceedings, volume 5, P26 at 2 to 8

to all the candidates. There was no cherry picking of the criteria solely designed to be advantageous to the fifth respondent.

[32] In paragraph 41.2 of the award, the third respondent states the following:

"As set out above and based on the guidelines provided by the relevant case law pertaining to promotion, I am however the opinion that the decision to appoint Stephens was indeed a rational decision which was not solely based on the point (wrongly) allocated to her by the panel but was also arrived at after proper consideration of additional factors such as the fact that she had previously acted in this position, has intimate knowledge of the specific working environment and that the working relationship between the different divisions was extremely successful while she acted in the vacant position.[25]

[33] I do not see how the third respondent created defenses for the first and second respondents as he was tasked with analyzing and surveying the evidence that was before him. What was before him are the minutes motivating the appointment of the fifth respondent which states the following:

"*The preferred candidate is a white female (B Stephens) that conformed to all the requirements of the post and was unanimously supported by the panel members as the preferred candidate.*

[25] Arbitration Award, page 48, para 41.2

Lt Col Stephen started working in the component in service police development in a coordinating post in 2004 and on a regular basis acted in the subsection head post in the absence (the current advertised post). Lt Col Stephens acted in the advertised post when the post became vacant, until she was transferred to operational response services in 2012, when the coordination function of ORS operational training was transferred to the division ORS.

The complexity of the environment in which the post is cannot be overstated, in that division ORS is responsible for coordinating and rendering of specific specialized training while the division HRD is ultimately responsible for training in the SAPS. The working relationship between two divisions was extremely successful while Lt Col Stephens acted in the vacant post.

Lt Col Stephens have intimate knowledge of the specific work environment and has proven herself as a competent worker in this environment with an exceptional track record. Lt Col Stephens is the preferred candidate for the post."

[34] Brig Breytenbach testified that the aforesaid information was obtained during the interview of the fifth respondent and from knowing the candidates and their working environment and that the applicant did not have the same experience and was coordinating at a much lower level than the fifth respondent.[26]

[26] Record of proceedings, volume 4, P 26 at 10-21; page 72 at 4-9; page 91 at 10-20; page 75 at 15-20

[35] Brig Breytenbach's evidence in this regard is sound as it is in keeping with clause 10 (1)(c) and 10(3) of the National Instruction which states:

> *" 10(1)(3) When conducting interviews, the panel must afford every candidate the opportunity to place any information which the candidate deems necessary, at the disposal of the panel and to ask any question…….*
>
> *10(3) The panel must put questions to every candidate to clarify his or her ability to function in the post."*

[36] In respect of the applicant's contention that Brig Breytenbach was used by the fifth respondent as a reference in her CV and that they had previously worked together, the third respondent held that the fact that a panelist has worked with a specific candidate does not per se mean that he/she has a real interest in that person which you have to declare. Only a personal relationship had to be declared.[27]

[37] I can find no fault in this logic as the applicant did not adduce evidence that Brig Breytenbach's professional relationship or interest influenced his assessment of the fifth respondent in her favour. Similarly, there is no evidence that the other panel members' assessment of the fifth respondent was influenced by Breytenbach and or his working relationship with the fifth respondent.

[27] Arbitration Award, page 47, para 40.3

[38] It is abundantly clear that the fifth respondent's appointment was meritorious and the fact that she acted in the post thereby having the necessary experience should count in her favour as it had surely done.

[39] The applicant contended that the fifth respondent stated in her CV that she was a Section Commander instead of Subsection Commander. This to me appears to be nothing more than a typographical error. No evidence was adduced that this error was made with the intention to mislead the panel.

Did the third respondent commit an irregularity?

[40] In consideration of whether the third respondent has committed an irregularity, the following dictum is instructive, *NUMSA obo Thilivali v Fry's Metals (A division of Zimco Group) and Others*[28] wherein Snyman A.J stated the following:

"*Therefore, the first step in a review enquiry is to consider and determine if a material irregularity indeed exists. A review court determines whether such an irregularity exists by considering the evidence before the arbitrator as a whole, as gathered from the review record and comparing this to the content of the award and reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law in order to determine what indeed constituted the proper evidence that the arbitrator, as a whole, would have*

[28] (JR2817/2009) [2014] ZALCJHB 115; (2015) 36 ILJ 232 (LC) (27 March 2014) at paras 16 and 17

had to consider. If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations need to be made, and the review must fail.

Should the review court, however, conclude that a material irregularity indeed exists, then the second step in the review test follows, which is a determination as to whether if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? The review court, in essence, at the second stage of the review test, takes the proper evidence as a whole, as ascertained from the review record, considers the relevant legal principles and decides whether the outcome that the arbitrator arrived at could nonetheless reasonably be arrived at by another reasonable decision-maker, even if it is for different reasons. The end result always has to be an unreasonable outcome flowing from an irregularity, for a review to succeed." See also Herholdt v Nedbank Ltd supra, discussed in paragraph 8 herein-above.

[41] As enunciated herein-above, I can find no fault in the reasoning and or conduct of the third respondent, thus he did not commit an irregularity. Accordingly the review application must fail. Even if he committed an irregularity, such must lead to an unreasonable outcome, which did not occur.

[42] In amplification of my reasoning hereof, I can do no better than to quote Ncane v Lyster No & Others:[29]

"*However, I share the uneasiness of the court a quo that the appellant may not have been correctly scored for performance. In the judgment for leave to appeal, the court a quo suggests that it was arguably, inter alia, that the appellant had more experience than the fourth respondent. But an arbitrator may only interfere where the decision is irrational, grossly unreasonable or mala fides. The arbitrator did not interfere with the panel's evaluation. The question is whether the decision of the arbitrator on this leg was one that a reasonable arbitrator would have reached? The arbitrator paid attention to the requirements for promotion including experience. He was satisfied that the appellant had a fair opportunity to compete for the post and that any errors were not such as to vitiate the process. He was satisfied that the appointment of the fourth respondent was rationally justifiable. I am of the view that it cannot be said that the arbitrator's decision is one that a reasonable arbitrator would not reach."*

[43] In casu, I likewise find that the third respondent paid attention to the requirements for promotion including experience. He was satisfied that the applicant had a fair opportunity to compete for the post and that any errors were not such as to vitiate the process. He was satisfied that the appointment of the fifth respondent was rationally justifiable. I am of the view that it cannot be said that the third respondent's decision is one that a reasonable arbitrator would not reach.

[29] (2017)38 ILJ 907 (LAC) at para 36 and 37

Managerial prerogative

[44] The definition of an unfair labour practice refers to any unfair act or omission that arises between an employer and an employee involving unfair conduct relating to promotion (section 186(2)(a) of the LRA). This definition has been interpreted by Labour Appeal Court in Department of Justice v CCMA & Others[30] as referring to conduct relating to the actual promotion or non-promotion and conduct relating to promotion. The Labour Appeal Court further pointed out that the definition of an unfair labour practice was not confined to disputes concerning conduct relating to promotion, thus excluding disputes concerning whether the employee should have been promoted.

[45] Employees have no right to promotion[31] and as long as the employer can provide a rational basis (a logical connection) for its decision, the non-promotion cannot be set-aside. It is important for an applicant to show a causal connection between the unfairness complained of and the prejudice suffered.[32] The first and second

[30] [2004] 4 BLLR 297 (LAC) at para 55

[31] De Nysschen v General Public Service Sectoral Bargaining Council & Others [2007] 5 BLLR 461 (LC). See also clause 10(6) of the National Instruction: The fact that a candidate was listed as having obtained the highest score in the interview or was recommended does not establish any right on the part of the candidate to be appointed to the vacant post or any other post.

[32] National Commissioner of the SA Police Service v SSBC and Others (2005) 26 ILJ 903 (LC)

respondents had provided a rational basis for appointing the fifth respondent and it is contained in the minutes of the panel recommending the fifth respondent.

[46] There is considerable judicial authority supporting the principle that courts and adjudicators will be reluctant, in the absence of good cause clearly shown, to interfere with the managerial prerogative of employers in the employment selection and appointment process.[33]

[47] In my view an employer may attach more weight to one reason than another and may take into account considerations such as performance at an interview and life skills.

[48] As it was stated in Ncane v Lyster No *supra*, it would be artificial and speculative to seek to analyse the scores allocated in the manner advocated by the applicant as the panellists had the benefit of observing the candidates during the interviews and making of their suitability in relation to experience.

[33] Provincial Administration Western Cape (Department of Health and Social Services) v Bikwani (2202) 23 ILJ 761 LC) at paras 29-30

[49] I could deduce no mala fides on the part of the first and second respondents. The decision to appoint the fifth respondent was rationally justified. The mistakes made in the process of evaluation were not such that they vitiated the process, resultantly do not constitute unfairness justifying an interference with the decision to promote.

[50] Consequently the third respondent did not commit an irregularity and his decision was reasonable. I find no basis to interfere with the award.

Costs

[51] Both parties sought costs on the basis that costs should follow the result. But the test is whether it would be in accordance with the law and fairness to grant costs.[34]

[52] The reasons raised by the applicant, though misplaced, were not frivolous and I can find no justification to mulct the applicant with costs.

Order

[52] I accordingly make the following order:

52.1 The application for review is dismissed;

52.2 No order as to costs

GIBA AJ

[34] Section 162 of the Labour Relations Act

Acting Judge of the Labour

Court of South Africa

<u>Appearances</u>:

On behalf of the Applicant:	Angeni Naidoo of Angeni Naidoo Law Firm
On behalf of the first and second respondents:	Adv C-M De Vos instructed by the office of the State Attorney: Durban