



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 57/2020

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Appellant

and

SOLIDARITY obo BRIGADIER SM SLINGERS

First Respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Second Respondent

Heard: 20 May 2021

Delivered: 14 June 2021

Coram: Waglay JP, Davis JA and Molefe AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This case concerns litigation launched by a disgruntled applicant for various positions which were advertised by the appellant where his applications proved to be unsuccessful. A key question to be determined in this appeal is the nature of the remedy that may follow a finding that the first respondent has been treated unfairly in being unsuccessful in all the applications which he lodged for the posts so advertised.
- [2] On 22 May 2011, the appellant advertised various positions within its organisation, the advertisements being published both internally as well as externally. The first respondent applied for the position of Operations Officer at the level of Major General as well as for various other positions which are not relevant to the present dispute. On 17 June 2011, the appellant generated further advertisements both internally and externally for the post of Provincial Head: Legal Service, again at the level of Major General in a number of provinces including the Free State, Limpopo, Northern Cape, Mpumalanga and the North West. The closing date for these applications was 4 July 2011.
- [3] The first respondent applied timeously for all these positions, save in respect of the position in Mpumalanga in which he applied when it was advertised on 15 January 2012. He was not shortlisted for any of the posts as a result of which he lodged grievances against the decisions not to promote him to any of the advertised posts. The dispute remained unresolved and was thus eventually referred to the second respondent.
- [4] The various disputes raised by the first respondent were consolidated and eventually set down for arbitration before Commissioner Thothozela Ndzombane between 4 to 8 November 2013.
- [5] On 5 February 2014, Commissioner Ndzombane ruled that, save for the post in the Free State, any dispute that challenged the appointment of an applicant for the post in the other provinces fell outside of the jurisdiction of the

bargaining council given that the mandated internal processes had not yet been exhausted.

- [6] Following this ruling, a further arbitration was heard before Commissioner P M Venter who issued an award on 17 August 2017. In keeping with the disturbing period over which this dispute was brought, evidence at the hearing to be led before Commissioner Venter on 2 July 2015 and eventually concluded at a further hearing between 25 to 27 July 2017. It is important to emphasise that Commissioner Venter was required to resolve a dispute which related to an unfair labour practice concerning the appellant's refusal to promote the first respondent to the two positions that were advertised in the Free State; positions that were ultimately filled by Major General Sempe and Major General Macala.
- [7] Commissioner Venter found that the first respondent should have been shortlisted for the advertised position or 'at least being provided with an opportunity to contest the positions.' However, the Commissioner went on to say: 'it is virtually impossible to predict whether the applicant (the first respondent) would have been promoted if he was interviewed. He claimed that he would have been promoted but in my view this is merely speculation.'
- [8] Although Commissioner Venter found that the first respondent 'might have even outscored the second and third respondents (Generals Macala and Sempe) the employer party is not obliged to promote on that ground alone. For these reasons, he found that the first respondent had not been treated fairly and it followed therefore that an unfair labour practice had been committed by the appellant. Thus an order was made that the appellant pay compensation to first respondent in the amount of R 261 925.00, which was equal to four months of salary of the first respondent at the time when the post was filed.

The decision of the court a quo

- [9] Following this decision, the appellant approached the Labour Court for an order declaring that the first respondent was not entitled to any further relief relating to the other unfair labour practice disputes lodged in relation to the posts determined by Commissioner Venter. It contended further that the unfair labour practice dispute relating to the promotion of the candidates to posts in Limpopo, Northern Cape and North West had effectively been determined to the extent that the arbitration award issued by Commissioner Venter involved similar posts that are 'at the same level (Major General) that were advertised in the same publication and during the same period.'
- [10] The appellant argued that the disputes in all the advertised cases involved similar circumstances, to the extent that the first respondent was not shortlisted for any of the positions that were advertised in the different provinces for the position of Provincial Head: Legal Service. As the arbitration award had already granted the first respondent compensation, which was based on a finding of an unfair labour practice dispute in that the appellant had failed to shortlist the first respondent and thus denied him an opportunity to compete for the various positions advertised the appellant contended that the first respondent was not entitled to any further compensation because he would have only been able to be appointed to one of these positions and not to all of them.
- [11] Before the court *a quo*, the first respondent contended that he sought protective promotion in the light of the appellant's refusal to promote him to one of the provincial positions for which he had applied.
- [12] Lallie J, sitting in the court *a quo*, considered these arguments and found with regard to the first respondent's argument pertaining to protected promotion that 'he chose the nature of the unfair labour practice the applicant committed against him and this has been dealt with by Commissioner Venter. It is not open to the first respondent to seek different relief in the form of protected

promotion or any other relief for the same unfair labour practice in that he has not been promoted to one of the advertised provincial head positions he applied for.'

[13] The learned judge went on to say:

'Absent valid reason an employee cannot be denied the opportunity to assert his or her right against being treated unfairly by an employer. The applicant failed to establish valid grounds to deny the first respondent the right to challenge the fairness of the applicant's conduct of not promoting him to a position of Provincial Head for Mpumalanga.'

[14] For this reason, Lallie J ordered that the first respondent was not entitled to further relief relating to the unfair labour practices lodged in relation to the same posts as those that were determined by Commissioner Venter. However, the learned judge ordered that the second respondent schedules an arbitration hearing when the dispute is ripe to determine the case of an unfair labour practice relating to the appellant's refusal to promote the first respondent to the post of Provincial Head: Legal Services Mpumalanga which was advertised on 15 January 2012 and to which Brigadier Nogwanya was appointed as of 1 May 2012.

[15] The appellant approaches this Court on appeal against the order that an arbitration must be scheduled in respect of the Mpumalanga post. The first respondent has lodged a cross-appeal against his failure to gain an order of protected promotion .

Evaluation

[16] This Court in *Apollo Tyres SA (Pty) v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 ILJ 1120 (LAC) held that while an employee, who alleges a case of an unfair labour practice relating to a promotion , does not need to prove that he has a right to promotion, he still bears the onus of proving that the decision of the employer not to promote him was unfair.

[17] Commissioner Venter dealt with this question and concluded, as I have indicated, that there was no basis by which the first respondent had established that he would have been promoted if he had been interviewed for the posts that formed the basis of the arbitration. However, Commissioner Venter granted relief to the first respondent, based on the fact that an unfair labour practice had been committed by virtue of the appellant's omission to interview the first respondent for any of the advertised posts. Accordingly, Lallie found 'it is not open to the first respondent to seek different relief in the form of protected promotion or any other relief for the same unfair labour practice of not being promoted to one of the advertised Provincial Head positions he applied for.'

[18] It was therefore not possible to adjudicate upon an unfair labour practice dispute that had been resolved by virtue of an order of compensation in favour of the first respondent. Manifestly, the first respondent could only have obtained promotion to one of the advertised posts. For the appellant's failure to consider the various applications of the first respondent, a *solatium* for the loss of a right to be considered was ordered in the form of compensation based on four months' salary. That compensation was clearly predicated on a particular cause of action. That cause of action was a failure to consider the first respondent for one or other of the posts which had been advertised. It is a clear proposition of law as articulated in *Custom Credit Corporation v Shembe* 1972 (3) SA 462 (A) at 472 that:

'The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him under such cause.'

[19] This is a text book case in which the law must prevent a repetition of litigation between the same parties based on the same cause of action, namely a failure to be considered for promotion to one or other of the advertised posts.

[20] In short, the court *a quo's* decision is unassailable with regard to its finding that the order of compensation awarded by Commissioner Venter for failure

to consider the first respondent for the then vacant Free State posts. This finding is equally applicable to the determination of this appeal. There is no basis by which to demarcate the Mpumalanga post as being predicated on a different cause of action to that which relates to the remaining posts. In short, the first respondent was compensated for the unfair labour practice which was committed by the appellant in respect of the first respondent's application all the range of advertised posts. As the first respondent could only have been promoted to one of the positions so advertised, there is one cause of action which is based upon the failure to appoint the first respondent to any of the post for which he applied. On the *Shembe* principle, the first respondent is not entitled to a multiple award of compensation simply because he applied for more than one position. Accordingly, there was no basis shown by which the court *a quo* should have ordered an arbitration to be constituted in respect of the Mpumalanga posts. In the result, the appeal against the order to schedule an arbitration in respect of the position of Provincial Head: Legal Services: Mpumalanga must be upheld.

[21] It appears that the cross-appeal which was lodged by the first respondent was based essentially on the failure of the court *a quo* to order promotion for the first respondent to any of these posts. I use the word "appears" to described the cross-appeal because both the drafting thereof as well as the heads which were lodged on behalf of the first respondent leave much to be desired. They are prolix, repetitive and lack any level of precision or clarity which should be demanded of any litigant who has the benefit of legal representation. Both documents regrettably produce only one consequence which is to throw obscurity rather than light upon the nature of the dispute.

[22] Nonetheless it is clear for all of the reasons that I have advanced that the cross-appeal must fail in that as the dispute based on one cause of action had been resolved by order of compensation, the first respondent had no entitlement to additional relief by way of protected promotion. In the result, the appeal succeeds and the cross-appeal must be dismissed.

[23] In the result, the order of the court *a quo* of the 8 February 2019 is set aside and replaced with the following:

1. The first respondent is not entitled to further relief relating to the unfair labour disputes lodged in relation to the same posts as to those that were determined by Commissioner PM Venter on 14 August 2017 under case number PSSS 483 and 489-12/13
2. The unfair labour practice disputes relating to the promotion of Major General Mbana and Major General Mpomane have been effectively determined.
3. There is no order as to costs.

[24] The first respondent is order to pay the costs of this appeal.

Davis JA

Waglay JP and Molefe AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Adv Sb Nhlapho and AdvR Ramatselela

Instructed by the State Attorney

FOR THE FIRST RESPONDENT:

N Ras of Solidarity