



Republic of South Africa

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT DURBAN)

Not Reportable

Case no: DA18/2010

In the matter between:

INSPECTOR J ZANDBERG

Appellant

and

NATIONAL COMMISSIONER: SOUTH AFRICAN

POLICE SERVICE

Respondent

Heard: 22 November 2011

Delivered: 23 March 2012

Summary: The issue was whether the failure by the SAPS to promote the Appellant to the rank of captain constituted an unfair labour practice. Found it was not.

CORAM: PATEL JA, NDLOVU JA and LANDMAN AJA

JUDGMENT

Landman AJA

Introduction

- [1] Inspector J Zandberg (“the appellant”) appeals with leave of the Labour Court (Pillay J) against the whole of her judgment delivered on 16 October 2009 in terms of which the arbitration award ordering the National Commissioner of the South African Police Service (“the respondent”) to promote the appellant to Captain, was reviewed and set aside.

Background

- [2] The facts of this appeal can be briefly stated as follows:
- (a) The South African Police Service advertised post 6974 in September 2005. This post was for a Platoon Commander, National Intervention Unit, Durban.
 - (b) The appellant, an Inspector in the National Interventions Unit, based in Durban applied for the post.
 - (c) The appellant was shortlisted and interviewed by a panel. The panel found the appellant was suitable for appointment. The panel recorded that the appellant had scored the highest score, followed by Inspector N E Ntoyi and another candidate. The panel recommended that the appellant be promoted to the rank of Captain in this post.
 - (d) In accordance with the prescribed procedure the recommendation was submitted to a divisional panel consisting of Divisional Commissioner A H Lamoor (hereafter referred to as the “Divisional Commissioner”). This panel examined the recommendation, declined to follow it and recommended to the respondent that Inspector Ntoyi be promoted to the post.
 - (e) The respondent promoted Inspector Ntoyi to the post.
 - (f) The appellant was aggrieved and referred a dispute to the Safety and Security Sectoral Bargaining Council. Inspector Ntoyi was joined in the

proceedings. The arbitrator noted that the issue to be decided was whether the respondent's conduct in failing to promote the appellant was unfair and constituted an unfair labour practice.

- (g) After hearing evidence the arbitrator handed down an arbitration award on 15 April 2008 which, *inter alia*, directed the respondent to promote the appellant to the rank of Captain in the post.
- (h) The respondent was dissatisfied with the award and launched an application in the Labour Court to review and set it aside. The application was successful.
- (i) The appellant was aggrieved with the decision of the court *a quo* and hence this appeal.

[3] Mr S Van Vollenhoven, who appeared for the appellant, attacked the fairness of every stage of the process leading to the respondent's decision not to appoint the appellant and also challenged the substantive fairness of the decision. However, at the outset of the hearing, Mr Van Vollenhoven and Mr Krüger, who appeared for the respondent, agreed that:

- (a) The respondent's final decision was to be exercised in accordance with the provisions of the Employment Equity Act 55 of 1998 ("the Employment Equity Act).
- (b) The respondent was not bound by the recommendations of the first and second selection panels.
- (c) Affirmative action is a constitutional imperative.
- (d) The respondent was obliged to implement the SAPS's employment equity plan.

The effect of this agreement was to limit the main submissions of the appellant which, initially, were centred on the inapplicability of the injunctive to apply affirmative action.

- [4] Counsel also agreed that the record was of such a standard that this Court could decide the appeal with reference to it. Condonation was granted in respect of late filing of the record.

The determination (classification) of the post

- [5] The appellant's principal contention, one which engaged the attention of the arbitrator and the court *a quo*, relates to the respondent's decision to determine (classify) the post and advertise it as it was done.
- [6] The governing instrument is National Instruction 1/2004 (the National Instruction) which regulates the promotion process (including fast-track promotions) within defined career paths of employees up to salary level 12. A Captain's post is a salary level 8 post.
- [7] Vacant posts are generally advertised on a quarterly basis (see clause 5(2) of the Instruction).
- [8] Clause 5(3) provides for the advertisement of posts. It reads:
- 'The National Commissioner may determine that certain posts be advertised for the designated or non-designated group. If posts are advertised as such, employees belonging to the non-designated group may only apply for the post advertised for the non-designated group, while employees of the designated group may apply for any of the post advertised for the designated or non-designated groups. The non-designated group includes all white males. The designated group includes all African males and females, Indian males and females, coloured males and females white females and persons with disabilities.'
- [9] The purpose of clause 5(3) is to facilitate the goal of a representative police service which broadly reflects the demographics of the country. In order to achieve this white males, who are predominant in the police services, are restricted from applying for posts which are advertised as designated posts.

- [10] A shift in the way the National Instruction is implemented has taken place. In order to reduce, eliminate or circumvent complaints levelled at the restriction of white males to applications for non-designated posts only, all posts are advertised without specifying whether they are designated or non-designated. Vacant posts are simply advertised. But, according to Director Van Rensburg, who testified at the arbitration, the concern with representivity remains unaltered. Representivity remains an important consideration as regards each and every application for promotion.
- [11] The appellant's contention is that this approach is not authorised by the National Instruction and therefore constitutes a gross irregularity which renders the process unfair. The motivation for this submission rests upon the belief that the intention of determining and advertising such a post as a non-designated post meant that affirmative action would not apply in the selection of the successful candidate for the post.
- [12] The court *a quo* did not subscribe to this view. Mr Van Vollenhoven has referred to a number of awards where the approach he contended for was adopted. Arbitrators, who have adopted such an approach, have, in my view, done so by seeking to draw a logical inference from the National Instruction. But clause 5(3) of the National Instruction must be interpreted against the broader background. This background is set by:
- (a) The Constitution of the Republic of South Africa, 1996 ("the Constitution") which provides, as regards the public administration of this country, in section 195(1) that:
 'Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
 - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation...' (My emphasis)
 - (b) The Bill of Rights, enshrined in the Constitution, which affirms the principles of equality and outlaws discrimination. It, however, permits

affirmative action in an attempt to address the inequalities of the past and to normalise our society. Regard must be had to the observations of Moseneke J (as he then was) in *Minister of Finance and Another v Van Heerden*¹ where he said

‘A comprehensive understanding of the Constitution’s conception of equality requires a harmonious reading of the provisions of s 9. Section 9(1) proclaims that everyone is equal before the law and has the right to equal protection and benefit of the law. On the other hand, s 9(3) proscribes unfair discrimination by the State against anyone on any ground including those specified. Section 9(5) renders discrimination on one or more of the listed grounds unfair unless its fairness is established. However, s 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorises legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. Restitutionary measures, sometimes referred to as “affirmative action”, may be taken to promote the achievement of equality. The measures must be “designed” to protect or advance persons disadvantaged by unfair discrimination in order to advance the achievement of equality.’

- (c) The Employment Equity Act which provides detailed rules for achieving these goals including the obligation to prepare and submit an employment equity plan.

[13] The National Instruction may not and, in my view, does not provide that affirmative action would not be applied in the event that a post was determined as a non-designated post.

[14] When a post is determined as a designated post, non-designated persons, i.e. white males, are completely excluded from applying for the position. This is a strict form of affirmative action. The construction, which the appellant suggests is applicable to clause 5(3), ignores the first sentence of that sub-clause. The determination, that certain posts be advertised for the designated group and others for the non-designated group, is a discretion entrusted to the

¹ 2004 (6) SA 121 (CC) at para 28.

respondent. In exercising this discretion, in the way in which he has done, the respondent has widened, on the face of it, promotional opportunities for white males in the South African Police Services. It *prima facie* benefits the appellant.

- [15] The benefit is not an insubstantial one. Depending upon the circumstances of the case, it may well be that a white officer may be promoted even where there is an oversupply of white officers in the category in question.

The first selection panel

- [16] It is the appellant's case that the proceedings of the first panel, chaired by Assistant Commissioner Freyer, were marred by gross irregularities which have the consequence that the recommendation of the panel should be set aside.

No secretary appointed

- [17] One of the appellant's complaints was that no secretary had been appointed to serve the panel. The appellant however conceded that the secretary has no role in regard to the substantive selection process. In any event the selection panel recommended the appellant for promotion so that any irregularity (if there was any) clearly did not prejudice the appellant.

No representative of the national component on the panel

- [18] This point was initiated during the cross-examination of the Divisional Commissioner. But no evidence was presented that a representative of the national component was not part of the panel. There is therefore no merit in this point.

The scores

- [19] The appellant submits that the panel should have scored him much higher on experience than it did. Moreover, the appellant alleged that he should have been scored higher in comparison to Inspector Ntoyi. Inspector Ntoyi's score card is missing. The only evidence which suggests that Inspector Ntoyi had

less experience than the appellant is the appellant's own opinion which he provided under oath at the arbitration hearing and the fact that he has longer, but broken, service. The appellant did not provide reasons for his opinion. No evidence of any irregularity has been shown.

Employment equity plan

- [20] As far as employment equity is concerned, the panel according to the Divisional Commissioner, had the section 21 report before it. This report will be discussed in more detail later. The panel stated that the promotion of the appellant would enhance representivity at the unit level. It is not clear how the panel arrived at this conclusion. It is undoubtedly a mistake as there was an oversupply of white males in the unit.

The second selection panel

- [21] The recommendations of the first panel served before a second panel. As the post in question is a national post, the recommendation was submitted to the second panel consisting only of the Divisional Commissioner.
- [22] The Divisional Commissioner decided not to recommend the appellant for promotion and reversed the recommendation of the first panel because he needed to improve representivity of the unit. The promotion of the appellant would not advance this goal but would hinder it. In order to improve representivity, the Divisional Commissioner decided to recommend the second candidate, Inspector Ntoyi, for promotion.
- [23] The respondent, it may be inferred, agreed with the Divisional Commissioner's recommendation and implemented it.

Obligation regarding due process by the first panel

- [24] The next complaint was that the second panel had not complied with the duty, set out in the National Instruction, to satisfy itself that the process of the first panel took place in accordance with the National Instruction. The evidence shows that the Divisional Commissioner must have examined the process because he was not satisfied with the first panel's recommendation. The

statement that the appellant's promotion would advance representivity was clearly erroneous and not in accordance with the National Instruction.

Was SAPS's employment equity plan taken into account?

[25] The appellant submits that this panel too did not consider an employment equity plan. The submission is based on two legs. The first is that there was no employment equity plan available to it when it considered the recommendation. The second is based on an inference that because the application of equity was allegedly inconsistent, there was no such plan available (see paragraphs 9, 10, and 11 of the grounds of appeal.

[26] The principal challenge to the second panel's recommendation is that it was made in the absence of an employment equity plan. The Employment Equity Act requires the South African Police Services to have an employment equity plan. The reason for this is that, all employers including the South African Police Service must work programmatically towards the achievement of equity amongst its employees. Without a plan, affirmative action measures may be arbitrary.

[27] In his evidence-in-chief the Divisional Commissioner said that there is an employment equity plan in place. He referred to a document entitled "Critical analysis operational response services: period 2005-04-01 to 2006-06-30". The Divisional Commissioner said that this document constitutes the applicable report in terms of section 21 of the Employment Equity Act. This document is supported by the employment equity plan and reflected the profile of the division at that stage. It was used to determine the equity composition of the division. This report reflects that at salary level 8 (the level of Captain):

- African males are underrepresented by 17;
- Indian males by 4;
- Coloured males by 1;
- White males are overrepresented by 27; and
- Females of every racial group are also underrepresented.

Application of employment equity

[28] The Divisional Commissioner was vigorously cross-examined with a view of showing that his recommendations regarding other candidates conflicted with the available documentation regarding employment equity. The Divisional Commissioner dealt with this by stating that he did not have the information at his disposal and pointed out that some comparisons raised by the appellant's representative, were not based on the applicable documentation for the period in question. I am unable to fault the Divisional Commissioner on the basis of his evidence. In other instances the Divisional Commissioner agreed that affirmative action was not applied strictly so that more than one non-designated officer was preferred above designated officers. But this, as the Divisional Commissioner pointed out, was where the analysis showed that the unit in question was broadly representative of the demographic profile of the country. In the case of the appellant white males were so far in oversupply that affirmative action was necessary.

Written records

[29] Mr Van Vollenhoven correctly pointed out that the panels were obliged to keep a record and that the Divisional Commissioner was obliged to record the reasons why he interfered with a recommendation by the first panel. The commissioner failed to do this.

[30] Written reasons for interfering with the recommendation by the first panel were provided to the appellant. There is no reason to think that the reasons provided in writing or that the Divisional Commissioner's evidence, as to why he changed the recommendation, was untrue.

[31] This is not to approve of the Divisional Commissioner's failure to record his reasons. The reasons must be judged at the date the recommendation was altered. The decision maker cannot seek to justify it at the time of the

arbitration. The failure to record the reasons can give rise to disputes which would not ordinarily arise if the reasons had been contemporaneously recorded.

- [32] The Divisional Commissioner's failure to comply with his duties was irregular but it cannot be said that this failure was such as to vitiate the proceedings.

Co-option of members to the second panel

- [33] The Divisional Commissioner called in the chairperson of the first panel and the head of personnel services to discuss the first panel's recommendation. The Divisional Commissioner believes that he was entitled to do so. The National Instruction does not provide for such a procedure. It would be unobjectionable for a panel to consult personnel services; provided that the decision which the panel must make is not entrusted to them. There is no authority for calling in the chair of the first panel although there may be an occasion when clarification is required. But there is no evidence on the facts that the Divisional Commissioner's action led to a gross irregularity.

Conclusion

- [34] The plain, unvarnished facts are that the appellant had been selected by the first panel on account of the scoring. He was about a point ahead of Inspector Ntoyi. The appellant has not shown that he should have outscored Inspector Ntoyi by more than this. The first panel erred in stating that the appellant's promotion would advance representivity in the unit. When the Divisional Commissioner received this information he realised there was a mistake. He took into account employment equity and concluded that he could not justify promoting the appellant and recommended the promotion of Inspector Ntoyi. This result, as the court *a quo* found, was entirely reasonable. The arbitrator's decision to the contrary was not one to which a reasonable arbitrator could have come; based as it was on an error of interpretation.
- [35] There is no merit in the point raised in the appellant's heads concerning condonation of lateness in the proceedings before the court *a quo*.

Costs

[36] Mr Krüger stated that the respondent would not seek an order for costs if the appellant was unsuccessful.

Order

[37] The appeal is dismissed and I make no order as to costs.

A A Landman AJA

Acting Judge of Appeal

I agree.

C N Patel JA

Judge of the Labour Appeal Court

I agree

S K Ndlovu JA

Judge of the Labour Appeal Court

APPEARANCES:

FOR THE APPELLANT: Adv S Van Vollenhoven instructed by Nirashieka Bramdeo Attorneys.

FOR THE RESPONDENT: Adv T P Krüger instructed by The State Attorney.

LABOUR APPEAL COURT