



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA 64/13

In the matter between:

CAPTAIN M. S. MONYAKENI

Appellant

And

SSSBC

First Respondent

RUSSEL MOLETSANE

Second Respondent

SOUTH AFRICAN POLICE SERVICE

Third Respondent

Heard: 19 March 2015

Delivered: 19 May 2015

Summary: Unfair labour practice related to promotion – employee’s recommendation for promotion by the evaluation panel set aside by the divisional evaluation panel – employee referring dispute to the bargaining council – commissioner finding process flawed; employee entitled to promotion; and ordering compensation – Labour setting aside arbitration award – Appeal – Divisional Commissioner chairing the divisional evaluation panel – divisional commissioner conflating steps rendering promotion process irregular – however employee having little experience in the core function of the job – Appeal partially upheld with no costs – Appeal reinstated - Labour Court’s judgment substituted to the effect that the review application is dismissed save for the arbitration costs.

Coram: Landman JA, Sutherland JA and Mngqibisa-Thusi AJA

JUDGMENT

LANDMAN JA

Introduction

- [1] The appellant, Captain M S Monyakeni, appeals against the judgment delivered by the Labour Court (Swanepoel AJ) on 20 January 2012 in terms of which it reviewed and set aside an award issued by the second respondent, an arbitrator acting under the auspices of the Safety and Security Sectoral Bargaining Council, the first respondent. The appeal is opposed by the third respondent, the South African Police Services (the Police Services).

Application for condonation and reinstatement of the appeal

- [2] The appellant failed to prosecute the appeal as required by the Rules of this Court. Consequently he applied for condonation for this failure and for the reinstatement of the appeal. Mr Laka SC, who appeared on behalf of the third respondent, opposed the application but solely on the grounds that there was no reasonable prospect that, in his submission, the appeal would succeed. I am satisfied with the explanation tendered by the appellant and, therefore, I turn to the merits of the appeal which will determine whether the appeal will be reinstated.

The facts

- [3] In 2006, the National Commissioner of Police internally advertised the post of Assistant Director: Social Services-Disability Management (post number 6000). The appellant applied for this post. No interviews were conducted. One may assume that the Commissioner, as he was entitled to do so waived this provision. An Evaluation Panel was established and convened. The Evaluation Panel received six applications including that of the appellant. One candidate was disqualified. Two candidates were not recommended. Three candidates including the appellant were

shortlisted. The appellant was recommended by the Evaluation Panel for promotion. The appellant scored 73% as against the 60% scored by each of his rivals.

- [4] The recommendations of the Evaluation Panel served before a Divisional Evaluation Panel chaired by the Divisional Commissioner. This panel declared that the minutes of the Evaluation Panel were null and void because they were insufficient and it replaced those minutes with its own minutes. It also concluded that the appellant and the other candidates had little or no experience in the core functions of the post. The upshot was that no recommendations for promotion were made and the vacant post was re-advertised.

The arbitrator's findings

- [5] The arbitrator's findings can be summarised as follows:

- (a) Post 6000 was a level 10 post, and in terms of clause 11(3) read with 13(5) of the National Instruction 1/2004, it ought to have been considered by the National Commissioner of Police, and not the Divisional Commissioner. Therefore there was non-compliance with the National Instruction in that the National Commissioner was not given an opportunity to consider the recommendation of the evaluation panel. (Para's 48 and 49 of the award).
- (b) The chairperson of the Divisional Evaluation Panel was above that of a Director which requires in terms of clause 82 that the chairperson of the panel for levels 8 to 10 must be at the level of a Director. Therefore there was non-compliance with the National Instruction. (Para 50 of the award).
- (c) There was a further violation of the National Instruction in that the Divisional Evaluation Panel consisted of more than five members. This was a violation of clause 8(3). (Para 51 of the award).

- (d) The Divisional Commissioner should not have been part of the Divisional Evaluation Panel. The purpose of excluding the Divisional Commissioner from sitting on the panel is for her or him to make an independent decision without his or her mind being contaminated. (Para 52 of the award).
- (e) The National Instruction does not give powers to the Divisional Evaluation Panel to nullify the minutes. In any case, even the minutes of the Divisional Evaluation Panel that was chaired by the Divisional Commissioner were not a true reflection of what transpired in that the panel's replacement of candidate Mathebe with Ishmael was not supposed to have happened. (Para 53 of the award).
- (f) 'The First Respondent did not comply with its Employment Equity Plan which, in terms of the priorities statistics an (sic) African Males were under-representative. Instead, the post was re-advertised and Coloured and White women, who were over-represented were appointed to the post. That shows bad faith on the part of the First Respondent.' (Para 55 of the award).
- (g) 'While the Second and Third Respondents did not apply for the post when it was initially advertised internally as they did not have the two years' experience, they were appointed to the posts when they were externally advertised and the applicant was not appointed despite the fact that the Applicant met the requirements of experience when he applied for the post internally.' (Para 56 of the award).

[6] The result is that, the arbitrator found that the Police Services had committed an unfair labour practice and, in view of the gross irregularity committed by the Divisional Commissioner on behalf of the Police Services and the bad faith on the part of Police Services, he awarded the appellant compensation in the amount of R181 983 and ordered the Police Services to pay the appellant's costs of the arbitration. (Paras 69 and 70).

The court *a quo*'s ruling

- [7] The court *a quo* examined the evidence presented at the arbitration particularly that presented by the appellant, and concluded that even though the appellant may have met the criteria for appointment, he lacked experience in the core functions of the post. The court *a quo* concluded that the arbitrator had not applied his mind to this issue.
- [8] The court *a quo* found that the arbitrator had misunderstood or not applied his mind to the National Instruction. Had he done so, he would have concluded, as did the court *a quo*, that only when a Divisional Commissioner makes a recommendation for promotion must the documentation be submitted to the National Commissioner for a decision. The Divisional Commissioner had not acted irregularly.
- [9] The court *a quo* examined the arbitrator's findings that the Police Services had acted in bad faith towards the appellant. The basis for this finding was that the Divisional Evaluation Panel exceeded the permitted number of members and that this was a significant violation of the National Instruction. The court *a quo* considered that there was no evidence of bad faith on the part of the Police Services. It remarked that the arbitrator did not explain why this violation was evidence of bad faith.
- [10] The court *a quo* held that the Evaluation Panel recommended the appellant and that the Divisional Evaluation Panel's interference with the view of the recommendation that the appellant did not have the necessary experience was within the spirit and meaning of the National Instruction.
- [11] The court *a quo* found that the arbitrator had ignored clause 13(6) and that this constituted a gross irregularity.
- [12] As regards the arbitrator's findings that the Police Services did not comply with the National Instruction on the basis that the chairperson of the Divisional Evaluation Panel was more senior than the required level of a Director, the court *a quo* found

that the appellant did not offer any valid reason as to why he was prejudiced by the chairperson, being at a higher rank of a Director. The court said:

‘The fact that the chairperson was at a rank higher than a Director did not prejudice the [appellant]. Bottom line prevailed - he had been with the [Police Services] for a rather short time, whether the Chairperson was of a rank higher than that of a Director and whether that panel consisted of five or seven people had no, if any, bearing on the validity of his application for promotion. If indeed there were minutes in his application, one would have suspected that someone on the extended panel would have drawn the attention of the Chairperson to such aspects. The fact that the recommendation lacked merit can be inferred from the evidence presented by Nkabinde as stated above.’ (Para 105 of the judgment.)

and

‘I therefore hold that the [appellant] was not prejudiced by the fact that the Divisional Evaluation Committee meeting consisted of more than five members, nor was it prejudiced by the fact that the chairperson was at a higher rank than that of a Director. Given the above, the [arbitrator] committed a gross irregularity. When he found that the non-compliance or violation as he had phrased it, constituted an unfair labour practice.’ (Para 108 of the judgment).

- [13] The court *a quo* found that the employment equity plan was not relevant to the question of his suitability for promotion. The appellant simply did not have the relevant experience. The court *a quo* noted that clause 2 of the National Instruction referred to “recognised experience” meaning any relevant experience in the Service or the Public Service at the required level and remarked:

‘However, given the fact that the post advertised was not a level 8 post, but a level 10 post and that the [appellant] had but five months of experience in the service of the [Police Services]. I hold not even this clause would have vindicated or entitled the [appellant] to be appointed to the position’. (Para 126 of the judgment.)

- [14] The appellant contended that the arbitrator committed a gross irregularity, when he did not take into account that it was the prerogative of the Police Services, as employer, not to promote anyone but to order that the post be re-advertised.
- [15] The court *a quo* pointed out that the re-advertised post was a second event that had no bearing on the appellant's dispute. The appellant was not even shortlisted when he applied in response to the re-advertised post.
- [16] The court *a quo* noted that even a candidate who obtained the highest rating in the assessment or highest marks or percentages did not have a legitimate expectation to be promoted. See paragraphs 1, 2, and 7 of the judgment. The appellant's case is that he had a right to promotion.

Peremption

- [17] When Mr Mogane, who appeared for the appellant, addressed the court, we inquired whether the appellant was entitled to process a dispute concerning his initial application for promotion as he had re-applied for promotion. Had the appellant perempted, abandoned or waived whatever rights he had regarding relief based on the initial application? Mr Mogane submitted that this was not the case. Mr Laka SC, on the other hand, espoused the proposition.
- [18] Peremption, abandonment or waiver is a factual question where the *onus* rests, in this case on the Police Services, to show that the appellant with full knowledge of his right, decided to abandon his right to seek relief regarding the initial application, whether expressly or by conduct plainly inconsistent with an intention to enforce it. See Innes CJ in *Laws v Rutherford* 1924 AD 261, *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 698 and *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704.
- [19] The Police Services did not raise this issue at the arbitration or in the court *a quo*. Had this been done, the appellant may have had an answer. It is doubtful whether it would be fair to decide this appeal on this issue especially as both applications relate to promotion post 6000.

Evaluation

- [20] There are two components to a complaint regarding a failure to promote an employee as an unfair labour practice. The one relates to the procedure followed by the employer. The other relates to the substantive merits and it concerns the suitability of the candidate for promotion to the post in question.

Promotion procedure in terms of the National Instruction

- [21] As the procedure for promotion is regulated by the National Instruction, it is desirable to set out the procedure mandated by the National Instruction in so far as it is relevant to this case. It will be seen that the procedure involved evaluation and sifting as the application progresses up the chain. The decision to promote a recommended candidate is vested in the Provincial or Divisional Commissioners (up to level 9) and the National Commissioner (levels 10 to 12).
- [22] Applications for promotion may be considered following an interview or without an interview. A letter dated 1 September 2006, emanating from the office of the National Commissioner, required applicants for level 10 and higher posts to be interviewed. This was not done. The parties seemed to be in agreement that the promotion process conducted in respect of the appellant was properly conducted without an interview. The recommendations of the Evaluation Panel together with all relevant applications of candidates are required to be submitted to a Divisional Evaluation Panel for consideration. The Divisional Evaluation Panel is entitled to review the Evaluation Panel's recommendation on wide grounds and substitute them with its own. (Clause 10(2)).
- [23] The chairperson of the Divisional Evaluation Panel is required to submit the recommendations of the panel and the applicable reports and the reasons for its review of the recommendations of the Evaluation Panel to the Divisional Commissioner. (Clause 10(3)).

- [24] Upon receipt of the recommendations of the Divisional Evaluation Panel, the Divisional Commissioner must satisfy herself or himself that the process took place in accordance with the National Instruction. (Clause 13(2)).
- [25] If the Divisional Commissioner is of the opinion that the recommendation for promotion does not address representivity at the level of the post in the business unit, but decides to nevertheless approve such a promotion, she or he must record this in writing with a full motivation. (Clause 13(3)).
- [26] The Divisional Commissioner may accept or reject the findings and recommendations of the Divisional Evaluation Panel. Should the Divisional Commissioner not approve a recommendation of an Evaluation Panel, she or he must record the reason for her or his decision in writing. (Clause 13(5)). If the Divisional Commissioner does not approve the promotion of a recommended candidate, she or he may consult with, in this case, the Divisional Evaluation Panel if she or he deems necessary and either promote ie recommend another candidate of her or his choice from the preference list submitted by the Evaluation Panel, or direct the post to be re-advertised. (Clause 13(6)).
- [27] Should a Divisional Commissioner recommend the promotion of a candidate, the Divisional Commissioner must forward all the relevant documentation and recommendations to the National Commissioner. (Clause 13(4)). The role of the Divisional Commissioner concerning applications to posts at Level 10 and higher was considered by the Constitutional Court in *South African Police Service v Solidarity obo Barnard*¹ where it was said that:

‘The Instruction sets out the parameters within which a selection panel must work. Its promotion guidelines vest a wide discretion in the National Commissioner. Although the interviewing panel and the Divisional Commissioner must recommend a list of suitable candidates, the recommendations are not binding on the National Commissioner. Rule 13(4) stipulates that appointments to salary level 8 and higher must be forwarded to the National Commissioner for his approval. He or she may

¹ 2014 (6) SA 123 (CC).

decline to appoint or leave a vacancy unoccupied. The ultimate decision remains with him or her.’² [Footnote omitted]

[28] It is clear that should the Divisional Commissioner not make a recommendation, the material regarding the candidates is not sent to the National Commissioner. See the evidence of Supt Kemp and clause 13(1). The National Commissioner has enough to do without the further burden of wading through applications which her senior officers consider unmeritorious.

[29] No one has a right to promotion. See clause 3(3) and 4(2).

Evaluation of the process followed

[30] In this case, the first panel recommended the promotion of the appellant. It sent the necessary recommendation and documentation to the Divisional Evaluation Panel. The Divisional Evaluation Panel should have met with its own chairperson having the rank of a Director. It was required to examine the recommendation and motivation and could have reviewed the recommendation of the first panel and sent its own recommendation to the Divisional Commissioner. However, the Divisional Commissioner conflated the last two processes.

[31] The arbitrator was of the opinion that this was an irregular step. In my opinion, the arbitrator’s decision is a reasonable one. The Divisional Evaluation Panel, once it was appointed, performs a distinct role from the next phase which involves the Divisional Commissioner reviewing the recommendation of the Divisional Evaluation Panel. The Divisional Evaluation Panel was entitled to meet in the absence of the Divisional Commissioner. The absence of the head of the division was necessary so that the officers could arrive at an independent decision according to their own insights. Thereafter, the Divisional Commissioner would be entitled, after consultation, to accept or reject the recommendation. The conflation of these steps deprived the Divisional Evaluation Panel of their role in the promotion process. It downplays the value of process and it devalues the role of the divisional selection panel.

² At para 47.

[32] Had the Divisional Commissioner allowed the Divisional Evaluation Panel to play its role, she might have had the benefit of its own wisdom. The Supreme Court of Appeal pointed out in *Solidarity obo Barnard v South African Police Service*³ (reversed on appeal but not on this issue) with reference to the National Commissioner but of relevance to a Divisional Commissioner:

‘It is safe to assume that the interviewing panels are constituted to serve a purpose. They are a management tool, comprised in the present case of senior police officers to be of assistance to the National Commissioner when he makes a final decision on whether to fill a vacancy. Thus, one can conclude that even though he is not bound by a panel’s evaluation and recommendation, the National Commissioner must at the very least give consideration to and engage with what is put before him by them. He discounts relevant and material factors at his peril, rendering him liable to legal challenge.’⁴

[33] The arbitrator seems to have appreciated this although he expressed it in terms of formality rather than substance.

[34] The process followed in the case of the appellant was therefore deficient. It is necessary to consider the substantive merits of the appellant’s bearing in mind the procedural deficiency.

Substantive promotion

[35] At the outset, it must be noted that whether the appellant met the requirements for promotion to the post must be judged, as far as possible, on the basis of his written application form.

Minimum experience

[36] The first issue that needs to be addressed is whether the appellant had the minimum experience as required by clause 6(1) for the post on level 10. As regards this requirement, a minimum of three years uninterrupted in the Police Service on

³ [2014] 2 BLLR 107 (SCA).

⁴ At para 60.

level 9 or a minimum of three years recognisable experience (ie service in the Public Service) on level 9 was stipulated. However, the letter referred to above reduced the period of three years to two years and also permitted employees, on level 8, who were otherwise qualified, to apply for promotion to a post on level 10.

[37] This raises the question on what level was the appellant in the Police Services and more importantly, in view of his short service with the Police Services, what level was he on in the public service for the uninterrupted period of two years prior to his application? The application form does not require a candidate to set out the level of the posts he has held or holds but in his evidence, the appellant says he was on level 8 for a period of six years.

[38] The court *a quo* considered that the appellant did not meet the required minimum experience. However, the court *a quo* did not make a finding on the level of his post in the Police Services. The court *a quo* overlooked his six year experience on level 8 in the public service.

[39] Neither the Divisional Evaluation Panel nor the Divisional Commissioner disqualified him on the basis that he lacked the minimum experience. The court *a quo* misdirected itself on this issue.

[40] I am satisfied that the matter must be judged on the basis that the appellant was entitled to apply for promotion.

Core experience

[41] Post 6000 was for Assistant Director: Social Work Services - Disability Management. The post description specifies:

‘Participation in policy, projects, planning international liaison and research prog, regarding disability issues. Execute middle and snr management responsibility. Co-ordinate disability man prog. Evaluate and co-ordinate feedback received from prov. Assist management in implementation of disability management strategic plan. Registration as a social worker is a statutory requirement for promotion to this post.’

[42] The appellant described his experience in his application form as follows:

'1995-03-03 to 1995-04-331. Transferred to Department of Correctional Services. Social worker (Department of Social Services Mpumalanga Province). Duties performed: provided therapeutic services to the community members through pro-active and re-active programmes. Represented the Department of Social Services in various community forums (welfare, disability and policing). Executed middle management responsibilities facilitated the implementation of transformation policies through coordination of the establishment of transformation units/forums in the province. Coordinated workshops for training the forums on the roles and responsibilities.'

'1999-05-012 to 2006-03-31. Transferred into Department will transferred to South African Police Services. Chief social worker (Department of Correctional Services. Duties coordinated HIV/AIDS, disability and victim empowerment programmes for the management area. Participated in the formulation of employee assistance program policies for the management area. Participated in a research, which evaluated the relevancy of social work services for the Department of Correctional Services. Executed middle management responsibilities when delegated, which included Supervision. Rendered rehabilitation services to offenders.'

'2006-04-01 until present. Chief Social Worker. Duties performed: execute some management tasks when delegated. Facilitate the implementation of the HIV-AIDS and disability management pro policies in workplace. Render pro-active and re-active employee assistance services to management and front line employees. Advised SAPS and police, social worker management regarding trends that can influence the work performance and do strategic human resource and then planning and development.'

[43] The minutes of the evaluation panel were done away with. But as that panel recommended the appellant one ought to be able to infer that that panel considered that the appellant had sufficient experience. But this would be incorrect.

[44] Because of the conflation of the Divisional Evaluation Panel and the Divisional Commissioner's function, the arbitrator could not know what that panel, if it had met

on its own, would have decided. But the arbitrator knew that this panel, under the chairmanship of the Divisional Commissioner, recommended that the post be re-advertised saying: 'The shortlisted candidates have little or no experience in the core functions of the post as advertised.'

[45] The reason for the appellant having not been considered by the Divisional Evaluation Panel/Divisional Commissioner was the lack of core experience for the post. Consequently, the commissioner who presided over the arbitration proceedings was required to evaluate this question with regard to the evidence and with appropriate deference to the evaluation.

[46] The evidence before the commissioner by the Assistant Provincial Commissioner was that the appellant had the potential to perform the duties of the post. The view of Director Stratford, who served on the Divisional Evaluation Panel, was that the appellant did not have sufficient experience. The commissioner did not make a specific finding on the suitability of the appellant having regard to the Divisional Panel's Evaluation of his core experience for the post and the evidence. But, clearly, this was the central issue and the best evidence, aside from the appellant's own assessment of his suitability was that of the Assistant Commissioner who was of the view that he had potential; meaning that he did not yet have the experience but he would be able to acquire it.

[47] The substantive issue as regards the appellant's dispute with his employer relates to the issue of his core experience in the field of disability management. The determination of whether the appellant's experience including "recognized experience" was such as to make him suitable for promotion is primarily a matter for the employer and the arbitrator was required to defer to this decision when it is taken following a fair and proper process. In this case the procedural deficiency does not assist the appellant.

[48] The assessment by the court *a quo* on this aspect is spot on and put paid to the other complaints raised by the appellant including his reliance on the employment equity plan.

Conclusion

[49] A failure to follow the prescribed process may often lead to a decision which is substantively flawed. The so-called no difference principle, is not easily applied in the Labour Court nor in this Court mainly because it devalues the role of process. But in this case, it is clear that even had the prescribed process been faithfully followed, the appellant was simply not qualified, at that time, for promotion to post 6000.

Compensation for procedural unfairness

[50] This brings me to the question whether any compensation should be ordered for the procedural irregularities which transpired in the promotion process. In deciding this issue, this Court is at large to decide it afresh as the Arbitrator's award of compensation also took substantive unfairness into account. I am of the view that it would not be fair nor appropriate to order compensation but the appellant should not be mulcted in costs. The arbitrator awarded the costs of the arbitration to the appellant. This too was set aside on review. As the Divisional Commissioner had been at fault, albeit without malice, it is appropriate that the Police Services bear the costs of arbitration but not the costs of appeal.

Reinstatement

[51] As there is partial merit in the appeal, it is appropriate to order that the failure to prosecute the appeal be condoned and the appeal be reinstated on the roll.

[52] The appellant has been partially successful; so has the Police Services in opposing the appeal. It seems fair to make no order as regards the costs of appeal.

Order

[53] In the premises, I make the following order:

1. The failure to prosecute the appeal is condoned and the appeal is reinstated on the roll.

2. The appeal is partially upheld.
3. The order of the Labour Court is replaced by the following:

‘1. The arbitration award save for the order for costs is reviewed and set aside.’
4. There is no order as to the costs of the appeal.

AA Landman JA

Sutherland JA and Mngqibisa-Thusi AJA concur in the Judgment of Landman JA

APPEARANCES:

FOR THE APPELLANT: Mr C Mogane of Mohlaba and Moshwana Inc.

FOR THE THIRD RESPONDENT: Adv Laka SC

Instructed by the State Attorneys.