

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NO: JR 244/07

In the matter between:

MINISTER OF SAFETY AND SECURITY

1ST APPLICANT

**NATIONAL COMMISSIONER: SOUTH
AFRICAN POLICE SERVICES**

2ND APPLICANT

AND

A HATTINGH

1ST RESPONDENT

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

2ND RESPONDENT

J. TOHLANG N.O

3RD RESPONDENT

M.A MOHLAPHULI

4TH RESPONDENT

JUDGMENT

NYATHELA AJ

Introduction

[1] This is an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA) of an arbitration award issued by the third respondent (the arbitrator) on 21 August 2007 under case number PSSS752-06/07.

[2] In terms of the award, the arbitrator ruled that: *“6.1 I find that by failing to promote the applicant the respondent committed an unfair labour practice.*

6.2 I accordingly order the respondent to promote the applicant to the rank of captain with effect from the date of the award.

6.3 No order as to costs”.

[3] It is this award which applicant seeks to review and have it set aside.

[4] The application is opposed by the first respondent.

The parties

[5] The first applicant is the Minister of Safety and Security who is cited herein in his official capacity as nominal head of the South African Police Services.

[6] The second applicant is the National Commissioner for the South African Police Service cited herein in his official capacity.

[7] The first respondent A. Hattingh is an employee of the first respondent.

[8] The second respondent is the Safety and Security Sectoral Bargaining Council (SSSBC), a statutory council established in terms of the LRA.

[9] The third respondent is J. Tohlang who is cited herein in her official capacity as the arbitrator who handed the award under the auspices of the SSSBC.

[10] The fourth respondent is M.A Mohlaphuli who is cited herein as the successful candidate who currently occupies the post sought by the first respondent.

The facts

[11] The first and fourth respondents both applied for a post of Senior State Accountant and were both shortlisted. The post was ultimately awarded to the fourth respondent.

[12] The first respondent lodged a grievance and requested reasons for her non appointment. First respondent was advised that the post was awarded to the fourth respondent due to equity. The grievance procedure was followed by first respondent. After the grievance remained unresolved, the first respondent referred a dispute to the second respondent. At the Bargaining Council, first respondent argued that:

10.1 Fourth respondent failed to declare in her interview that she had received a departmental sanction;

10.2 The fourth respondent was on sick leave for two years prior to applying for the promotion; and

10.3 The evaluation panel was not properly constituted.

[13] The arbitrator found amongst others that the panel was not properly constituted in accordance with Clause 8.2 of the National Instruction which provides that:

“Panels must be appointed as follows:

*Level 8-10: Chairperson of the panel must be on the level of a Director.
Members of the panel must at least be on the level of a Senior Superintendent or equivalent rank”.*

[14] In the present case, it is common cause that the panel consisted of a director, senior superintendent and a superintendent.

[15] Applicant seeks to review the order and have it set aside.

Grounds for review

[16] In the founding affidavit, applicant contends that:

14.1 The arbitrator committed gross irregularity by finding that the panel misdirected itself by not enquiring what the fourth respondent was doing in the past four years. This information was irrelevant given that fourth respondent met the established criteria for the post in that she was inspector from 1994.

14.2 The arbitrator committed gross irregularity in the conduct of the proceedings, alternatively, exceeded her powers as arbitrator by ordering that the first respondent must be promoted to the post in question. This was beyond her powers given that:

14.2.1 She found that the panel was not properly constituted. Thus any decision of the interview panel including her own scoring, would be vitiated. The only course open was to order that a new interview panel be constituted to consider the applications; and

14.2.2 The filling of the post was circumscribed by the equity plan.

14.3 The arbitrator acted unjustifiably and irrationally in that:

14.3.1 There was no basis for her finding that, on the information before the panel, the fourth respondent was not properly qualified for the position.

14.3.2 She disregarded the applicant's equity plan and proceeded to order the first respondent's promotion as if the equity plan was not in place.

14.3.3 There is no rational connection between her decision and the evidence properly before her.

Applicant's Submissions

[17] Applicant's representative reiterated the grounds for review stated above.

First Respondent's Submissions

[18] She was scored higher than the fourth respondent. The equity report provided that no white females were to be promoted. However, three white females were promoted to level 3. According to the applicant, if no suitable candidate could be found, the Provincial Commissioner may give a Directive to disregard the equity plan. The panel did not give the commissioner the opportunity to exercise this discretion.

[19] The panel was improperly constituted.

[20] The arbitrator's decision is correct and should be confirmed.

Legal position

- [21] In *Le Roux v CCMA & others* (2000) 6 BLLR 680 (LC), the court held that
“‘exceed’ does not mean only that which is awarded is greater than that which can permissibly be awarded. It simply means that the award is one which the commissioner did not have the power to make”.
- [22] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) Ngcobo J at para 276-7 offered the following explanation: *“Where a commissioner renders an award that is inconsistent with his or her powers conferred on a commissioner by the LRA, ...the commissioner exceeds his or her powers and the award falls to be reviewed and set aside under section 145(2)(a)(iii) of the LRA. Given the constitutional right to fair labour practices, ...an award which is manifestly unfair to either employer or employee can hardly be said to be consistent with the powers conferred upon a commissioner to make an award that is fair.If section 145(2)(a)(iii) of the LRA were to be construed as permitting a manifestly unfair award to go unchallenged, then its provisions would fall foul of section 23 of the Constitution. A construction which requires a commissioner to render an award which is fair is consistent with section 23 and must be preferred to a construction which would render section 145 (2)(a)(iii) unconstitutional.*
- [23] In *Sidumo (supra)* Navsa AJ at para 72 stated the following: *“In deciding how commissioners should approach the task of determining the fairness of a dismissal, it is important to bear in mind that the security of employment is a*

core value of the Constitution which has been given effect to by the LRA. This is a protection afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterizes employment in modern developing economies...”

- [24] In *Sidumo (supra)* the court held that in reviewing an arbitration award, the test should be whether “...*having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision maker could not reach.*”

Analysis

- [25] In this matter, it is common cause that the selection committee which interviewed the first and fourth respondents was improperly constituted. The commissioner proceeded to find that in view of the defect in the composition of the selection committee, the assessment made by the committee was vitiated. However, instead of simply setting aside the assessment made by the panel, the commissioner proceeded to use the same scores of the improperly constituted panel to promote the first respondent.

- [26] In my view, the commissioner’s reasoning is very much flawed in this regard in that on the one hand, he accepted that the assessment of an improperly constituted panel is vitiated but on the other he proceeded to accept the vitiated assessment to justify a promotion of the first respondent. In other words, the commissioner has found that the assessment of an improperly constituted panel cannot justify the promotion of the fourth respondent but he proceeded to find

that the same assessment of the same improperly constituted panel can justify the promotion of the first respondent. This is illogical.

[27] Clearly the commissioner has committed a gross irregularity which is discernable from the reasoning leading to the conclusion he has reached in this matter.

Order

[28] In the premises I make the following order:

- (i) The award issued by the arbitrator under case number PSSS752-06/07 dated 21 August 2007 is reviewed and set aside.
- (ii) The matter is remitted to the second respondent to be heard by a commissioner other than the third respondent.
- (iii) There is no order as to costs.

Nyathela AJ

Date of Hearing : 19 June 2009

Date of Judgment : 22 September 2009

Appearances

For the Applicant : Adv. Baloyi

For the Respondent: A. Hattingh appeared in person