



Not Reportable
Of interest to other judges

REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case No: JR 2364/08

In the matter between:

GG GOUDEN

First Applicant

SOUTH AFRICAN POLICE SERVICES

First Respondent

SUPERINTENDENT F E STEYN

Second Respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Third Respondent

E BESTER (N.O.)

Fourth Respondent

JUDGMENT

HEAD NOTE: Review – unfair labour practice – promotion – material procedural irregularity – appropriate relief – remitted on existing record

LAGRANGE, J

Introduction

[1] The applicant has applied to review and set aside an award issued in his favour on 28 August 2008 by the fourth respondent, an arbitrator appointed by the Safety and Security Sectoral Bargaining Council ('the SSSBC'), in terms of section 145 of the Labour relations act 66 of 1995 ('the LRA'). The award concerned and alleged unfair labour practices concerning the failure to promote the applicant to the post of Senior Superintendent, post number 2, Commander Organised Crime, North East Rand, Germiston.

[2] The applicant has also applied for condonation for the late filing of the review application which was approximately five weeks' out of time. The explanation for the lateness related to the need to consult with the applicant's legal insurers and obtain an agreement on the attorneys representing the applicant, which was only done on 13 October 2008. The application was filed on 6 November 2008. The explanations is reasonably satisfactory and the delay was not unduly excessive. Moreover, the respondent did not appear to feel prejudiced by the matter as it did not oppose it. In the circumstance, the condonation application for the late filing of the review application succeeds.

Factual background

- [3] The applicant has been employed by the SAPS since 1984. He applied for the above-mentioned post which was advertised and was interviewed after being short listed as a candidate. He scored the third highest points in the interviews. The only persons to do better than him were the acting incumbent in the post, Superintendent Nel and the second respondent Superintendent Steyn. Steyn scored the highest mark, followed by Nel. Steyn scored 82% and the applicant 70%.
- [4] Notwithstanding the rankings of the candidates by suitability as measured by their score, the applicant was placed second after Steyn as a recommended nomination for the post. The applicant did not dispute that Steyn was an appropriate candidate for appointment, but as he said under cross-examination, "*The procedures were all wrong*".
- [5] The applicant's essential argument was that Steyn was not one of the original eight short-listed candidates, and therefore should never have been interviewed. The logic of his argument was that, if it were not for this procedural irregularity, Steyn would never have been interviewed and therefore would never have been recommended as a candidate. If this irregularity had not occurred, it followed according to the applicant that he would have been the first choice of the interview panel followed by Nel.
- [6] There was also a suggestion in the evidence that in recommending Steyn for the post that recommendation was made by the panel on the basis that the members of the panel were under the impression that Steyn was acting in the post at the time instead of Nel. The applicant contends likewise that if it were not for this misunderstanding, he would have been appointed.
- [7] When one of the interview panellist, Director Palko when asked whether the applicant, as the second recommended appointee, would not have got the post if Steyn had not been appointed his answer was 'no'. He explained that according to his recollection the applicant's was put forward as the

panel's second recommendation for equity reasons. The logic was that if Steyn was not appointed, then the second person to be offered the post should not be another white candidate which Nel was.

The award

[8] The arbitrator found that two of the panellists who gave evidence were well aware that Steyn was not acting in the promotion post at the time of the interviews and found that it was unlikely the panel could have been misled that he was, but he found that the recommendation of the panel to approving authority that he was acting was misleading. Nevertheless, she concluded that it was not possible to tell if this was the decisive factor that was ultimately considered in appointing Steyn, in the sense that if this representation had not been made, she could not be confident the applicant would necessarily have been appointed.

[9] She also found that the fact that the panel had not short-listed Steyn, was a material irregularity because it was clear it should have been done by the panel. Such conduct she held was unfair in terms of section 186(2)(a) of the LRA.

[10] Although the arbitrator then held that if it was not for the unfair inclusion of Steyn in the interview, the applicant would have been appointed. However, she decided it would not be appropriate to make a finding in respect of the validity of Steyn's appointment in circumstances where the panel did not object to Steyn's inclusion on the short-list. She then decided to award compensation in the absence of Steyn's appointment being set aside and in the absence of a suitable alternative position available.

The review

[11] The applicant contends essentially that the relief awarded by the arbitrator was out of line with her finding, which made the award of relief irrational and unjustifiable.

[12] The applicant also argued at the hearing that he was the best candidate, on the evidence before the panel, though this ground of review was not clearly articulated in his notice of motion. It was simply the contention in his notice of motion that, but for the procedural irregularity, he would necessarily have been appointed.

[13] He also argued that it was not correct in law that Steyn's appointment had to be set aside in order for him to be promoted to the post.

[14] At the hearing, Mr Ascar, for the applicant, emphasised that the thrust of the applicant's case on review was that he ought to have obtained substantive relief given that the arbitrator found that he would have been appointed if it were not for the irregular inclusion of Steyn in the interviews.

Analysis

[15] It must be said that the record provided left much to be desired, as the bundle of documents was missing. Nevertheless both parties were content to proceed on the basis of the transcript and the award.

[16] The essential question is whether it was irrational for the arbitrator to only award the applicant compensation, or whether she ought to have awarded him ongoing relief in the form of a protective promotion to the rank but not the post occupied by Steyn.

[17] Effectively, the arbitrator granted the applicant relief for a procedural irregularity by awarding him compensation from the date of the appointment until the date of the award.

[18] It is true that there is a tension in the arbitrator's findings. On the one hand she found that but for the irregularity of the improper short-listing of Steyn, the applicant would have been appointed. On the other hand, she found that it was inappropriate for her to make a finding on the validity of

Steyn's appointment in particular because the selection panel did not object to Steyn's inclusion on the short-list.

[19] I agree that it is hard to reconcile the arbitrator's conclusions. If indeed she found that but for the irregularity Steyn would have been successful, then that would seem to be determinative of the matter. In truth her finding amounts to more than a finding of a mere material procedural irregularity: it is implicit that she found that it also robbed the applicant of an appointment that was rightfully his. On the other hand, she seems to have decided that substantive relief was not appropriate because the panel had no difficulty in interviewing Steyn despite the irregularity. This suggests that she found that the substantive outcome might have been justified, which is something she also hints at by suggesting she was unable to decide on the validity of Steyn's appointment. In the circumstance, it cannot be said she unequivocally decided whether or not there was substantive unfairness in not appointing the applicant to the post.

[20] In such a case, it is difficult to understand why the applicant was only entitled to compensation for the period during which the procedural irregularity had not been remedied. On the face of it, the arbitrator should have also considered how to remedy the substantive injustice the applicant suffered, if indeed she felt he ought to have been appointed. She could have done this without setting aside Steyn's appointment, but by promoting the applicant, with benefit, to the rank of the post until such time as he was appointed to a post at such rank, or promoted to a higher position, sometimes referred to as a 'protective promotion'.

[21] In the circumstance, it appears to me that the relief flowing from the arbitrator's finding of procedural irregularity should be set aside because of the abovementioned contradictions in her findings and her failure to make an unequivocal finding on the question of substantive unfairness.

[22] Ordinarily, the court would substitute its own findings in this regard in a matter of this nature. However, any adjudicator reconsidering the appropriate relief will be compelled to consider whether or not the finding of procedural irregularity had the effect of denying the applicant substantive fairness, because it is essentially this that the arbitrator was grappling with. It is well established that for substantive relief to be justified, the adjudicator must be satisfied that the aggrieved applicant would have been appointed, on a balance of probabilities, not merely that they qualified for it and would have made a suitable appointee.

[23] The absence of the bundle of documents relied on by the arbitrator is an obstacle to the court in this regard and it seems that any reconsideration of the appropriate relief would require this to be reconstructed. For this reason, it seems to me that the only practical solution is to require the applicant with the respondent's co-operation to reconstruct the bundle and for the complete record to be set down before another arbitrator for reconsideration without the need to hear further evidence.

[24] However, the failure of the applicant to attend to this before the matter was heard inclines me to disallow the applicant an order of costs.

Order

[25] In the light of the above:

- a. The arbitrator's finding in her award dated 28 August 2008 on the appropriate relief due to the applicant flowing from her finding that there was a material irregularity in the appointment process leading to the appointment of the second respondent is set aside.
- b. The third respondent is directed to set the matter down before another arbitrator to determine the appropriate relief including any substantive relief which ought to be granted to the applicant

flowing from the arbitrator's finding of a material irregularity in the appointment procedure.

- c. The arbitrator appointed by the second respondent shall determine the appropriate relief based on a reconstructed record of the arbitration proceedings under review in this matter.
- d. Each party is to pay its own costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of judgment: 17 January 2011

Date of hearing: 14 September 2010

Appearances:

For the applicant: C Ascar instructed by Fluxmans Inc.

For the respondent: T K Manyage instructed by the State Attorney