

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case no.: JR 3007/09

In the matter between:

THE MINISTER OF CORRECTIONAL SERVICES

Applicant

and

POPCRU obo PETER SELOLO

First Respondent

ADVOCATE M J MOLAPO N.O

Second Respondent

THE GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL

Third Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] The applicant seeks to review and set aside the award of the second respondent (“the commissioner”) under case number PSGA 1360-08/09 in terms of section 145(1)(a) of the Labour Relations Act, 66 of 1995 (“the Act”). The applicant further seeks condonation for the late filing of the review application. The application is opposed by the first respondent.

Background facts

[2] The applicant advertised 3128 positions nationally on salary grade 7 (Correctional Officer Grade 1) on 12 November 2007. The first respondent (“the employee”) applied for a position and was shortlisted but was not appointed despite meeting the minimum requirements for the position. He was at the time on salary grade 6 (correctional officer grade II). He referred an unfair labour practice dispute in terms of section 186 (2)(a) of the Act to the third respondent. The commissioner found that the failure to appoint him was unfair and issued an award in his favour.

[3] The criteria for promotion from salary level 6 to 7 (correctional officer grade II to grade I) were set out in departmental guidelines (paragraph 3.2) as follows:

- grade 12 ;
- 7 years' applicable experience ;
- at least three years' service in the rank of correctional officer grade II;
- average performance rating (at least 65%) for 2006/2007.

Paragraph 7.3 provided that officials are considered in terms of the abovementioned criteria and where there are still more qualifying officials than the available posts the following additional selection criteria may be applied:

- area of locality
- seniority (i.e number of years on current salary level)
- performance rating in respect of the 2006/2007 year under review
- passing of the prescribed promotional exams/further studies etc.

Paragraph 3.4 of the national advertisement provided that *"officials should take note that all applications for posts will be subject to a selection process and promotions approved will inter alia depend on the number of vacancies available"*.

[4] The employee testified that he complied with the minimum criteria as set out in paragraph 3.2 and given the fact that there were thus more applicants than posts available, the additional selection criteria would have to be applied. In this regard he was stationed in the area i.e. at the Bavianspoort Correctional Center where the promotions were to take effect and this was a factor in his favour. He was also more senior than all the preferred candidates except one, and should have been entitled to promotion on the additional selection criteria. He conceded however that the other candidates scored higher than him on the performance rating when applying the minimum selection criteria, but still contended that had his performance rating of 77.14% been taken into account it would have resulted in the number of applicants exceeding the requirements and hence would have triggered paragraph 7.3.

[5] The applicant alleged that all the successful candidates were appointed in terms of paragraph 3.2, thus dispensing with the need to apply the additional selection criteria. It did not lead any evidence at the arbitration, and submitted that the employee was outclassed by the preferred candidates on the performance rating, which was a minimum requirement of the position.

Grounds of review

[6] The conclusion reached by the commissioner is not a reasonable conclusion that could have been reached on the evidence presented. The commissioner, Ms Matlejoane submitted on behalf of the applicant, was confused about the application of the criteria in paragraphs 3.2 and 7.3, and concluded that once the employee met the minimum requirements he was entitled to a promotion. However he took into account only two requirements i.e. the grade 12 qualification and seven years' applicable experience. He ignored the other minimum requirements, specifically the performance rating of at least an average of 65% in the previous year. This indicates that he deliberately disregarded evidence to the effect that the first respondent was outclassed by the preferred candidates on the performance rating.

[7] The commissioner misdirected himself in finding that the applicant was required to apply the additional selection criteria, even though this is clearly only applicable where there are more qualifying officials than available posts. In doing so he disregarded material evidence that it was not necessary for the applicant to apply paragraph 7.3 in that all the preferred candidates were eligible for promotion simply by application of the initial criteria, and that they had all scored more than 80 % on their performance ratings. He failed to apply his mind to the fact that paragraph 7.3 would only be invoked if the employee also had a performance rating as high as the other candidates. He would then have been eligible for promotion, resulting in more qualifying candidates than posts, and this would have triggered the application of the additional criteria.

[8] The commissioner committed misconduct in that he failed to act as an impartial decision maker. He committed a gross irregularity in that he ignored material facts placed before him and took into account irrelevant considerations and argument not based on the evidence.

The award

[9] The commissioner sets out the issue to be determined as being whether the applicant's conduct was unfair in relation to the non-promotion of the employee, and if so, whether he is entitled to the relief sought. He concludes as follows :

"Since the applicant and other qualifying candidates had already met the requirements in 3.1, therefore making it to the selection stage, I concur that the respondent had to effect the promotions by applying its criteria in paragraph 7.3 above. The respondent in its own document providing for the guidelines, warns all officials that the applications will be subject to a selection process. It is only paragraph 7 that provides for this process as outlined above. The respondent's case is that they were a limited number of promotional posts. He concedes that had there been more posts the applicant would have been promoted. His only justification for the non- promotion is based on the contention that the preferred candidates were rated higher than the applicant at the qualifying stage provided in paragraph 3.

The respondent's argument in this regard does not in my view pass the scrutiny of paragraph 3.4 above. The latter is very clear what process has to succeed the shortlisting of qualifying candidates. In other words had all the qualifying candidates number be (sic) equivalent to the available posts the applicant would have been promoted. Since the qualifying candidates were more than the available posts the selection process in accordance with paragraph 7.3 would then be invoked. The applicant equated the criteria in 7.3 to a house, which would require a complete phase after another to become real. He contends that the criteria as outlined in its sequence in 7.3 had to be followed by the respondent. He would had that taken place, have made it by first considering him being stationed at the Bavianspoort prison, then being more senior to all the other respondents except Khoza (who is at the same number of years of seniority). He believes the criteria in his respect should have ended at the seniority requirement, advantaging him as compared to the other respondents. Having referred to the spirit of the advert by referring to paragraph 3.3 above, I conclude that the respondent by not adhering to its selection process in terms of the advert read in its whole context, acted unfairly by not promoting the applicant."

[10] The applicant was ordered to effect the promotion of the employee to the promotion post with effect from 1 April 2008 and also pay him the difference in salary.

Analysis and conclusion

[11] In regard to the merits of the review it is by now trite that the test applicable is as set out in *Sidumo & Another v Rustenburg Platinum Mines Limited & Others* (2007) 28 ILJ 2405 (CC), namely that a decision is reviewable if it is one which a reasonable decision maker could not have reached.

[12] In opposing the review Mr Basson submitted that the employee's version at the arbitration was not disputed and the commissioner's conclusion therefore could not be interfered with. Furthermore, the applicant's submission that it was not obliged to apply paragraph 7.3 was based on a misreading of the circulars advertising the positions, in that it failed to distinguish between the minimum requirements that all applicants had to comply with and the additional selection criteria that were triggered by more applicants meeting the minimum criteria than available posts. It followed as a matter of logic that the process in paragraph 7.3 would then have to be complied with. The reference to being "outclassed" in terms of a performance evaluation did not follow grammatically or logically from any interpretation of the circulars. This is clear from the simple meaning of paragraph 3.1 which refers to "*the criteria to be considered for posts...*" and the reference to "*additional criteria*" where the number of qualifying candidates exceeds the number of posts. The applicant elected not to tender evidence which could have clarified the confusion surrounding the application of the criteria. In the circumstances the commissioner correctly rejected the applicant's version and his award cannot be said to be one that could not be made by a reasonable decision-maker on the evidence before him.

[13] It is trite that the *Sidumo* test requires consideration of the decision in the context of the material presented and in the present matter the commissioner was undoubtedly constrained in his interpretation of the applicant's conduct given its election not to lead evidence. However, at the same time it cannot be disputed that

the reasoning of the commissioner is eminently flawed in that even on a literal interpretation his assumption of the automatic triggering of the additional criteria cannot be sustained. Even if the employee met the minimum criteria, which was not in dispute, he would still only be entitled to consideration for promotion, which is subject to the employer's discretion and has to be exercised fairly. As for the reference to the "*spirit*" of the circulars, it is unclear from the record what evidential basis exists for this. This would in my view render the award reviewable on the *Sidumo* test.

[14] I am of the view that good cause exists for the granting of condonation and that the delay involved is minimal. In the circumstances the review succeeds and there is no need to determine the section 158(1)(c) application.

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

1. *The award is reviewed and set aside.*
2. *The matter is remitted to the third respondent for determination de novo by a senior commissioner other than the second respondent.*
3. *There is no order as to costs.*

Bhoola J

Judge of the Labour Court of South Africa

Date of hearing : 17 February 2011

Date of judgment: 25 February 2011

Appearance:

For the Applicant: Ms M B Matlejoane instructed by the State Attorney

For the Respondent: Adv J L Basson instructed by Groskopf Attorneys