

**THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

Case: JR 885/07

In the matter between:

Reportable

MINISTER OF SAFETY AND SECURITY

Applicant

and

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

First Respondent

Z S SIBEKO (N.O.)

Second Respondent

M J MTUNGWA

Third Respondent

JUDGMENT

Head notes: (failure to promote - single interview - two posts)

LAGRANGE, J:

Introduction

1] This is an application to set aside an award issued by second respondent an arbitrator appointed by the Safety and Security Sectoral Bargaining Council on 21 February 2007. The arbitrator held that the applicant's failure to promote the third respondent, Superintendent Mtungwa, to the rank of senior superintendent was procedurally and substantively unfair. He then ordered the applicant to appoint the third respondent to that rank backdated to the date of appointment of the candidate who was successfully appointed in post number 2210. The third respondent also launched an application to dismiss the review application because of delays in finalising the review application, but did not persist with this application and the parties argued the merits of the review.

2] The application was filed on 15 April 2007 which meant it was five days late. The applicant sought condonation for this, which was unopposed. Essentially the explanation for the delay was that the instruction to appoint counsel to draft the review papers was only received by the state attorney on 30 March 2007 and the first consultation could only be held on 3 April, after which documents still had to be forwarded to counsel to complete the

drafting exercise. The delay is minimal and the explanation for the delay is acceptable in relation to the length of the delay. Below I consider the merits of the review application fully, from which it is apparent that I consider them to be strong. For these reasons the late filing of the review application is condoned.

3] Prior to the arbitration the parties agreed to a pre-arbitration minutes. In terms of those minutes certain facts were agreed as being common cause namely:

- a. Supt. Mtungwa had applied for two posts, one being post 2208 (Station Commissioner: Piet Retief), the other being post 2210 (Station Commissioner: Tonga).
- b. Both posts were designated for African female candidates. However no African female was shortlisted for post 2208, a deal was an African female candidate for post 2210.
- c. Supt. Mtungwa was shortlisted for both posts but not recommended for appointment in either. No reasons were provided for not appointing him.
- d. Supt. Mtungwa was only interviewed for post 2208 and not

for post 2210.

^{4]} In terms of the same minutes the parties were in dispute about whether the applicant had acted fairly by not interviewing Supt. Mtungwa for the second post and in not appointing him. He also questioned whether the employer had acted fairly in not following the Employment Equity plan at the Piet Retief station, but this was not an issue which ultimately played any role in the dispute.

The arbitrator's award

^{5]} To answer the question whether or not the applicant had acted improperly by not interviewing Supt. Mtungwa for the second post, the arbitrator relied on the provisions of National Instruction 1/2004. The pertinent provisions selected and relied on by the arbitrator read as follows:

"Paragraph 7: applications for promotion to posts read with paragraph 9 sub paragraphs 5

(1) The National Commissioner may restrict the number of posts employees may apply for.

(2) an application for an advertised post must –

- (a) be made on the form determined by the National Commissioner;
- (b) be received at the appropriate office within the time limit specified in the advertisement;
- (c) mention the post numbers of the posts applied for;
- (d) contain sufficient information showing that the candidate meets the applicable promotion requirements as set out in paragraph 6 (10);
- (e) be completed, signed and dated; and
- (f) the documentation requested in the advertisement must be attached.

(3) An employee who applied for an advertised post must be considered for the post if she or he –

- (a) meets the applicable promotion requirements;
- (b) meets the requirements of this specific post;
- (c) is in all respects suitable for promotion; and
- (d) is able to render services for at least twenty four months in the higher post.

(4) An employee may only apply for promotion to a post at the next higher level. Ranks or levels may not be skipped.

Paragraph 8: Appointment of evaluation panels

(7) A secretary must be assigned to assist the selection panel by rendering administrative services during the selection process and may not form part of the evaluation panel. A secretary of a panel may not be a candidate for any advertised post in respect of which the panel has been appointed.

Paragraph 9: Generic functions of evaluation panels (where the interviews are conducted or not)

(5) Candidates must be considered for all the posts they have applied for taking into account any restriction by the National Commissioner on the maximum number of posts for which candidates may apply.

Paragraph 11: evaluation process where interviews are to be

conducted

(2) When scheduling interview, secretary of the panel must inform the candidates in writing of the date, time and venue of the interview as well as of the post(s) for which the candidates will be assessed. In the event that a candidate cannot attend a scheduled interview without a valid acceptable reason, he or she will forfeit the opportunity of being assessed for the specific post."

(Arbitrator's own emphasis)

6] On the basis of his interpretation of the provisions set out above the arbitrator drew four conclusions. Firstly, he decided that the National Commissioner may restrict the number of posts employees may apply for. Secondly, once an employee applied for a post that employee has to be considered for the post if he meets its requirements. Thirdly the secretary of the interview panel may not be part of the panel. Lastly, if a candidate does not attend a scheduled interview without a good reason the candidate forfeits the opportunity of being assessed for the

specific posts.

7] Applying these principles to the matter before him, the arbitrator found that there was no restriction on Supt. Mtungwa applying for both posts, but in deciding not to interview him for the second post this amounted to a restriction which was not authorised by the National Commissioner. He also found that because Supt. Mtungwa met the requirements for the post he ought to have been considered for it, and the fact that the marks he obtained in the first interview were transferred to evaluations for that post did not amount to consideration for the post as envisaged by the National Instruction. For that to have taken place he had to be interviewed and considered together with the other candidates who applied for that post.

8] The arbitrator dismissed the employer's contention that if Supt. Mtungwa had been interviewed for the second post he would have been advantaged over other candidates, because the employer had shortlisted him for both posts and invited him for interviews. Therefore he should have been considered together with the other candidates for post 2210.

9] Supt. Mtungwa was invited to both interviews for the posts he had applied for and attended the first interview for the Piet Retief post. He claimed that he was not advised that he would not be required to attend an interview for the second post until after the interview was completed when he was advised of this by the secretary of the panel. The arbitrator found that the secretary acted outside of the course and scope of the duties in advising him of this.

10] The arbitrator also concluded that, by not interviewing Supt. Mtungwa for the Tonga post, he lost the opportunity to be considered together with the other candidates. He also concluded that he probably would have done better when compared with the other Tonga candidates than he did in the interview for the Piet Retief post.

Grounds of review

11] The applicant raises a number of grounds in support of its review application, which are set out below.

^{12]}The applicant submitted that the arbitrator's finding that Supt. Mtungwa was not considered for that post was not sustainable because his score from the first interview was transferred to the evaluation of the Tonga candidates and that his application was indeed considered. The chairperson of the selection panel confirmed in his testimony that he was considered but not found to be the most suitable candidate. Moreover, whereas Supt. Mtungwa was not placed in the list of the five most preferred candidates for the Piet Retief post, he was ranked third in the five most preferred candidates for the Tonga post.

^{13]}It must be mentioned that a number of candidates had applied for more than one station commissioner post in the province, and the composition of the interview panel was the same for each post except that the area level member of the panel varied. Also, the same questions were asked in each interview and each candidate was scored when they were interviewed. Thus, in the case of Supt. Mtungwa, if he had been interviewed for the Tonga position after the Piet Retief interview he would have had a second opportunity to deal with the same questions he had just answered in the previous interview.

^{14]}In defending the arbitrator's decision, Supt. Mtungwa submits that the single interview approach could not have been fair because a score given in relation to the Piet Retief post could not provide an objective assessment for the Tonga post, and at the time of his interview he did not know it would be used as the basis for the second interview. It should be noted in this regard that if there was any area specific character to each interview, every candidate who was shortlisted for more than one post would have been in the same position as Supt. Mtungwa insofar as they would not have had an opportunity to deal with that aspect of the post they were not interviewed for.

^{15]}Because the composition of the panel was virtually the same and because the interview questions were the same, the employer believed that it would give persons who were interviewed twice an unfair advantage over persons who had only applied for one post and were interviewed for that post alone. The applicant contends that the arbitrator did not properly consider this when he decided that Supt. Mtungwa would not have been advantaged *vis-a-vis* other candidates if he was interviewed a second time. The applicant also points out the

arbitrator provided no reasons for this conclusion, indicating he did not apply his mind to the question.

^{16]}Secondly, the applicant argues that the arbitrator was simply speculating when he concluded that Supt. Mtungwa would probably have done better in the second post as there was no information before the arbitrator about the other candidates against which she could have made such an assessment.

^{17]}In reaching the conclusion that the secretary of the selection panel acted improperly in advising Supt. Mtungwa that he was not required to attend the second interview, the applicant maintains that the arbitrator did not apply his mind to the role and function of the secretary of the panel. Her role as set out in the National Instruction was clearly an administrative one and in advising Supt. Mtungwa that he would not be required to attend the second interview she was not performing a deliberative function.

^{18]}The applicant also attacked the arbitrator's finding that by excluding Supt. Mtungwa from the second interview he had been denied the opportunity to be assessed to which he was

entitled. It submitted this was based on an elementary misreading of the provision in the National Instruction relating to an applicant forfeiting the right to be assessed if he fails to attend an interview without just cause.

19] The arbitrator stated that he was required to decide whether the applicant acted improperly in not interviewing him for the second post and if so whether to order that he be appointed to the post of similar rank or status as he requested. The applicant contends that the arbitrator appeared to consider this relief to be the only relief he should consider, whereas section 193(4) of the Labour Relations Act, 66 of 1995 ('the LRA') required him to determine the dispute on terms that he deemed reasonable which meant that he had a discretion to be exercised judicially, and he provided no reasons for the relief he decided on and appeared to believe was the only appropriate relief he should consider.

Evaluation

20] The arbitrator's assessment of the panel secretary's role is unsustainable on the basis of what she actually did, which was simply to advise the third respondent of the panel's agreed

approach to all the interviews, namely that he would not be interviewed again. It is patently clear she did not take this decision but merely conveyed it, which was in keeping with her function as described in the National Instruction. There is simply no justification for concluding that she performed a deliberative function of any sort in her own right.

^{21]}Equally, no factual foundation of any substance was provided in evidence for determining the suitability of the third respondent vis-a-vis the other candidates for the Tonga post that could have enabled the arbitrator to reasonably conclude that Supt. Mtungwa would probably have succeeded had he been interviewed.

^{22]}Even if his conclusion that Supt. Mtungwa had been prejudiced by not being interviewed twice was correct, at best that would have been the basis for a finding of some kind of procedural unfairness. In any event, that could only have been the starting point for an enquiry into the substantive fairness of Supt. Mtungwa's non-appointment. In ***Ndlovu v Commission for Conciliation, Mediation and Arbitration and others (2000) 21 ILJ 1653 (LC)***, Wallis AJ held that the second stage of a dispute over an alleged unfair failure to promote an employee requires an employee:

"[12] ... to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost

invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise.”¹

23] Without a full and detailed consideration of evidence why the panel acted irrationally in appointing another candidate to the Tonga post, the arbitrator had no basis for reaching a conclusion that he ought to be compensated by an appointment to the same rank level of the post for which he had applied.

24] The heart of Supt. Mtungwa's complaint was that he should have been interviewed twice and he was prejudiced by not doing so. That failure in turn allegedly led to him not being appointed to the post as he then would have been selected as the best of the preferred candidates. It is true that the composition of the interviewing panel changed by one member if the post under consideration fell within a different area. But the arbitrator clearly failed to evaluate the merits of the employer's case for only interviewing candidates once, particularly when the questions asked were the same, and candidates were all scored on the basis of the evaluation of their answers to those questions. It is inconceivable on any rational basis how the arbitrator could have concluded that a candidate who was interviewed twice in interviews following the same format by the

¹ At 1655-6, paras [11] – [12]

same panel would not be advantaged over candidates who only had one interview.

25] Moreover, he failed to consider the actual results of the rankings of the candidates for the Tonga post in deciding that Supt. Mtungwa was prejudiced, namely that he did better in the rankings for the post where he did not participate in an interview than in the post in which he did.

26] On the question of whether Supt. Mtungwa's candidacy for the Tonga post was effectively not entertained, there is an inescapable inference that he clearly was seriously considered based on the fact that he was ranked as one of the five preferred candidates for the Tonga post: his absence from that interview did not prevent him being seriously considered. The arbitrator could only have reached the conclusion he did by ignoring this material evidence.

27] In the circumstances, I am satisfied that the award stands to be set aside for one or more of the reasons mentioned.

28] In relation to substituting for the arbitrator's award, it is clear from the reasons why it should be set aside that the arbitrator ought not to have found that the failure to promote Supt. Mtungwa to the Tonga post was procedurally and substantively unfair.

Order

29] In the circumstances an order is made in the following terms:

- a. The applicant's late filing of the review application is condoned.
- b. The award of the second respondent, issued on 21 February 2007 under case number PSSS435-05/06 is reviewed and set aside.
- c. The second respondent's findings are substituted with a finding that the applicant's failure to appoint him to the post of Tsonga Station Commissioner at the rank of Senior Superintendent was neither procedurally nor substantively unfair.
- d. No order is made as to costs.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 21 October 2010

Date of judgment: 01 November 2011

Appearances:

For the applicant: L M Moloisane instructed by the State Attorney

For the third respondent: S T I Mbethe