



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 866/09

In the matter between:

KWA-ZULU NATAL DEPT OF TRANSPORT

Applicant

and

U DEVAR

First respondent

GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL

Second respondent

COMMISSIONER PUNGI PILLAY

Third respondent

SJC SIMELANE

Fourth respondent

Heard: 18 November 2011

Delivered: 30 November 2011

Summary: Review – ULP – failure to promote – application of employment equity plan. Employer did not accept recommendation of selection panel. Arbitrator found ULP in terms of s 186(2)(b) of LRA. Award reasonable. Application for review dismissed with costs.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant (“the Department”) advertised a position for assistant manager, office services. The position was at salary level 9 in the public service. The first respondent, Ms U Devar (“the employee”) applied for the position. At the time, she was acting in the post of assistant manager at salary level 9 in another section of the Department.
- [2] The employee was shortlisted and interviewed by a selection panel. She scored the highest of all shortlisted candidates at 82.8%. The selection panel recommended that she be appointed.
- [3] The head of Department rejected the recommendation of the selection panel, and re-advertised the same post.
- [4] The employee applied again, and, once again, she obtained the highest score at 84.9%. The next highest score was 73% obtained by the fourth respondent, Ms SJC Simelane.
- [5] Once again the selection panel recommended the employee for the post. Once again the Head of Department rejected the recommendation. Ms Simelane, who scored 11.9% less in the opinion of the selection panel, was appointed instead.
- [6] The employee referred a dispute to the second respondent, the General Public Service Sectoral Bargaining Council. The third respondent, commissioner Pungi Pillay (“the arbitrator”), found that the Department had committed an unfair labour practice and ordered the Department to promote the employee to the post of Assistant Manager: Office Services at salary level 9 at its head office in Pietermaritzburg.

Grounds of review

- [7] The Department seeks to have the arbitrator's finding reviewed and set aside. Its main complaint is that the employee was not a member of a designated "target group", being black women; and that the arbitrator did not take this into account when coming to the conclusion that she did.
- [8] In order to consider this argument, it is unfortunately necessary to refer to racial classifications under the now repealed Population Registration Act. This is so because the Department insists on making a distinction between "black African" women and "Indian" women, despite the clear definition in the Employment Equity Act¹ that "black people" is a generic term that means "Africans, Coloureds and Indians". For the sake of this judgment, I have to record that the employee, Ms Uven, would have been classified as "Indian" and Ms Simelane as "African" under apartheid legislation.

Consideration of the award

- [9] The award spans 47 pages. The arbitrator sets out the evidence led comprehensively. She then applies the provisions of section 186(2)(a) of the Labour Relations Act² ("the LRA") and the relevant case law to the evidence. In considering whether the award is reasonable as envisaged in *Sidumo*³, I need only consider the pertinent aspects of the award that the Department takes issue with.
- [10] The Department has implemented an affirmative action and employment equity policy. In order to implement this policy, the selection panel was called upon to use certain guidelines during the selection process in order to facilitate "numerical targets" according to race and gender. These guidelines included the following:

"3.1 the selection committee must recommend the highest scoring candidate on condition that he/she is from the target group based on the numerical goals as recommended by the Assistant Manager: Employment Equity;

¹ Act 55 of 1998.

² Act 66 of 1995.

³ *Sidumo & another v Rurstenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC).

3.2. should the highest scoring candidate not be from the target group, the selection committee must recommend the target candidate provided that there is not more than a 10% difference between the top scoring candidate target candidate."

- [11] Firstly, it is common cause – as the arbitrator noted – that, in this case, there was more than a 10% difference between the employee who was the top scoring candidate and the one who was appointed.
- [12] There was a further dispute as to whether the employee was from the "target group" or not.
- [13] The advertisement for the post did not specify any target group. It simply stated that: "The Provincial Administration of KwaZulu-Natal is an equal opportunity affirmative action employer."
- [14] It was common cause that Indian women were "undersubscribed" in the Department. However, the applicant relied on the fact that Indian women were "oversubscribed" in the directorate: corporate services in which the advertised post fell and "African" women were "undersubscribed".
- [15] The chairperson of the selection committee, Mr Riaz Ahmed, gave evidence at arbitration. He also developed the employment equity plan for the Department, including the employment equity targets. He confirmed that Indian women were undersubscribed in the Department.
- [16] The arbitrator considered these aspects and the relevant case law, especially the decision of the Supreme Court of Appeal in *Gordon v Department of Health, KwaZulu-Natal*.⁴ She came to the conclusion that the selection panel that followed a balanced approach based on policy, his words and legislation in recommending the employee as the most suitable candidate for the post. She found that it was clearly unfair of the Department not to accept this recommendation as it did not follow its own guidelines. The arbitrator therefore found that the Department conduct constituted an unfair labour practice as envisaged in section 186(2)(a) of the LRA.

⁴⁴ (2008) 29 ILJ 2535 (SCA); [2008] 11 BLLR 1023 (SCA).

[17] Even though the facts in *Gordon* are distinguishable in that the Department in that case had not implemented an employment equity plan, the reference to the case is not misguided, as the applicant would have it. In the case before her, the arbitrator took into account the Department's own employment equity plan. In terms of that plan –

17.1 Indian women were undersubscribed;

17.2 Even if the highest scoring candidate was not from the “target group”, a candidate from the target group could only be appointed if there was no more than a 10% difference between their scores; that was not the case here; and

17.3 the selection panel recommended the employee, ie the highest scoring candidate by a large margin, in terms of the Department's own policy.

[18] I can find nothing unreasonable in this conclusion. On the contrary, it is the decision of the Department, in contradistinction to the recommendation of its own selection panel, that was unreasonable, irrational and arbitrary.

[19] In these circumstances, and taking into account the considerations of law and fairness, the Department should be ordered to pay the employee's costs.

Conclusion

[20] The application for review is dismissed with costs.

A J Steenkamp
Judge

APPEARANCES

APPLICANT: Ms MM Posemann
Instructed by Lambert & associates.

FIRST RESPONDENT: Mr B Macgregor of Macgregor Erasmus.

LABOUR COURT