

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2999/07

In the matter between:

TENJIWE MADYWABE

Applicant

and

F. VAN DER MERWE

First Respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Second Respondent

MINISTER OF SAFETY AND SECURITY

Third Respondent

SOUTH AFRICAN POLICE SERVICE

COMMISSIONER

Fourth Respondent

Heard : 10 October 2012

Order : 10 October 2012

Summary : Application to review dismissed, principles re-stated.

JUDGMENT-REASONS FOR ORDER

Introduction

- [1] This was an application to review and set aside an award by the first respondent ("the arbitrator") in terms of which the arbitrator held that the applicant's claim is dismissed with costs. The applicant is currently employed as a police official in the rank of Sergeant.
- [2] The parties had agreed that it was unnecessary to lead oral evidence during the hearing and argued the matter before the arbitrator on the papers (a bundle of documents).
- [3] The crux of the issue before the arbitrator was whether the employer (the Minister of Safety and Security and the South African Police Service Commissioner) committed an unfair labour practice in withdrawing the applicant's promotion to a higher rank on the basis that she had failed to disclose the fact that she had a pending disciplinary hearing against her. The question to be answered was whether the applicant, at the time when she completed the application form knew or ought to have known that the disciplinary hearing against her had not yet been finalised. The applicant's case was that she had acted in good faith when she completed her application and that she was not aware of the fact that the employer still considered proceeding with the disciplinary hearing against her.
- [4] The applicant's case was that the findings of the arbitrator are reviewable. It was further argued that the arbitrator's actions were "unjustifiable and irrational" in finding, *inter alia*, that it was unreasonable for the applicant to have assumed that there no longer was a case pending against her.
- [5] In a well-reasoned and detailed award the arbitrator summarised the facts that were placed before the arbitration. More in particular, the arbitrator recorded that when the disciplinary hearing involving the applicant was postponed, she was informed that a notice would be given her to appear at the hearing should the office of the Provincial Commissioner decide to proceed with the disciplinary hearing. The applicant did not disclose in her application that the disciplinary proceedings against her had not been finalised. It was only after the

applicant's promotion that the Head Office became aware of the fact that the disciplinary proceedings against the applicant was still pending. The applicant was afforded an opportunity to submit written representations as to why her promotion should not be withdrawn. The applicant's submissions were considered before a decision was made to withdraw her promotion. In withdrawing her promotion, the employer relied on clause 15(3) of the National Instruction 1/2004 which states that failure to disclose information regarding pending disciplinary action may result in the withdrawal of promotion of such employee.

- [6] The arbitrator after having evaluated all the evidence, arrived at the conclusion that the applicant knew, at the time when she completed the application form or ought to have known that the disciplinary hearing against her had not been finalised. In this regard the arbitrator also took into account that the disciplinary hearing against her was not withdrawn but postponed indefinitely, *inter alia*, because of her own absence from the hearing. The arbitrator was mindful of the fact that it was difficult to decide whether the applicant had intentionally misled the employer bearing in mind that no *viva voce* evidence was led which had deprived him of the opportunity to make a credibility finding in respect of witnesses. However, despite this fact the arbitrator was satisfied that the withholding of the information was not *bona fide*. At least the applicant should have made enquiries if she was uncertain. The arbitrator also concluded that it was not reasonable to have formed the view that the disciplinary hearing would never have proceeded. Lastly, the arbitrator also took into consideration the fact that the applicant had been afforded a reasonable opportunity to be heard prior to deciding to withdraw her promotion.
- [7] In arriving at this decision the arbitrator took into account the overwhelming and undisputed evidence that was placed before the arbitration. I can find no reason to interfere with the decision. I am further in agreement with the respondent's submission that the merits of the pending hearing are irrelevant for purposes of this application.
- [8] I am satisfied that the arbitrator has arrived at a reasonable conclusion. I am therefore of the view that the review should be dismissed. I have, despite the

fact that there is an on-going relationship between the parties, decided to order that the applicant pay the costs.

[9] Therefore the following order is made;

9.1 The application to review is dismissed.

9.2 The applicant is ordered to pay the costs.

AC BASSON J
Judge of the Labour Court

APPEARANCES:

For the Applicant : Mr. J.M Gouws of Johan Gouws Attorneys

For the Respondent : Advocate Makhubela

Instructed by : The State Attorney

LABOUR COURT