



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR832/11

In the matter between:

SUPT. MM ADAMS

Applicant

and

**THE SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

First Respondent

JOYCE TOHLANG

Second Respondent

MINISTER OF SAFETY AND SECURITY

Third Respondent

**SOUTH AFRICAN POLICE SERVICE;
COMMISSIONER OF POLICE**

Fourth Respondent

Delivered: 25 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant, a Superintendent in SAPS sought promotion to the rank of Director (previously Brigadier). When his application was unsuccessful, he

lodged an alleged unfair labour practice dispute at the First Respondent (the SSSBC). The dispute was arbitrated by the Second Respondent (the Arbitrator), who issued an award on 3 March 2011 under case number PSSS567-05/06, in which she dismissed the claim. With this opposed application, the Applicant seeks an order reviewing and setting aside and/or correcting that arbitration award.

Background:

- [2] The facts of this case are fairly common cause. The Applicant sought promotion to the rank of Director, Detective Services, Commercial Branch, which position was advertised in 2005. A panel consisting of four individuals did not shortlist the Applicant on account of his limited management experience in respect of the position applied for. Aggrieved at the decision, the Applicant lodged an internal grievance on 28 October 2005 which could not be resolved. He had then referred an unfair labour practice dispute to the SSSBC on 3 November 2005. It was further common cause that the Applicant resigned from SAPS prior to the award being issued.

The arbitration proceedings:

- [3] The matter came before the Arbitrator for a hearing on 27 August 2010. This was after it had been postponed several times before by the parties due to a number of reasons including that documents that had been requested by the Applicant had not been provided. On the date that the dispute was heard, the parties agreed not to lead oral evidence but to have the dispute determined on the basis of documents and written heads of argument to be submitted at an agreed date. Nevertheless the Arbitrator had to wait for these documents as none of the parties had complied with the time frames agreed upon.
- [4] The Secretariat of the SSSBC had to be called upon to intervene by the Arbitrator and only thereafter did the Applicant submit his documents on or about 3 November 2010, some two months after the hearing date. The SAPS failed to submit any documentation or written heads of argument, and the Arbitrator decided to dispense of the matter based solely on those documents submitted by the Applicant and his written heads of argument.

- [5] The issue for determination before the Commissioner was whether the failure to promote the Applicant by the SAPS constituted an unfair labour practice as contemplated in section 186 (2) of the Labour Relations Act¹ (the LRA).

The award:

- [6] In her award, the Arbitrator considered the Applicant's submissions to the effect that another candidate, a white male, was appointed to the position that he had applied for. His argument was nevertheless that the SAPS as a designated employer was obliged to comply with the Employment Equity Act² (the EEA), and its own Employment Equity Plan in eliminating discrimination.
- [7] The applicant's further contention was that the promotion panel failed to apply its mind to considerations of equity, and that the reason for not shortlisting him was not in accordance with the provisions of section 5 of the EEA. As the Commander of the Detective Services, Commercial Branch, the Applicant considered himself to possess the necessary experience for the post. His further contention was that he had various qualifications including BA in Police Science, LLB and LLM, and that at most, the SAPS should have sent him for a managerial course.
- [8] In her analysis, the Arbitrator had regard to the meaning of an unfair labour practice as defined in section 186 of the LRA and pointed out that no oral evidence was presented before her to show that the Applicant indeed had the necessary experience and to show that the panel's decision not to shortlist him was unfair. The Arbitrator further took into account the Applicant's own version that he indeed had limited experience and concluded that there was no evidence to suggest that the SAPS had acted in an inconsistent, arbitrary or capricious manner against the Applicant.
- [9] The Arbitrator further took into account that the Applicant's claim appeared to be based on an alleged discrimination as he had contended that the post advertised was a designated post. The Arbitrator found no evidence of this contention, and concluded that the Applicant had been on a fishing expedition

¹ Act 66 of 1995 as amended

² Act 55 of 1998

to find some irregularities from documentation he sought from SAPS. The Arbitrator further concluded that there was no evidence to suggest that the Applicant was superior to any candidate, and the mere fact that he was unhappy with not being appointed did not imply that SAPS had committed an unfair labour practice

Grounds of review:

- [10] The award was attacked on the basis that it was not justifiable in relation to the reasons given for it having regard to the evidence presented to the Arbitrator, or alternatively, that there was no rational connection between the material placed before the Arbitrator and the conclusions reached. It was submitted that the Arbitrator failed to apply her mind to the evidence and facts presented to her; that she committed a gross irregularity by failing to apply her mind to the evidence, misunderstood the evidence and attributed motives to the Applicant which could not reasonably be drawn from the evidence.

Evaluation:

- [11] The test on review is fairly well established. The reviewing court in accordance with the *Sidumo*³ test, asks the question whether the decision reached by the Arbitrator is one that a reasonable decision-maker could not reach on the material placed before her⁴. It has also been held that an award would be susceptible for a review where it is established that the decision of the Arbitrator was “entirely disconnected with the evidence” or is “unsupported by any evidence” and “involved speculation by the Commissioner”⁵.

³ *Sidumo v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC), held that [at par 110]:

⁴ See also *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2779 (SCA) at para [12] where the SCA held that the test

“... involves the reviewing court examining the merits of the case ‘in the round’ by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the Commissioner was not one that could reasonably be reached on the evidence and other material properly before the Commissioner. ... The reasons are still considered in order to see how the Commissioner reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether apart from those reasons, the result is one that a reasonable decision-maker could reach in the light of the issues and the evidence.”

⁵ *Herholdt* at par [13]

- [12] The dispute before the Arbitrator was whether the SAPS had committed an unfair labour practice by not promoting the Applicant. It was common cause that no oral evidence was presented to the Arbitrator, and further that she had determined the matter solely on the documentation presented by the Applicant including his written heads of argument. To the extent that this was what the Arbitrator was confronted with, it was submitted on behalf of the Applicant that there was nothing to rebut his version and therefore the Arbitrator should have found in his favour.
- [13] When it is alleged that an arbitrator failed to apply her mind to the evidence and facts presented to her, or failed to apply her mind to the evidence, or misunderstood the evidence, the assumption is that there was indeed evidence presented to the arbitrator. Concerns have always been raised over the tendency by parties at bargaining councils to simply burden arbitrators with documents and written heads of argument with an expectation of a favourable outcome. In such circumstances, parties do not even bother to hold a proper pre-arbitration hearing and submit comprehensive minutes in that regard. No effort is made by the parties to agree on a stated case capturing the salient issues that are common cause or those that are in dispute. In circumstances such as in this case where there are material disputes of fact, the parties' approach in this regard can only at best be described as lackadaisical.
- [14] It is accepted that despite the parties' agreement to adopt this clearly untenable approach in circumstances where there are material disputes of fact, the arbitrator ordinarily has a say in the matter in that he or she can call for oral evidence. This is premised on the principle that parties must be afforded an opportunity to have their say in respect of the dispute⁶. In the same token, it is also accepted that parties are entitled to restrict the ambit or scope of arbitration and statutory proceedings⁷. Where however the parties adopt a short-circuited approach as in this case, and parties did not comply with their undertakings to file documents and written heads of argument as

⁶ *Gold Field Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration & others* (2014) 35 ILJ 943 (LAC)

⁷ See *Shoredits Construction (Pty) Ltd v Pienaar NO and Others* 1995 (16) ILJ 390 (LAC) at 393

agreed and on time, the arbitrator in my view was entitled to dispose of the matter in a manner she deemed fit as contemplated in section 138 (1) of the LRA. This was even more appropriate in circumstances such as in this case, where the hearing of the dispute had previously been postponed on several occasions.

- [15] Furthermore, where the parties had not presented oral evidence to support their respective cases in circumstances where there are material disputes of fact, it cannot be said that the arbitrator failed to consider 'evidence', or misunderstood 'evidence' in that strictly speaking, there can be no evidence before the arbitrator where no oral evidence to substantiate documents is submitted. It is trite that documents on their own do not constitute evidence, and written heads of argument can never be considered as evidence.
- [16] As a result of the SAPS not filing its documents as promised, the Arbitrator had essentially treated the matter as unopposed. This however did not necessarily imply that it should have been plain sailing for the Applicant, in that the Arbitrator still had to be satisfied that a proper case of unfair labour practice had been made out.
- [17] Central to the dispute was whether the Applicant had the necessary managerial experience to be appointed to the post. This required of the Applicant to place evidence before the Arbitrator that he indeed possessed the necessary managerial skills, and to show that he should at the most have been short listed. It is trite the onus was on the Applicant to establish the existence of an unfair labour practice⁸. In this case however, starting with the

⁸ See *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others* (2013) 34 ILJ 1156 (LC) at para 19. See also *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 248 (LAC) at para 73

Where the Court held that :

".... An employee who complains that the employer's decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. This is not one of those cases such as disputes relating to unfair discrimination and disputes relating to freedom of association where if the employee proves the conduct complained of, the legislation then requires the employer to prove that such conduct was fair or lawful and, if he cannot prove that, unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of item 2(1) (b) matters, the Act does not say so because it was not intended to be so."

pre-arbitration minutes concluded by the parties, nothing of substance in regards to the factual issues was addressed by the parties.

- [18] In the written heads of argument, the Applicant had essentially blamed the SAPS for not being able to present or prove his case in that he was not furnished with the documents he had requested. On this contention alone, his claim should have been dismissed. Furthermore, the Applicant had made reference to the EEA and the SAPS' Employment Equity Plan and it is not known in what context this submission was made as it was completely irrelevant to the issue at hand. To the extent that the Applicant claimed that he was discriminated against in not being shortlisted in that a white male was appointed to the post, the Arbitrator correctly pointed out that she had no jurisdiction over the matter, and again, his claim should have been dismissed on that basis. The written heads of argument filed for the purposes of these review proceedings do not take the Applicant's case any further in that the same submissions as those before the Arbitrator were made.
- [19] In the light of the above, there is no basis upon which it can be said that the Arbitrator's conclusions in the light of what was placed before her did not fall within a range of reasonableness. There was nothing placed before her to indicate in what material respects the Applicant possessed the necessary experience for the post in question. The Arbitrator dealt with each contention raised in the Applicant's written heads of argument, and I fail to appreciate how it can be said that she had failed to apply her mind to the issues before her. The Applicant hopelessly failed to discharge the onus placed on him to prove that the failure to either shortlist or appoint him constituted an unfair labour practice, and based on his own version that he was unable to prove his case, or that his claim was based on an alleged discrimination, the Arbitrator's decision cannot be faulted.
- [20] It is not sufficient for an employee to merely allege that an unfair labour practice had been perpetrated where it is not shown in what respects the employer's conduct was capricious or motivated by irrelevant considerations. It is trite that an employee has no right to a promotion except in terms of statutory/contractual right to promotion. The employee is only entitled to a fair

opportunity to compete for a position and a fair consideration of his or her application and nothing more. To this end, there is no basis to interfere with the Arbitrator's award.

- [21] In regards to the issue of costs, it is taken into account that the Respondents did not comply with their undertakings before the Arbitrator and did not file their documents or written heads of argument when requested to do so by the Arbitrator and the SSSBC. In my view, it was extremely opportunistic on the part of the Respondents to seek to oppose this application at this late stage. Furthermore, it was common cause that the Applicant resigned before the arbitration proceedings or the award could be issued. In his referral form, the outcome he sought from the arbitrator was to be promoted to the rank of Director. In the light of his resignation and the outcome he sought, it is apparent that the application before the court is superfluous. To this end, considerations of law and fairness dictate that a cost order should not be made.

Order:

- a) The application to review and set aside the arbitration award dated 3 March 2011 issued under case number PSSS567-05/06 by the Second Respondent is dismissed.
- b) There is no order as to costs.



Tlhotlhamajje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:

Mr JM Gouws of Johan Gouws Attorneys

On behalf of the First Respondent:

Adv. S Tilly

Instructed by:

State Attorney

LABOUR COURT