



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no. D915/13

In the matter between:-

E P SWARTS

Applicant

and

NATIONAL COMMISSIONER SOUTH AFRICAN

POLICE SERVICES

First Respondent

ASHA SEWPERSAD NO

Second Respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Third Respondent

AN SIKHAKHANE

Fourth Respondent

Heard: 8 January 2015

Delivered: 20 January 2015

Summary: Review in terms of S145 – unfair labour practice – promotion – Arbitrator failed to apply her mind to whether the candidate appointed to the post met the advertised requirements for the post – award reviewable.

JUDGMENT

NAIDOO AJ

- [1] This is an application to review and set aside the arbitration award by the second respondent (“the arbitrator”) dated 8 August 2013.
- [2] The arbitrator found that the applicant has failed to prove that the decision not to promote her constituted an unfair labour practice and the application was accordingly dismissed.

Background facts

- [3] The applicant who holds the rank of Captain has been in the employ of the first respondent since 14 January 1987. She has held the position of Staff Officer to the Deputy Provincial Commissioner: Operations since 1 October 2000.
- [4] On or about 15 June 2011, the vacant post of Staff Officer to the Provincial Commissioner (Post no. 7/06/11 - level 10) was advertised internally. On 21 June 2011, the post and the advertisement were withdrawn by the Provincial Commissioner.
- [5] On 3 July 2011, the same post was advertised externally in the Sunday Times newspaper. The applicant, A N Sikhakhane (“fourth respondent”) and Captain M Mhlongo were amongst the candidates shortlisted and interviewed for the post. The fourth respondent, who is a personal assistant and the only candidate amongst the final six who did not hold the rank of Captain, scored the highest during the interview with 64.4%. The applicant scored the second highest with

61.1% and Captain M Mhlongo scored the third highest with 57.7%.

[6] The selection panel made the following recommendation:

'A N Sikhakhane is recommended (sic) if she can't take the post Capt M Mhlongo is recommended due to equity followed by Capt E P Swarts. Should non (sic) of the recommended candidates take up the post it should be re-advertised'.

[7] The fourth respondent was appointed to the post with effect from 1 January 2012.

[8] The applicant referred an unfair labour practice dispute to the third respondent regarding the failure to promote her to the post. She sought a protected promotion alternatively, compensation. Prior to the conciliation and subsequent arbitration of the dispute, the applicant applied to have the fourth respondent joined as a party to the dispute on the basis that she had a substantial interest in the outcome of the proceedings. Captain Mhlongo was not joined as a party to the proceedings.

[9] The arbitrator made the following findings:

'In this instance I am not satisfied that the applicant has proven to me that but for the unfair conduct, she would have been appointed, because according to the preferred list of candidates, (Sikhakhane) scored the highest whilst the applicant scored the second highest, but notwithstanding that in the event of (Sikhakhane) not taking the post, Capt Mhlongo who scored third highest was recommended because of equity followed by the applicant.

.....The applicant's contention is that she stood out head and shoulders above Sikhakhane who was merely a typist and it was impossible for Sikhakhane to have scored the highest. However there were no documents available and hence nothing to suggest that the panel did not apply their minds in appointing Sikhakhane.

The applicant also testified that there were no documents at the arbitration to indicate that Sikhakhane would have within a reasonable period of time have

acquired the ability to perform in the post; that the panel considered (sic) their minds because there was no equity plan which was considered by the chairperson and there was no evidence of satisfactory performance by Sikhakhane or the second candidate and no documents to prove their suitability for the post.

....In this case the employee did not even prove any unfair conduct, let alone a causal connection between non appointment and alleged unfair conduct.

I find that the applicant has failed to discharge the onus of proving, on a balance of probability, that the decision not to promote her, constituted an unfair labour practice towards her’.

The requirements for the post

- [10] The requirements for the post as advertised was a relevant NQF 6 or equivalent qualification with three years proven managerial experience in the specific field. It is common cause that an NQF 6 is a three year degree or diploma.
- [11] It is further common cause that the fourth respondent only had a matric qualification which is the equivalent of an NQF 4. Additionally, she did not appear to meet the three years managerial experience criterion. Major General Radebe who was a member of the selection panel testified that the fourth respondent had indicated during the interview that she did perform some of the functions of the person who previously occupied the vacant post after he resigned. Even if her representations are correct, it could not have been for a period of at least three years as required. More importantly, the shortlisting for the post would have been done on the basis of the fourth respondent’s application and her *curriculum vitae* amongst other supporting documents. There is no indication in any of those documents that she performed any functions beyond her post as personal assistant.
- [12] Had the arbitrator applied her mind to the evidence and the other material before her, she ought to have found that the fourth respondent did not satisfy the requirements for the post and should never have been shortlisted. It follows that

her appointment to the post is irregular and falls to be set aside (*Manana v Department of Labour* [2010] 6 BLLR 664 (LC)).

- [13] Whilst the appointment of the fourth respondent constitutes unfair conduct on the part of the first respondent, this does not entitle the applicant to the relief that she seeks, that is, a protected promotion. In the case of *Minister of Safety and Security v SSSBC and Others* [2010] 9 BLLR 965 (LC) it was held that awards of “protected promotions” are permissible only where it is clear from the evidence that an employee would have been employed but for the unfair labour practice. In this case, the disqualification of the fourth respondent is not the end of the matter.
- [14] In terms of the recommendation of the selection panel, Captain Mhlongo is to be appointed to the post in the event that the fourth respondent is unable to take up the post.
- [15] The evidence at the arbitration and the content of the award do not deal with the possible appointment of Captain Mhlongo. The letter of appointment only mentions the fourth respondent and it is unclear whether Captain Mhlongo is automatically appointed to the post in these circumstances. No evidence was led about whether he qualified to be shortlisted or to be appointed on merit or on the basis of equity. These are aspects of the enquiry that need to be fully canvassed before there can be any proper finding on whether the failure to promote the applicant constitutes an unfair labour practice.
- [16] I am of the view that it would be inappropriate for me to make any final determination on the record as it stands. It is accordingly necessary to refer the matter back to the third respondent for a proper determination once the necessary evidence has been considered.

Costs

- [17] Both parties have asked that costs follow the result.

[18] The applicant has been substantially successful and there is no reason why she should not be awarded the costs of the application.

Order

[19] I make the following order:

- (a) The arbitration award dated 8 August 2013 and issued by the second respondent under case number PSSS 263-12/13 is hereby reviewed and set aside.
- (b) The appointment of the fourth respondent to the post of Staff Officer to the Provincial Commissioner (Post no. 17/6/2011) is hereby set aside.
- (c) The matter is remitted back to the third respondent for a hearing *de novo* before a different arbitrator for a determination on whether the failure to appoint the applicant to the post constitutes an unfair labour practice.
- (d) The first respondent is ordered to pay the costs of the application.

Naidoo AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Ms A Naidoo

Instructed by R Ramdayal Attorneys

For the First Respondent: Mr N S V Mfeka

Instructed by: State Attorney

LABOUR COURT