



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN
JUDGMENT

Not reportable

Case no.: D627/2012

In the matter between:

PUBLIC SERVANTS ASSOCIATION

First Applicant

KHUMBULANI COLLEN KHESWA

Second Applicant

And

DEPARTMENT OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

First Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Second Respondent

COMMISSIONER VEESLA SONI

Third Respondent

Heard: 7 JULY 2014

Delivered: 20 January 2015

Summary: The matter concerned the review of a finding by the Third Respondent that the First Respondent had not committed an unfair labour practice in failing to promote the Second Applicant. The Applicants contended that the Second Applicant was the better candidate on the merits and that the First Respondent had not justified the preference for appointing a woman to the position in terms of a valid employment equity plan. The Court disagreed and found that the existence of a National Employment Equity Plan

had been proved and it was not necessary for each region to have one. Further, the evidence did not support the contention that the Second Applicant was otherwise the better candidate. In any event, even if the Third Respondent had erred, this did not make the award reviewable.

JUDGMENT

SCHUMANN AJ

- [1] In this matter, the Applicants seek an order that an award by the Third Respondent acting under the auspices of the Second Respondent arbitrating a dispute between the Second Applicant and the First Respondent be reviewed and set aside. The Second Applicant had applied for the position of Director, Court Administrator - Northern Cape Regional Office and had been unsuccessful in such application. He had subsequently referred a dispute to the Second Respondent, alleging that the First Respondent's failure to appoint him to the position constituted an unfair labour practice. The matter was heard and dismissed by the Third Respondent. (Curiously, the order requested by the Applicants in these proceedings sought to both confirm the appointment of the Second Applicant to the position and have the dispute reheard before the Second Respondent *de novo*. In a supplementary affidavit the Second Applicant confirmed that he had been subsequently promoted to a director's position and only compensation was requested.)
- [2] The mechanics of the process that unfolded in making the appointment to the position are contained in a memorandum from the Selection Committee dated 22 February 2010 which set out the Committee's reasoning for recommending the appointment of one Ms

Petunia Mphato to the position. The vacant post was advertised on 4 October 2009. The advertisement made it clear that the appointment would be subject to the employment equity imperatives in the Employment Equity Act and the human resource policies of the First Respondent.

- [3] After a short-listing process on 26 January 2010, five shortlisted candidates were interviewed by the Selection Committee in the boardroom at the Office of the State Attorney, Kimberley, on 16 February 2010. Twenty questions were formulated and members of the committee scored candidates on their responses to the questions, which scores were then averaged. The Second Applicant achieved the highest overall rating of 18.51, a Mr AC Thabethe was in second place with a score of 18.33 and Ms Mphato was in third place with a rating of 18.03.
- [4] The memorandum records that the panel had agreed, prior to the interviews, that the scores would not be the determining factor when recommending candidates for a subsequent competency assessment, or for appointment to the post.
- [5] It is apparent from the memorandum of 22 February 2010 that the committee did not recommend that the Second Applicant proceed to the competency assessment to be conducted but recommended that only Mr Thabethe and Ms Mphato participate in the next round of the process. Mr Thabethe held both an LLB degree and a National Diploma in Public Administration and had six years' experience as an Area Court Manager. In Mphato's case the committee felt that she was more solid than the other two candidates in terms of fundamental experience in management and an administrative environment. She had twelve years' experience in the Department of Justice at supervisory and management level, including four years as a Senior Administration Officer, four years as an Acting Deputy Director and

four years as an Area Court Manager in Rustenburg. It was apparent from the table at paragraph 3 of the memorandum that Ms Mphato held a degree of Bachelor of Commerce with Honours and a Master's degree in Management and Development. On further comparison based on a psychometric competency assessment conducted by external consultants, Lead Train Assessments (Pty) Limited, and the equity profile of the region, the committee recommended Ms Mphato for the post.

- [6] It is apparent from the memorandum that when it came before Dr K De Wee, the National Chief Operations Officer, it did not pass muster as Dr De Wee was of the view that the Second Applicant should have been afforded the opportunity to participate in the competency assessment. Accordingly, the process was held in abeyance while the Second Applicant participated in a psychometric evaluation by the external consultants. The psychometric reports of all three candidates are contained in the record that was before the Third Respondent. On 15 July 2010, a revised memorandum was issued by the interview committee which included the Second Applicant and the competency assessments of all three candidates. The selection committee unanimously agreed that Ms Mphato should be recommended for the post. A contributing factor was that the appointment of a female candidate would assist in redressing under-representivity of females in the region at Senior Management Level 13.
- [7] The recommendation was supported by both Mr P Du Randt, the Chief Director: Court Services – National Office and Dr De Wee, on the basis that the appointment of Ms Mphato would promote “gender diversity/ employment equity”.
- [8] When the matter came before the Third Respondent she considered the evidence and concluded that “based on equity and merit” Ms Mphato “was the most suitable candidate for the post”. The Third

Respondent further found that there was an equity plan in place, on which the First Respondent could rely for preferring the female candidate. The initial failure to send the Second Applicant for a competency assessment was simply an error. She accordingly held that the First Respondent did not commit an unfair labour practice and the application was duly dismissed.

- [9] In their founding affidavit, the Applicants contended that the Third Respondent's finding was "clearly flawed" as the Employment Equity Plan on which the First Respondent relied was a general plan for the First Respondent as a whole and not for specific regions. The Applicants further contended that the Third Respondent's finding that the failure by the interview committee to initially send the Second Applicant for a competency test was a "human error" was insupportable on the evidence. It was suggested that the process was not *bona fide* and that the post had clearly been reserved for another candidate. In addition, the Applicants alleged that the finding of the Third Respondent that Ms Mphato was more qualified or suited for the position was in no way linked to the evidence placed before her. I will examine each of these aspects of the matter.
- [10] The First Respondent led the evidence of its Chief Director and Regional Head, Mr RD Isaacs who had served as one of the members of the selection committee and had drafted the memoranda. He testified that, at the time the decision was made to send only two candidates for a competency assessment, the members of the panel had been of the view that they were the two highest scoring candidates. The calculations had been done by the Chairperson who had made an error which was only pointed out to the committee after the competency assessments and prior to the drafting of the memorandum of 22 February 2010. However, it was apparent that the difference between the scores of the top three candidates was

minimal. The committee had also formed a *prima facie* view, by this stage, that both due to the nature of the position and the department's transformation imperatives, a woman would be a more suitable appointee. Accordingly, the correct information regarding the scores was included in the memo but the committee did not deem it necessary to send the Second Applicant for a competency assessment and recommended Ms Mphato for the post.

- [11] When the matter was sent back by Dr De Wee and a competency assessment performed on the Second Applicant, the result did not alter the committee's perception as to who was the most suitable candidate and the recommendation did not change in the subsequent memorandum in July.
- [12] The Third Respondent accepted Isaac's testimony and specifically found him to be a credible and forthright witness. She accepted his explanation as to how it came about that the Second Applicant was initially not sent for a competency assessment, which explanation was never challenged in cross examination during the arbitration. There is thus little basis on which the Applicants can maintain the theory that there was a conspiracy to deny the Second Applicant the position and the point was not seriously pursued in argument before me.
- [13] Regarding the existence of its Employment Equity Plan, the First Respondent led the evidence of the Human Resources Director of the Northern Cape Region, Mr Mekoa. He explained the advertisement and selection process generally and confirmed the existence of the "Master Employment Equity Plan for the Department" emanating from the National Office in Pretoria. He testified that the various regions would give input to the National Department on Employment Equity who would then compile the Master Plan for the Department as a whole. He confirmed that the document put up at page 171 and following of the record (titled: Revised Master Employment Equity

Plan, 1 July 2007 to 30 June 2010) had been confirmed by the Director General in September 2008 as evidenced by the signature on the final page thereof. According to the tables at page 175 of the record a target of 50% representivity for women was set at all levels of management. As at the date of the Plan, that figure had been exceeded by 7% in junior management, but had not been achieved at all other levels of management.

[14] Mekoa further referred to a circular from the Deputy Director General of the First Respondent of 12 July 2009 which confirmed that the required levels of representivity for women and persons with disabilities had not been achieved and that the Department would strive to achieve same by March 2010. Certain positions were “earmarked” to be filled by particular designated groups as per an annexure to the memorandum. Mekoa further testified that the position in question in these proceedings was not specifically earmarked for preference to women or people with disabilities as the position had not been vacant at the time Circular 53 of 2009 had been produced. However, this did not mean that the general employment equity goals of the Department did not apply to the appointment.

[15] The main thrust of the Applicants’ objection to the Employment Equity Plan was based on the first paragraph thereof which stated as follows under the heading “Introduction and Background”:

‘This document seeks to provide broad guidelines that can be used by different branches and regions within the Department in developing their own Employment Equity Plans. The document will therefore be general and broad in its approach. The specifics and details will, however, be found in the Employment Equity Plans of the branches and the regions’.

[16] Mekoa confirmed that, despite the wording of the preamble to the Master Employment Equity Plan, the regions had not considered it

necessary to draft their own plans and had simply adopted and applied the broad outlines and percentages contained in the Master Plan, as applied to the demographics of their particular region. He explained that the employment of Ms Mphato in preference to the Second Applicant achieved the result that two of the four management positions at that level were filled by women and the 50% target for the region was achieved.

- [17] The Third Respondent accepted the validity of the Master Employment Equity Plan and that the region was entitled to apply its principles when appointing Ms Mphato. I concur with her in this regard. Although the Master Plan seems to have anticipated that more specific Employment Equity Plans would be drafted by the regions I see no reason why such regions could not have elected to simply utilise the Master Equity Plan. This is particularly so in respect of the representivity of women in the department. On the assumption that approximately half the population of this country is female (and that this situation will persist, barring any particularly bizarre turn of events) the demographical considerations are relatively simple. If the regional HR Department established that there was under representivity in any of the management levels identified in the Master Plan in the region, it is difficult to envisage what more was required to apply affirmative action principles and favour the appointment of a woman.
- [18] As to whether the Second Applicant was a better candidate on the merits, the case is, at best for the Second Applicant, somewhat murky. As previously mentioned, Ms Mphato held a relevant University qualification at the Master's level and would thus appear to have trumped the Second Applicant as far as qualifications were concerned.
- [19] It is apparent from the memoranda of 22 February and 15 July 2010 that Ms Mphato had twelve years relevant managerial experience with the First Respondent (as set out above) and had further been

employed for three years as a manager with SASSA at the time of the selection process. The Second Applicant testified only that from April 2002 to November 2005 he had been working for the Department of Social Development as a Deputy Director. In December 2005, some four years prior to the advertisement he had taken up a Deputy Director's position with the First Respondent. At the time of the advertisement he held a Bachelor of Arts Degree majoring in Public Administration and Politics. He confirmed that his experience as a Deputy Director involved "office and district administration". The Second Applicant bore the onus of proving that he was a better candidate for the position. If he indeed held greater relevant managerial experience than did Ms Mphato, one would have expected him to testify more fully in this regard. (While Ms Mphato did not testify at the arbitration, the contents of the memoranda regarding her qualifications and experience were never placed in dispute.)

- [20] Although the Second Applicant scored marginally higher in the interview process than Ms Mphato, this is hardly a determining factor. The Second Applicant's attorney argued vociferously that the Second Applicant fared better in the competency assessment but, as was pointed out in the evidence of the First Respondent's witnesses, this was based on a misinterpretation of the scores.
- [21] A perusal of the assessment of Ms Mphato and the Second Applicant reveals that the Second Applicant achieved the "demonstrated proficiency level" in every respect and exceeded the requirement in one respect. Ms Mphato's scores, so it was contended on behalf of the Second Applicant, demonstrated that she had failed to achieve the required proficiency in one category and had thus achieved a negative overall score. The problem with this argument was that it is abundantly apparent from the test results that, for some or other reason, the required proficiency levels were understated in the Second Applicant's

assessment results (although all other parameters remained the same), thereby creating the impression that the Second Applicant had exceeded the required proficiency levels and Ms Mphato had not. However, a simple comparison of the actual proficiency levels achieved clearly shows that Ms Mphato outscored the Second Applicant.

- [22] On my assessment of the evidence it is thus appears that, not only did the appointment of Ms Mphato achieve a desirable employment equity ratio, but she was more highly qualified, quite probably more experienced, and she outscored the Second Applicant in the competency assessment. (The perception expressed by members of the interviewing committee that a woman would be more successful in managing the interpersonal relationships between members of the bench and the court administration is a subjective view, but one which may not be without merit. However, as the Second Applicant failed to demonstrate that he was a better candidate for the position there is no need to consider this issue further.)
- [23] In my view, the award is cogent and well reasoned on the evidence. However, even if the Third Respondent was incorrect in her assessment of the evidence and misdirected herself in some respects, this does not make the award reviewable. I am mindful of the caveat expressed by the Supreme Court of Appeal in *Herholdt vs Nedbank Ltd* and Others 2013 (6) SA 224 (SCA) and even if the Applicants, criticisms of the award are correct, they have failed to show any reviewable irregularity committed by the Third Respondent. The only such irregularity seriously contended for by the Applicants' was that the decision by the Third Respondent was one which no reasonable decision maker could have made on the evidence before her. In light of the lack of evidence supporting the conspiracy theory, the clear existence of an applicable National Employment Equity Plan and

significant evidence to support the contention that Ms Mphato was the better candidate, I cannot possibly come to such a conclusion and the application must fail. I further see no significant reason why the costs should not follow the result.

[23] The application is accordingly dismissed with costs.

Schumann AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants: E Geldenhuys of Tomlinson Mnguni James Attorneys

For the Respondents: Advocate L.L. Ngumle

Instructed by State Attorney (KwaZulu-Natal)