



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

Not reportable

Case no: D726/2013

In the matter between:

KAMALANATHAN GOVENDER

Applicant

And

SOUTH AFRICAN POLICE SERVICE

First Respondent

**SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

Second Respondent

FAAIZA SYED

Third Respondent

LT. COL. G.D. JOSEPH

Fourth Respondent

Heard: 09 September 2014

Delivered: 07 May 2015

Summary: Review — public sector protective promotion; application for advertised post not considered - no reasons given for non-consideration of application; failure to provide reasons renders conduct inherently substantively unfair.

JUDGMENT

- [1] The applicant is a captain in the South African Police Services (“the SAPS”). The SAPS advertised posts for “Crime Prevention Commander” to be stationed at Hillcrest (post 2607) and at Umlazi (post 2608), both in the Durban South jurisdiction. Both posts had the same post description and minimum requirements. The same panel, with the same official presiding on both panels, considered applications for the two posts. The applicant applied to be considered for each of the posts.
- [2] The panel placed the applicant on the preferred list for the Hillcrest post. He was not appointed because of equity considerations. He did not challenge his non-appointment. The panel did not screen, shortlist or evaluate the applicant’s application for post 2607. The fourth respondent was appointed to post 2607. The applicant launched an internal grievance. This culminated in arbitration proceedings, in which the applicant alleged that the SAPS committed an unfair labour practice towards him in relation to his application for post 2607.
- [3] The Commissioner described the issue to be decided as whether the SAPS committed an unfair labour practice in failing to evaluate the applicant’s application, shortlist him and furnish reasons for his non-appointment and; if so, the appropriate relief. The Commissioner gave the following award:

“8. AWARD

- 8.1 The respondent has committed in unfair labour practice.
- 8.2 The applicant is awarded the amount of 2 months compensation at his salary level 8.
- 8.3 Payment of this amount is to be made within 30 days of date of service of the award on the respondent.

8.4 There is no order as to costs.”

[4] The applicant seeks to have the award reviewed and set aside. The second to fourth respondents do not oppose the application. The applicant relies on the following grounds:

4.1 The applicant was not given a fair opportunity to compete for the post.

4.2 The Commissioner did not consider evidence that the applicant was the most meritorious candidate and that the applicant would have been promoted.

4.3 The Commissioner misconstrued the dispute that she was required to determine.

4.4 The Commissioner failed to apply her mind to a material issue.

[5] The applicant seeks relief that:

“1. The arbitration award dated 7th June 2013 of the third respondent is hereby reviewed and set aside.

2. The applicant be and is hereby awarded with protected promotion to the rank of Lt. Colonel dated retrospectively to 2005-12-01 with full financial benefits associated thereto.

3. Any other relief as deemed fit by the above Honourable Court.”

[6] The SAPS filed a cross-review to have the award reviewed and set aside, and for the main review application to be dismissed. The applicant opposes the cross-review.

[7] It was submitted on behalf of the applicant that the Commissioner ultimately had to make a determination with reference to two main considerations. First,

that the applicant was not given a fair opportunity to compete for post 2607 when the panel failed to screen, assess or shortlist the applicant. It was submitted that the third respondent failed to have regard to the prejudicial effect that was visited on the applicant as a result. Second, it was submitted that the Commissioner ignored the undisputed evidence that the applicant was the most meritorious candidate. In this regard, it was submitted that the third respondent, in his analysis of the evidence, did not attribute any material relevance to the fact that the applicant proved that he was a most meritorious candidate and that he ought to have been promoted to the post.

- [8] The panel was obliged to deal with the applications in terms of the SAPS National Instruction 1/2004, the applicable promotion policy at the time. The applicant contended that he was the more meritorious candidate in terms of all the criteria set out in the national instruction. The SAPS did not dispute this during the arbitration. The SAPS did not give evidence as to why the panel did not consider the applicant's application for post 2607. The SAPS do not dispute, in any real way, that the evaluation panel did not comply with the terms of the national instruction. Indeed, the SAPS did not lead evidence during the arbitration.
- [9] The SAPS make unsubstantiated denials in its opposing affidavit. Such denials include that the applications for the two posts were not considered by the same chairman and panelist. There is no evidence in the record to support the denial. It bears repeating that the SAPS did not lead evidence during the arbitration.
- [10] Brigadier Wayne Nixon McCullough deposed to the affidavit on behalf of the SAPS. He did not participate in the arbitration proceedings. His knowledge of the dispute is based on a reading of the record of the arbitration. He says, in his affidavit, that the Commissioner did not apply her mind to the facts and that the Commissioner gave a ruling in favour of the applicant on the face of "overwhelming evidence" against the applicant. Brigadier McCullough does not particularise the "facts" or "overwhelming evidence" that support setting the award and dismissing the review application as prayed for by the SAPS.

- [11] It is my impression that the opposition to the review is not earnest. It seems to me that the opposition and the cross-review were intended to frustrate a final determination of the dispute between the applicant and the SAPS.
- [12] The SAPS did not lead evidence during the arbitration. The SAPS cannot, in review proceedings, seek to make a case that was not advanced before the Commissioner during the arbitration. This court exercises its power of review only with regard to the decision by the Commissioner arising from what transpired during the arbitration.
- [13] The Commissioner concluded that the SAPS committed an unfair labour practice by failing to comply with procedures governing the process of promotion, but that the applicant was not entitled to protective promotion because, according to the Commissioner, the applicant "... agreed that all he sought was a fair opportunity to compete and that he was aware that there was no guarantee that he would be appointed." The Commissioner found that there was no nexus between the relief sought by the applicant and the evidence. She also found that such relief (i.e. protective promotion) would be a disproportionate remedy.
- [14] The Commissioner also found, in considering the matter, that "given the lapse of time that has past (sic) and the ramifications of an order to set aside the appointment in these particular circumstances, I find that compensation is the only appropriate relief to order to cure (sic) the procedural defect of failing to evaluate and even shortlist the applicant and furnish reasons for such a failure".
- [15] The Commissioner determined that the SAPS committed an unfair labour practice. The Commissioner erred, however, in her finding that the manner in which the South African police dealt with the applicant's application for post 2607 was a "procedural defect". It had a substantive effect.
- [16] The fact that the applicant's application for post 2607 was not even

considered; with no reasons at all by the SAPS, renders the conduct by the SAPS inherently substantively unfair. That is because the SAPS, in failing to even consider the application, could never account for why the applicant could not have been a suitable candidate. This court held in *City of Tshwane Metropolitan Council v SALGBC & Others*¹ that “if a candidate ought to have been successful based on legitimate criteria used by an employer, but the employer cannot provide a rational explanation for that person’s non-appointment, then an arbitrator might be justified in regarding that non-appointment as unfair”. The finding in this matter is compounded by the undisputed evidence that the applicant was the more meritorious candidate. The Commissioner did not take this evidence into account.

[17] The Commissioner, when one has regard to the award, appreciated the wrong done to the applicant. She however laboured under the misapprehension that too much time had elapsed and that it would not be appropriate to “set aside” the appointment of the fourth respondent. This court pointed out in *Minister of Safety & Security v Safety & Security Sectoral Bargaining Council & Others*² that victims of a blatant unfair labour practice cannot be left without a remedy. The court also pointed out that the fact that a position has been filled is not a bar to an arbitrator not ordering a person to be promoted.

[18] The finding by the Commissioner that compensation “is the only appropriate relief” is not one that a reasonable decision-maker could have made. I do not consider that it would be just to remit the review for consideration by a different Commissioner. I find that the court, and having regard to the record, is in as good a position to make a final determination.³ I agree that the irregularities and unfairness in not shortlisting the applicant, the lack of justification by the SAPS, the applicant’s undisputed evidence that he was the more superior candidate, all taken together, qualified the applicant for

¹ [2011] 12 BLLR 1176 (LC) at para [20]

² [2010] 4 BLLR 428 (LC), at para 24

³ See for example, *Israel Sibiya and Safety and Security Sectoral Bargaining Council and Others* (unreported: Case No. D961/10, judgement by Boqwana AJ, dated 29 November 2012), para 43

promotion. The applicant ought to have been promoted.

- [19] The finding by the Commissioner that the infringement by the SAPS was a mere procedural defect is unsustainable. The record does not support the conclusion that the applicant's case was that he only wanted "a fair opportunity to compete". This finding does not reflect the real dispute that the Commissioner had to consider. This finding is in any event not supported by the Commissioner's own summary of the evidence.
- [20] The Commissioner did not set out the respect in which, according to her, there was no nexus between the relief sought by the applicant and the evidence. The Commissioner summarised the evidence for the applicant to include the following: the applicant met the requirements for promotion and for the post. The applicant did not receive documents to show that he was evaluated; he was not considered for the post; the panel did not comply with the national instruction; he was not given an opportunity to compete for the post; he would have been shortlisted, in comparison with the fourth respondent, and that he stood a good chance at promotion; and that the applicant agreed that there was no assurance that he would be appointed.
- [21] The SAPS did not challenge the applicant's evidence that the applicant met the requirements for promotion and for the post. It is unclear how the Commissioner concluded that there was no nexus between the evidence and the relief sought by the applicant on the face of such uncontested evidence. The conclusion is a fundamental misdirection. No reasonable decision-maker could have arrived at the findings by the Commissioner in the light of such uncontested evidence.
- [22] The applicant sought condonation for the late filing of his replying affidavit. It is in the interests of justice that condonation be granted and it is so granted.
- [23] The record shows that the applicant notified the SAPS on 7 December 2005 that he intended to submit a grievance pursuant to his non-appointment. He requested documents for that purpose. The internal grievance procedure took

some five years before the dispute was referred to the second respondent.

[24] I invited the parties to present submissions on whether it is competent for the court to order a protective promotion with benefits retrospective to 1 December 2005. The SAPS did not make submissions, nor did the SAPS (in its opposing affidavit) contend that it would not be competent for a court to grant the relief sought in paragraph 2 of the notice of motion.

[25] I make the following order:

1. The arbitration award in case PSSS240-11/12 and dated 7 June 2013 is reviewed and set aside.
2. The first respondent is ordered to promote the applicant to the rank of Lt. Colonel (or its equivalent as at the date of this order) and that such promotion be made retrospective to 1 December 2005.
3. The first respondent is ordered to furnish the applicant with all financial benefits associated with the position of Lt Colonel (or its equivalent as at the date of this order) with effect from 1 December 2005.
4. The cross-review by the first respondent is dismissed.
5. The first respondent is ordered to pay the costs both in the main review and in the cross-review.

O Mooki

Judge of the Labour Court (Acting)

APPEARANCES:

Applicant: A. Naidoo
Instructed by: R Ramdayal Attorneys

First Respondent: P Valed
Instructed by: The State Attorney