

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D773/2013

In the matter between:

SOUTH AFRICAN POLICE SERVICE

Applicant

And

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

First Respondent

COMMISSIONER A DEYSEL N O

Second Respondent

ROBERT ANTON EVERSON

Third Respondent

Heard: 26 August 2015

Delivered: 27 August 2015

Summary: review. Application dismissed

JUDGMENT

GUSH J

- [1] This is an application to review and set aside the award of the 2nd respondent in which award the 2nd respondent found that the applicants failure to promote the 3rd respondent constituted an unfair Labour practice and ordered the applicant to place the 3rd respondent in the position he would have been had he been promoted and pay the 3rd respondent the difference between his salary actually earned and the salary he would have earned.
- [2] During 2009 the 3rd respondent amongst others applied for the advertised post of senior administration clerk grade 2 at the Newcastle dog unit.
- [3] Eight candidates were shortlisted and following a series of interviews the evaluation panel listed, as preferred candidates the three top scoring candidates. The third respondent was the fourth highest scoring candidate. These candidates scores were:

	Madida	Ramlal Hlongwane	3 rd respondent	
Competence	8	8	8	7
Prior learning Training and development	9	8	5	6
Experience	8	8	8	7
Total	25	24	21	20
Percentage	83%	80%	70%	67% ¹

- [4] Based on the above the evaluation panel recommended the appointment of Madida as the most preferred candidate, Ramlal as the second most preferred candidate and Hlongwane as the third most preferred candidate. As the fourth highest scoring candidate the third respondent was not on the preferred list.

¹ Award page 19

[5] Madida was appointed to the post with effect from 1 November 2009. It was in respect of this appointment that third respondent raised a grievance and ultimately declared a dispute. In the third respondent's referral of the dispute the third respondent makes the following averments:

- a. I was not promoted into this post even though I have all the necessary knowledge and skills perform duties attached to the promotional post.²
- b. That the outcome required was: to be promoted with all costs backdated to the next level.³
- c. The referral included an application to join only the successful candidate Madida in which application the third respondent averred: I was unsuccessful and I believe that I am the better candidate.⁴ the third respondent did not either cite or join the second and third ranked candidates.

[6] The dispute was enrolled for arbitration before the second respondent and at the commencement thereof the third respondent's counsel clearly identified the nature the dispute to be arbitrated as follows:

The [third respondent] is aggrieved because he believed he fulfilled the full criteria for this post. He also believed that he had more experience and qualifications to the successful candidate, application equivalent.⁵

[7] It is abundantly clear from both the referral of the dispute the third respondent's confirmation of the nature thereof and the evidence adduced at the arbitration that the third respondent was clearly only concerned with his score vis-a-vis that of the successful candidate Madida. There is nothing in the record to show that the third respondent challenged the score allocated to the second and third

² Bundle of documents page 392

³ Bundle of documents page 393

⁴ Bundle of documents page 398

⁵ Record page 2-3

recommended candidates or that he regarded their score as being unreasonable or unfair.

- [8] Despite this absence of any evidence to the contrary in the course of his award the second respondent saw fit in his analysis of the evidence and argument to record what he believed “the scores awarded to the top four candidates should at best for the [applicant] have been”. In his revised score card following his analysis of the evidence in which neither Ramlal nor Hlongwane are mentioned Ramlal’s score is reduced by two points: 1 for competence, from 8 to 7 and 1 for experience, from 8 to 7. The second respondent scorecard reads:

	Madida	Ramlal Hlongwane	3 rd respondent	
Competence	7	7	7	8
Prior learning Training and development	9	8	5	7
Experience	7	7	7	8
Total	23	22	19	23
Percentage	77%	73%	63%	77% ⁶

- [9] The second respondent expressly records that his conclusion that this scorecard is the best the applicant could have arrived is based on his analysis of the evidence and argument. What is conspicuous by its absence is any reference whatsoever by the second respondent to the scores allocated to Ramlal by the evaluation panel that alone the appropriateness or otherwise thereof.
- [10] It might well be so that the second respondents conclusion that the applicants and Madida should have been scored equally and that on his analysis of the employment equity considerations the third respondent should have been

⁶ Award page 29

appointed there is nothing to suggest that the third respondent should have been preferred to or scored better than Ramlal.

[11] This is reinforced by the conclusion reached by the second respondent at the conclusion of his award:

In the present matter the respondent's failure to promote the applicant was unfair for a number of reasons which can be summarised as follows:

- the failure refusal to promote was caused by unacceptable and irrelevant considerations on the part of the respondent and bites failure to take relevant considerations into account;
- the respondent failed to follow its own policy and in particular its policy that the advancement of employment equity should be considered alongside factors such as promotion of equal opportunities and fair treatment in the advancement of service delivery;
- the respondent failed to apply its mind to the promotion of the applicant in particular failed to take into account that he had been performing the functions of the post for two years and was still doing so the time that the appointment was made;
- they were substantial reasons for the respondent's decision not to promote the applicant despite the factors favouring his promotion;
- failure to promote the applicant was unreasonable.⁷

[12] Whilst it is so that Madida was joined in the proceedings but elected not to participate, Ramlal was not cited, joined nor mentioned in evidence and was apparently disregarded as a potential candidate for the position.

[13] Given the nature of the relief that the third respondent sought namely that he be placed in a position equivalent to the post on the basis that he should have been appointed in place of Madida it follows that it was incumbent upon the third respondent not only to show that he deserved to be preferred to Madida but that he was the best candidate and therefore entitled to appointment. The third

⁷ Award page 32 -33

respondent did not seek compensation for an unfair labour practice simply on the grounds that Madida had been appointed but he sought an order to the effect that he be found to be the most successful candidate and therefore entitled to the promotion.

- [14] The third respondent did not establish in any way whatsoever that he was the best candidate. Accordingly the third respondent was not entitled to the relief that he sought.
- [15] It might well be that the second respondents analysis of the experience, competence and prior learning correctly identified the applicant as the equal of Madida in the absence of any evidence that he was the best candidate of all he was not entitled to the relief the second respondent awarded him.
- [16] The applicant's grounds are that the second respondents award is not one that a reasonable and objective decision maker could reach in relation to the reasons advanced; that the second respondent exceeded his powers and that he committed a gross irregularity in the conduct of the proceedings by misconceiving the nature of the enquiry.
- [17] The test on review is enunciated in Goldfields Mining⁸, a decision of the Labour Appeal Court.

The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the

⁸ Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA (2014) 35 ILJ 943 (LAC)

arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?⁹

[18] In this matter the second respondent appears not to have understood the nature the dispute he was required to arbitrate. The dispute was, based on the third respondents own submissions, whether he should have been appointed to the post in place of the successful candidate Madida. In order to establish this it was incumbent upon the third respondent not only to deal with the appointment of Madida but to establish that he should have been scored the best candidate. In order to do so it was necessary to place before the second respondent evidence to establish that he was a better candidate than Ramlal. This he did not do.

[19] In the circumstances the second respondents decision as set out in the award is not a decision that "another decision-maker could reasonably have arrived at based on the evidence".

[20] As far as costs are concerned I am not satisfied that the requirements of fairness an order for costs.

[21] Accordingly and for the reasons set out above I make the following order:

- a. The arbitration award of the second respondent dated 11 June 2013 under case number PSSS 16 – 10/11 is reviewed and set aside;
- b. There is no order as to costs.

D H Gush

Judge of the Labour Court of South Africa
Durban

⁹ At paragraph 20

APPEARANCES:

FOR THE APPLICANT: Adv D Pillay

Instructed by: State Attorney Durban

FOR THE RESPONDENT: T Mbili A P Shangase and Associates

LABOUR COURT