



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case Number: JR1871/13

In the matter between:

BOTSILE MAIMELA

First Applicant

FANKIE MALEPA

Second Applicant

FUNEKA MFAZWE

Third Applicant

CHARLES MOHUDI

Fourth Applicant

and

**THE SAFETY & SECURITY SECTORAL
BARGAINING COUNCIL**

First Respondent

K. DRISCOLL N.O.

Second Respondent

THE SOUTH AFRICAN POLICE SERVICES

Third Respondent

GM VAN DER MERWE

Fourth Respondent

Date heard: 5 August 2015

Delivered: 8 February 2016

JUDGMENT

RABKIN-NAICKER J

- [1] The applicants (who have the rank of Lieutenant Colonel in the SAPS) seek the setting aside of an award by the second respondent (the arbitrator) under case numbers PSSS 572/ 573 /575/576-11/12 dated 11 July 2013. The arbitrator found that the SAPS did not commit an unfair labour practice by failing to appoint the applicants to post 06/14/2010 and appointing the fourth respondent, a white male to the post instead.
- [2] The pre-arbitration minute which the applicants stood by in the arbitration proceedings, required the arbitrator to decide whether the employer followed its own policies in appointing the fourth respondent (the successful candidate); the suitability of the successful candidate and whether the applicants suffered an unfair labour practice. They sought that the appointment of the successful candidate be declared null and void and the interview procedure to start afresh and in addition that they receive compensation for the unfair labour practice suffered by them.
- [3] The grounds of review contained in the founding papers are as follows that:
- 3.1 The arbitrator erred in finding that that the Council did not have jurisdiction to consider whether or not the SAPS was bound to follow its Employment Equity Plan.
- 3.2 That the arbitrator committed gross misconduct in failing to find that selection panel member Brig. Mogale's non-disclosure of his relationship with the successful candidate (despite finding that this relationship was a good one) was prejudicial to the applicant.
- 3.3 The arbitrator committed gross misconduct in blindly accepting the score that the Fourth Respondent purportedly obtained without adequate proof thereof.
- [4] In his award the arbitrator records that: "...the Applicants were cautioned that should they intend to argue that the Respondent was obliged to appoint them in

terms of the Respondent's employment equity plan or the provisions of the Employment Equity Act or that the Respondent had discriminated against them, that the Bargaining Council was not the correct forum for such a matter". The applicants did not pursue the first ground of review in the proceedings before me.

- [5] There were specific issues raised by the applicants in the proceedings in respect of the conduct of the selection process, in addition to the inclusion of Brig. Mogale in the panel. These included that:

5.1 The score sheets of the successful candidate were not provided to the applicants;

5.2 That the selection panel classified the successful candidate as an African male and this was not corrected prior to his appointment.

- [6] The successful candidate (a white male) was the second respondent in the arbitration proceedings. The arbitrator found as follows in respect of the score sheets:

"While I am aware that the Respondent unnecessarily clouded this issue by not providing the 2nd Respondent's score sheets to the applicants, I am not persuaded that there is an absence of evidence on this point. It was Brig. Chilambe's evidence that the minutes signed by the chairman of the selection panel indicates the 2nd Respondent's score and that the list also forwarded by the Human Resources department to Head Office also reflected the 2nd Respondent's score (see page 124 to 129 bundle R3.) Brig. Chilambe further testified that he had been a member of the selection panel and that he could confirm that the 2nd Respondent had indeed had the highest score."

- [7] In as far as the miss-classification of the successful candidate and taking into account the SAPS policy on appointments the arbitrator reasoned as follows:

"In terms of the National Instruction, the selection panel and the Respondent, through the Provincial or Divisional Commissioner, is required to take equity into consideration when selecting candidates for potential appointment. There is nonetheless no provision in the National Instruction that precludes the appointment of White males or that the RAG numbers must be applied without exception or

discretion. Indeed the Labour Appeal Court in *South African Police Services v Solidarity obo Barnard* (2013) 1 BLLR (LAC) was of the view that the composition of the Respondent with regard to filling of posts remained the prerogative of the National Commissioner. If the Respondent had intended to make an affirmative action appointment and the 2nd Respondent were listed as a White male then the Provincial or Divisional Commissioner has the discretion in terms of the National Instruction to appoint.....If the 2nd Respondent had still appeared erroneously as an African male then there would have been necessity for the request for a motivation from the interview panel, as the 2nd Respondent would ostensibly have fulfilled the Respondent's equity requirements. I have no reason not to accept Brig. Chilambe's evidence that the reason the panel had been requested to submit a motivation for the recommendation of the 2nd Respondent was because the 2nd Respondent is a White male. I further agree with the Respondent's contention that it is clear from the content of the motivation that it related to the 2nd Respondent and the post in question despite the incorrect post number being used."

- [8] In addition, the arbitrator expressed the following significant insight in respect to the applicants' case:

"Having considered the issues raised by the Applicants, it is apparent that the Applicants have not materially dealt with the biggest obstacle to their claim, namely, that none of the Applicants obtained scores which placed them amongst the top three candidates. It was not disputed that the 2nd Respondent met the minimum requirements for the post and I may therefore accept that the Applicants did not possess qualifications or experience which the second respondent does not equally possess. Even if I accept that Brig. Mogale should not have participated in the selection process, he did not score the Applicants on his own and a removal of Brig. Mogale's assessment would not reasonably catapult the Applicants, in the circumstances, into the position of the highest scoring candidates."

- [9] In view of the above reasoning by the Arbitrator, and taking into consideration the grounds of review relied upon by the applicants and the record before me, I cannot find that the result of the arbitration was one that a reasonable decision maker

could not make.¹ The applicants must therefore fail in their application. I do not consider it apposite to award costs in this matter on grounds of law and equity². I therefore make the following order:

Order

1. The review application is dismissed.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

¹ *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 (6) SA 224 (SCA); *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* (2014) 35 ILJ 943 (LAC)

² *NUM v East Rand Gold & Uranium Co Ltd* 1992 (1) SA 700 (A); (1991) 12 ILJ 1221 (A) at 738–9.

Appearances:

Applicants: Thapelo Kharametsane Attorneys

Third Respondent: Advocate Molatelo Malowa

Instructed by: The State Attorney

LABOUR COURT