



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 2801/2012

In the matter between

COLONEL I B PILLAY

Applicant

and

COMMISSIONER OF SA POLICE SERVICE

First

Respondent

**SAFETY & SECURITY SECTORAL
BARGAINING COUNCIL (SSSBC)**

Second Respondent

FJ VAN DER MERWE N. O

Third Respondent

M A MAKHELE

Fourth Respondent

Heard on: 06 June 2017

Delivered on: 06 December 2017

Summary: [Review application is dismissed-No order as to costs].

JUDGMENT

MABASO AJ

Introduction

- [1] The applicant is Colonel Inbanathan Bob Pillay (the applicant), the first respondent is the Commissioner of the South African Police Service (the SAPS), the second respondent is Safety and Security Sectoral Bargaining Council (the Bargaining Council), the third respondent is Advocate FJ van der Merwe (the arbitrator) and the fourth respondent is Brigadier M A Makhele (the fourth respondent).
- [2] The applicant approached this Court in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside paragraph 27 of the arbitration award issued by the arbitrator under the Bargaining Council case number PSSS S50 – 11/12 wherein the arbitrator ruled that,

“SAPS is ordered to pay compensation to [the applicant] in an amount equal to what lastmentioned would have earned over a 3 month period, calculated on the basis of his present gross monthly remuneration”.²

To be replaced with an order in the following terms,

“2. The SAPS is ordered to promote the applicant in a post on the same level and rank as that occupied by the fourth respondent, retrospectively from 1 September 2011”³

Relevant Background

- [3] The genesis of this matter was that the applicant, “an Indian male” in terms of Employment Equity Act⁴ (the EEA) is classified as a black person⁵, employed by the SAPS as a police officer. In 2011 he applied for an advertised post of

¹ Act 66 of 1995 as amended.

² Founding affidavit (arbitration award), page 26.

³ As per the notice of motion. This prayer was further amended by the applicant’s representative during argument before this Court.

⁴ Act 55 of 1998

⁵ Section 1 of the Employment Equity Act 55 of 1998: “Black people” is a generic term which means Africans, Coloureds and Indians.

Provincial Head: Criminal Record and Crime Scene Management, Division Forensic Services (the post). Four candidates were shortlisted for this position, including the fourth respondent, however, the applicant was not shortlisted. Three of the shortlisted candidates were Colonels Mokone, Matjeng (both black African females), and Colonel Lembrechts, a white male. Subsequently, the fourth respondent was appointed to the post.

- [4] Aggrieved by this outcome, the applicant proceeded to declare an unfair labour practice⁶ dispute against the SAPS before the Bargaining Council. Following the non-resolution of the dispute during conciliation, it proceeded to arbitration whereby the arbitrator was appointed to arbitrate it.⁷
- [5] Before the arbitrator, in an opening statement it was submitted on behalf of the applicant that he was not shortlisted despite having both the relevant experience and qualifications, and “[t]he four people who were shortlisted, either did not have the necessary experience or did not have the necessary qualification for the specific position”⁸, and that the whole process was flawed as there was no panelist at the meetings. The parties had submitted pre-arbitration minutes wherein they agreed that the arbitrator was required to decide as to “whether [the SAPS] committed an ALP⁹ by not shortlisting and appointing [the applicant] into the post in question”.¹⁰ In respect of relief claimed by the applicant, the pre-arbitration minutes provide that,

“[A]ppointment retrospective to date of appointment of the successful candidate to the rank of Brigadier at salary level 13(incl of all benefits)”¹¹

- [6] Mr Van Rensburg, on behalf of the SAPS, submitted in his opening statement that the non-shortlisting of the applicant was based on equity figures in the Free State province.¹²

⁶ Section 186(2)(a) of the Labour Relations Act 66 of 1995(the LRA).

⁷ Section 133(2)(a) of the LRA

⁸ Transcribed records, page 5, line 20 -22.

⁹ Acronym for Unfair Labour Practice.

¹⁰ Pre-arbitration minutes, page 160.

¹¹ Ibid, page 161.

¹² Transcribed records, page 6, line 15 -25.

- [7] The SAPS presented evidence through General Tsietsi Khunou (General Khunou). In summary, his evidence was that: he was part of the selection panel that was responsible for the shortlisting of the candidates for the post, and his role was that of a representative from the Division in Forensic Services. He placed on record that the recruitment specification for the post was binary, namely minimum requirements such as three years' experience and qualifications (minimum requirements), and equity as black females were underrepresented in the province (equity requirements). The selection panel consisted of Major-General Sithole and five other members and meetings were held.¹³ In amplifying the equity requirement, his evidence in chief is captured in the transcribed records, thus:

"MR KHUNOU: and according to the, under the presentation, the applicant names there was zero, we did not look at them, and in terms of coloured it was zero underrepresentation, the whites there were two ...

MR VAN RENSBURG: Okay, what about Indian males?

MR KHUNOU: and then African females it was minus 6 which was under-representation.

MR VAN RENSBURG: Yes.

MR KHUNOU: And then Indian males, Indian males it was zero according to the equity of the province.

MR VAN RENSBURG: Okay, so what did you say to Arsenal, what does it mean? if you had to shortlist or appoint an Indian made would that have actually enhanced your equity in the province or not?

*MR KHUNOU: well, it could not have enhanced equity in terms of the figures which were presented."*¹⁴

- [8] I interpose and mention that according to the transcribed records, the above evidence was never disputed by the applicant, and he did not testify during the arbitration. This missed opportunity to testify means that the evidence, in

¹³ Ibid, page 14.

¹⁴ Transcripts at pages 17, 22,25.

respect of the equity requirements which was part of the criteria used for the shortlisting and subsequent appointment of the fourth respondent, remained the only evidence properly placed before the arbitrator.¹⁵ The Labour Appeal Court referred with approval in *First Garment Rental (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁶ and in *The President of the RSA and others v South African Rugby Football Union and Others*¹⁷ where the Court held as follows regarding a duty to cross-examine:

“[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. **If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.** This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts” (Own emphasis)

- [9] During cross-examination, General Khunou confirmed that the applicant met the minimum requirements of the post. There were holes that were poked in the respect of whether the shortlisted candidates (only black females) met the minimum requirements. However, in respect of Colonel Lambrechts (a white male and one of those who were shortlisted), Mr Kruger on behalf of the applicant put it to General Khunou as follows:

“MR KRUGER: Mr Lambrechts, like Colonel Pillay, complied with all the requirements for the job.

¹⁵ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* [2003 (1) SA 11 (SCA) at para 5

¹⁶ [2015] 11 BLLR 1094 (LAC)

¹⁷ [1999] JOL 5301 (CC)

[MR KHUNOU: That is true].¹⁸

- [10] General Khunou further confirmed that Colonel Lambrechts was acting in the same post, meaning he had more advantage than that of the applicant. Despite meeting all the minimum requirements, the only disadvantage about both the applicant and Colonel Lambrechts was the issue of employment equity as mentioned above, and the recruitment process was followed. No evidence that was tendered by the applicant to dispute this testimony.

Grounds for the review

- [11] In the founding affidavit, the applicant, after recapping what the arbitrator has found in the respect of the substantiveness of the alleged unfair labour dispute, for example, in finding that he could not conclude that if the applicant had been shortlisted and interviewed he would have necessarily been appointed as compared to one of the candidates, Colonel Lambrechts, who was an excellent candidate or any of the candidates "on the long list". Meaning that there was no certainty on a balance of probabilities that he would have been appointed to this position. The applicant alleges that the arbitrator committed gross irregularity alternatively exceeded his powers for the following reasons:

"[1] [He] was overlooked for promotion in circumstances where [he] possessed the necessary objective attributes, including the requisite experience and qualification, which the person who was promoted did not possess. (Point 1)

[2] The SAPS advanced no acceptable reason for my exclusion from the shortlist, and it appeared that it arbitrary decided to shortlist three African females with no intention to appoint one of them. (Point 2)

[3] The arbitrator, once he found that the SAPS had acted unprocedurally and/or in bad faith, should have found that the intention of the SAPS was not to appoint Lambrechts. In consequence, he should have held that it was manifestly obviously that, but for the unfair labour practice, I

18 Transcribed records, page 37.

would have been shortlisted and to the exclusion of Lambrechts, that I would have been promoted.**(Point 3)**

[4] The arbitrator should have ordered the SAPS to promote [him] alternatively appoint me in a post on the same level and rank as that occupied by the fourth respondent, retrospectively from 1 September 2011. **(Point 4)**

[5] The arbitrator, in the alternative, having found that in appointing the fourth respondent the SAPS exercised its discretion capriciously, or that the decision was taken on the wrong principle or in biased manner, should have set aside the appointment of the fourth respondent and ordered the SAPS to repeat the entire selection process afresh.**(Point 5)**

[6] The compensation ordered by the arbitrator in my favour can never undo the future loss I stand to suffer as a result of the unfair conduct of the SAPS. **(Point 6)**"

Principle and application thereof

[12] This Court is required to apply the test as introduced by the Constitutional Court,¹⁹ in a review application of this nature which is whether the decision that was reached by the arbitrator was one that a reasonable decision-maker could not have reached, taking into account the totality of evidence that was properly presented before the arbitrator.

[13] In deciding such issue, this Court has to remind itself that commissioners are required to decide issues that are in dispute between the parties as the Constitutional Court, in the matter of *Cusa v Tao Ying Metal Industries and Others*,²⁰ held that,

*"A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining **the real dispute between the parties**. In deciding what the real dispute between the parties*

¹⁹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007)

²⁰ 2009 (1) BCLR 1 (CC) ; [2009] 1 BLLR 1 (CC) ; (2008) 29 ILJ 2461 (CC) (18 September 2008)

is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration...”(Own emphasis)

- [14] A party bringing a review application before this Court based on gross irregularity, is required to show that such irregularity has led to him not getting a fair trial of issues, that were required to be decided by an arbitrator, in order for the arbitration award and/or part thereof to be reviewed and set aside,²¹ as I have referred above in the case of *Tao Ying* that an arbitrator has to determine the real dispute between the parties.
- [15] I deal with the grounds of review as pleaded by the applicant hereunder.
- [16] POINTS 1, 2 and 3: It was common cause between the parties that the applicant had the necessary experience and qualifications (minimum requirements), however, the SAPS presented evidence that the reason for the shortlisting of the three black females was to balance the equity figures, and this was never seriously disputed during cross-examination. And the issue of equity figures was the reason that was provided by the SAPS from the beginning and the applicant did not suggest otherwise. The arbitrator, in dealing with this aspect, held that:

“Even if I were to accept that he was a strong candidate, I cannot conclude that that panel , or any other panel for that matter, would necessary have selected

²¹ *Shatterprufe (Pty) Ltd v Sesani NO and Others (PA4/13) [2014] ZALAC 44 (10 September 2014): [29]* In the circumstances, it cannot be said that the arbitrator committed any irregularity which rendered her ultimate finding unreasonable. The arbitration award, when considered with reference to the evidentiary material before the arbitrator, represented a result that fell within the range of reasonable outcomes. A review of a CCMA award is permissible only if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable. Thus, even had the arbitrator committed an irregularity by not resolving the factual disputes, it was incumbent on the court to enquire further to determine if the outcome was unreasonable, which, for the reasons given, in this case it was not.

*the applicant over Lambrechts(or anyone else on the long list). **Both Indian males and white males were in no specific need of being better represented.** The fact that White males were over-represented by 2, does not necessarily mean that a panel would rather have selected the applicant where Indian males were already on target or at an ideal level.This would call for speculation...”(Own emphasis)²²*

- [17] One has to take into account that the arbitrator’s conclusion is in line with the fact that there was no evidence presented by the applicant to gainsay the testimony by General Khunou.
- [18] POINT 4: regarding the ground that the arbitrator should have made an order that the SAPS promote the applicant, alternatively appoint him in a post on the similar level as the one occupied by the incumbent. This point has no evidential weight taking into account that as much as the applicant had a burden to adduce evidence that the SAPS should have looked at an alternative post, he tendered no such evidence , therefore, this point fails.
- [19] POINT 5: the point that the arbitrator should have set aside the appointment of the fourth respondent. It is my view that the arbitrator would have exceeded his powers by doing this and would have decided something that he had not been asked to do taking into account that the pre-arbitration minutes were specific in respect of the relief sought, as mentioned above, the arbitrator was not asked to declare the appointment of Brigadier Makhele invalid or set it aside and he could not have done so *mero motu*, as the pre-arbitration minutes are an agreement between the parties in a dispute from which an arbitrator cannot deviate from unless such pre-arbitration minutes are not in line with the law.
- [20] Taking into account the circumstances of this case, and the arbitration award, I am of the view that the conclusion of the arbitrator is reasonable in such a way that it is based on the evidence that was presented before him and is in line with what he had been asked to determine.

Order:

²² Arbitration award, page 24, at para 21.

[21] I, consequently make the following order:

1. The review application is dismissed.
2. There is no order as to costs.

S. Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Kruger SC

Instructed by: Garlicke & Bousfield Inc.

For the Second Respondent: Advocate Tilly

Instructed by: The State Attorney (Johannesburg)

LABOUR COURT