



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: JR 1115/15

In the matter between:

TEDDY KOMMAL

First Applicant

POPCRU

Second Applicant

and

SOUTH AFRICAN POLICE SERVICE

First Respondent

BRIGADIER C M KOTZE

Second Respondent

ADV E MAREE (NO)

Third Respondent

SAFETY AND SECURITY

Fourth Respondent

BARGAINING COUNCIL

Delivered: 24 January 2018

**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL AND VARIATION
OF THE JUDGMENT**

LAGRANGE J

Variation of Judgement

[1] Before addressing the leave to appeal of the applicants against the judgement handed down on 5 December 2017, I need to correct some patent errors in the judgement, which are set out below. None of the errors involve matters of substance and are simply typographical. Accordingly, to the extent necessary, the judgement is varied by the substitution of the following paragraphs, in which the changes are underlined:

- 1.1 Replace paragraph 5.3 with “5.3 The respective overall scores of the panellists of the applicant and Kotze, were 68, 7 % and 75.1 % respectively. They can be broken down further thus:.”
- 1.2 Replace paragraph [8] with “[8].The arbitrator accepted that because the applicant had a Master’s degree he had been given a score of 9/10 by the panel compared to 7/10 for Kotze. The fact that the panel acknowledged his higher qualification demonstrated that the panel had not ignored this factor. As far as the additional training qualification is concerned, the arbitrator accepted that at the time of the advertisement, neither he nor Kotze had an EDLP qualification, but that Kotze had completed hers by the time of the interviews whereas the applicant still had the last phase of the qualification to complete but he did not advise the panel of this. He also conceded that Kotze had done particularly well in all three phases of the EDLP achieving the accolade of “Overall Best Achiever” and that he had not amended his third phase research proposal despite being asked to. An issue which arose in relation to the EDLP qualification was that the applicant had stated in his CV that he had completed it which led to him being credited with points for that.”

Application for leave to appeal

[2] The citation of parties is the same as in the original review application. The applicants’ grounds of appeal are summarised and addressed below. The second applicant, an Indian male, had applied for the post of Commander:

SAPS Academy Paarl: Division: Human Resource Development at the level of Brigadier. Although he was shortlisted, Brigadier C M Kotze was preferred by the selection panel based on their respective scores and other factors. He referred an unfair labour practice dispute relating to promotion to arbitration but his referral was dismissed. Subsequently, his application to review and set aside the award was also dismissed. It is the review judgement which he seeks leave to appeal against.

- [3] In essence, the applicants raise three grounds of appeal. Firstly, they contend that the Court erred in its understanding of the minimum requirements for the post as a result of making certain errors of fact. Secondly, the Court erred in respect of the effect of employment equity criteria in determining whether or not an unfair labour practice had been committed. Thirdly, the court failed to consider the effect of the procedural irregularity of the failure of the respondents to retain records of the selection panel.

Minimum requirements of the post

- [4] The applicants contends that having found that the SAPS ought not to have equated Kotze's Higher Diploma in Education with the "additional" job requirement of a qualification in Management science, the court ought to have recognised that her application for the post should have been disqualified for failing to meet the minimum requirements of the post.
- [5] While it is correct that I held that Kotze's diploma was not equivalent to the management science qualification, which was mentioned in the post advertisement as an additional requirement, the critical issue was whether or not as part of the 'additional' requirements, it was a mandatory requirement. In the judgement, I held that it was debatable whether it should have been considered mandatory or not. The applicants do not attack the court's finding on this issue. As such, the arbitrator could not be faulted for not finding that it was mandatory.
- [6] The applicants now also make much of the fact that Kotze had not completed all the requirements for the EDLP qualification at the time of the shortlisting, even though she had completed the qualification by the time

she was interviewed. In her application, she had advised SAPS that she was in the process of completing the qualification and it was not unreasonable to have included her in the shortlisting on the basis that she was in the process of completing the qualification. Had she not completed the application by the time of the interviews, it would have been a different matter if she had been allowed to proceed to the interview stage notwithstanding not meeting the minimum requirement by then. In any event, this argument relating to the EDLP appears to be something of a red herring as both the second applicant and Kotze already had academic qualifications which were rated above NQF level 6. Insofar as the second applicant's non-completion of his EDLP by the time he was interviewed is concerned, the relevance of that related to the representation he allegedly made that he had in fact completed the qualification.

- [7] The applicants further argue that paragraph (4) (2) Of National Instruction of 2010 states that if the job applicant for a post on salary levels 13 to 15 does not have an applicable NQF 6 qualification or the higher qualification mentioned in the advertisement, the application must be rejected. However, this argument as it was presented in the arbitration was premised on the applicants' understanding that the additional requirements stated in the advertisement were mandatory, which contention has already been dealt with above.

Application of employment equity

- [8] In the judgement, I held that there was sufficient evidence before the arbitrator to establish that even if equity targets had been applied rigidly, the second applicant would not necessarily have benefited from it. Secondly, the unfair labour practice claim had not been based on unfair discrimination. I made reference in the course of that part of the decision to the case of **Dudley v City of Cape Town**¹, where the LAC decided that the enforcement of employment equity policies had to first be dealt with under the provisions of chapter V of the Employment Equity Act, 55 of 1998.

¹ (2008) 29 ILJ 2685 (LAC) at 2708A-B

- [9] The applicants argue that the Court erred in relying on that judgement and instead should have taken account of the decision in ***SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)***² where the Constitutional Court held that compliance with the SAPS employment equity plan is mandatory, viz:

“[46] In the course of 2004 the national commissioner issued a national instruction 42 (instruction) which pertinently regulated the manner in which promotions within the police service were to be dealt with. It provides that the employment equity plan is binding on all members of the police service. Observing its requirements was mandatory.”³

Quite apart from the fact that *Barnard’s* case concerned a member of the SAPS who had challenged her non-promotion as a case of unfair discrimination and not an unfair labour practice, the applicants do not dispute the first finding I made, namely that even if employment equity considerations had been rigidly applied, there was no certainty that he would have benefited from that. As long as that finding is unchallenged, I do not understand how the further arguments of the applicants on employment equity can provide a basis for another court coming to a different conclusion on the arbitrator’s decision on the fairness of the second applicant’s non-promotion.

Procedural irregularities in the assessment process

- [10] Apart from the fact that the applicants raise the failure of the selection panel to retain the records of its deliberations, they do not identify in what respect the court allegedly erred in regard to this issue in the review. In my judgement, I found that the absence of the entire selection process record, by itself, was not sufficient to give rise to an inference of procedural unfairness. The applicants provide no reason why there is a reasonable prospect another court might come to a different conclusion on this issue.

Order

- [11] The application for leave to appeal is dismissed, with costs.

² (2014) 35 ILJ 2981 (CC)

³ At 2997.

Lagrange J
Judge of the Labour Court of South Africa

LABOUR COURT