



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case no: C242/2023

In the matter between:

SOLIDARITY OBO R BURGER

Applicant

And

SOUTH AFRICAN POLICE SERVICE

First Respondent

WARRANT OFFICER HARTZENBERG

Second Respondent

**SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

Third Respondent

CLARENCE RANDALL N.O.

Fourth Respondent

Heard: 3 July 2025

Delivered: 9 July 2025

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 9 July 2025

Summary: application to review – review dismissed – applicant failed to prove that arbitrator failed to properly consider the evidence or that the decision is one that a reasonable decision maker could not reach.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter concerns an application by Solidarity, on behalf of R Burger to review and set aside an arbitration award given by the fourth respondent (Randall) in his capacity as an arbitrator of the third respondent (SSSBC). The application has been brought in terms of section 145 of the Labour Relations Act¹ ('the LRA').
- [2] The matter arose from an alleged unfair labour practice regarding the first respondent's (SAPS) failure to promote Burger to the position of warrant officer. The arbitration proceedings before Randall took place on 13 December 2021 and concluded on 15 February 2023. Randall, following the conclusion of the arbitration proceedings, issued an award dated 19 April 2023 wherein he found that SAPS did not commit an unfair labour practice against Burger when it, instead, appointed Hartzenberg to the post in question, i.e., to the post of warrant officer. It is this determination that gave rise to the current review application.

¹ Act 66 of 1995 (as amended).

The relevant background

- [3] Most of the background facts are common cause and will be briefly summarised. Burger applied for post 4301, which was advertised on or about 28 August 2020. The post was for the rank of warrant officer and in the division known as Forensic Detective Services and in the Explosive Section, previously known as Local Crime and Criminal Record Centre (LCRC). The post was advertised and formed part of Post Promotions Phase 1: 2020/2021 Financial Year; Division Forensic Services.
- [4] Candidates were shortlisted and interviewed, who included Burger and Hartzenberg. Burger was the highest scoring candidate, scoring 73% and he was recommended for the post. Hartzenberg was the third highest scoring candidate, scoring 65%. There was another candidate who was scored the second highest score, but he was recommended and appointed to another post. For purposes of the arbitration proceedings, Burger obtained the highest scoring for post 4301 and Hartzenberg the second highest scoring.
- [5] Burger was however not appointed, and Hartzenberg (a Coloured male) instead was appointed. The decision to appoint Hartzenberg, and not Burger, was to address equity. The appointment date was announced on 6 April 2021 and applied from 1 April 2021.
- [6] SSSBC agreement 3 of 2011 (SSSBC 3/2011) and National Instruction 3 of 2015 (NI 3/2015) are applicable to the dispute. For purposes of the dispute, Coloured males were underrepresented by 8, and White males were overrepresented as per the relevant SAPS employment equity figures, by 116. The interview panel, being aware of SAPS' applicable Employment Equity profile, still recommended Burger for the post. The divisional commissioner appointed a moderation committee after

receiving the panel's outcome, who recommended Burger for promotion. The divisional commissioner, thereafter, supported the recommendation of the moderation committee. The recommendation to appoint Burger was however not approved and, in applying equity, Hartzenberg was promoted to the post in question.

- [7] The advertisement, at clause 11.2 explains that all promotions up to the rank of Lieutenant Colonel will, subject to the recommendations received by the person under whose responsibility the post resorts, be approved by the deputy national commissioner (NDC), Human Resource Management. The advertisement, at clause 11.3 sets out that: *'to ensure that employees in the different divisions/provinces are treated equally and to ensure one standard in the process, the National Commissioner approved that Divisional/Provincial present their recommendations for promotion to the National Commissioner during the week of 19-23 October 2020 with specific reference to the following-*

- *Posts not filled.*
- *Employees recommended for promotion with convictions / pending cases (both criminally and departmentally); and*
- *Representivity."*

The SSSBC award

- [8] Randall found that, in respect of SAPS' two witnesses, he had attached no weight to their evidence. The witnesses were not part of any panel or moderation committee, appointed by the divisional commissioner, that concluded that it would be improper to promote Burger. The witnesses were asked to comment on how the initial panel came to their scores, yet they did not score the interviewed candidates, and they were not even part of the panel that recommended Burger for promotion.

- [9] Randall agrees with Burger that NI 3/2015 does not make provision for the National Commissioner to have any input regarding the approval and appointment of the recommendation received by Burger's Divisional Commissioner. On a plain reading of NI 3/2015, the approval for promotion rests with the Divisional Commissioner. Randall however added that, what is however common cause, is that an additional "step" or "safeguard" had been set out in the advertisement. The rationale for it is set out in clauses 11.2 and 11.3 thereof. Randall found that it can therefore not be argued that this was an afterthought that was introduced by SAPS to prejudice Burger or any other applicant in the process.
- [10] Randall states that the rationale for this deviation from NI 3/2015 is explained in clause 11.3 of the advertisement wherein it states that this additional step was introduced – *"to ensure that employees in the different divisions/provinces are treated equally and to ensure one standard in the process."*
- [11] Randall however finds that the advertisement must not be read in isolation but ought to be measured against the decisions taken by SAPS when it came to the promotion or non-appointment of other recommended candidates. Reference is then made to the promotions of Brink and Barnard, also White males, who were recommended for promotion although being part of the group of SAPS employees within the division that were overrepresented as set out in the applicable Employment Equity Plan and Guidelines.
- [12] It was however found that their situations depart from that of Burger where the 10% variation in scores comes into consideration. In the promotion of Brink, he scored more than 10% when compared to the second-best candidate for the post in which he was appointed, who was also a Coloured male and who was underrepresented. As a result of the 10% principle, employment equity guidelines are not to be considered by SAPS. In the case of Barnard, he also scored more than 10% when

compared with the third best candidate. In respect of the second-best candidate, an African female, the score was less than 10%. African females are also part of another group of SAPS employees within the division that were overrepresented. The 10% rule does not come into consideration where candidate one and candidate two are both over-represented.

- [13] Randall finds that it can only be inferred from an assessment of the facts that the introduction of the additional step contained in the advertisement was to ensure equal treatment. Such equal treatment would consequently mitigate inconsistencies taking place when appointing candidates for various post promotions. Randall finds further that the additional steps taken by SAPS in ensuring equal treatment in this round of promotions cannot be seen as arbitrary or based on biased principles. In simple terms, “the head now has a say in which direction its body moves” and Randall finds that he cannot fault SAPS for this approach.

The test for review

- [14] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,² the Court held that ‘the reasonableness standard should now suffuse section 145 of the LRA’, and that the threshold test for the reasonableness of an award was: ‘...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...’³. In *Herholdt v Nedbank Ltd and Another*⁴ the Court applied this reasonableness consideration as follows:

² (2007) 28 ILJ 2405 (CC).

³ Id at para 110.

⁴ (2013) 34 ILJ 2795 (SCA) at para 25.

‘... 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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

- [15] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.
- [16] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.⁵ This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only

⁵ *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 102.

basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.⁶

- [17] The court will now proceed to consider the review application by the applicant against the above principles and test applicable to review applications.

Grounds of review

- [18] Burger's grounds of review, as contained in his founding affidavit, are that:

- (a) Randall committed a gross irregularity in that he misconstrued evidence and failed to properly apply his mind to material facts, whilst assuming allegations without fact as accurate.
- (b) Randall failed to have regard to the full complement of evidence, which resulted in Randall arriving at the unreasonable conclusion and made a decision that a reasonable decision maker could not reach.
- (c) Had Randall understood the evidence and the question of law before him he would have come to a different conclusion.
- (d) In the light of the above, defects exist in the arbitration award in one or more of the following respects:

⁶ See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

That Randall –

- (i) Committed misconduct in relation to the duties of the commissioner as an arbitrator.
- (ii) Committed a gross irregularity in the conduct of the arbitration proceedings.
- (iii) Exceeded his powers as a commissioner.

[19] Under “The Commissioner’s Award”, Burger challenges the following:

- (a) That despite Randall mentioning that almost none of Burger’s evidence was disputed, he does not attach the necessary weight to his evidence.
- (b) That Randall did not properly apply his mind to the evidence that proved SAPS’s arbitrary and inconsistent conduct relating to record keeping. Significant inconsistencies in marks awarded against set criteria, and clear contradictions as set out in Burer’s closing argument.
- (c) That Randall’s comments regarding the “additional requirement” in the advertisement being allegedly common cause, and allegedly for a good cause and that “the head now has a say in which directions the body moves” are problematic –
 - (i) as it is not common cause that the advert merely established an additional requirement that supplements NI 3/2015 for a fair reason;

- (ii) there being no evidence that the alleged requirement was duly mandated by the National Commissioner, or even having given any proper mandate to the Deputy National Commissioner to vary the NI 3/2015;
 - (iii) the alleged additional requirement in the advertisement is contradictory to the NI 3/2015 that the Divisional Commissioner has the authority to approve the appointment;
 - (iv) there was no waiver of the NI 3/2015; and
 - (v) the National Commissioner already exercised his authority as Head when he signed the NI 3/2015 to which he is also bound.
- (d) The award makes no reference to Burger's arguments relating to the Employment Equity Plan of SAPS.
- (e) That Burger's testimony proved objectively speaking that the difference in score was more than 10% between Burger and the successful candidate.
- (f) That Randall misconstrued the evidence by Burger and did not give due consideration to relevant evidence.
- (g) That the result by Randall was unreasonable in the sense of it being disconnected with the evidence, alternatively unsupported by the evidence, alternatively the findings do not correlate with the evidence.
- (h) That Randall misconstrued the evidence before him, acted grossly irregular and came to an unreasonable outcome.

Analysis of the grounds of review

- [20] The test applicable in review applications, in essence, is whether a commissioner's decision is one that a reasonable decision maker could not reach. The court is not required to determine whether Randall's decision is correct, or whether his decision is one that this court would not have reached. What is required is to determine whether the decision, based on the evidence before Randall, is a decision that falls within the bands of reasonableness.
- [21] Randall firstly was obviously quite correct that the onus to prove that SAPS committed an unfair labour practice was on Burger during the arbitration proceedings. Randall referred to *Noonan v Safety and Security Sectoral Bargaining Council and Others*⁷ where it was held that there is no right to promotion in the ordinary course, only a right to be given a fair opportunity to compete for the post. As long as the decision taken by the employer can be rationally justified, mistakes in the process of evaluation do not constitute unfairness justifying an interference with the decision to promote. The court held that it will be arbitrary if the decision has little or no rational basis.
- [22] Randall also found, correctly so, that to succeed with a claim of unfair labour practice related to promotion, the employee must prove that the employer had exercised its discretion capriciously, for unsubstantiated reasons, or that the decision was taken on a wrong principle or in a biased manner.⁸

⁷ [2012] 33 ILJ 2597 (LAC)

⁸ *Msobo and Independent Municipal & Allied Trade Union* (2008) 29 ILJ 459 (CCMA) and *Aries v CCMA & Others* (2006) 27 ILJ 2324 (LC)

- [23] Burger's challenge to inconsistency in promotion of employees from an over-represented group (White males), the 10% principle, and the alleged incorrect scoring of Burger, leading to the application of the 10% principle, has in the court's view no merit. Randall firstly clearly applied his mind to the evidence and to the 10% principle and found that Brink and Barnard's promotions are distinguishable to Burger's non-promotion. In their promotions, the scores reflected a difference of 10% and more between the first and second-best candidates, which resulted in their applications being accepted. Randall's decision, based on the evidence and based on the reasons given, is a decision that a reasonable decision maker could reach. It is also a decision that this court would have reached based on the evidence before Randall.
- [24] Perhaps more controversial is the allegation that there were mistakes made in the scoring of Burger during the interview and, by accepting the mistakes and determining the "correct" score, the 10% principle would have applied. Had this issue been properly dealt with during the arbitration proceedings, and if it was established that the scores were indeed incorrect and would have resulted in the 10% principle coming into the equation, Burger's allegation that SAPS committed an unfair labour practice in not promoting him would probably have had a positive outcome.
- [25] However, Burger did not deal with the 10% principle during his evidence in chief. Burger was represented by Solidarity, and one would have expected Solidarity to challenge the correctness of the scoring during Burger's evidence in chief, and to call or subpoena the members of the interview panel to present evidence to establish the incorrectness of the scoring. It appears that this was not done because Solidarity and/or Burger was not aware of the 10% principle.
- [26] The 10% principle only received attention when SAPS' witnesses were cross-examined regarding the alleged inconsistencies. Although Burger

had already closed his case at this time, Solidarity ought to and perhaps should have applied for Burger's case to be re-opened to address the alleged incorrect scoring. The duty to call the members of the interview panel did not rest with SAPS, and neither was there an obligation on Randall to explain to Solidarity what they were required to do. Had he done this, he would have descended into the arena so to speak. Solidarity's failure to request Randall to re-open their case to properly address the scoring does not and cannot be relied on to seek a review of the award. Randall could not place any reliance on the alleged incorrect scores in the absence of direct evidence to show that the scores were indeed incorrect, leading to the application of the 10% principle.

- [27] This then leaves the challenge to the advertisement being contrary to NI 3/2015 and to the decision to promote Burger falling with the Divisional Commissioner and not being subject to interference by the National Commissioner.
- [28] The court is unable to accept the challenges raised as grounds of review to Randall's decision in this regard. Burger, in applying for the post in response to the advertisement, could have had no misunderstanding as to what the process will be in respect of the appointment of recommended candidates. It was made very clear that the National Commissioner will have the final say on appointments, and not the Divisional Commissioner. The Divisional Commissioner therefore did not approve the appointment in line with NI 3/2015 but accepted the recommendation of the moderation committee before submitting his recommendation to the national moderation committee.
- [29] The national moderation committee, for reasons of representivity in line with the Employment Equity Guidelines, reverted to the Divisional Commissioner advising that Burger's recommendation cannot be accepted, and that Hartzenberg, being the second-best candidate for the

post, should be appointed. The Divisional Commissioner agreed with the decision of the national moderation committee.

- [30] The court is satisfied that Randall's decision regarding the advertisement, finding that the advertisement added an additional safeguard, cannot be said to be a decision that no other reasonable decision maker could reach. The decision taken not to accept the recommendation to appoint Burger was not done arbitrary and was in line with the Employment Equity Plan and Guidelines. There was a substantive reason for not accepting the recommendation, which was based on White males being overrepresented by 116, and Coloured males being underrepresented by 8 with the 10% principle not being applicable based on the scores by the interview panel members.
- [31] Randall's decision that it can only be inferred from an assessment of the facts that the additional step contained in the advertisement was to ensure equal treatment is a decision that a reasonable decision maker could reach. The issue of representivity is contained in NI 3/2015 and the court is unable to find that the advertisement was contrary to NI 3/2015 in providing that all promotions be approved by the Deputy National Commissioner – Human Resource Management. Burger therefore failed to prove that SAPS acted irrational, capricious or arbitrary, was motivated by bias, malice or fraud, failed to apply its mind or had exercised its discretion for insubstantial reasons or based on wrong principles.

Costs

- [32] In terms of the provisions of section 162(1) of the LRA, the court has a wide discretion when it comes to the issue of costs. The court is mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the*

*Province of Kwa-Zulu Natal and Others*⁹ when it comes to the issue of costs in employment disputes. In the matter before the court, there is no compelling reason, in law and fairness, for an order to be made regarding costs.

[33] In the premises, I make the following order:

Order

1. The review application is dismissed.
2. No order is made as to costs.



C de Kock

Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicant:

Mr. I Stockenström

From:

Solidarity

For the Respondents:

Adv. K Ngqata

Instructed by:

M Dyalivane (State Attorney)

⁹ (2018) 39 ILJ 523 (CC).