

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO:C484/98

In the matter between:

DEPARTMENT OF HEALTH WESTERN CAPE

Applicant

and

First Respondent

HOSPITAL PERSONNEL TRADE UNION

Second Respondent

JUDGEMENT**ZONDO J:**

- [1] In this matter I give judgment which I reserved after hearing argument last week. The applicant has brought an application to have a certain arbitration award reviewed and set aside. The award is one which was issued by the first respondent, a Commissioner of the Commission for Conciliation Mediation and Arbitration (CCMA). The award was issued in respect of a dispute between the applicant and the second respondent over the applicant's failure or refusal to appoint one Mr Abrahams to the position of administrative officer.

[2] The applicant had advertised a vacancy of a senior administrative officer in a newspaper. Mr Abrahams responded to that advertisement by applying for that post. He was called for an interview. At the interview he was informed that the post of senior administrative officer was no longer available. He was, however, offered an interview there and then for the position of an administrative officer. He agreed to be interviewed for that post. Subsequently he was shown a letter which appointed him to the position of administrative officer. He was excited about this and started informing his colleagues about his new appointment. However, Mr Abrahams' excitement proved short-lived because no sooner had he started telling his colleagues about his new appointment as an administrative officer than he was informed that actually there had been a mistake and that his appointment was to the position of assistant administrative officer and not administrative officer. Though Mr Abrahams was very disappointed by this news, he accepted the appointment to the position of assistant administrative officer under protest.

[3] A dispute arose between the applicant on the one hand and Mr Abrahams on the other about whether or not the applicant's failure to appoint him as an administrative officer, or put differently whether the applicant's withdrawal of Mr Abrahams' appointment as an administrative officer constituted an unfair labour practice as envisaged in the unfair labour practice provisions of the Labour Relations Act, 1995 (“**the Act**”). The second respondent and Mr Abrahams contended that it did, whereas the applicant contended that it did not. The dispute was referred to the CCMA for arbitration where the first respondent was appointed to arbitrate it. The first respondent, a Commissioner of the CCMA, arbitrated the dispute

and issued his arbitration award.

- [4] In terms of the arbitration award, the first respondent found that the conduct of the applicant constituted an unfair labour practice. She ordered that Mr Abrahams be **“confirmed”** (to use the Arbitrator's words) in the post of administrative officer by means of a letter of appointment, back-dated to 16 September 1996 and that the difference in salary for the interim period be paid to him.
- [5] It would appear from a reading of the award that the applicant's defence before the first respondent, which was the same case pursued in this application, was that in order for Mr Abrahams to be appointed to the position of administrative officer, he was required to have had a tertiary institution qualification and experience gained after obtaining such qualification. It is common cause that at the time of the interview, Mr Abrahams did not have such qualification.
- [6] The second respondent's attack before the first respondent appears to have been based on the contention that the applicant had waived or condoned Mr Abrahams' non-fulfilment of this requirement. The basis of the first respondent's finding was that the applicant condoned the fact that Mr Abrahams did not have the required three year qualification and experience obtained after the acquisition of such qualification at the time of the interview. The condonation was found by the first respondent to be constituted by the applicant's act in short-listing Mr Abrahams for an interview.

[7] The first respondent seems to have based her finding of unfairness on the applicant's part on the allegation that the applicant had failed to explain to Mr Abrahams at the interview and thereafter that he did not qualify for the post of administrative officer. The first respondent said Mr Abrahams expected to be appointed to the position of administrative officer because the applicant had not told him he did not qualify for the post. Furthermore, the first respondent said she believed that the applicant acknowledged experience obtained prior to the acquisition of the tertiary qualification. She also referred to a report made about Mr Abrahams' performance in the interview and she said it demonstrated that his experience before getting the qualification was acknowledged. The interview report reads thus:

"During the course of interview, Mr Abrahams demonstrated to us that he had the criteria for the position, these included initiative. His qualifications and experience indicate he had the accounting and computing expertise required."

The first respondent found that it could not be said that Mr Abrahams' qualifications were not known to the applicant. Also the first respondent emphasised that the applicant had no complaint about Mr Abrahams' capabilities.

[8] Mr Oosthuizen, who appeared for the applicant, submitted that the award of the first respondent required the applicant to act in breach of the provisions of the Public Service Act and that an award that required an employer to do that fell to be reviewed and set aside. The argument on behalf of the second respondent, as I have already indicated, was simply that the employer in this case had condoned Mr Abrahams' lack of qualification and that it was

not open to the employer to rely on the lack of the said qualification to deny Mr Abrahams the position for which he had been interviewed.

[9] This case turns on the question whether or not the award issued by the first respondent is an award which the Commissioner had power to issue. There can be no doubt that the award that she issued would have the effect that the employer, in this case the applicant, should do something that it had no right to do, or should do something that would be contrary to the provisions of the Public Services Act and that the employer should appoint somebody to a position for which he did not qualify.

[10] Also the issue of waiver has been raised by the second respondent. The difficulty that I have with the issue of waiver is, firstly, that the requirements which have been laid down for this particular post, as is the case with many other posts in the Public Service, is not a requirement that has been laid down by the employer. It is one that has been laid down by the Public Service Commission which lays down requirements for various posts in the Public Service. It is not open, in my view, to the employer to waive such a requirement. What is conceivable is that the employer may well be able to obtain some ruling or directive from the Public Service Commission waiving a particular requirement. Whether or not that can be done, I do not know and that is not a matter that was argued before me. The fact of the matter is that it is a requirement which is not stipulated by the employer but it is one which is stipulated by another statutory body, whose function includes ensuring that proper requirements are laid for posts in the Public Service.

[11] The other difficulty I have with the argument of the second respondent is that this is not a private employer. It is an employer in the Public Service. There is an element of public interest involved. The public is entitled to know that people who get appointed to various positions will be people who meet the requirements for those positions. In my view, it is not, generally speaking, open to the employer to simply waive or condone such a requirement in such circumstances.

[12] Mr Oosthuizen has referred me to a number of judgments one of which is that of **Hlophe J** in **The University of the Western Cape & Others v Member of Executive Committee for Health and Social Services & Others, 1998(3) SA 124 (C)**. There Hlophe J dealt with a case where the applicants, inter alia, argued that they should be appointed to certain posts even though such posts had not been advertised and even though the Public Service Staff code required that they should be advertised first. Hlophe J said, quite correctly in my view, that the applicants could not have a legitimate expectation that something contrary to the law would be done. In the same way I am of the opinion that the applicant in this case could not condone or waive a requirement which it had no power to waive. The arbitrator had no power to order the applicant to appoint Mr Abrahams contrary to the law. In making such an award the commissioner exceeded his powers. Accordingly I have come to the conclusion that the application must succeed. With regard to costs I am of the opinion that the applicant has treated Mr Abrahams unfairly enough already. Firstly, he was invited for an interview for the position of senior administrative officer which, it turned out at the interview, was not available. Secondly, he was offered an interview in respect of the position

of administrative officer, which, it has subsequently turned out, he did not qualify for. In those circumstances I think it would not be in accordance with the requirements of the law and fairness to award costs in favour of the applicant. Accordingly I propose to make no order as to costs.

[13] During argument I was told that there was an application to make the arbitration award an order of Court which had been filed by the second respondent. In the light of the conclusion which I have reached on the review application, it follows that the application to make the award an order of Court cannot succeed. For the above reasons the order that I make is the following :-

1. The arbitration award issued by the first respondent under case number WE11053 in the CCMA is hereby reviewed and set aside.
2. The application to make the arbitration award referred to in 1 above an order of Court is hereby dismissed.
3. There is to be no order as to costs.

R. M. M ZONDO

Judge in the Labour Court of South Africa

DATE: 10-3-1999

:Mr Oosthuizen

:The State Attorney of WCP

:Miss A. Kyriakou

:HOSPERSA