

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN_____

CASE NO: D544/99

In the matter between

D P NDLOVU

Applicant

and

CCMA

First Respondent

**MR AUBREY NGCOBO
DEPT OF SOCIAL WELFARE AND
POPULATION DEVELOPMENT**

Second Respondent

Third Respondent

JUDGMENT

WALLIS AJ

[1] The applicant in this case is an employee of the Department of Social Welfare and Population Development. It is apparent from the documents that over a number of years he has felt a sense of grievance in regard to questions of promotion. Ultimately, his feeling of grievance was such that he raised a dispute concerning an unfair labour practice in terms of item 2(1)(b) of Schedule 7 to the Labour Relations Act which defines as one of the residual unfair labour practices in terms of the Act, any unfair conduct of the employer relating to the promotion of an employer.

[2] In terms of item 3(1)(b) of that schedule that dispute was referred to a Commissioner and when it remained unresolved it was referred for arbitration by a Commissioner in terms of item 3(4) of Schedule 7. The arbitration was held in Pietermaritzburg on 29 April 1999.

The person appointed to act as Commissioner by the CCMA was Mr Aubrey Ngcobo. The applicant was represented by an attorney and there was no appearance on behalf of the Department. That want of appearance is explained in the affidavits before me on the grounds that the Department was not properly notified of the arbitration hearing. Nothing, however, turns upon that for present purposes.

[3] After the arbitration hearing, Mr Ngcobo handed down an award in which he found that the Department had not committed an unfair labour practice in failing to promote the applicant and he dismissed the application.

[4] The matter comes before me by way of an application in terms of section 145 of the Labour Relations Act for that award to be reviewed and set aside. The order which the applicant asks me to make is not only to set aside the award but to substitute in its place an order directing the Department to promote him to the position of director.

[5] Whilst it is fair to say that the correctness of some aspects of the judgment of the Labour Appeal Court in Carephone (Pty) Ltd v Marcus n.o. and Others ((1998) 19 ILJ 1425 LAC) in regard to the standard of review is open to debate, I propose for the purposes of this application to apply the test laid down in paragraph 37 of the

judgment and to ask myself whether there is a rational objective basis justifying the connection made by the arbitrator between the material properly available to him and the conclusion arrived at in the form of his award. I make that assumption because it is the assumption most favourable to the applicant in this case.

[6] In the documents which were furnished to the arbitrator and, in particular, in a statement made by Mr Ndlovu but undated, which appears at pages 33 to 41 of the papers, Mr Ndlovu gives details of his accumulated grievances in regard to the question of promotion. It is apparent from reading the statement that on a number of occasions he was not promoted in circumstances where in his view the persons who were appointed to particular posts lacked his qualifications, his abilities and his length of service.

[7] The last promotion in regard to which he raises a complaint in that document is an application which he made during July or August 1995 for a post of Deputy Director. There are two letters in these papers, the one of which records the receipt of his application for that post and the other of which is a letter advising him that he had not been appointed thereto. The latter letter is dated 4 March 1996.

[8] It is in my view clear from this that Mr Soni is correct when he submits that whichever of these complaints formed the basis of the reference to arbitration, it was a complaint which had arisen before the Labour Relations Act came into force. As such it was not appropriate or permissible for such complaint to be referred to arbitration in terms of item 3.

[9] Be that as it may, however, it is clear from the arbitration award that Mr Ngcobo approached the matter on the basis that Mr Ndlovu's complaint relates to his non-appointment at the level of Deputy Director in the Department. That is the question to which he addressed his mind and that is the most favourable approach to the application papers, from the point of view of Mr Ndlovu.

[10] In regard to that question Mr Ngcobo said the following and I quote:

"There is no doubt in my mind that the applicant is eminently qualified for a senior position in the ranks of Government. It is also quite clear that he has rendered sterling service to his employer. Is he, therefore, on the aforementioned basis entitled to a senior position? If indeed he is so entitled, does he stand head and shoulders above everyone else who is so qualified? There is no evidence to persuade me that the answers to these two questions should be in the affirmative. Considering the applicant's stated intention to obtain a severance package as far back as 1996, I question the wisdom of promoting him. It appears to me that the clamour for a senior post is intended to justify a demand for a more

generous severance package. It appears to me that any employer who acts conservatively in order to avoid being saddled with an exorbitant severance package is not committing an unfair labour practice. Such an employer, in my view, can legitimately claim to be inspired by a desire for proper governance. In sum, I am not convinced that the respondent committed an unfair labour practice in failing to promote the applicant. It is nowhere evident that the applicant was entitled to the promotion deserved. It is also not clear that the successful applicants was or were not more deserving than the applicant. No evidence was led to show that the respondent was capricious or arbitrary in its decision."

- [11] In my view, the questions which the Commissioner asked in the first paragraph of that quotation were wholly justifiable questions in relation to a dispute over a matter of promotion. It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed.

[12] The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise.

[13] On the papers which are before me and which were before the arbitrator, that question was hardly canvassed. Certainly no evidential basis was placed before the arbitrator to suggest that in relation to any of the appointments there was not proper reason for the relevant departments to appoint the persons whom they chose to appoint in preference to Mr Ndlovu. In the absence of such evidence it is difficult to see how the arbitrator could have made a finding in favour of the applicant.

[14] I also regard the arbitrator's comments in regard to a severance package as being justifiable. The statement to which I have referred included a very substantial claim in respect of a severance package. In argument before me, Mr Ndlovu indicated that the claim was erroneously calculated but he apparently did not indicate that to the arbitrator.

[15] As regards his position, he told me that if I granted the order which he seeks, namely that he be promoted to the position of

Director, then such appointment would be one which in the parlance of the public service would be an appointment to a post "out of adjustment" and as a consequence Mr Ndlovu would then qualify for a severance package. That package would be calculated on the basis of his promotion post.

[16] As was stressed in the Carephone case, an application for review under section 145 is not an opportunity to appeal from the decision of the arbitrator to this Court. It is not open to this Court simply to substitute its view of the merits of the matter for that of the arbitrator. Such an approach would be wholly destructive of the intended purpose of arbitration, namely that it should be expeditious and, in general, not subject to judicial challenge.

[17] It is irrelevant whether I agree with the finding by the arbitrator. The only thing that is relevant is that in the light of what I have said earlier in this judgment it is manifest that there was a rational objective basis connecting the evidential material placed before the arbitrator with the decision at which the arbitrator arrived. That being so, there is no basis upon which I am entitled to interfere with the arbitration award.

[18] In those circumstances Mr Soni asked that the application be dismissed and asked that the applicant be ordered to pay the costs of the application. That is, of course, the usual order in the case of

ordinary disputes. In this Court there is long standing jurisprudence to the effect that the Court must weigh up considerations of equity in deciding whether or not to award costs against an unsuccessful party.

[19] In doing so it must avoid making such stringent orders that it has a chilling effect on the willingness of people to bring their grievances to this Court. It is also well established that where there is a continuing relationship between the parties, it is in general undesirable to prejudice that relationship by making an adverse order for costs.

[20] On the other hand, Mr Soni is quite correct in submitting that Government Departments are particularly vulnerable to unmeritorious litigation in pursuit of unsubstantiated grievances. They employ a very large number of people. Indeed, it is probable that collectively the Government is the largest employer in this country. The salaries of those people and the costs of the department in resisting unmeritorious litigation are paid out of the public purse. In other words, the taxpayers have to bear those costs.

[21] It is undesirable that the taxpayers should be burdened with needless expense arising from unmeritorious litigation. There are far more pressing things on which to spend the money raised by

taxation.

[22] Weighing all those factors up I am persuaded that this is a case so lacking in merit that it would be inappropriate to penalise the public purse by compelling the Respondent to pay the costs of the litigation without any prospects of recovery.

[23] In the result the order that I make is that the application is dismissed with costs.

WALLIS AJ

