

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case Nr: JR11802/2002

In the matter between:

THE NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE SERVICE

Applicant

and

SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL & OTHERS

1st Respondent

P ROOPA N.O.

2ND Respondent

J P GREYLING 3RD Respondent

JUDGMENT: MUSI J

HEARD ON: 2 MARCH 2005

DELIVERED ON: 21 APRIL 2005

- [1] The third respondent is a Captain in the South African Police Service stationed at Potchefstroom, Northwest Province. In 2000 he, along with other police officers, responded to an advertisement issued by the South African Police Service inviting candidates to apply for the newly

created post of Area Head: Crime Intelligence, at Potchefstroom. His application was unsuccessful. The post was given to a Captain Nel, who has since been promoted to the rank of Superintendent (Nel). The third respondent declared a dispute on the basis that the failure to appoint him amounted to an unfair labour practice. The matter was ultimately referred for arbitration under the auspices of the Safety and Security Sectoral Bargaining Council (the SSSBC). The second respondent was appointed Commissioner to conduct the relevant hearing.

- [2] The second respondent subsequently issued an undated Award in terms of which he found in favour of the third respondent that the South African Police Service had committed an unfair labour practice in the handling of the third respondent's application. The second respondent found that he had no power to grant any relief and referred the matter to the Labour Court to consider relief. The Court however, referred the matter back to the second respondent with a direction that he should consider an

appropriate relief. The second respondent then issued an amended Award that included an order of compensation in the following terms:

“I direct that the respondent is to pay the applicant an amount which is the difference in remuneration and benefits between the posts of Superintendent and Captain from the date of appointment of Superintendent Nel to such date that the employment contract between them comes to an end.”

The amended Award is also undated but it is undisputed that the applicant received it on 3 October 2002.

- [3] I should note that in the arbitration proceedings the SAPS was cited but the Commissioner of the SAPS has, by proper notice, joined these proceedings and replaced the South African Police Service as applicant. The applicant now seeks to have the awards of the second respondent reviewed and set aside. The application is opposed by the third respondent, to whom I shall henceforth refer simply as the respondent.

[4] There has been a dispute as to whether applicant needed to apply for condonation of the late filing of the instant application in regard to the first award. This award was also undated but was received by the applicant on the 16 July 2002. Technically the application is out of time in regard thereof. However the applicant adopted the attitude that as the first award contained no order and no prejudice to it, there was no need to apply for its review. It is only when the second award was made that the need arose to want to review the matter. The applicant nevertheless filed an application for condonation *ex abundanti cautela*. It is, however, not a substantive application in the sense that it is not supported by affidavit. On the other hand, the respondent took the view that a proper, substantive application for condonation was needed and went on to cite the applicable case law in the heads of argument filed on his behalf.

[5] In my view, condonation is unnecessary. The two awards

cannot be treaded as if they were separate, distinct awards. They are for all practical purposes part and parcel of one arbitration process, which was concluded with the second award. It is significant that the second award is entitled “Amended Award” which implies that it flows from and encompasses the first award. Nor can the aspect of compensation be divorced completely from the merits. Review of the amended award necessarily entails considering the merits of the first award. Otherwise, in so far as it may be necessary, I would grant condonation. The reasons why the applicant did not file the application timeously emerge clearly from the papers and there was no need to file any supporting affidavit.

- [6] The root cause of the dispute between the parties herein is to be found in the conduct of the Selection Panel that was appointed to consider the applications for the relevant post. It is not disputed that one of the panellists, Area Commissioner Moloi, informed the other panellists that Nel was the best candidate in that he had set up the same unit

whose head was to be appointed, had headed it for some time and had gained the necessary experience in the post. The other panellists accepted that and the panel proceeded to simply appoint Nel without considering the applications of the other candidates, including the respondent. That was clearly a gross irregularity and on that basis the arbitrator found that the respondent was a victim of an unfair labour practice.

- [7] The applicant does not dispute the correctness of the second respondent's finding in this regard, though Mr. Hiemstra, for the applicant, somewhat suggested that the finding was irrelevant. The gist of the applicant's contention, as articulated in oral argument, was that the finding was not in itself sufficient to support the grant of the relief contained in the amended award. Mr. Hiemstra argued that the respondent had to establish a causal connection between the irregularity and the harm suffered. To do that the respondent had to show that, but for the irregularity, he would have been appointed to the post.

Counsel cited **WOOLWORTHS (PTY) LTD v WHITEHEAD** (2000) 21 ILJ 571 LAC and **UNIVERSITY OF CAPE TOWN V AUF DER HEYDE** (2001) 22 ILJ 2647 LAC. He submitted that the respondent needed to show not only that he was better qualified and suited for the post than Nel but also that he was the best of all the candidates. This, it was submitted, the respondent had not shown in the arbitration proceedings.

[8] The applicant also attacked the compensation aspect of the award on the basis that it is irrational. There is merit in this criticism but in the view that I take of the matter, it is unnecessary to deal with it.

[9] In his response, Mr. Branford, for the respondent submitted that the second respondent has in effect rejected the allegation that Nel had set up and headed the unit concerned and he referred to the passages in paragraph 4.4.1 and 4.4.2 of the first award which read as follows:

“4.4.1 The reasons tendered by the respondent in respect of Superintendent Nel’s experience in respect of acting in the post he was eventually appointed to are unsatisfactory on a proper conspectus of the evidence presented, which does not support such contention;

4.4.2 For Commissioner Moloi to have suggested same to the provincial panel who made the decision in this regard is therefore dubious.”

Mr. Branford contended that the evidence before the arbitrator clearly shows that the respondent was far more experienced and better qualified for the post than Nel and therefore that the respondent should have been preferred over Nel.

[10] I indicated to counsel during argument that I was prepared to accept that, on the evidence, the respondent was indeed better suited for the post than Nel and I then broached with counsel the subject of whether the respondent was the best of rest of the candidates. It was accepted that Nel and the respondent were not the only candidates. However, very little was known about others precisely because their applications, just like that of the respondent, had not been considered at all. Mr. Branford could not find his way past the fact that it had not been established that the respondent was the best of all the candidates. And the respondent did not deal specifically with such aspect in his evidence precisely because he had been preoccupied with exploding the myth that Nel was a better candidate than him. This aspect also eluded the arbitrator.

[11] In **WOOLWORTHS (PTY) LTD v WHITEHEAD** *supra* at

580 paragraph 24 Zondo, AJP (as he then was) endorsed the principle that there must be a causal connection between the act complained of and the prejudice suffered for the act to be branded an unfair labour practice. This decision was cited and followed in **UNIVERSITY OF CAPE TOWN v AUF DER HEYDE** *supra*. See also **MINISTER FOR SAFETY AND SECURITY AND OTHERS v JANSEN N.O. AND OTHERS** (2004) 25 ILJ 708 LC at 27.

- [12] Applying the principle to the facts of the instant case, it is clear that there was a causal connection between the serious irregularity committed by the Selection Panel in failing to consider the respondent's application and the prejudice he sustained by not being appointed and Nel being appointed instead. However that is not the end of the matter. If Nel and the respondent had been the only candidates the matter would probably have ended there. But they were not the only candidates and it has not been shown that but for the irregularity the respondent would have been preferred over and above the rest of the

candidates. In that sense there is no causal connection between the irregularity and the fact that the respondent was not appointed. The conduct of the applicant was in that context not an unfair labour practice. In this respect, the second respondent committed a serious error of law and the award stands to be reviewed on that basis.

- [13] There is a further and, dare I say, more serious problem. The applicant prayed in the alternative that this Court should refer the matter to a newly constituted Selection Panel of the South African Police Service to reconsider the respondent's application together with those of the other candidates. In oral argument, counsel for the respondent supported such a course and it was in fact agreed that that would be an appropriate order to make. However as I was preparing this judgement, it struck me that Nel had not been joined in the arbitration proceedings nor in the proceedings before this Court. This raises serious practical difficulties and I then requested counsel to either arrange to present oral argument in court or submit Supplementary

Heads of Argument on the issue of Nel's non joinder. I addressed the following memo to counsel:

“Whether the proposed referral to a new Selection Panel to consider the applications afresh would be competent in view of the following:

1. The post is now held by Superintendent Nel and is no longer vacant.
2. In order to consider the applications afresh Nel's appointment will have to be set aside.
3. Can this Court set aside Nel's appointment when he has not been joined in these whole proceedings? See **PUBLIC SERVANTS ASSOCIATION v DEPARTMENT OF JUSTICE AND OTHERS** (2004) 25 ILJ 692 LAC.”

Counsel opted to submit Supplementary Heads of Argument.

[14] Mr. Hiemsta, for the applicant, opened his Supplementary Heads of Argument as follows and I quote paragraph 2 thereof:

“I am indebted to Honourable Judge for pointing out the failure of the second respondent to join Nel in the proceedings before him and I apologise for failing to alert the Honourable Court to the judgement in **PUBLIC SERVANTS ASSOCIATION v DEPARTMENT OF JUSTICE AND OTHERS** as well as the common law position.”

This gives the impression that counsel was aware not only of the relevant authority but also of Nel’s nonjoinder but somewhat failed to bring it to the attention of the Court. Be that as it may, he went on to concede that the alternative order that the applicant had proposed would certainly affect Nel adversely. Counsel seems to suggest that the referral itself would have the effect of setting aside Nel’s appointment and submits that that could not be done without giving him a hearing. Counsel concedes that the matter may have to be referred for a fresh arbitration with a direction that Nel be joined. But then he alludes to practical problems that may arise in such a scenario. In the end, Mr. Hiemstra submits that the correct order would be to simply set aside the awards.

[15] Mr. Branford, for the respondent, focuses on the submission that the awards should simply be set aside and submits that such order would be fatally flawed. He contends that such approach would be tantamount to condoning the gross irregularity committed by the applicant's Selection Panel in its total disregard of procedural fairness in the appointment of Nel and would leave the respondent without any remedy in circumstances where a clear unfair labour practice has been committed. I read in this that Mr. Branford prefers that the matter be referred to the first respondent for arbitration *de novo* before another Commissioner with instructions that Nel be joined.

[16] In essence, both counsel appeared to accept that on the authority of the Public Servant Association case *supra* the second respondent committed a gross irregularity in failing to join Nel in the arbitration proceedings. The issue therein was basically whether the respondent was better suited for the post than Nel and any decision thereon would clearly

have adversely affected Nel. And there can be no doubt that Nel had a direct and substantial interest in the matter.

[17] In the Public Servants Association case *supra* Zondo, JP pronounced himself on some very important issues of law. The points that have a direct bearing on the issues in this case can be summarised as follows:

- a. Where a party has a direct and substantial interest in arbitration proceedings he/she must be joined in such proceedings or at least be given an opportunity to be heard. The duty to join the affected party rests primarily on the arbitrator. Of course the parties themselves have a duty to alert the arbitrator in this regard and can apply for the joinder of the affected party.
- b. Failure to join the affected party would be a gross irregularity. The following statement at page 704 H – I sums up the legal position and I quote:

“In conducting the arbitration proceedings to finality and

making such a damaging finding against the appointees without affording them any opportunity to be heard or joined in the arbitration proceedings, the Commissioner committed a gross irregularity which vitiates the entire arbitration proceedings over which he presided. The parties before him must also bear some blame for not drawing his attention to the need to join or hear the appointees.”

- c. An adverse order thus made in the absence of the affected party would not be binding on him.
- d. It is no good a defence to a non joinder point to say that the affected party had knowledge of the proceedings and decided not to join.

[18] When taking into account the legal position as stated above, it becomes clear that referral of the matter to a newly constituted Selection Panel would be an exercise in futility. In the first place, there is no longer any vacancy for which applications can be reconsidered since Nel’s appointment still stands. Secondly any such referral would

have to be preceded by the setting aside of Nel's appointment, which this Court cannot do since Nel has not been joined in the proceedings nor was he given a hearing during the arbitration proceedings wherein adverse findings were erroneously made against him.

- [19] The only option to be considered is remittal of the matter to the first respondent for arbitration to be commenced *de novo* before another Commissioner with instructions that Nel be joined together with those other candidates who are still interested in the post. There are, however, practical difficulties in the way of this option. Firstly, it is almost five years now since Nel was appointed to the position. Reversing the appointment now is likely to cause serious disruption in the operations of the relevant Unit and the SAPS generally, especially taking into account that a new arbitration process would in all probability take considerable time to conclude. With the prospects of the new award being subjected to the same challenge that we are now dealing with, it could be another four years before the

matter is finally brought to an end. This would be a complete negation of the underlying principle that labour disputes should be resolved expeditiously. Granted that the blatant disregard of procedural fairness by the applicant's Selection Panel should not be seen to be condoned and that the respondent deserves some atonement for the resultant unfair treatment he received, it has to be borne in mind that the respondent is not without blame. He was legally represented throughout and it should have been obvious to his representatives that Nel needed to be joined. Besides, the respondent has failed on another score. He failed to establish that, but for the irregularity committed by the selection panel, he would have been appointed over all other candidates.

[20] In the Public Servants Association case *supra* the LAC declined to remit the matter to the CCMA. In doing so, it remarked that it was up to the aggrieved party to commence arbitration proceedings afresh. I intend to follow a similar course.

[21] As far as costs are concerned, the matter was argued on the basis that costs should follow the cause. However this Court has a discretion in the matter of costs. I am of the view that this Court must show its displeasure to the improper manner in which the Selection Panel, comprising senior police officers, who should lead by example, conducted themselves in the appointment of Nel and there are indications that one of them falsified information. It is largely due to the improper conduct that this matter is before this Court. The best way of expressing the Court's displeasure is to deny the applicant his costs.

[22] In the result, the following order is made:

1. The arbitration awards issued by the second respondent in the dispute between the applicant and the third respondent are reviewed and set aside.
2. There shall be no order to costs.

H.M MUSI, J

On behalf of Applicant: Advocate J Hiemstra
Instructed by
The State Attorneys
PRETORIA

On behalf of Respondents: Advocate D Branford
Instructed by
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