IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No.: JR 1770/01

In the matter between

MINISTER FOR SAFETY AND SECURITY 1st
Applicant

SOUTH AFRICAN POLICE SERVICE 2nd
Applicant

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE 3rd
Applicant

and

S. JANSEN N.O. 1st
Respondent

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL 2nd
Respondent

CHRISTO BRITS 3rd
Respondent

JUDGMENT

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REVELAS, J.

[1] This is an application for review. The applicant seeks to set aside an award made by the first respondent ("the arbitrator") under the auspices of the second respondent ("the Bargaining Council" or "the Council").

[2] The third respondent, Mr Christo Brits (also the "third respondent"), applied for

the position of Director: Legal Services. He was shortlisted but not selected. The SAPS appointed Mr Mocwaledi to that position. Mr Brits then referred a dispute about an unfair labour practice in terms of item 2(1)(b) of Schedule 7 of the Labour Relations Act 66 of 1995 ("the Act"). It was the case of Mr Brits (or "the third respondent") that the failure to promote him constituted an unfair labour practice.

[3] Prior to the short-listing of the third respondent, Mr Mocwaledi and two other candidates (one white and one black), interviews were held with all persons who had applied for the post. The four shortlisted candidates were assessed by the panel of the selection committee by *inter alia* determining percentage scores for them. Mr Mocwaledi, out of the four candidates, had the lowest percentage score and the third respondent achieved the second highest score. Mr Mofokeng and Mr

Rooyen came first and third, respectively. Later, when the percentages were checked, it appeared that the third responedent had the highest score. The appointments were not made in accordance with the percentages achieved. According to the applicants, the panel gave preference to the two black candidates at the expense of two white candidates in consideration for the need to achieve greater racial diversity. Because of Mr Mocwaledi's managerial skills, he was preferred to Mr Mofokeng, and consequently was promoted.

[4] At the pre-arbitration meeting between the representatives of the parties, it was agreed that the issue to be decided by the arbitrator was whether the failure by the South African Police Service to promote the third respondent amounted to

an unfair labour practice.

[5] It was recorded in the pre-trial minute by the parties that the facts in dispute were:

"Whether the interviewing panel complied with the Nation Instruction 3/2000" and further that:

"The parties have a common understanding that the arbitrator may not make any findings with regard to the fairness of any discrimination that may have occurred vis-a-vis [the third respondent] on the basis of his race (my underlining) or gender".

[6] The arbitrator found that the decision taken by the selection committee was substantively unfair. She then awarded Mr Brits

"protective promotion" retrospectively from 01/02/2001 with full benefits as if he was appointed in the post. She also awarded him compensation from the date of appointment of the other candidate in the post in dispute, to the date of the award. She also made a punitive cost order against the applicant.

[7] The applicants main grounds for review are that:
"The Arbitrator exceeded her jurisdiction and powers. The award accordingly offends the fundamental principle of legality;

There has been a gross irregularity in the approach adopted by the Arbitrator who failed to apply her mind properly to the true issues which

she was called upon to decide (and to the relevant evidence), resulting in a failure to ensure a proper and fair adjudication of the dispute; the award is not rationally justifiable in relation to the reasons given and the issues (as agreed and limited by the parties) and the material placed before her."

[8] Before proceeding to deal with the merits of the review, I will first deal with the issue of joinder.

When the review application was launched the only applicant cited was the Minister of Safety and Security. In his answering affidavit the third respondent raised the objection that there has been a failure to join the true employer who he contends is the South African Police Services (SAPS) or the commissioner. An application was filed seeking leave to join the SAPS and the National Commissioner of the SAPS as second and third respondents respectively. This application then became opposed. In my view there is no prejudice to be suffered if I grant leave to join the second and third respondent to these proceedings and accordingly such leave is given.

[9] The main thrust of the review application was that the arbitrator was not empowered or authorized to make any finding as to the fairness or otherwise of a decision by the employer to appoint someone other than Mr Brits on the grounds of racial discrimination to achieve its representivity. The pre-trial "agreement" - as the arbitrator termed it - expressly precluded her from making such a finding. The arbitrator was clearly aware of this prohibitive clause in the agreement. She refers to it in her award at paragraph XII thereof. The arbitrator

made the observation that Mr Brits "only based his case on mainly on [sic] the procedural aspects of the selection process".

[10] The arbitrator found that several procedural irregularities were committed by the selection committee. For example, that Director de Wet's signature did not appear on the "List of Preferred Candidates". He was the chairperson of the committee. The arbitrator therefore doubted whether he was present during the final proceedings. Director de Wet could not give an explanation for the absence of his signature, but he testified that he was the first person to address the selection panel followed by Commissioner Pienaar during the final discussions. There is no attempt to demonstrate that these two persons were lying, which the arbitrator had to find if she wanted to reject their evidence, which she in effect did

[11] Mr Mocwaledi's references were not checked before he was appointed, only after Mr Brits had filed his dispute. The arbitrator rejected Director de Wet's explanation that the background, achievements and managerial abilities of an applicant can be tested through questions asked during the interview. She stated that "an applicant can easily lie". In this regard, it must be borne in mind that probably none of the references, including the third respondent's were investigated for their accuracy. In my experience this was not a fatal flaw in the interview proceedings. I do not believe that in general, all references given to a panel are meticulously checked to establish whether the applicant in question had lied. Verification of references is a precautionary step to take if the

suspicion is aroused that the person has lied, or to shed more light on an aspect which came to light during or after the interview. There was no suggestion that Mr Mocwaledi had given false references or that the third respondent's references were not false.

[12] The arbitrator held that the miscalculation of the marks scored by the candidates "cost the applicant [the third respondent] dearly" and that it constituted gross misconduct. The SAPS' argument that the calculation errors were *bona fide* and in any event involved only a marginal difference, she "rejected in total".

[13] Apart from the "negligent miscalculations" another complaint about the interview proceedings was, that "several direct instructions to the chairperson of the selection committee and the members were blatantly ignored or omitted". The arbitrator stated that the "subversion" of the purpose of National Instruction 3/2000 was "clear". She criticized the panelists for applying the National Instruction in a discretionary way, whereas Commissioner Pienaar gave evidence that the Instruction is an absolute minimum standard.

[14] The arbitrator also listed the incomplete record of the interview proceedings as a further breach of the National Instruction. At the same time she also made adverse credibility findings against the applicants witnesses for the absence of their "voices" on the transcript.

[15] The panel is also criticized for not adhering to the instruction in paragraph 18(1)

of the National Instruction that the decisions and recommendations of the committee must be signed. She reasoned that the short-listing record does not exist and the tape recordings are not capable of being signed. Therefore there was another breach of the National Instruction. She also held that the "List of Preferred Candidates" could hardly be construed as a record. This approach seemed overly

technical.

[16] The arbitrator severely criticized the selection committee's failure "to meet" and short-list candidates. According to the arbitrator's understanding of the transcript, "this was done" on the same day. She then asked rhetorically: "...by whom and when was the short-listing done? Where is the record(s) of such a meeting(s)?". She finds in this regard that:

"Although the applicant [the third respondent] was short-listed, such non-compliance with National Instruction 3/2000 constitutes irregular procedures."

[17] The arbitrator also attacked the National Instruction itself. According to her, "the numerical score sheets with a percentage mark does not serve the purpose of the instruction, to evaluate candidates (sic) that fall into an 'equally suitable bracket'. Instead the percentage mark clearly differentiates between the candidates. No two candidates in their interviews had the same score and therefore no one was equal. She also stated that one is not able to deviate from existing core functions of the posts, and therefore one has to apply less rigid but fair measuring instruments. This last opinion of the arbitrator is interesting. The arbitrator criticized the panelists for expressing "opinions" and exercising

discretions which they did not have. She found them to have failed in their duty for not following the Direction more rigidly, as it was a

prescriptive Direction. This criticism totally contradicts her stance on the allocation of percentages, which is also based on an opinion only and which argues for more discretion. This bifurcated reasoning of the arbitrator resulted in an outcome which is not rationally sustained by the case before her, nor her terms of reference.

[18] The case for the SAPS was, that representivity was the decisive factor in recommending Mr Mocwaledi. Director de Wet also reminded the rest of the panel that it should be. This the arbitrator regarded as undue influence, and an irregularity, irrespective of the fact that the preamble to the National Direction emphasizes the need for transformation.

[19] Commissioner Linda Pienaar believed that although the third respondent was the best candidate, she recommended Mr Mocwaledi. She testified that a five percent difference between the two candidates would render the candidates in the same bracket as "equally suitable". This evidence the arbitrator labeled as commissioner Pienaar's opinion and "not an instruction as per the National Instruction 3/2000, which is applicable to this case".

[20] During the interviews Director de Wet stated that the Employment equality goal for the year 2000 was a "50/50 split" on all levels, including that of director and to that extent, the goal had been reached. He went on to say:

"...but bear in mind that for the end of the year it ought to be a 40/60 split. So

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for 60/40 we'll have to move further down the line. We do have only this one director post on this current round but there will be two other vacant director posts within the next round of advertisement. So taken that into consideration, we have to move quite a while. Our concern is as we said yesterday, is gender representivity commissioner, only one out of twenty three is female".

[21] The arbitrator quoted the above passage in her award and held that since the goal for 2000 had already been achieved at the time of the interview, the "40/60 split target" should not have been taken into consideration. She found that:

"The endeavours of the employer about the fact that representivity should never have been involved during this particular appointment. I have to view the argument of the employer with suspicion as this case was also not arbitrated on the principle of discriminaton".

[22] She found that the committee failed to "test" the ability of the candidates in relation to the requirements of the post and two of the members including the chairperson were not "knowledgeable" with the procedures and that the committee members failed to apply their minds during the selection process.

[23] All the regularities listed by the arbitrator, according to her, caused the eventual decision to be unfair. She also found the application of representivity as a reason for Mr Mocwaledi's appointment to be *mala fide* and stated further:

"The least an employee can expect from the employer is to follow its own procedures. The errors and omissions can be regarded as the prime cause of the

eventual substantive unfairness of the decision taken by the selection committee" and also held that:

"Clearly the authors of the instruction could not have intended that an interviewing panel, irrespective of scores awarded to candidates, can exercise their discretion".

[24] The applicants argued that the arbitrator blurred the distinction between substantive and procedural fairness. This contention appears to be correct. On the strength of complaints about certain procedural errors, such as incorrect percentage calculation (where the margin was as low as two percent), she promoted Mr Brits to a position which was already occupied by someone else (who was not cited as a party in the proceedings before her) and awarded compensation. In addition, the nature of the actual relief awarded is clearly the type of award which is almost always associated with a finding of substantive unfairness.

[25] The arbitrator was not in a position to ignore the fact that the

substantive fairness issue was directly linked to the application, by the SAPS, of its own affirmative action policies, which the SAPS put forward, throughout, to justify that there was indeed permissable discrimination between the candidates. Mr Mofokeng and Mr Mocwaledi were given preference over the third respondent, not withstanding percentage scores, specifically in order to achieve greater representivity. The arbitrator cloaked the substantive issue in a whole host of procedural findings about breaches of procedure. This is borne out by her

award. On the basis of her findings on several alleged irregularities, she gave an award which is completely disproportionate to the nature of the procedural shortcomings of the interview proceedings.

[26] The arbitrator was not entitled to ignore the fact that the applicant, and therefore the panelists, had the discretion to discriminate between candidates in order to achieve greater representivity, in any posts, including that for Director: Legal Services. The fact that the target had been met did not mean that the applicant was precluded from seeking to improve on the target which was a minimum. The arbitrator's finding in this regard is in essence a finding as to the fairness or otherwise of a decision by an employer to appoint someone other than the third respondent on the grounds of race discrimination. Her terms of reference expressly precluded her from doing this.

[27] Before reaching the conclusion that the third respondent should be promoted, she must have considered whether there was a causal connection between the unfair conduct and the failure to promote him. This would have involved an assessment of the substantive basis of his promotion. She therefore exceeded her powers and jurisdiction by deciding the dispute not merely on procedural grounds but on the very substantial ground which was excluded from her scope of powers. She made a specific finding that the representivity principle should never have been invoked.

[28] She exceeded her jurisdiction because she was empowered only to determine a

dispute concerning an alleged unfair labour practice under Item 2 of Schedule 7 tot he Act which still applied at the relevant time. Such a residual unfair labour practice could not encompass a dispute which had as its basis an allegation of unfair discrimination. Such disputes are reserved to be determined by the Labour Court and not by the CCMA or a Bargaining Council. The arbitrator with respect, exceeded and misconceived her powers and the issues she had to decide. Even if I am wrong in this regard, the promotion and double compensation awarded, and the prejudice to Mr Mocwaledi was not appropriate relief, given the nature of the procedural defects she found

to have existed. On this basis alone the award should be set aside.

[29] The award issued by the first respondent dated 7 October 2001 under case number PSSS 589 is therefore set aside and the dispute is to be referred back to the Council to be arbitrated afresh before an arbitrator other than the first respondent.

[30] The third respondent is to pay the applicant's costs.

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E. REVELAS

On behalf of the Applicant:	Adv. Paul Kennedy SC Instructed by the State Attorney
On behalf of the Third Respondent:	Adv J. Nortje Instructed by Moodie and Robbertson
Date of hearing:	6 February 2003
Date of Judgement:	12 May 2003