

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JR391/04

In the matter between:

**NATIONAL COMMISSIONER OF THE
S.A. POLICE SERVICE**

APPLICANT

AND

SENIOR SUPERINTENDENT A.S. BASSON

1ST RESPONDENT

C.J. WESSELS NO.

2ND RESPONDENT

**SAFETY AND SECURITY SECTOTIAL
BARGAINING COUNCIL**

3RD RESPONDENT

JUDGMENT

NGCAMU A.J.:

[1] This an opposed application for the review and setting aside of the arbitration award issued by the second respondent

[2] The first respondent occupies the post of legal administration officer at the rank of senior superintendent at level 2 of the salary range applicable in the SAPS. He wanted to be promoted to the higher rank of senior legal administration officer at a salary range of level 12 whilst at the rank of senior

superintendent. He referred an unfair labour practice to the third respondent as a result of the applicant's failure to promote him to the position of senior legal administration officer. The dispute could not be resolved at the conciliation stage and it was referred for arbitration.

- [3] At the conclusion of the arbitration hearing the arbitrator concluded that the first respondent's post was upgraded to senior legal administration (post level 12) in terms of the work study investigation dated 12 December 2002. He found that the applicant had committed an unfair labour practice by not promoting the first respondents to the position of senior legal administrative officer. The applicant was ordered to promote the first respondent as from 12 December 2002 and to pay compensation to the respondent as senior legal administration officer as from 12 December 2002.
- [4] It is as a result of this finding that the applicant has sought to review and set aside the award. The applicant contends that (a) the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings.(b) In the alternative, the arbitrator exceeded his powers alternatively the award is not justifiable as to the reasons given.
- [5] The issue the arbitrator was required to decide was whether the applicant had committed an unfair labour practice by not promoting the first respondent to the position of senior legal administration officer post level 12 from 1 February 2002.
- [6] The relief sought was promotion to the position of senior legal administration officer post level 12 from I February 2002 alternatively, payment of

compensation calculated on the difference between his current salary and the salary he would have earned had he been promoted. He also sought indemnity against any disciplinary, civil or criminal prosecution as a result of the services and functions he performed.

[7] At the arbitration hearing only the first respondent gave evidence. No evidence was led on behalf of the applicant. The first respondent bore the onus of proving that the applicant had committed an unfair labour practice.

[8] The first respondent's version was that he was appointed legal officer on 1 March 2000 by the Head of Legal Services, Director D.D. Pistorious. He was instructed to perform all functions or competencies and obligations attached to the component legal services in the absence of the Director. Some of the functions were delegated by the National Commissioner to be performed by a functionary holding a rank of senior administrative officer attached to the legal services. No senior legal administration officer had been appointed. The Provincial Commissioner was informed of this by letter dated 22 February 2002. Director Pistorious indicated that the first respondent's post had to be reviewed. The matter was taken up with the applicant. There was no communication from the applicant.

[9] The divisional commissioner indicated that the post was not subject to evaluation process. The first respondent enquired why the upgrading of the

post of legal administrative officer was not considered. The first respondent was requested to continue performing the duties he performed/

- [10] A work study investigation was performed by efficiency services concerning the establishment of a legal services structure at Provincial and area level. The structure was recommended for legal services. The recommendations were approved on the 15 November 2002 by the Deputy National Commissioner Eloff and circulated to the Provincial Commissioner on 12 December 2002.
- [11] Resolution 7/2002 dated 20 December 2002 indicated that two (2) senior superintendent posts were allocated to the legal advisory services in the Northern Cape. One was filled by the first respondent. The first respondent was never appointed senior legal administration officer.
- [12] It was common cause that Director Pistorious could not delegate functions or power delegated to him. It was conceded that the first respondent's post was not evaluated in February 2002. The commissioner found that if the work study investigation is read with consolidation notice 2/02, the 1st respondent's position was upgraded to senior legal administration officer. He further found that the first respondent had performed the duties of senior administration officer for 22 months and therefore his post had been upgraded. The commissioner was at pains to agree that the work study did not distinguish between senior superintendent on post level 11 and post level 12. The commissioner however, found that no other inference could be drawn but that the first respondent's post had been upgraded.

[13] The first respondent's case is that the approval of the formal structure for legal services upgraded his post and gave him the right to promotion. It would seem that on this line of argument, it is not necessary to place a date of implementation of the new structure as the approval automatically puts the new structure into implementation.

[14] The employment of the members of the South African Police Services is regulated by the South African Police Act 68 of 1995 as well as the Regulation.

[15] The grading and the remuneration of members is regulated by Regulation 24. It is important to set out this regulation in full. The regulation states that:

“(1) The National Commissioner must determine the grade of a post to correspond with its job weight and set the commencing salary of an employee on the minimum notch of the salary range attached to the relevant grade, unless the salary proves inadequate under the criteria in sub regulation(3)

(2) if a job has a weight that applies more than one salary range, the National Commissioner may set the salary for a post or an employee above the minimum notch of the salary range indicated by the job weight_____

(a) if she or he has evaluated the job, but cannot recruit or retain an employee with the necessary competencies at the salary indicated by the job weight, and,

(b) she or he shall record the reasons why the salary indicated by the job weight was insufficient.

(4) if the job weight demonstrates that a filled post is over graded or under graded, the National Commissioner must either effect changes to the work

organisation or regrade the post according to the job weight and the relevant collective agreements as provided for in sub regulations (5), (6) and (7).

- (5) The National Commissioner may increase the salary of a post to a higher salary range in order to accord with the job weight, if _____
- (a) the job weight as measured by the evaluation system indicates that the post was graded incorrectly and
 - (b) the budget of service and the medium term expenditure frame work provide sufficient funds.
- (6) if the National Commissioner raises the salary of a post as provided under sub regulation (5), she or he may continue to employ the incumbent employee in the higher- graded post without advertising the post if the incumbent-
- (a) already performs the duties of the post,
 - (b) has received a satisfactory rating in her or his most recent performance assessment, and
 - (c) starts employment at the minimum notch of the higher salary range.
- (7) if the National Commissioner determines that the salary range of an occupied post exceeds the range indicated by a job weight, she or he must _____
- (a) if possible _____
 - (i) redesign the job to equate with the post grade, or
 - (ii) transfer the incumbent to another post on the same salary, range, and
 - (b) abide by relevant legislation and collective agreements
- (8) As far as possible, the National Commissioner must set the salary of a part-time sessional or temporary employee proportional to the salary of an equally graded fulltime employee”

[16] In terms of the regulation if the post is upgraded, the National Commissioner may decide to advertise the post or retain the incumbent in the same post if the provisions of sub regulation (6) are satisfied.

[17] I am of the view that the findings by the commissioner that the first respondent's post was upgraded is rational and cannot be reviewed for the reasons that follow. The third respondent was performing functions he was not permitted to perform. The National Commissioner was aware of this. The work study was undertaken in order to evaluate the legal administration structure for the purpose of rendering efficient service. The structure was recommended which was later approved. The level of the first respondent's post was placed at a higher level. He was not told to stop performing his duties after the approval of the new structure. He performed his duties as before. The fact that the first respondent continued to perform his duties implies that his post was considered to be at a higher level. The factors considered cannot be said to be irrational or that he exceeded his powers. The applicant did not give evidence to dispute that the post level was upgraded.

[18] It was common cause that the National Commissioner did not advertise the post which had been regraded in terms of the work study. The third respondent continued to work in the post. The Commissioner acknowledged that the National Commissioner did not expressly exercise his discretion of either advertising the post or keeping the incumbent in the same post. He however, came to the conclusion that the National Commissioner did exercise his discretion because he received the work study investigation on 12 December 2002 and continued to employ the first respondent in the higher graded post.

[19] The next question to be considered is whether the award compelling the applicant to promote the third respondent is rational. It was submitted on

behalf of the applicant that there is no obligation on the applicant to promote the respondent to the post even if the post had been upgraded. The respondent submitted that the failure of the applicant to exercise his discretion to promote the first respondent brings the inference that the applicant exercised his discretion.

[20] In terms of sub-regulation (4), once the National Commissioner has decided to either effect changes to the post or regrade it, he has to act in terms of sub-regulations (5),(6) and(7). Before the commissioner decides to increase the salary of a post to a higher salary range, he or she is obliged to consider if the budget of the service and the medium term provide sufficient funds to increase the salary.

[21] If the salary of the post is raised the commissioner may continue to employ the incumbent in the higher graded post instead of advertising the post if the incumbent meets the requirements of the sub-regulation (6) (a), (b) and (c). The first respondent contends that he met these requirements.

[22] Ponnar J in the unreported case of *The National Commissioner of the South African Police Service v The South African Police Union & Other* (unreported case no. 28812/2002(TPD) delivered on 31/10/03, dealt with the upgrading of the post. In paragraph 19 of the judgment, the learned judge stated:” The upgrading of the incumbent’s post, creates notionally at least, a new vacant post, for which the applicant is free to compete together with other suitably qualified candidates. In those circumstances, to confer upon an incumbent a right, to the exclusion of others, to the

redesigned post, even if it bears little resemblance to the post previously occupied by her/ him, is untenable. Such an approach, equates, erroneously so, incumbency in a particular post with the right of employment in the police service. It bears noting, that a number of the SAPS ,although employed in public service is deployed to a particular post. For the duration of the member's employment, s/he may be deployed to a varying number of different posts in the police service”

[23] I fully agree with Ponnann J, the upgrading of the post does not give the right to the incumbent of an automatic promotion. The first respondent was deployed to the legal services and it is upon the commissioner to redeploy him to another post. The upgrading of an occupied post does not result in the promotion of the incumbent. The commissioner is obliged to follow the steps provided for in Regulation. The upgrading creates a vacant post which the employer may decide to fill or not to fill.

[24] In paragraph 23 Ponnann J, further stated:

“Within the framework of the regulations, promotions are made only after the post in question is advertised. If the retention of an incumbent in a post with an increase salary was in each case intended to occur absent the process of advertising, the use of the word”may” by the drafter is irreconcilable with that intent”

I agree with this approach.

[25] The advertisement for the filling of the post is required for the purposes of transparency. The incumbent in the upgraded post is protected against the loss of the job but not against competition from other people who may be interested in the higher position. There is no entitlement to an automatic

promotion to a more senior rank upon the decision to continue to employ the incumbent in a post which has been regraded to a higher grade.

[26] I can find no reason to differ from the conclusion made by Ponnann J. The arbitrator came to the conclusion that:

“I am of the opinion that the applicant would only be entitled to promotion if he can prove on a balance of probabilities that the respondent acted unfairly by not promoting the applicant. I have already indicated that I am of the opinion that the respondent’s conduct toward the applicant as a whole, was unfair.

[27] The applicant has not filled the post in an manner that can be said to have been unfair to the first respondent. The unfairness referred seems to stem from the fact that the commissioner has not made his decision whilst allowing the first respondent to perform the duties of a senior legal administration officer. It is also based on the erroneous view that because the first respondent has not been accused of not acting in the interest of the applicant, he is entitled to promotion. This view is erroneous because the commissioner is obliged to comply with the principle of transparency.

[28] I agree with the arbitrator that the first respondent ran the risk of disciplinary action against him as well as the possibility of civil or criminal proceedings being instituted against him. It must however be noted that the first respondent took that risk and continues to do so. He conceded that the director could not delegate the delegated powers to him.

- [29] I have mentioned that the National Commissioner is enjoined to consider the availability of funds when increasing the salary of a post to a higher salary range. The commissioner did not consider that. There was no evidence provided by the first respondent regarding the sufficiency of funds. Even if the funds were available, the respondent does not have a right to promotion to a higher post.
- [30] I cannot find any unfair labour practice where the post has not been given to another person and the first respondent side lined. The National Commissioner retains a discretion to appoint or promote a member in the SAPS in a manner that is transparent and open. The failure to promote an incumbent in an upgrade post cannot constitute unfair labour practice.
- [31] Another difficulty with the respondent's case is that the powers delegated to him could not legally be delegated. He therefore cannot claim any right to the position. He cannot have any legitimate expectation to a position he does not lawfully occupy.
- [32] It is on these basis that the arbitrator's award is irrational. The commissioner did not take into account the fact that the commissioner has a discretion to promote a member. If he does , he has to satisfy himself that he complies with the Regulation 24.
- [33] In the result the application should succeed. The next question I need to consider is whether the costs should follow the result. In coming to the conclusion that I should not make an order for costs, I have taken into account the fact that there is an existing employment relationship between the parties. The situation which caused the respondent to refer a dispute was created by the inaction of the applicant to make an appointment. The respondent has been

allowed to perform duties not lawfully delegated to him. This placed the respondent in a difficult position. In the light of that, to burden him with costs would be unfair.

The order I make is the following:

- (a) The award is reviewed and set aside.
- (b) There is no order as to costs.

NGCAMU A.J.

DATE OF HEARING:

DATE OF JUDGMENT:

FOR THE APPLICANT:

FOR THE 1ST RESPONDENT: