IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case number: JR2797/2005

In the matter between:

BARNARD, ESM **Applicant**

and

THE DIRECTOR, SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **First Respondent**

BOSCH, D N.O **Second Respondent**

SOUTH AFRICAN POLICE SERVICES **Third Respondent**

JUDGEMENT

NGALWANA AJ

Introduction

[1] This is a review application for the setting aside of the second respondent's decision sitting as arbitrator under the first

respondent's auspices. On 19 October 2005 the second respondent made an award in which he found that the promotion of a black female inspector to the position of captain at the Daveyton police station above that of a white female inspector in the size and shape of the applicant did not constitute an unfair labour practice. The successful female black inspector had scored 9 out of a possible total score of 30 points for what the assessment document terms "COMPETENCE BASED ON INHERENT REQUIREMENT OF THE JOB". The applicant had scored 12 points. A third candidate for that position – another black female inspector – had scored 19.5 points but was not considered since she was apparently considered for a different position.

[2] It is not in dispute that the position of Daveyton police station captain involves crime prevention duties. It is also clear that the equity plan to which this court has had regard makes provision for the appointment of one white female in the North Rand region under which the Daveyton police station apparently falls. The one vacancy for a white female was at the relevant time available for a level 8 position, which a captain's position is.

The Applicant's case

[3] The applicant's main complaint is that she was overlooked by the third respondent's panel not because she was a lesser candidate than the successful candidate – in fact one of the panellists who testified at the arbitration hearing said the applicant has a more suitable crime prevention experience than the successful candidate and that is why she obtained a higher mark – but because she was not proficient in an African language (other than Afrikaans), a requirement that was neither mentioned as such in the advertisement for the position nor conveyed to the applicant as a requirement before the shortlisting. She submits that because proficiency in an African language did not form part of the advertisement, and she was not forewarned on the issue, the third respondent committed an unfair labour practice in suddenly springing it on her as a reason for overlooking her in the promotion.

[4] Her sole ground for the review of the second respondent's decision is that, notwithstanding that the panel found her to be unsuitable for promotion by reason of her lack of proficiency in an African

language (other than Afrikaans), the second respondent somehow contrived to find that the panel did not consider proficiency in an African language to be an absolute requirement for the promotion. This seems to suggest that the second respondent's decision in finding no unfair labour practice in the promotion of a black female by reason only of her proficiency in an African language in the circumstances of this case as already described, is not justifiable in relation to the reasons given for it, namely, that the panel did not consider such proficiency to be an absolute requirement for the promotion.

The Third respondent's defence

[5] The third respondent's defence is rooted firmly in the shortcomings of the applicant's attack on the second respondent's decision. None of the grounds upon which the applicant relies, so the third respondent's argument goes, are founded on section 145 of the Labour Relations Act, 66 of 1995 ("the Act") as the applicant purports to do. In fact, so the argument goes, none of these grounds are permissible in law.

The court's finding

[6] Section 145 of the Act on which the applicant relies for this review application requires the applicant to prove one of four grounds of review. These are misconduct on the arbitrator's part in relation to his duties as an arbitrator; gross irregularity in the conduct of arbitration proceedings; *ultra vires* conduct by the arbitrator in the exercise of his powers and an improper obtaining of the award. On a *conspectus* of all the cases, however, it seems to me the permissible grounds of review are wider than those set out in section 145 of the Act and can perhaps be reduced to this: for the applicant to succeed the decision must be shown to be irrational (in the sense that it does not accord with the reasoning on which it is premised or the reasoning is so flawed as to elicit a sense of incredulity) and unjustifiable in relation to the reasons given for it (*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp NO* (2002) 23 *ILJ* 863 (LAC) at paragraph [19]; *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 *ILJ* 1603 (LAC) at paragraph [26]; *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 *ILJ* 1425 (LAC) at paragraph [37]; *Pharmaceutical Manufacturers' Association of SA and Others: In re Ex Parte*

Application of the President of the RSA and Others 2000 (3) BCLR 241 (CC)). It is not the reviewing court's task to consider whether or not the decision is correct in law as that would be an appeal (*Minister of Justice and Another v Bosch NO and Others* (2006) 27 *ILJ* 166 (LC) at paragraph [29]).

[7] The second respondent's conclusion that "a police officer will manage even better if able to speak the home language of the members of the public in the area served", while disturbing in its seeming proposition within the police service of an "own affairs" or "native affairs" existence reminiscent of days best forgotten in the history of this country, is nevertheless supported by evidence led at the hearing that there have often been complaints from the Daveyton community about difficulty experienced in communicating with white members of the police force by reason of language shortcomings. This evidence was not disputed by the applicant at the arbitration hearing and so the second respondent's decision in this regard cannot successfully be challenged.

[8] As regards the issue of equity and representativeness in the North Rand region, the third respondent (through the evidence of a Mr

Maharaj who had been one of the panellists who considered the applicant's application for promotion to captaincy at the Daveyton police station) testified at the arbitration hearing that according to provincial equity targets white females should have a 4.4% representation in the North Rand police force at each level. At the time of the applicant's application for promotion, so the evidence went, white female representation stood at 24%. At the same period, black African female representation stood at 13% while the provincial equity target was 30%. As a result of the promotion of a black African female instead of the applicant, white female representation was reduced from 24% to 9.2% (still above the equity target) and the black African female representation increased to 20% (still short of the equity target). The applicant did not dispute this evidence.

[9] She did, however, submit in her replying affidavit that considerations of equity and representativeness were irrelevant and that the panel committed an unfair labour practice in taking them into account. In failing to consider this argument properly, the applicant submitted in reply, the second respondent committed an irregularity. But it appears the second respondent found the equity

argument irrelevant and did not consider it for purposes of his award as is clear from paragraph [13] of the award.

[10] The applicant did not challenge the constitutionality of these racial considerations and so I am not at liberty *mero motu* to deal with the constitutional implications of the third respondent's promotion policies. In any event, no constitutional issues were raised by the applicant before the second respondent.

[11] In the result, the applicant has failed to show that the second respondent's award is objectively unjustifiable in relation to the reasons given for it based on the evidence advanced at the arbitration hearing, or that the award is irrational to the point that a conclusion is inescapable that he failed to apply his mind properly to the issues before him.

Relief

[12] The application for the review and setting aside of the second respondent's award can thus not succeed.

[13] In the circumstances of this case I consider it inappropriate to make a costs order against the applicant as that would tend to dissuade people from challenging in this court policies of the kind here in issue. I thus make no order as to costs.

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Ngalwana AJ

Appearances

For the applicant:	*Mr GJ Rossouw*
Instructed by:	*Alan Knight Attorneys*
For the third respondent:	*Mr WR Mokhare*
Instructed by:	*The State Attorney*
Date of hearing:	*31May 2007*
Date of Judgement:	*06 June 2007*