

IN THE LABOUR COURT OF SOUTH FRICA

HELD IN JOHANNESBURG

CASE NUMBER: JR

2222/05

IN THE MATTER BETWEEN:

MINISTER OF SAFETY AND SECURITY

APPLICANT

AND

AM DE VOS

FIRST

RESPONDENT

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

SECOND

RESPONDENT

Y NAGDEE NO

THIRD

RESPONDENT

JUDGEMENT

MOLAHLEHI J

Introduction

[1] The applicant seeks an order to review and set aside the arbitration award issued by the third respondent (“the commissioner”) under case number PSSS 11-05 dated 19 July 2005. In terms of the arbitration award the commissioner found and ruled that the applicant had committed an unfair labour practice and should accordingly promote the first respondent to the superintendent's rank.

[2] The reconstruction of the record which was done pursuant to the order of this Court, still remains unsatisfactory but as will appear later in this judgment this matter turns on the issue of non-joinder of the successful candidate.

Background facts

[3] The first respondent was among a number of candidates who were

short-listed for promotion to the post of superintendent, which was advertised as post number 3412. The panel that considered the applications found the first respondent and other candidates to be unsuitable for the promotion.

[4] The panel found a certain coloured female captain, whose identity will at this stage not be disclosed, to be the most suitable candidate and accordingly appointed her. For the purpose of this judgment I will refer to her as "the successful candidate." The appointment was based on the marks that she scored in respect of all components of performance areas as well as on equity or the programme of affirmative action.

[1]

[5] It is common cause that post 3412 which gave rise to the dispute was the only post advertised at the time as a promotion post from captain to superintendent. It would appear that the promotion process was handled through the application forms only and no interviews were conducted before the decision to appoint was taken.

[6] It is also common cause that the successful candidate was awarded 23 marks and the first respondent 17 marks. The second short listed candidate, who scored 18 marks, seems not to have contested the promotion. The other candidates received marks lower than 17.

[7] The testimony of the only witness that the applicant called to support its case was senior superintendent, Scheppers who was also a member of the panel that recommended the promotion of the successful candidate. He testified that the successful candidate was promoted because of her managerial experience and the fact that she was a coloured female. It was not disputed that the equity grouping in the applicant's workplace is further demarcated between the various women racial groupings. At the workplace where the dispute arose, in the East Rand, there are more white females than coloureds.

[8] The first respondent contended that she had applied for the position because she had experience in all but one of the components attached to the position. In her heads of argument submitted during the arbitration hearing the first respondent submitted that:

"As the post was advertised as a member post and not a commander post, she was led to belief that her acting experience which was not substantiated officially would not be that relevant."

- [9] She further contended that she was better qualified and had better work experience than the successful candidate.

Grounds for review

- [10] The issues which the commissioner was required to determine are set out in the arbitration award as follows:

"3.1 The arbitration is required to decide whether the failure to promote the Applicant to post 3412 constitutes an unfair labour practice.

3.2 Whether the Employer adhered to its own policies.

3.3 Whether the Employee was the best candidate for the post or not."

- [11] The applicant challenged the commissioner's award on seven

grounds based on gross irregularity and misconduct. The first ground is based on the contention that the successful candidate having been found to be the most suitable candidate for the post and appointed thereto, should have been joined in as a party to the arbitration proceedings. Her non-joinder led to the irregularity or nullity of the arbitration proceedings.

[12] The second ground raises the issue of the commissioner having contradicted himself in finding that the applicant did not provide evidence to prove that there was a further demarcation within the equity group. In this regard the applicant contended that there was no need to lead formal evidence about this fact, there being common cause between the parties that such demarcation existed and that the East Rand had more white females than coloureds.

[13] The third ground of review challenges the finding of the commissioner that it was not clear that the post in question was a command post. The applicant contended that it was common cause that the post was a superintendent post which is above that of a

captain. According to the applicant the posts above the rank of a captain are command posts and therefore require managerial skills.

[14] The other challenge to the arbitration award, being the fourth ground, is that the commissioner failed to apply his mind when he disregarded the evidence that the successful candidate had acted in the post, while the first respondent had not.

[15] The fifth ground is that the commissioner committed a gross irregularity when he allocated marks to the first respondent, declaring her the most suitable candidate and appointing her to the contested post without first establishing that there was any irregularity in the promotion process.

[16] The sixth ground of review is that the commissioner committed a gross irregularity when he took into account evidence that had not been placed before the panel, being the fact that the first respondent did not mention that she had managerial experience in her application and/or placed the same before the panel.

[17] The last ground of review is that the commissioner committed a gross irregularity when he granted protective promotion with retrospective effect to an arbitrary date, being 1 December 2004, without giving reasons for backdating the promotion to that date.

[18] The commissioner found that the decision of the selection panel was unjustifiable because it was based on an incorrect evaluation of the post. He, in this regard, found the panel to have been incorrect in using managerial skills as a criterion when the advertised post was not a command post. He also found the evidence of the applicant's witness to have been lacking in a number of respects in particular in relation to the inherent requirements of the job which was according to him one of the criteria for the selection.

[19] The first respondent conceded to the existence of a further a division in the female equity grouping within the workplace of the applicant, and confirmed that there were more white females than coloureds. Despite this concession the commissioner, found that the applicant

did not produce direct evidence to proof the existence of the further division within the equity grouping. He accordingly found that the applicant failed to demonstrate that the appointment was done in accordance with the equity plans.

[20] The commissioner ruled that the first respondent be granted protective promotion to the rank of the superintendent with retrospective effect to 1st December 2004. It is not apparent from the reading of the award as to how the commissioner chose this date. The record being in the state it is in, does not assist. It would appear however that the date may have been chosen in relation to the date on which the grievance that ultimately led to the dispute was lodged. The rationality of this is not apparent from the arbitration award.

[21] In relation to the first ground of review, the first respondent argued that the issue of non-joinder was never raised during the arbitration hearing and that it cannot be sustained because the successful candidate was not demoted in any manner affected by the arbitration award. It was also argued that the unfair labour practice was

committed against the first respondent and not the successful candidate.

[22] The issue of non-joinder of an interested or affected party and its implication was considered in details in the case of *PSA v Department of Justice and Others* [2004] 2 BLLR 118 (LAC), wherein Zondo JP held that in circumstances similar to the current case the successful candidate must be joined as a party to the arbitration proceedings or should at least be afforded an opportunity to be heard. In arriving at this decision Zondo JP (at para 27) quoted extensively and with approval the decision in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) wherein Fagan AJA in propounding the two principles upon which the issue of non-joinder is founded said:

"(1) *that a judgment cannot be pleaded as res judicata against someone who was not a party to the suit in which it was given; and*

(2) that the Court should not make an order that may prejudice the rights of parties not before it."

[23] The commissioner has a duty, where the appointee who has interest or is likely to be affected by the outcome of the arbitration proceedings, to raise the issue of non-joinder *mero motu*. This duty arises from the principle that a third party should be joined in proceedings if he or she has a direct and substantial interest in a matter and has not consented or undertaken to be bound by any judgment that may be given in the matter. It cannot be disputed in the current matter, as was the case in the *PSA case*, that the successful candidate had an interest in the outcome of the arbitration proceedings. She had been appointed in the position which the first respondent was contesting and declared a dispute about. One of the issues which was identified for determination by the arbitrator was whether the first respondent was "the best candidate for the post or not." The arbitrator had to consider this in the context of the successful candidate having been appointed into the very same position.

[24] The argument that the unfair labour practice was brought against the

applicant and not the successful candidate is unsustainable because a finding of unfair labour practice would, with or without any relief being sought against the successful candidate, affect her rights and interests negatively. Her interests are broader than the appointment itself as they include her integrity, her competency and more importantly her right to a fair hearing.

[25] In this regard Zondo JP in the *PSA's case* (at page 13 par 39) quoted with approval in the decision of Goldstone J in *Traub & others v Administrator Transvaal & Others* 1989 (1) SA 397 (W) at 4001-J, where it was said:

"A decision that a professional person is unsuitable for a post is potentially of the utmost importance and will, if it remains, be a permanent blot on his good name."

[26] Goldstone J is further quoted (at 40IC-D) as having said that:

"Where the suitability of a person is the issue, and an adverse

decision has serious consequences for that person in relation to his application and in relation to his career, then I have no doubt that in the absence of a clear provision to the contrary in the statute he must be entitled to be heard before he is made to suffer an adverse decision."

[27] In dealing with the issue of affording the successful candidate an opportunity to be heard the Court in the *PSA's case* noted that in cases of this nature the commissioner could make a finding that could be very damaging to the third party. In this regard the Court noted with concern that such findings are usually published in the *Industrial Law Journal* which is read widely within the legal circles. In fact there exists also the possibility that such cases may be reported or discussed in the general media.

[28] Although, unlike in the *PSA's case*, the commissioner did not expressly rule on the suitability of the successful candidate, his arbitration award is to that effect. The essence of his award is that the respondent should, rather than the successful candidate, have been

appointed.

[29] After failing to afford the successful candidate an opportunity to be heard during the arbitration proceedings, the commissioner issued an award whose consequences turned out to be detrimental to the successful candidate's interests. Accordingly, in conducting the arbitration to finality, without affording the successful candidate the opportunity to be heard and making a finding whose consequences had negative implications to her, committed a gross irregularity.

[30] In the light of the above I deem it unnecessary to consider the other grounds of review set out above. I see no reason why the costs should not follow the result.

[31] In the premises, the commissioner's arbitration award is reviewed and set aside with costs.

MOLAHLEHI J

DATE OF HEARING : 19 JUNE 2007

DATE OF JUDGMENT : 02 NOVEMBER 2007

APPEARANCES

For the Applicant : Adv D T Skosana

Instructed by State Attorney (E H Erasmus)

For the Respondent: Adv I C Prinsloo

Instructed by: Geldenhys Botha Attorneys