IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN PORT ELIZABETH

CASE NO: P377\03

In the matter between:

SOUTH AFICAN POLICE SERVICE	**Applicant**
and	
SAFETY AND SECURITY SECTORIAL BARGAINING COUNCIL	**First Respondent**
LUVUYO BONO	**Second Respondent**
NJ OERSON	**Third Respondent**

JUDGMENT

MOSHOANA AJ

Introduction

[1] This is an application brought in terms of the provisions of section 145 of the Labour Relations Act. The registrar also enrolled an application to dismiss the review application on the basis of non-prosecution. That application has since become academic as the review was heard and this judgment relates to the review application.

Background facts

[2] During or about February 2001, a post of Provincial Head: operational response, Eastern Cape Province, post number 1039, was advertised by the applicant.

The Third Respondent together with other candidates applied for the said post, so was the aptly named Director Best. The Third Respondent as well as other candidates was shortlisted.

[3] On 06 April 2001, the Third Respondent was interviewed by a panel of five. Amongst the panellist was a Director Nevling. It is apparent that upon noticing that Dr Nevling was part of the panel, the Third Respondent allegedly approached Director Thoba to register his dissatisfaction about the presence of Director Nevling on the panel. Director Thoba apparently undertook to ensure his removal from the panel. Lo and behold, when the Third Respondent appeared before the panel, Director Nevling was part of the panel.

[4] From the evidence, it is clear that the Third Respondent raised an objection about representivity of the panel (there was no coloured person on the panel). The chairperson of the panel then informed him that the shortlisting has occurred and therefore it will be difficult to add or remove any of the panel members. It is apparent that the Third Respondent was satisfied thereby. He continued with the interview after having been given time to return to the interview.

[5] The Third Respondent was not successful. Owing to that he lodged a grievance which was not resolved in his favour. The Third Respondent then referred the dispute to arbitration after conciliation has failed. The Second Respondent then concluded that the fact that the promise by Director Thoba was not fulfilled, then the Applicant's conduct was unfair. He then ordered that the Third Respondent be promoted to the position to which Director Best was appointed.

[6] The Applicant disputed the fact that the Third Respondent objected to Director Nevling. In its version the only objection as confirmed by evidence and material before the Second Respondent related to the representivity issue.

The attack

[7] The first attack relates to failure to keep the record of the proceedings to be reviewed. The second attack relates to reasonableness of the award. The third attack relates to the relief granted by the Second Respondent in that same is *ultra vires*.

Analysis

[8] In my view, this award ought to be reviewed simply on the basis that the Second Respondent has not kept a proper record. (**Uee – Dantex Explosive (Pty) Ltd v Maseko and others (2001) 7 BLLR 842 (LC)**.

Ordinarily the Applicant has a duty to produce and place a record to be reviewed. Failure to do so leads to the dismissal of the review application. However, that can only happen if the Applicant has failed to take steps to reconstruct or search for the missing portions of the record. **(Fidelity Cash Management Services (Pty) Ltd v Muvhango NO & Others (2005) 8 BLLR 783 (LC) and Lifecare Special Health Services (Pty) Ltd t\a Ekurkhuleni Care Centre v CCMA & Others (2003) 5 BLLR 416 (LAC)**.

[9] In this matter, it is common cause between the parties that all steps were taken by both to attempt to reconstruct the record. The parties did what they could. In my view the award of the Second Respondent is not reasonable in that no other reasonable commissioner could have arrived at that conclusion. The Second Respondent finds that the fact that the Applicant allegedly reneged from the alleged undertaking to remove Director Nevling from the panel renders the conduct of the Applicant unfair. In my view this conclusion is not reasonable. I do not see how the conduct of the Applicant is unfair thereby. Director Nevling was a mere member of the panel. From the records of the interview, the Third Respondent never raised an objection nor sought the recusal of Director Nevling.

[10] The evidence does not support any conclusion of unfair conduct as contemplated in section 186 (2). The Third Respondent was treated fairly. He was given time after his first objection about representivity. He had an opportunity to ask for the recusal of Director Nevling if he felt, so strong that he will prejudice his case. It is clear that the Second Respondent ignored to deal with such an important consideration. In his award he says:

"I have not dealt with the fact that Dr Nevling should have excused himself as he testified that this was not brought to his attention".

[11] In assessing the alleged unfair conduct, the Second Respondent ought to have given serious and due consideration to the failure by the Third Respondent to seek the recusal. The fact that the Third Respondent was given and used the opportunity to address and attempt to convince the panel that he is the best candidate for the job, points that the Third Respondent was treated fairly. All of the above did not matter to the Second Respondent. This can only point to failure to apply mind. The alleged undertaking to recuse Director Nevling was actually an irrelevant fact and consideration when the fairness of the conduct of the Applicant was assessed. This envinces failure to apply mind.

[12] Even if the Second Respondent was correct in finding that the process that led to the appointment of Dr Best to the disappointment of the Third Respondent was unfair, the remedy he ordered is inconsistent with such findings. He in a sense orders reinstatement to the position when the finding is that the process was flawed.

[13] In my view, he ought to have considered the exceptions set out in section 193 (2) of the Labour Relations Act. Section 193 (4) empowers him to determine on terms that he deems reasonable which may include ordering reinstatement, re-employment or compensation.

[14] Surely once he considers to order reinstatement he ought to have considered the basis of unfairness. That seems to be that the Applicant did not follow a fair procedure by including Dr Nevling in the panel despite undertaking not to

do so. Thus same can only relate to process than substance.

[15] Therefore, section 193 (2) prevented him to order promotion to the position (which has the effect and which is indeed reinstatement).

[16] He did not make a finding that the Third Respondent was the best candidate on merits and he deserved to be appointed. At best a reasonable term would have been to set aside the appointment and order the assessment without the participation of Dr Nevling. In the court's view he exceeded his powers in that regard.

[17] In the result, I make the following order:

1. The award issued by the Second Respondent on 07 July 2003 is hereby reviewed and set aside.
2. The dispute is remitted to the First Respondent to be considered afresh by another arbitrator other than the Second Respondent.
3. No order as to costs.

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G N MOSHOANA AJ
Acting Judge of the Labour Court
Port Elizabeth

Appearances

For the Applicant	: Adv Gqamana
Instructed by	: State Attorney
For the Respondent	: Adv Grobler
Instructed by	: J Gruss Attorneys
Date of hearing	: 05 February 2008
Date of Judgment	: 07 February 2008