IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 2619/05

In the matter between:

NM MASOMBUKA	APPLICANT
AND	
MERCY MASHIANE N.O.	1ST RESPONDENT
EDUCATION LABOUR RELATIONS BARGAINING COUNCIL	2ND RESPONDENT
MEC FOR EDUCATION (MPUMALANGA PROVINCIAL GOVERNMENT)	3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The Applicant in this matter is seeking to review and set aside the arbitration award issued by the First Respondent (the arbitrator) under case number PSES603-04/05 dated 9th September 2005. The Applicant seeks an order in the following terms:

> *"1 That 3rd Respondent be ordered to ensure that Applicant receives the same salary and benefits she would have received had she been promoted to the position of Senior Education Specialist*

(Isindebele) advertised under reference number E5/3141/32, and that the 3rd Respondent will be entitled (but not obliged) to give effect to this order by granting the Applicant protective promotion in terms of the applicable official code or regulations.

2. *Alternatively, that the matter be referred back to the 2nd Respondent to be heard by a panellist other than 1st Respondent."*

[2] The Applicant is thus seeking protective promotion which if granted should not affect the status or interests of the successful candidate. The issue of non-joinder does not on the authority of *Gordon v Department of Health KwaZulu Natal (337/2007) [2008] ZASCA 99 (17 September 2008),* arise.

Background

[3] The Third Respondent advertised the post of Senior Education Specialist Regional Language (IsiNdebele) (FET), under reference E5/3141/32 in the City Press dated 14 September 2003. The requirements of the post as was set out in the advert included among other things an appropriate recognized Bachelors Degree or equivalent qualification in the specific FET learning field, supported by a professional qualification in Education including teaching/management experience in the FET environment.

[4] The applications for the post were submitted by a number of applicants but only 4 (four) were short-listed by the head office. Another candidate was however included in the short-listing by the Regional Director, Mr JJ Mabena.

[5] The Applicant who was one of the short-listed candidates and was also interviewed, is employed by the Mpumalanga Department of Education as a teacher at the Silamba School. Her qualifications as stated in her founding affidavit are; "*Secondary Teacher's Diploma, IsiNdebelel 02-302 {Degree]."*

[6] The Applicant was short-listed but was unsuccessful in the interviews. She contends that the Chief Education Specialist, Ms G M Ditshego did not agree with the recommendation of the interview panel that the incumbent was the suitable candidate because she (the incumbent) did not have IsiNdebele as required by the advert, but was qualified in IsiZulu and at the time was teaching Geography.

[7] According to the Applicant, Ms. Ditshego sent a memo expressing her view about the recommendations of the panel to the Regional Director and included therein her recommendation that the Applicant who ranked number 2 (two) on the list of the interviewing panel be appointed.

[8] The Applicant further states that the Regional Director ignored the memo recommending her for the appointment to the post. She further states that on the 10 May 2004, the Regional Director approached Ms. L G Ntuli who was acting in the position of Ms Ditshego and required her to sign a recommendation, which he had prepared. Ms. L G Ntuli signed the recommendation that the incumbent be appointed.

[9] In its answering affidavit the Third Respondent placed in dispute a number of facts averred to by the Applicant in her founding affidavit. In this respect the

Third Respondent denied the existence of the memo which the Applicant claims were addressed to the Regional Director recommending that she be appointed.

[10] The Third Respondent further placed in dispute the allegation that the Regional Director called Ms L.G. Ntuli to his office to sign the recommendation which he had prepared. The memo recommending the appointment of the incumbent was according to the Third Respondent prepared and signed by the Senior Administrative Clerk, Ms E. Nkabinde. The allegation that the Regional Director told Ms, L.G. Ntuli that Ms Ditshego had given her permission to sign the recommendation on her behalf was also denied.

[11] The allegation that the incumbent did not have IsiNdebele as required by the advert since she had a Masters Degree in IsiZulu with aspects of the copulative in IsiNdebele was also placed in dispute by the Third Respondent. In this regard the Third Respondent contended that the incumbent was able to teach IsiNdebele and had already done so in Grade 10 from 1997 to 2001.

Grounds for review

[12] The Applicant complains that the Commissioner misdirected herself and committed misconduct in that:

> *"10.1 She lost sight of the fact that she was supposed to scrutinize the decision of the regional director, and not only consider the panel's recommendation. The regional director was supposed to have considered the recommendations made to him independently and with an open mind, which he, according to 1" Respondent's own*

findings, obviously did not do. His actions caused the decision not to appoint me to be both procedurally as well as substantively unfair and grossly irregular.

10.2 1st Respondent's reasoning was based on a distinction between procedural and substantive fairness, namely that despite absence of procedural fairness, the substantive fairness was present. However, in the end she made the conflicting finding or award that the appointment of the incumbent was procedurally fair. This was grossly wrong and calls for setting aside."

Evaluation of the evidence

[13] In my view the Applicant's case stand to be dismissed on the ground that, disputes of facts have arisen from the affidavits presented before this Court. The approach which a Court must follow when confronted by disputes of facts in motion proceedings is that which was enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD)*. In that case (at 634 F) the Court in dealing with this issue had this to say:

"It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, wherein in proceedings of Notice of Motion disputes of fact have arisen on the affidavits, a final order whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavit which have been admitted

by the Respondent, together with the facts alleged by the Respondent, justify such an order. The power of the court to give such final relief on the papers before it, is however, not confined to such a situation. In certain instances the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real genuine or bona fide dispute of fact…if in such a case the Respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under Rule 6 (5) (g) of the uniform rules of court and the court is satisfied as to the inherent credibility of the Applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the Applicant is entitled to the relief which he seeks….moreover there may be exceptions to this general rule as, for example, where the allegations or denials of the Respondents are so far fetched or clearly untenable that the court is justified in rejecting merely on the papers."

[14] The Supreme Court of Appeal in the recent case of the *National Director of Public Prosecution v Zuma (2009) ZASCA 1 at para [26],* in confirming the *Plascon Evans* rule had this to say:

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule

that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.13 The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

[15] In the present instance the Third Respondent, as indicated, earlier denies the existence of the memorandum in which the Applicant was recommended for appointment. In the first instance the Applicant has not attached the said memorandum to her papers and secondly she has not filed a replying affidavit wherein one would have expected her to deal with the denial by the Third Respondent. Failure to produce the memorandum gives credence to the contention by the Third Respondent that the Regional Director could not have ignored such a memorandum.

[16] The Applicant's application further stands to be dismissed even on its own merits. The argument of the applicant is based on two main issues, namely; (a) the incumbent of the post, should not have been short-listed and appointed because she does not have a Bachelors Degree in IsiNdebele or an equivalent

qualification and (b) that the Regional Director, acted improperly by interfering with the process, and thereby making it substantively and procedurally unfair.

[17] The Applicant's application stands to be dismissed because the conclusion reached by the arbitrator can not be faulted for unreasonableness. The decision of the arbitrator can not be said to be one which a reasonable decision-maker could not have reached. In my view, the arbitrator's conclusion does comply with the standard set out by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC)*.

[18] I have already indicated earlier that the requirements of the post as was set out in the advertisement were that the applicant should be in possession of:

> *"an appropriate recognized Bachelors Degree or equivalent qualification in the specific FET learning field, backed by a professional qualification in education plus credible teaching/management experience in the FET environment."*

[19] It is apparent from the reading of the arbitrator's award that in arriving at her decision she was influenced and took into account the following facts:

(a) that the incumbent of the post did aspects of copulative in IsiNdebele as a research topic and therefore has some qualification in the language which can be regarded as equivalent qualification as required by the advert;

(b) that the incumbent of the post had also taught IsiNdebele at grade 10 from 1997 to 2001; and

(c) that the incumbent of the post had also proved herself at the interview to have a good understanding of the IsiNdebele terminology of the National Curriculum Statement.

[20] The other factor which the arbitrator took into account in assessing the Applicant's complaint relates to the ability of the interview panel which she found to have consisted of individuals who had extensive knowledge of the IsiNdebele language as well as the curricular aspects thereof. The ability of the interviewing panel was found to be unquestionable. She however recognized that the panel was faced with a challenging task in that they had before them two applicants who had the skill, knowledge and experience in the language.

[21] The arbitrator correctly pointed out in the award that the onus to prove that the respondent acted unfairly in the appointment of the incumbent was on the Applicant. It is not clear on the evidence which was before the arbitrator nor the founding affidavit whether or not the Applicant possessed a Degree in IsiNdebele. The Applicant states in her CV that she attended the University of Pretoria from 1997 to 1999 studying Arts Special and then mentions IsiNdebele 102-302. In her founding affidavit she states that her qualifications are *"Secondary Teacher's Diploma, IsiNdebele 102-302 [Degree]"*. It is not clear from this whether IsiNdebele is part of her Secondary Diploma, which is not a Degree, or is part of her studies at the University of Pretoria and/or whether or not she obtained a Degree from the University of Pretoria. It is for this reason that the arbitrator's conclusion that the applicant failed to show that she was

more qualified than the incumbent of the post at the time of the interview is both reasonable and correct.

[22] As concerning the alleged *"interference with the process"* by the Regional Director the arbitrator rejected the version of Ms Ntuli that she signed the recommendation under duress. She found that there was no evidence indicating that the Regional Director influenced the outcome of the recommendations of the panel. The memorandum that recommended the appointment of the incumbent was prepared by a Senior Administrative Clerk, Ms E. Nkabinde from the office of Mrs GM Ditshego and was signed by Ms LG Ntuli in her capacity as Acting Chief Education Specialist whilst Ms Ditshego was away.

[23] It should be noted that the Applicant does not attack the reasoning and the motivation of the interview panel regarding the scoring of the candidates and their recommendations. She also does not place in issue the qualification and experience of the panel members as concerning their ability to assess all the candidates that appeared before them. The extensive knowledge and experience of the panel members in as far as it concerned the knowledge in IsiNdebele language was not disputed by the Applicant. They were therefore in the best position to assess the respective candidates.

[24] The transcript of the arbitration proceedings which the Applicant failed to reconstruct did not help her case. She in law had the duty to ensure that the poor transcript of the arbitration proceedings was reconstructed. See *Papane v Van Aarde NO and Others (2007) 28 ILJ 2561 (LAC) at 2574 para [27],*

Department of Justice v Hartzenberg 2002 (1) SA 103 G (LAC); (2001) 22 1LJ 1806 (LAC),- JDG Trading (Pty) Ltd t/a Russells v Whitcher NO & others (2001) 22 1LJ 648 (LAC); Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & others (2003) 24 1LJ 931 (LAC).

[25] In the result the review application stands to be dismissed. In my view there is no reason in law and fairness why the costs should not follow the outcome of this application.

[26] In the light of the above the following order is made:

(i) The application to review and set aside the arbitration award issued by the First Respondent under case number PSES603-04/05 dated 9th September 2005 is dismissed.

(ii) The Applicant is to pay the costs of the Third Respondent.

Molahlehi J

Date of Hearing : 22nd July 2008

Date of Judgment : 3rd February 2009

Appearances

For the Applicant : Adv M F Ackermann

Instructed by : Len Dekker Attorneys

For the Respondent: Adv D T Skosana

Instructed by : The State Attorney (Pretoria)