

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO**JR1162/08****Reportable**

2 SEPTEMBER 2009

SOUTH AFRICAN POLICE SERVICES APPLICANT**And****INSPECTOR ZANDBERG AND TWO OTHERS
RESPONDENTS****JUDGMENT**

PILLAY D. J

The applicant employer seeks to review and set aside the award of the third respondent Commissioner. The first respondent employee had referred a dispute about his non appointment to arbitration under the auspices of the second respondent Bargaining Council. The Commissioner found that the failure to promote the employee was an unfair labour practice in terms of section 186(2) of the Labour Relations Act, 66 of 1995 and ordered the employer to promote and compensate him retrospectively.

THE ISSUES

At arbitration, it was common cause that the interviewing panel had rated the employee the highest and the most suitable candidate for the job. The panel recommended him for promotion but the Divisional Commissioner rejected the recommendation in favour of Officer N E Ntoyi. Officer Ntoyi, the second respondent at the arbitration, is not a party to the review. He is an African male who was second on the panel's shortlist.

The employee challenged the procedural and substantive fairness of the promotion on the ground, firstly that the post was not a designated post. As such, it was not reserved for members of designated groups which the Employment Equity Act, 55 of 1998 seeks to affirm. Secondly, he was the most suitable candidate because he scored higher than Officer Ntoyi.

The employer's case was that the Divisional Commissioner was obliged to apply its National Instructions 1/2004 to fill the post. In terms of these instructions the employer had to apply equity to fill the position.

THE AWARD

At the arbitration, Director van Rooyen had submitted for the employer that posts were advertised as designated, non designated and, in this instance, without any designation. The practice of advertising posts as designated and non designated had been abandoned, he had contended.

The Commissioner referred to section 25(2) of the South African Police Service Act 68 of 1995 which states:

“National orders and instructions issued under subsection 1 shall be **known** and issued as National orders and instructions and shall be applicable to all members.”

[COMMISSIONER'S EMPHASIS]

She then interpreted Clause 5.3 of the National Instructions 1/2004 to permit posts to be designated and non designated only. She reasoned as follows:

“However, I am not at the same time inclined to believing that the procedure is fundamentally flawed in that the respondent has adopted a procedure which is not commonly known amongst the members. (*sic*) In this matter, like many other similar disputes, applicant’s grievances seems to stem from the fact that in terms of the National instructions 1/04 and other relevant policy documents there has not been compliance of peremptory provisions by the respondent.

In this matter there has been no proof presented that the procedure [‘no designation’] adopted was ‘**known**’ by the members. It appears that the respondent had changed their selection procedure and did not effectively communicate same to the members... But where the applicant was not made aware of the third categorisation of a post which was read into clause 5.3 then it cannot be reasonably expected of him to have knowledge of such a variation of the interpretation of that clause. In that it is the first time that I have been presented with this interpretation of *clause* 5.3 and as a legal person I am unable to align myself with such an interpretation. Further the fact that some advertisement still displayed the non-designated post

classification symbol must be seen as misleading.

Accordingly I am of the opinion that the respondent's interpretation of *clause* 5.3 is firstly misplaced and irrational in that the interpretation is non-sensical, linguistically and academically.”¹ (*sic*)

[COMMISSIONER'S EMPHASIS]

The second part of the Commissioner's reasoning was to determine whether equity should have applied to a non designated post. She took the view that:

“(M)erit should have been the dominant or prevailing requirement during the selection process. If the requirements of equity were intended to be applied then the post would have identified as a designated post. By identifying the post as a non-designated post means that the appointment is neither subject to nor determined by the equity plan. Which in essence means that the outcome of the selection process is neither dependent on nor determined by the existing or the required demographics and therefore the issue of representatively of either race or gender in the applicable business unit should not be consideration as a first resort but perhaps only of the last resort. If that is the case then in this instance criteria other than that related to the requirements of equity should

¹ Page 9 of award

determine who should be promoted. Further the description of non-designated means that the best person should be appointed and the appointment should have been based on merit. If equity were to prevail under all circumstances and during each and every selection process there would not have been a need to distinguish between designated and non-designated posts. In the event that panels conduct the selection process as if they were dealing with a designated post when the advertisement quite clearly states that it is a non-designated post, they thereby not only misdirect themselves but they misinterpret the respondent's National instruction 1/04 and further to that they act contrary to the spirit of the equity plan.

This interpretation of the respondent's policy document in this regard leads to a travesty of justice and fairness, for by implication the panel's approach is one where the most suitable candidate will only be considered for promotion when all the requirements of the equity plan have been fulfilled. A close reading of the respondent's policy document shows on a balance of probability is that, that was never the respondent's intention when the equity plan was implemented and/or when reference was made to equity anywhere in its policy documents as in circumstances where the

advertisement post was a non-designated post.”² (sic)

ANALYSIS

In this case, the procedural and substantive fairness of the non appointment are inextricably intertwined. Central to the determination of both the procedural and substantive fairness is the interpretation of Clause 5.3 of the National Instructions.

Clause 5.3 of the National Instruction provides:

“The National Commissioner may determine that certain posts be advertised for the designated or the non-designated group. If posts are advertised as such the employees belonging to the non designated group may only apply for posts advertised for the non-designated groups while employees for the designated group may apply for any of the posts advertised for the designated or non designated groups. The non-designated group includes all White males. The designated group includes all African males and females, Indian males and females, Coloured males and females, White females and persons with disabilities.”

² Page 10 of award.

On procedure, assuming that the Commissioner's interpretation of Clause 5.3 and her finding that the employer "failed to adhere to its own procedures and policies" are correct, the remedy she prescribes is irrational. If there had been a fundamental procedural impropriety then the panel's recommendation of the employee himself would also be suspect. As such, she could not direct that he be promoted. The appropriate remedy would then have been to set aside the promotion and direct that it be redone.

On substance, the Commissioner based her reasoning on her interpretation of the National Instructions. She interpreted Clause 5.3 to mean that the post was non-designated.³ Based on this finding she concluded that the appointment was not subject to the equity plan, that race and gender should not have been considerations of first resort but perhaps only of last resort, that equity did not apply, that the best person should have been appointed, based on merit. In her opinion, if the employer's interpretation prevailed then the "most suitable candidate" would only be considered when all the requirements of the equity plan had been fulfilled; and that, she remarked, could not have been the intention of the employer.⁴

On this basis she concluded that the employer acted arbitrarily, unreasonably, irrationally and unfairly. After considering several cases on the circumstances in which a Commissioner should interfere with an employer's decision she concluded that the employer's conduct was so unreasonable that it warranted her intervention.

Quite simply Clause 5.3 merely enables the National Commissioner to advertise posts as designated or non-designated. If the National Commissioner does not expressly state whether a post is designated or non-designated then impliedly it must be non-designated. Whether a post is non-designated or without designation its import is the same: anyone can apply. Nothing therefore turned on the distinction between non designated or without designation. The employee, a White male, did apply. There was

³ Page 9 of award.

⁴ Page 10 of award.

therefore no procedural defect, at least none that was material.

On substance, distinguishing between designated or non designated posts in Clause 5.3 is relevant for the purpose of advertising the post and soliciting applicants for it. Clause 5.3 does not apply to the short-listing, interviewing, selection and appointment processes.

The Commissioner therefore misdirected herself firstly in conflating the advertisement requirements with the requirements for other steps in the appointment process.

Her second misdirection occurred when she assumed that applying equity means appointing candidates who are less than “best”, less than “the most suitable” and less meritorious.

Opening the post to all groups does not mean that a higher standard applies when assessing suitability and merit for posts for non designated groups than when posts are restricted to designated groups. Applying a higher standard for non designated groups implies that a lower standard is used to appoint persons from designated groups. By implication, less suitable and less meritorious people fill posts reserved for designated groups. That cannot be the intention or the letter and spirit of the EEA.

Equity means fairness and justice, to the candidate and to the people they serve. Fairness and justice cannot prevail if candidates who are less than

best, who are less suitable and less meritorious are appointed. However, in assessing suitability and merit, technical competence and experience are not the only criteria. Acquiring a high aggregate is also not decisive.

Equity on the one hand and merit and suitability on the other hand are not mutually exclusive criteria. Furthermore, equity under the Employment Equity Act cannot be different from equity which the Constitution of the Republic of South Africa, 108 of 1996 promises. Promoting equity in the workplace can therefore not conflict with or compromise the constitutional promise, which includes equitable delivery of goods, socio economic rights and benefits and services, including security services. Equity is therefore not only a workplace concern but also a community concern. Therefore, in assessing merit and suitability, qualities relevant to ensuring delivery to the community must also be considered.

Hence, in a case where a white job applicant scored better on managerial ability, vision, leadership and appropriate experience and knowledge than the successful coloured candidate, the Labour Court (*per* Murphy AJ) upheld the appointment of the coloured candidate who had better communication and interpersonal skills, as well as service delivery. (*Alexandre v Provincial Administration of the Western Cape Department of Health*(2005) 26 ILJ 765 (LC) para 25)

Community needs also weighed in when the Labour Court (*per* Landman J) ordered the South African Police Service to promote white inspectors in the explosives unit (the bomb squad) when no members of designated groups applied. (*Coetzer & Others v Minister of Safety & Security & Another*(2003) 24 ILJ 163 (LC))

In this case, the constitutional promise of equity is captured in the following extracts from the National Instructions:

“9. Generic functions of evaluation panels [whether interviews are conducted or not]:

A panel must in considering the applications for a promotion, promote equal opportunities, fair treatment, **employment equity and advance service delivery by the service.**

.....

12 Criteria for selection of candidates: [1] The selection of a candidate must be based on the following criteria:

[a] competence based on the inherent requirements of the job or **the capacity to acquire within a reasonable time the ability to do the job.**

[b] Prior learning, training and development.

[c] Record of previous experience.

[d] **Employment equity in line with the employment equity plan of the relevant business unit.**

[e] Evidence of satisfactory performance.

[f] suitability and

[g] Record of conduct.”

(THE COURT’S EMPHASIS)

The National Instruction does not create a hierarchy of criteria; therefore all the criteria for selection must be considered cumulatively to balance both

equity in the workplace and equity in the delivery of services. Suitable, meritorious candidates, whether from designated or undesignated groups, are those who meet the criteria for selection and are also capable of advancing service delivery.

Many reasons exist for opening posts to non-designated groups. They include: the scarcity of technically qualified candidates; the requirements of the post are such that it cannot accommodate a person who is not immediately competent but who can, within a reasonable time, acquire the ability to do the job; and the demographics in the business unit. It does not follow that whenever non designated posts are filled equity is a secondary consideration, or that equity trumps merit and suitability.

In this case, the demographics evident from the employer's equity plan weighed strongly in favour of appointing an African male. At salary level 8 the SAPS was short of African males by at least 5. Although the scores of the interviewing panel were not available, the difference between the employee's and Officer Ntoyi's scores was marginal. It is also not clear whether equity considerations weighed in during the deliberations of the interviewing panel. From the available evidence, it appears not. Only competence, prior learning and experience seem to have been assessed. Therefore, the Divisional Commissioner had to apply the employment equity plan to the recommendations of the interviewing panel.

The panel had the power to merely make recommendations. The power of

appointment vested in the Divisional Commissioner. He was entitled to deviate from the panel's recommendation. His deviation in this instance is rational and justified.

REVIEWABILITY OF AWARD

Having identified flaws in the Commissioner's reasoning it remains for the Court to determine whether such flaws so vitiate the award as to render it unreasonable.

In deciding this issue the Court notes that the Commissioner's misdirection goes to the root of the dispute. She misread the plain meaning of the text of Clause 5.3. She knew that disputes have been "raging for a long time" about designated and non-designated posts and when equity should be primary and secondary in the selection process.⁵

The Court finds that no commissioner serving on a panel of the Bargaining Council could reasonably come to the conclusion that the Commissioner in this case did. If the Court fails to interfere in this award it could perpetuate a misconstruction amounting to a gross irregularity to the detriment of the police services.

The award falls to be reviewed and set aside.

⁵ Page 9 of award.

However, with regard to costs, by opposing the review the employee assisted the Court in arriving at its decision. In the circumstances, no order for costs should be made against him

The Court orders the following:

The application for review is GRANTED WITH NO ORDER AS TO COSTS.

PILLAY D J

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| <u>Heard:</u> | | 21 August 2009 |
| <u>Delivered:</u> | 2 September 2009 | |
| <u>Edited:</u> | | 16 October 200 |

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