IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

reportable

CASE NO.: J1282/09

In the matter between:

DENOSA OBO J E VAN DER MERWE Applicant

and

DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] The applicant sought urgent interim relief in an application brought on 25 June 2010. On 29 June a *rule nisi* was granted by Van Niekerk J in the following terms:

1. *A rule nisi is issued calling on the Respondent to show cause on 3 August 2010, why the following order should not be made final.*

1.1 *Non–compliance with the rules of the above Honourable Court in these proceedings is condoned and the Applicant is granted leave to bring this application on an urgent basis.*

1.2 *Directing the Respondent to perform the undertakings it made at the grievance conciliation meeting, held on 24 March 2010, which were to:*

(i) *Recall the job interviews for the post of the Assistant Director Sedibeng District, advertised by the Respondent in November 2009, with reference number 7067765 (the post) and;*

(ii) *Grant the Applicant, Ms Van Der Merwe an opportunity to be interviewed.*

1.3 *Directing the Respondent to pay the costs of this application pending the return date.*

2. *The Respondent is interdicted and restrained from appointing any persons to the post referred to in paragraph 1.2 (i).*

[2] On 3 August 2010 after hearing submissions from Counsel for the parties this Court confirmed the *rule nisi,* with costs, in an *ex tempore* order. These are the reasons for the order.

Factual background

[3] The applicant, the Democratic Nursing Organisation of South Africa, a registered trade union, brings this application on behalf of its member, Ms Van Der Merwe ("the employee"), who is currently employed by the respondent at its Heidelberg Clinic in the Sedibeng District.

[4] During November 2009 the respondent published an advert in the Sunday Times inviting suitably qualified individuals to apply for the post of Assistant Director Sedibeng District. The closing date for applications was 30 November 2009. The employee submitted her application form and supporting documents to the address stipulated in the advert. A factual dispute exists as to whether the respondent received some of the supporting documents.

[5] On 9 January 2010 the employee made enquiries about when her interview would be held and was informed that she had not been shortlisted for an interview. She approached the applicant for advice and on 13 January it lodged a formal grievance on her behalf. The grievance form states that she is aggrieved by the failure to shortlist her as she has the relevant qualifications and experience set out in the advert; she fulfilled the same duties set out in the advert and she acted in the position when the incumbent was on leave. The outcome she sought was that she be shortlisted and given the opportunity to be interviewed for the position.

[6] The respondent commenced conducting interviews for the post the day after the employee's grievance was lodged, on 14 January 2010. On 15 January Ms

Dichaba, a Deputy Director of the respondent in the Sedibeng District, delivered a written outcome on the grievance form, stating that the grievance had been resolved and that employee was not shortlisted for an interview in that she did not fall within the required score for short listing. It is common cause that no grievance hearing had preceded the outcome stated on the grievance form.

[7] In a shortlist prepared prior to the interviews the respondent listed the applicants for the post who had been screened out. The annotation “No qualifications” appears alongside the employee’s name on the shortlist.

[8] On 3 February 2010 a meeting was held between the parties to discuss the grievance, at which it was agreed that the respondent would appoint someone to investigate and report on the correctness or otherwise of the procedure followed by the respondent in handling the employee’s grievance. The respondent appointed a Mr Ndaba to conduct the investigation and he met with the employee in the course of the investigation in order to establish the facts pertaining to her grievance.

[9] On 24 March 2010 a grievance conciliation meeting was held between the parties at which Sipho Qankase (the deponent to the founding affidavit), Ms Segone (an official of the applicant), and the employee were present on behalf of the applicant and Dichaba, among others, represented the applicant. Ndaba’s finding and recommendations were discussed, although the applicant was not provided with a copy of his report. It is common cause that Ndaba’s finding was that the grievance had not been dealt with in accordance with the respondent's grievance procedure and his recommendation was that it be dealt with without further delay.

[10] The applicant alleges that during the grievance conciliation Dichaba requested a recess during which she consulted another Director of the respondent, Ms Hlahane, regarding the finalisation of the respondent’s position on the resolution of the grievance. Dichaba then informed the meeting that the respondent would recall the interviews and grant the employee an opportunity to be interviewed for the post. The nature of this undertaking (“the undertaking”) in resolution of the grievance is the subject of a factual dispute between the parties.

[11] On 10 June 2010 the respondent sent the employee a letter stating *inter alia* that "*after scrutinising of the short listing documents as well as your curriculum vitae, you were eliminated from the shortlist on the basis that you did not fufill the following criteria : Attachment of Council certificate; certified copy of ID; general and midwifery certificates".*

[12] The letter was contrary to the undertaking and the applicant addressed a letter to the respondent on 17 June 2010 in which it stated: *"It has come to our attention that you are contemplating to make a permanent appointment to staff of an Assistant Manager reference no 7016775.*[1] *On the 24/03/2010 at a grievance meeting it was resolved that your office would conduct fresh interviews for that post and that our member Ms J.E Van der Merwe shall be included in these interviews. It was resolved further that a new independent panel without Ms Dichaba would be appointed to conduct these interviews".* The letter requested a further written undertaking that the respondent would not proceed with the appointment. Despite being advised in an undated reply that a complete response would follow, this was not forthcoming and the applicant was forced to seek relief by way of this application.

[13] It is common cause that the employee had been shortlisted and invited to interview for the same post (Assistant Director Health Services) when it had previously been advertised in 2001.

Preliminary objection

[14] The respondent objected to the admissibility of the applicant's replying on the grounds that it had been deposed to by Segone whilst Qankase was the deponent to the founding affidavit. This, it submitted, was an attempt to make out a case that it had failed to make out in its founding papers. The applicant should have provided a confirmatory affidavit from Segone in its founding papers. Segone avers that Qankase had been involved in an accident and was not available to depose to the

[1] It is common cause that this was an incorrect reference number. This was in fact the reference number for the Project Manager post, which the employee had also applied for and had in fact been shortlisted for. This lends further credence to the improbability of the respondent's version in regard to her failure to attach the necessary documents, as is discussed below.

replying affidavit. The applicant submitted that due to the urgency of the matter it had not been able to file an initial confirmatory affidavit.

[15] The respondent further objected that it emerged for the first time in reply that the employee had applied for two of the advertised posts, namely Project Manager (reference 7016775 for which she had been short listed), as well as the post in dispute. This was an attempt to make out a case in reply. The applicant submitted that this was not a new issue and was a reply to the allegation in the answering affidavit that the employee was not shortlisted because she did not meet the criteria for the post. The fact that she had been shortlisted for another post would render it unlikely that she would have submitted a defective application for the disputed post.

[16] I dismissed the objection and proceeded to hear the merits.

The applicant's submissions

[17] The applicant submitted that the employee was eminently qualified for the advertised post. She had a diploma in general nursing and midwifery obtained on 24 June 1986 after completing 3 ½ years of study; she was registered with the South African Nursing Council as a general nurse and midwife; and on 1 April 2006 she had been promoted to Chief Professional Nurse at Sedibeng Health District Services. She is currently employed by the respondent as Operational Manager in the same district.

[18] She has made out a case for relief in that she has a clear, alternatively *prima facie* right to be considered for selection. The failure to address her exclusion from the selection process constituted an unfair labour practice, even on the respondent's own version given that the respondent conceded that it had no intention of dealing with the substance of her grievance but was simply going through the motions in order to comply with its grievance procedure. Furthermore, the respondent could not avoid complying with its undertaking.

[19] The balance of convenience favours the employee, and the harm suffered by being unjustifiably excluded from the selection process is irreparable. The respondent received the grievance on 13 January 2010 but notwithstanding this permitted the interviews to proceed the following day. Despite the applicant

interceding timeously to attempt to ensure that the employee was interviewed the respondent has persisted in its refusal to comply with its undertaking and the employee has no alternative remedy but to seek relief from this Court. Moreover, the respondent had indicated that it intended to make a permanent appointment to the post with effect from 1 July 2010.

[20] The applicant submitted that the undertaking addressed and resolved the grievance. If this had not been the case the grievance hearing would have proceeded until the issues had been fully ventilated.

The respondent's submissions

[21] The respondent denies that the undertaking was made at all. Dichaba states in her answering affidavit that Ndaba's recommendation had only been to the effect that a formal grievance hearing should be held instead of the respondent addressing the grievance in writing. The investigation was limited to the correctness or otherwise of the procedure by which the respondent had resolved the grievance. It was not intended to canvass the substantive issue of the employee's exclusion from the short list. In any event, the grievance hearing could not address her exclusion in that her application was defective. The selection panel determining the short list had agreed that all applicants who did not attach certified copies of the relevant qualifications would be automatically disqualified from being interviewed. On this basis, of the 27 applications received 11 were disqualified. If she was afforded the opportunity to be interviewed the same opportunity would then have to be extended to all other excluded applicants. This would undermine a process whereby the respondent sought to ensure a level playing field and treat all applicants equally whilst attracting as wide a pool of applicants as possible.

[22] Mr Manyage, appearing for the respondent, conceded however, that had the employee met all the requirements she would have "stood head and shoulders above" all the other shortlisted candidates. The facts however do not support her version that she submitted all the documents in that the three disputed documents reflects the date of certification as July 2010 while her application was made in November 2009. Furthermore, when she enquired about her interview she was informed that her application was defective and she could then have taken steps to

remedy this. She failed to exercise the alternative remedies at her disposal. If she is correct that her application was not defective she could have sought to review the selection panel's decision, which would have enabled the reviewing court to determine whether they applied their minds to her application. She also has the further remedy of being able to refer an unfair labour practice dispute. However, she elected to lodge a grievance, not in respect of the decision not to shortlist her but rather in regard to the respondent's non-compliance with its grievance procedure. She is then given an opportunity to state a case on the manner in which her grievance should have been dealt with, which led to the parties agreeing on an investigation. The investigation recommends a formal grievance hearing, at which is emerges that the reason why she was not shortlisted could not simply be remedied (i.e. her application had fallen short when measured against a standard set of rules which were applicable equally to internal and external applicants) and she then seeks urgent relief. In these circumstances if she were to succeed other employees of the respondent who applied and were disqualified for similar reasons would all have to be similarly provided with the opportunity to remedy their defective applications. Furthermore, the selection panel is *functus officio* and a *de novo* process would have to commence with obvious disadvantage to the respondent. Moreover the post has been filled and recalling the interviews would constitute unwarranted interference with the respondent's managerial prerogative.

Analysis and conclusion

[23] The facts lend themselves to two material issues being disputed and possibly referred to oral evidence if they are not capable of resolution on the papers. The first is the undertaking made in resolution of the grievance and the second concerns the reason why the employee was not shortlisted for the disputed post. If this Court should find that on the probabilities the undertaking was made, this would dispose of the second issue in that the reason for the employee's exclusion from the shortlist would be moot. I now deal with the undertaking.

[24] The factual dispute in relation to the undertaking is material to this application. The respondent denies that the undertaking, or indeed any undertaking, was made. However, it provides no explanation for the failure to provide a confirmatory affidavit

from Paul Musa, the Labour Relations Officer from the respondent's Ekurhuleni District who chaired the grievance conciliation hearing. This would have cast some light on the nature of the grievance conciliation and indeed on the vexed issue of the disputed undertaking. As Mr Manchu, for the applicant submitted, the respondent would have had sufficient opportunity to obtain an affidavit from Musa - the *rule nisi* was issued on 29 June 2010 and the respondent's answering affidavit was filed a month later. On an issue which is patently material it is telling that the respondent would have omitted confirmation from a source that is indisputably material to its resolution. Moreover, in these circumstances, it would appear to be illogical for the respondent to suggest that the formal grievance hearing arose as a result of a grievance related to a defective grievance procedure, and was not intended to dispose of the merits. This is not borne out by the facts, and it must therefore be concluded on the probabilities that the undertaking was made in resolution of the grievance that the applicant was unfairly excluded from the short list.

[25] Insofar as the respondent persists in relying on the dates of certification as proof that the application was defective, the applicant's explanation is entirely plausible, i.e. that at the time replying affidavit was filed the employee did not have certified copies in her possession and these had to be obtained because the respondent had placed her qualifications in issue in its answering papers. Indeed the respondent's reliance on the defective application as the reason for her exclusion cannot be sustained given the fact that the panel records the employee's reason for being screened as: *"no qualifications*". This distinguishes her from other applicants whose reason for being screened out is *"qualifications not attached.* However, even if the annotation is simply an error (although this was not submitted), and was intended to refer to the fact that the three disputed documents were not before the panel, there would be no reason why the employee could not be afforded the opportunity to remedy the defect. This would render nugatory the respondent's concern about a level playing field particularly given its concession regarding her qualifications.

[26] In the circumstances the respondent's version simply cannot be sustained on any construction of the probabilities. Accordingly, the *rule nisi* is confirmed.

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Bhoola J

Judge of the Labour Court of South Africa

Date of application: 3 August 2010

Date of reasons: 30 August 2010

Appearance:

For the Applicant: Adv Manchu instructed by KD Maimane Inc

For the Respondent: Adv Manyage instructed by the State Attorney