IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN PORT ELIZABETH)

CASE NO: P54/09

In the matter between

South African Police Services	**Applicant**
and	
Safety and Security Sectoral Bargaining Council	**1st Respondent**
J Labuschagne N.O	**2nd Respondent**
Gertruida Petronella Swart	**3rd Respondent**

JUDGMENT

AC BASSON, J

[1] This was an application to review and set aside paragraph [1] of the award made by the 2nd Respondent (hereinafter referred to as "the arbitrator") in terms of which the failure of the South African Police Service (hereinafter referred to as "the applicant") to promote the 3rd Respondent to the rank of captain was held to be unfair. The applicant was ordered to promote the 3rd Respondent (hereinafter referred to as "*the respondent*") to the rank of captain retrospective to 1 December 2005.

[2] The applicant applied for condonation for the late filing of the review application. The application is approximately 14 calendar days out of time. I have considered (a) the degree of lateness or non compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or *bona fide* defense in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgment, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice (see *Foster v Stewart Scott Inc* (1997) 18 *ILJ* 367 (LAC)). I am satisfied that the length of the delay is not exceptionally long and that the explanation for the delay is adequate. I have also considered the remainder of the factors and am of the view that the applicant has made out a proper case for condonation.

Relevant facts

[3] The respondent served as an inspector in the post (of an inspector) for eight years. In 2005 the post was upgraded to a captain's post. It was common cause that during September 2005 the applicant internally advertised the post of Senior (Principal) Communication Officer, Uitenhage as part of Promotion Phase 2/2005 under post number 1627. The post, being a Level 8 post was a promotion post. It was common cause that this post was the same post as the one that the respondent occupied at the time.

The evaluation panel

[4] Fifteen applicants applied for the post. A panel was constituted to consider the 15 applications received for the advertised post (which was referred to as post no 1627). On 24 October 2005 the Evaluation Panel, after considering the 15 applications, recommended that the post be re-advertised externally. The panel disqualified one applicant, eleven applicants were found not to sufficiently comply with the requirements of the post. The remaining three, including the respondent, was placed on a "*long short list*". Director Zondeki chaired the evaluation panel.

[5] The panel recorded that it was the recommendation of the panel that the post be re-advertised externally to attract more applicants. It was common cause that no interviews were held and that no appointment was subsequently made. It is important to point out that the Evaluation Panel

did not identify one candidate above the other but only identified three suitable candidates.

[6] It is this decision (the decision to re-advertise) that the respondent sought to challenge following the internal grievance procedure of the applicant.

[7] The internal grievance procedures did not resolve the dispute and the respondent then referred the dispute to the SSSBC (the 1st Respondent). No evidence was led during the arbitration and the parties have agreed to submit closing arguments to the arbitrator in writing.

[8] The appointment of the evaluation panels and the functions of the evaluation panels are governed by, *inter alia*, the provisions of the National Instruction 1/2005 which sets out the processes and procedures for promotion of employees of the applicant to post levels 2 to 12. The National Commissioner is in terms of clause 5(7) of the National Instruction under no obligation to fill an advertised post.

The respondent's case

[9] The case for the respondent was that the applicant had committed an unfair labour practice in terms of section 186(2) of the Labour Relations Act 66 of 1995 (hereinafter referred to as "the LRA"). The respondent argued that the Evaluation Panel lacked the competency and/or authority to recommend to re-advertise post 1627. In essence it was therefore argued that Director Zondeki (who chaired the panel and who made the

recommendation that the post be re-advertised) acted *ultra vires*. It was also argued that no evidence was placed before the arbitration as to why it was necessary to re-advertise to attract more applicants. The respondent also argued that she had a legitimate expectation that she would be the successful application for post 1627. The question before the arbitrator was, according to the respondent's heads of argument the following: "*Was the said promotion panel competent in the circumstances of the Applicant's case to decide that the relevant post should be re-advertised?*"

Case for the applicant

[10] It was submitted on behalf of the applicant that the mere fact that the respondent had a long service in the post did not create a legitimate expectation that she would be appointed in the upgraded post. It was further submitted that the National Commissioner was not obliged to fill an advertised post and that the respondent was not prejudiced as she retained her employment and salary as an inspector.

The award

[11] The arbitrator referred to paragraph 5(7) of the National Instruction 1/2004 and acknowledged that the National Commissioner was not obliged to promote the incumbent to a post or to an advertised post. The arbitrator further pointed out that this discretion must be performed in a manner that

does not constitute an unfair labour practice. The arbitrator then evaluated the reasons for not promoting the respondent to the post which she (the respondent) continued to occupy. In essence the arbitrator was of the view that the reasons advanced for not promoting her was "*not sustained by any evidence and, in my opinion, unconvincing*".

[12] It would seem from the award that the arbitrator was of the view that promotion posts "*cannot be reserved for re-advertisement in the arbitrary manner alluded to by Supt. Jojo* [the applicant's representative]". The arbitrator also took into account that the recommendation to re-advertise the post was not even implemented and the fact that there was no *"evidentiary explanation of why the captain's post is still occupied by an inspector"*. The arbitrator concluded that the refusal to evaluate the applicant was procedurally and substantively unfair:

> "*In conclusion, I am of the opinion that Respondent's neglect, in the present matter, of the career advancement of a proficient and loyal employee borders on disrespect and does not meet the progressive human resource standards expected from public employers by the Constitutional Court."*

[13] In coming to the conclusion the arbitrator relied on the decision of the Constitutional Court in *SAPS v PSA* [2007] 5 BLLR 383 (CC). I will return to a discussion of this case hereinbelow. Suffice to point out that what the arbitrator relied upon was the fact that a balanced approached must be

followed and that the discretion not to promote must be exercised in a manner that does not constitute an unfair labour practice.

Grounds for review

[14] The applicant argued that the applicant erred in the following material respects in reaching a conclusion:

(i) That the Evaluation Panel had the authority to appoint the respondent.

(ii) Despite accepting that the respondent did not enjoy a right to automatic promotion in post 1627 the arbitrator nonetheless continued to order that the applicant promote the respondent to the post.

(iii) The arbitrator accepted that there were three suitable candidates. However, the arbitrator then accepted that the most suitable candidate was the respondent and therefore that the Evaluation Panel was compelled to appoint the respondent.

(iv) The arbitrator erred in focusing and placing reliance on the fact that the applicant highlighted representivity as an issue for consideration by the Evaluation Panel.

(v) It was impermissible for the arbitrator to make an award ordering the applicant to promote the respondent to post 1627 as the arbitrator lacked authority to do so.

(vi) The arbitrator failed to have regard to the applicant's National Instruction 1/2004: Promotion of Employees of the Service to Post Levels 2 to 12: The Evaluation Panel did not have the authority to appoint the respondent to post 1627 (as it was a level 8 position). The Evaluation Panel did not have the power to recommend that post 1627 be re-advertised. The National Commissioner is the only person who has the authority to appoint an employee to post level 8 and above.

(vii) The arbitrator erred in finding that the Evaluation Panel took a decision not to appoint the respondent as it never had the authority to appoint.

(viii) The arbitrator, in appointing the respondent, in effect automatically promoted the respondent to the upgraded post 1627.

Merits of the review

[15] The review will be considered against, *inter alia*, the following principles:

(i) Firstly, a decision not to promote should be exercised in a manner that does not constitute an unfair labour practice.

(ii) Secondly, the definition of an unfair labour practice refers to any unfair act or omission that arises between an employer and an employee involving unfair conduct relating to promotion (section 186(2)(a) of the LRA). This definition has been interpreted by the

Labour Appeal Court in *Department of Justice v CCMA & Others* [2004] 4 BLLR 297 (LAC) as referring to conduct relating to the actual promotion or non-promotion and conduct relating to promotion (see paragraphs [55] *et seq*[1]). The Labour Appeal Court further pointed out that the definition of an unfair labour practice was not confined to disputes concerning conduct relating to promotion, thus excluding disputes concerning whether the employee should have been promoted.

(iii) The decision to promote or not to promote falls within the managerial prerogative of the employer. In the absence of gross unreasonableness or bad faith or where the decision relating to promotion is seriously flawed, the Court and arbitrator should not readily interfere with the exercise of the discretion. Where the employee complains about the fact that another employee was promoted, he or she must show that he or she has the necessary skills and that the person who was promoted does not possess the same or same level of skills. The mere fact that the candidate who

[1] *[55] Counsel for the department also submitted that a dispute about whether a decision not to appoint a candidate to a post is an unfair labour practice is not a dispute that falls within the ambit of item 2(1)(b). He submitted that what G item 2(1)(b) labels as an unfair labour practice in relation to promotion is 'conduct relating to promotion' and not promotion itself. Since the PSA's and Mr Bruwer's case was based on labeling an alleged decision not to promote H Mr Bruwer an unfair labour practice, continued the argument, that was not 'conduct relating to promotion'. He submitted that the conduct sought to be labeled as an unfair labour practice cannot be the promotion or non-promotion itself but it must be conduct relating to promotion. The difficulty with this argument is the last portion of item 2(1)(b) which provides that an unfair labour practice means an act or omission that arises between an I employer and an employee involving 'the unfair conduct of the employer ... relating to the provision of benefits to an employee'.*

was eventually promoted did not score the highest marks or is not better qualified does not, however, necessarily justify a conclusion that the decision not to promotion was unfair.

(iv) A commissioner or arbitrator is not the employer. It is not the task of the commissioner or the arbitrator to decide who the best or most suitable candidate is. The role of the commissioner is to oversee that the employer did not act unfairly towards the candidate that was not promoted.

(v) The mere fact that an employee is already in a post, does not give him or her an automatic right to a promotion even if such a position becomes available. At best it gives such an employee the right to be heard. (see *Administrator Transvaal & Others v Traub* (1989) 10 ILJ 823 (A)). See *SAPS v PSA* (*supra*) and *De Nysschen v General Public Service Sectoral Bargaining Council & Others [2007] 5 BLLR 461 (LC)* where the Court confirmed the principle that an employee does not have an automatic right to promotion. In *SAPS v PSA (supra)* the question before the Constitutional Court was whether or not a Commissioner (of Police), having upgraded a post found to be under graded by an evaluation, is obliged by the regulations to promote the incumbent to that upgraded post without advertising it, regardless of the circumstances and provided only that the incumbent already performs the duties of the post and has

received a satisfactory rating in the most recent performance assessments. The SAPS obtained a declaratory order from the High Court stating that, *inter alia,* the incumbents of upgraded posts were not automatically entitled to promotion but that the National Commissioner has a discretion to do so. The Supreme Court of Appeal reversed the order by finding that the incumbents of the upgraded posts are entitled to automatic promotion provided that they satisfy the requirements of the regulation. The Constitutional Court held that an incumbent of a post is not entitled to an automatic promotion to a post upgraded by the SAPS. The discretion with regard to upgrading of posts in terms of regulation 24(6) must, however, be exercised in a manner which does not result in retrenchment of an incumbent employee who is not promoted to the upgraded post. The Court also found that the Commissioner (of Police) had a discretion not to appoint incumbents and that the regulation provided no guidelines for the exercise of this purported discretion.

(vi) Between these two principles namely that an incumbent does not have an automatic right to promotion and the principle that the decision not to promote should be exercised in a manner that does not amount to an unfair labour practice, arbitrators (and the Courts) must strike a balance as to what is fair or not in the context of a

decision not to promote. In doing so, the Court and the arbitrator should be mindful of the fact that the right to promote or not to promote falls within the managerial prerogative of the employer.

[16] What was unfair in the present case? The arbitrator was of the view that it was unfair not to promote the respondent because the decision to re-advertise was made in an arbitrary manner. If the award is closely read, it is clear that the arbitrator was of the view that the applicant (the panel) could not decide to re-advertise the post in the manner that it was done and that that constituted an unfair labour practice. This is clear from the following extract from the award:

> "*One of the latter strategies is illustrated by par 5(5)(c) of NI 1/2004, referred to above. It is my understanding, however, that promotion posts cannot be reserved for re-advertisement in the arbitrary manner alluded to by Supt Jojo. I have not been referred to any representivity targets that had to be met during promotional round under consideration, nor of any procedure of establishing how many, or which of the promotional posts had to be re-advertised…. No one has testified how the recommendation was arrived at, nor has there been evidence as to why and by whom the recommendation was accepted, if indeed it was."*

As a result of this conclusion, the arbitrator *mero motu* promoted the respondent despite the fact that no interviews were held and despite the

fact that no other person was preferred over the respondent by the panel and despite the fact that there was no evidence before the arbitrator to show that the respondent was the "*best"* or "*strongest*" or *"best suited*" person for the job. I have already referred to the point that I am of the view that the arbitrator cannot usurp these powers. At best, if the arbitrator was of the view that the re-advertising recommendation of the panel amounted to an unfair labour practice relating to promotion (see the next paragraph), the arbitrator should (at best) have considered referring the matter back to the applicant.

[17] The respondent also argued before the arbitration that, because post 1627 was a non-designated post, the applicant's argument that clause 5(5)(c) of the National Instruction Regulation allowed the National Commissioner to reserve a vacant post for, *inter* alia, an appointment that would enhance representivity, cannot be sustained. The arbitrator, however, based his conclusion of unfairness on the fact that, because he (the arbitrator) was not referred to any representivity targets, the decision to re-advertised was therefore done in an arbitrary manner.

[18] I have the several difficulties with the arbitrator's approach in considering the fairness of the decision to re-advertise as well as with the remedy of promotion.

(i) Firstly, the respondent bears the onus to prove the unfairness. The mere fact that the panel makes a recommendation to the National

Commissioner to re-advertise the post cannot *per se* be unfair. It is clear from the National Instruction that no employee has any right or legitimate expectation to be promoted to an advertised post or any other post (clause 4(2)). It is also clear that the National Commissioner may reserve any vacant post advertised for appointment which would enhance representivity (clause 5(5)((a) – (c)). Moreover, the National Commissioner is under no obligation to even fill an advertised post (clause 7). Unless the respondent (who bears the onus) can show arbitrariness or any other unfairness in making a recommendation to re-advertise, the arbitrator can hardly come to a conclusion that the recommendation was unfair.

(ii) Secondly, the panel made a recommendation to the National Commissioner. No final decision not to promote has been made. As no final decision not to promote was taken, the referral was, in my view, in any event premature. It is common cause that the applicant did not appoint any of the candidates that were short-listed by the panel to the advertised post. Moreover, the panel had no authority to make a final decision. It follows, therefore, in my view that the referral to arbitration was premature.

(iii) Thirdly, the arbitrator states the following:

> "*In conclusion, I am of the opinion that Respondent's neglect, in the present matter, of the career advancement of*

a proficient and loyal employee borders on disrespect and does not meet the progressive human resource standards expected from public employers by the Constitutional Court."

Apart from the fact that this is non-sensical conclusion, being "*disrespectful*" does not mean that the employer committed an unfair labour practice. This conclusion also clearly underscores the fact that the arbitrator misunderstood his duties. An arbitrator is not the employer. He is the overseer of the process in order to ensure that the employer acted fairly in selecting employees for promotion.

(iv) Fourthly, by agreement no evidence was led before the arbitrator. The parties have agreed to submit their closing arguments in writing. Despite this, the arbitrator held that because no evidence was placed before him in respect of representivity targets and because no one has testified how the recommendation was arrived at, he is of the view that the recommendation to re-advertise was arbitrary. If the arbitrator was of the view that evidence was necessary, he should have informed the parties of the need to lead evidence.

[19] Lastly, even if I am wrong in my view that the referral was premature and wrong in my conclusion that no unfair labour practice was committed in recommending to re-advertise the post, the decision to promote the respondent as a remedy is, in my view, patently reviewable. I have already

referred to the duties of an arbitrator in unfair labour practice disputes relating to promotion and that the arbitrator's role is limited to that of an overseer of the process. In the present case the arbitrator (as a remedy) ordered that the respondent be promoted without any evidence whatsoever in respect of which of the short listed candidates is the best or the most suitable candidate. The three candidates were all found to be suitable by the panel. They were not ranked in respect of suitability by the panel. To come to this conclusion the arbitrator must have had evidence on which it could have been concluded that the candidate (who was not promoted) would have been promoted if it had not been for the unfair conduct of the employer. This is a particular difficult onus to discharge. In the present case the respondent merely referred to factors that, in her view, made her eligible for promotion. No evidence was placed before the arbitrator that she was the most suitable or best candidate compared to the other two candidates. Lastly, even if there had been a scoring process and even if the respondent had received the highest score, that would not necessarily have created a legitimate expectation or even a right to be promoted (see in this regard clause 3(3) of National Instruction 1/2004.) The arbitrator therefore erred in finding that the respondent was the most suitable candidate as there was no evidence before the arbitrator about the other candidates.

[20] By promoting the respondent without such evidence, the arbitrator effectively usurped the power of the National Commissioner who has the discretion in terms of the National Instruction 1/2004 to act on the recommendation of the evaluation panel in respect of the promotion of individuals. All promotions to a level 8 post (post 1627 was a level 8 post) and higher levels had to be submitted to the National Commissioner for consideration. The award therefore falls to be reviewed and set aside. See also *Department of Justice v CCMA & Others* [2004] 4 BLLR 297 (LAC).

[21] Apart from the fact that there were two other candidates that were simply ignored by the arbitrator, the arbitrator also seemed to have overlooked the fact that the respondent (the incumbent) does not have an automatic right to a promotion. The mere fact that her post was re-evaluated and then upgraded and the mere fact that she already was in the post, does not give her an automatic entitlement to the post. By appointing her to the post the arbitrator effectively automatically promoted the respondent.

[22] In the event I am of the view that the arbitrator came to a decision that is not reasonable.[2] In the event paragraph 1 of the award is reviewed and set aside. I make no order as to costs.

Order

1. Condonation for the late filing of the review application is granted.
2. Paragraph 1 of the award is reviewed and set aside.
3. There is no order as to costs.

AC BASSON, J

13 April 2010

[2] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 *ILJ* 2405 (CC): "*[110]To summarize, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star : Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."*