IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT PORT ELIZABETH)

CASE NO: P186/08

P184/08

In the matter between:

MINISTER OF SAFETY AND SECURITY **Applicant**

and

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **1ST Respondent**

J C ROBERTSON N.O. **2ND Respondent**

A J ARENDS **3RD Respondent**

H G BOOYSEN **4TH Respondent**

VARIATION OF JUDGMENT

LAGRANGE,J

1. The parties are notified that the judgment handed down in the above matter has been amended in terms of section 165(b) by the replacement of paragraph 13 of the judgment which was incomplete, with the paragraph which appears below. The

incomplete paragraph, which was merely for the purposes of reference appeared in the judgment in error.

2. The existing paragraph 13 of the judgment is accordingly replaced with the following paragraph:

> "13. Clause 13(11) deals with the steps to be followed in the event that the provisions of clause 13(10) are not complied with, and permits the non-compliance to be condoned and further conditions imposed with the proviso that, in the absence of condonation or compliance with the new conditions, the candidate will not be promoted."

3. A copy of the judgment as varied is issued as attached.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date: 19 July 2010

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JUDGMENT

LAGRANGE,AJ

Background

4. The Minister of Safety and Security initially applied to set aside an arbitration award handed down by the second respondent ('the arbitrator'), on 10 March 2008. The arbitrator had found that the applicant had committed an unfair labour practice relating to promotion in terms of section 186(2)(a) of the Labour Relations Act 55 of 1996 ('the LRA'). The unfair labour practice concerned the applicant's failure to promote the third respondent, Captain A J Arends, to the Rank of Superintendent (level 9) in the post of Commander Crime Prevention Humansdorp (Post 1536) on 31 July 2005.

5. In view of his finding, the arbitrator ordered the applicant to promote the third respondent to the rank of Superintendent (level 9) on the same terms and conditions as he would have enjoyed had he been promoted on 31 July 2005, with retrospective effect to that date, and to amend his service record accordingly.

6. By the time the matter came before this court, the applicant and third respondent agreed that the applicant had committed an unfair labour practice by permitting the fourth respondent to act as a secretary to the same interview panel when it conducted interviews for other posts at the time the third and fourth respondent's applicants

were considered. This was in contravention of paragraph 8(7) of the of National Instruction 1 of 2004 ('NI 1/2004')[1] governing the promotion of SAPS employees to post levels 2 to 12, which states:

> "A secretary must be assigned to assist the selection panel by rendering administrative services during the selection process but may not form part of the evaluation panel. A secretary of a panel may not be a candidate for any *advertised post* in respect of which the panel has been appointed." (original emphasis)

7. Two of the other factors on which the arbitrator based his finding that an unfair labour practice had been committed should be noted. Firstly, he found that the fourth respondent as secretary to the panel must have had sight of the applications of other candidates. Secondly, the fourth respondent obtained a copy of the list of questions the interview panel put to candidates, which he was not entitled to have. Four of the five questions posted to candidates in respect of post 1536 came from this list thereby serving to advantage the fourth respondent above other candidates.

8. Based on the marks received by the candidates for the post, Arends was ranked second in preference for the Humansdorp post and the fourth respondent was ranked first. The fourth respondent was appointed to the post.

9. The arbitrator found that given the respective experience, qualifications and closeness of the scores awarded for those qualities, together with testimony of two witnesses at the arbitration to the effect that a candidate in possession of the question list would have been at an advantage, Arends would have been ranked first rather than the fourth respondent were it not for the improper advantage the latter obtained.

10. However, the applicant contended that the relief granted by the arbitrator exceeded his powers. The applicant argued that the arbitrator he failed to consider that the National Commissioner of the South African Police Services had the prerogative to appoint any candidate in the preference list and not in accordance with the marks scored in the interview process. The applicant further contended that the remedy for

[1] Issued by SAPS national headquarters as Consolidation Notice 9/2004 on 21 July 2004

the procedural irregularity in the interview process which was the basis of the unfair labour practice finding ought to have been an award of compensation. Alternatively, the arbitrator should have referred the matter back to the interview panel and, or alternatively the National Commissioner, if he felt that Arends ought still to be considered for promotion.

11. In the circumstances, the court is only required to determine if the relief awarded by the arbitrator fell outside his remit in adjudicating an unfair labour practice dispute relating to promotion.

The legal issues

12. There have been a number of cases in which the appropriate relief in disputes over promotion in the SAPS have been considered, and different remedies have been adopted.

13. Mr Simoyi, who appeared for the applicant, argued that the arbitrator could not usurp the functions of the National Commissioner in granting a promotion to Arends. Promotions could only be effected in accordance with the provisions of NI 1/2004 which sets out the procedure which the National Commissioner and other SAPS functionaries must follow in approving promotions.

14. The applicant argued that the arbitrator ought to have realized from the provisions of NI 1/2004 that there are internal processes which must be undertaken by the National Commissioner before an appointment can be confirmed. According to the applicant, the arbitrator failed, in particular, to consider clauses 13(10) and 13(11) of NI 1/2004.

15. Clauses 13(10) of NI 1/2004 states:

> "The approval of a promotion is conditional and a promotion will only become effective, after compliance with the following requirements:
>
> (a) receipt of a letter by the employee stating that she or he –
>
> (i) accepts the promotion offered to him,

(ii) has no personal or other circumstances which may adversely effect (sic) her or his ability to function in post offered to her or him,

(iii) has declared all convictions during the period of her or his present rank and pending criminal or disciplinary cases or actions, and

(iv) is able to render services for at least 24 months in the higher post;

(b) receipt of a certificate by the commander of the employee stating that the employee is still suitable for promotion in all respects, and

(c) the employee taking up the specific post offered to her or him within the time period specified by the National Commissioner."

16. Clause 13(11) deals with…

17. Arends' counsel, Mr Grobler, argued that even if these provisions ought to be complied with they did not have any application in a case such as this where the relief awarded by the arbitrator did not involve appointment to a specific post, but merely a personal promotion in rank. Quite apart from what follows, I think this interpretation of the relevance of those provisions is correct.

18. The applicant sought support for its stance in a number in a number of authoritative decisions. Firstly, it repeated the note of caution contained in the Constitutional Court judgement in ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others*** **2004 (4) SA 490 (CC)**, in which that court warned that a court should be careful not to usurp the functions of administrative agencies.[2] However, the warning in that case was uttered in the context of reminding courts of the importance of not treating reviews of administrative decisions as appeals when determining whether or not an administrative decision is reasonable. I do not think the analogy is apposite when applied to the functions performed by the arbitrator *in casu*. In the matter before this court, the power that was being exercised by the arbitrator was his power to determine an unfair labour practice dispute and not the exercise of a power of review.

[2] At 513, par [45] of the judgment

19. Other authorities relied on by the applicant in support of its case that the arbitrator lacked the power to order the relief he did are the cases of ***Minister of Defence v Dunn*** **2007(6) SA 52 (SCA)** and ***KwaDukuza Municipality v SALGBC & others*** **(2009) 30 ILJ 356 (LC)**.

20. In *Dunn'*s case the court *a quo* was seized with an administrative review of a decision not to promote an officer to a newly created post. The court declined to set aside the appointment of another candidate but found that the applicant's legitimate expectation to an interview had been thwarted. It awarded the respondent damages in terms of section 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), based on the salary he would have been paid had he been appointed to the position. Section 8(1)(c)(ii)(bb) of PAJA provides for the payment of compensation only 'in exceptional circumstances'. On appeal, the SCA reversed the decision of the court a quo, finding *inter alia* that the applicant had suffered no prejudice on account of the way the appointment process had been handled, as the court *a quo* itself had held that the risk of non-appointment was inherent in the process and therefore no prejudice to the applicant could be attributed to the outcome of the process. The SCA went further than simply dismissing the applicant's claim for compensation for lack of prejudice and any demonstrable loss suffered by him. The court found also that:

> "(e)ven if there were exceptional circumstances, it is impermissible for a court to substitute its own decision - in this case to give Dunn an effective promotion in the Defence Force - for that of the Minister. It is the Minister, in terms of the Defence Act, who has the power to make appointments and promotions."[3]

21. In the *Kwadakuza* case, this court had to consider the case of a prospective job applicant who had missed the opportunity to apply for promotion because the post he was interested in applying for was not advertised as required by a collective agreement which prescribed the relevant procedure to be followed by the employer when new posts were created. The arbitrator found the failure to advertise the posts in question had been an unfair labour practice for which the employee was entitled to

[3] Per Lewis JA, at 64, par [39]

compensation in the form of a protected promotion in terms of the provisions of section 193(4) of the LRA 1995.

22. In the review proceedings, the applicant employer argued that protected promotion was not an appropriate form of compensation for someone who has not proven that he would have been successful, but only that he was unfairly denied the opportunity to compete.[4] Pillemer AJ agreed and held that:

> "[11] Protected promotion is a concept that is recognized by the Public Service Code and in a minority judgment of the Labour Appeal Court such an order would have been granted on the facts in that case (see Goldstein JA in ***Department of Justice v CCMA & others*** **(2004) 25 ILJ 248 (LAC); [2004] 4 BLLR 297 (LAC)** see also ***Willemse v Patelia NO & others*** **(2007) 28 ILJ 428 (LAC); [2007] 2 BLLR 164 (LC)**). However in a recent judgment the SCA held that it is impermissible for a court to substitute its own decision - to give an effective promotion - for that of the employer (see ***Minister of Defence v Dunn*** **[2007] SCA 75 RSA; (2007) 28 ILJ 2223 (SCA)** at para 39). Paragraph 1 of the award seems to do this, but then again the arbitrator clarified her award by describing what had been awarded as compensation under s 194 of the LRA. On either basis I am satisfied that it was wholly inappropriate and unreasonable as a remedy or as a measure of compensation for the reasons advanced by Ms Nel . In fact had the arbitrator properly applied her mind to the question of compensation she would have found that there was insufficient material before her to enable her to hold that any actual damages had been suffered. She had to determine the amount of compensation, if any, that would appropriately compensate the third respondent for unfairness in denying to him the opportunity to compete for a post for which he seems to have had the requisite qualifications and in which he may have succeeded had he competed and been considered. Ms Nel contended that the evidence did not prove that the third respondent was in fact qualified, but since third respondent when he testified alleged he had the qualifications and this was not challenged in the arbitration and appeared to be accepted by all involved in the proceedings I am of the view that the matter is properly dealt with on the basis that he had the qualifications and had a chance if he had been given the opportunity to apply, but there was no probability of success."
>
> (emphasis added)

23. In the result the court awarded the aggrieved employee R 5000 compensation in the form of a *solatium*.

[4] At 362, par [10] of the judgment.

24. In this instance, the arbitrator found that, but for the procedural improprieties which had taken place and given the relative ranking of Arends and the fourth respondent, who was appointed on the basis of his ranking by the interview panel, Arends would have been appointed. The facts in this case are therefore distinguishable from those in *Dunn*'s case and the *Kwadakuza* case. On the facts in *Kwadakuza* there appears to have been ample justification for setting aside the relief granted by the commissioner given the tenuous basis that existed for arguing that the aggrieved employee would have been appointed had he applied for a post.

25. However, to the extent that the legal principles informing the decision in *Kwadakuza* rests on the authority of the SCA decision in *Dunn's* case, I respectfully believe such reliance is misplaced. In *Dunn's* case the court was sitting as a court of review and considering the matter within the legal framework of the rights and remedies for unfair administrative action set out in PAJA. In this instance and in the *Kwadakuza* case the arbitrator was exercising the power to determine an unfair labour practice dispute in terms of the provisions of sections 186(2)(a), 191(5)(a)(iv) and 193(4) of the LRA. These provisions seek to give practical effect to the constitutional right to fair labour practices set out in section 23(1) of the Constitution.

26. Moreover the provisions of section 193(4) which describe the remedies for unfair labour practices that are available to an arbitrator are described in wide terms, viz:

> "An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation."

27. The remedial powers which are afforded to an arbitrator when making an award under section 193(4) of the LRA are powers derived from that Act and are not same powers of appointment exercised by the National Commissioner acting within the parameters of NI 1/2004 and other statutory instruments governing his authority, nor are they a substitute for those powers he possesses. It should also be noted that insofar as it might be argued that the provisions of section 193(4) conflict with the

procedures to be followed by SAPS when implementing promotions, section 210 of the LRA asserts that the provisions of the LRA will prevail.

28. Lastly, the type of personal promotion or protected promotion awarded by the arbitrator in this case to the third respondent does not interfere with the promotion of the fourth respondent to the Humansdorp post. It does not usurp the decision of the National Commissioner: his decision to promote the fourth respondent to the Humansdorp post remains intact. What it does is it provides an equitable remedy for the employee whose appointment was thwarted as a result of the way the appointment process was conducted. The prejudice to the employer of the relief granted is primarily that it imposes additional salary expenditure on it, though if it sees fit at some later stage to appoint the third respondent in a superintendent's post in the future, that expenditure will no longer form part of an unwanted burden on its budget. On the other hand, the prejudice to Arends of not receiving the tangible and quantifiable benefits of a promotion he deserved are properly compensated for by the arbitrator's award.

29. While this case is distinguishable from that of *Kwadakuza*, it must be emphasized that it is only when the circumstances of the promotion dispute in question clearly show that the unfair labour practice most probably had the effect of denying the employee appointment in a post, as in this intance, that a compensatory form of promotion of this kind is likely to be an appropriate remedy under section 193(4) of the LRA.

Making the award an order of Court

30. The parties agreed at the commencement of the review proceedings that if I dismissed the review application, the application to have the arbitrator's award made an order of court, which was set down for a hearing on the same day as the review application under case number 184/08, should follow the result of the first application. Accordingly, I have made an order to this effect also.

Conclusion

31. Accordingly,

31.1. the application to review and set aside the second respondent's arbitration award of 10 March 2008 in case number PSS 551-05/06 is dismissed;

31.2. the second respondent's arbitration award of 10 March 2008 in case number PSS 551-05/06 is made an order of this court, and

31.3. the applicant is ordered to pay the third respondent's costs in the review application and the application under section 158(1)(c) of the LRA to have the award made an order of court.

ROBERT LAGRANGE

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 4 March 2010

Date of judgment: 23 March 2010

Appearances:

For the Applicant: Mr M Simoyi, instructed by State Attorney

For the Respondent: Mr M Grobler, instructed Anthony & Unwin Inc.