REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN DURBAN

CASE NO: D 676/11

In the matter between:

SOUTH AFRICAN POLICE SERVICES ("SAPS") — **First Applicant**

and

SIPHIWE JOSEPH GEBASHE — **First Respondent**

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL — **Second Respondent**

POLICE AND PRISONS CIVIL RIGHTS UNION ('POPCRU') — **Third Respondent**

Heard: 10 May 2013

Delivered: 24 November 2014

Summary: (Review- unfair labour practice – unfair promotion dispute – candidate recommended for appointment – post withdrawn – jurisdictional issue – no reasons given for non appointment/withdrawal of post contrary to National Instruction – finding of unfairness reasonable).

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application to review an arbitration award in which the arbitrator held that the non-promotion of the first respondent, a Warrant Officer, to an advertised post of Captain at Port Shepstone constituted an unfair labour practice relating to promotion. The arbitrator ordered the applicant, the South African Police Services (' SAPS') to promote the first respondent to the rank of, and level of Captain with effect from November 2009.

[2] The review application was filed one week late. The reason given was a rather poor one that various personnel handling the matter at SAPS were on leave. Nevertheless the delay was slight and the first respondent did not oppose the condonation application, which accordingly is granted.

The arbitrator's award

[3] The essential facts are common cause, namely:

3.1 The first respondent applied for a captain's post, post number 1540, at Port Shepstone.

3.2 He was shortlisted, interviewed and obtained the highest interview score. Consequently, he was selected by the interview panel as the most suitable candidate.

3.3 However, after this process the post was withdrawn and he was never notified of the results of his application.

3.4 It was only when he made enquiries in early 2010, some months after the post was advertised and he had been through the interview process that, he learnt that the post had been withdrawn.

3.5 In terms of paragraph 2 (f) of National Instruction to 2007 the National Commissioner "is under no obligation to fill an advertised post, but if he or she decides not to fill an advertised post, the reasons will be recorded."

3.6 By the time of the arbitration hearing the National Commissioner had still failed to provide reasons for the withdrawal of the post and consequently for the second respondent's non-promotion.

[4] The attitude of SAPS was that in terms of the advertisement of the post, he ought to have realised that it contained a provision stating that if an applicant was not notified within three months then they were unsuccessful. It is also suggested to him in cross-examination that it was not practical to send out letters to all applicants, but he pointed out that the SAPS did communicate by email and letters and always informed members that posts are withdrawn two weeks after the decision to do so and before interviews conducted, which did not happen in his case. SAPS did not lead any evidence in the case despite it being said in the arbitration by its representative that he was informed of the withdrawal and the reasons therefore and that witnesses would be called to testify on this. Consequently the applicant's evidence was effectively unchallenged.

[5] The arbitrator noted that the dispute differed from other promotional disputes in that there was not a successful candidate appointed to the post but that it was withdrawn after the interview was conducted. The arbitrator considered that the failure of the National Commissioner to provide reasons for withdrawing the post, contrary to the provisions of the National instruction requiring him or her to record the reasons, was "strange" and "a glaring lacuna."

[6] The arbitrator found the National Commissioner had acted in breach of the national instruction and that the first respondent was right to point out that he was entitled to reasons because the decision amount to an administrative act which adversely affected the first respondent. The arbitrator expressed the view that his reference to his rights to fair administrative action and the Promotion of Administrative Justice Act 1of 2000 highlighted an important procedural oversight in the public sector employment relationship in terms of which employees were entitled to written reasons.

[7] The arbitrator referred to the principle set down in the case of ***Arries v Commission For Conciliation, Mediation & Arbitration & Others*** [1] that she had to decide:

> *"whether the employer had exercised its discretion (managerial prerogative) capriciously, or frivolously or pursuant to a failure to apply its mind thereto, or for insubstantial reasons, or based on any wrong principle or in a biased manner."* [2]

[8] The National Commissioner's failure to comply with the obligation to provide reasons even by the time the matter came to arbitration was a serious matter and the arbitrator felt that it was reasonable to draw the inference that the National Commissioner did not properly apply his mind if he did not record his reasons or, if he did record them, such reasons were probably not lawful or fair. Consequently, the arbitrator concluded that the only reasonable inference to draw on a balance of probability was that the SAPS had acted arbitrarily. This amounted to permitting an unfair labour practice causally connected to the applicant's non-promotion and the only reasonable remedy in the circumstances would be to ensure his promotion.

Grounds of review

[9] Somewhat obliquely, the applicant raised a jurisdictional point claiming that because the advertised position was for a specific post and not simply for promotion to a higher rank, once the post was withdrawn there could be no expectation of being promoted. In any event it argued that until a decision has been made to fill a post referral is premature, placing reliance in this regard on the LAC decision in ***Department of Justice v CCMA & others***.[3] In that matter, the LAC held that at the time of the arbitration another candidate had only been appointed on an interim basis to the post in question and the arbitrator had dealt with the matter as if it concerned

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[1] **(2006) 27 ILJ 2324 (LC)**

[2] At 2333, para [30]

[3] **[2004] 4 BLLR 297 (LAC)**

the final appointment decision. Consequently, the commissioner had misconstrued the issue upon which he was called to decide.[4]

[10] Secondly, and despite having misled the first respondent and the arbitrator during the arbitration by announcing its intention to call a witness who would somehow make the National Commissioner's reasons clear, and then reneging on this undertaking by failing to call any witnesses at all, the applicant attacks the arbitrator for concluding that the National Commissioner did not apply his mind in withdrawing the post. The applicant contends that the arbitrator's conclusion in this regard was unsupported by the evidence.

[11] Related to this ground, the applicant contends that the absence of reasons for the decision did not mean that the only reasonable remedy was to order the promotion of the first respondent and argues that a more obvious solution would be to direct the National Commissioner to provide reasons why the post was withdrawn.

[12] Lastly, the applicant argued that the award of retrospective promotion despite it being withdrawn was flawed if the context of the sequence of events from the time of the first respondent's application of the post in July or August 2010 is considered.

Evaluation

[13] Firstly, I agree with the first respondent that simply because the applicant had applied for a specific post to which the rank of Captain was attached, that did not make it a dispute that was unrelated to alleged 'unfair conduct by the employer…relating to the promotion of an employee'. The result of the first respondent's application for the post is that if he had been successful, which on the face of it he would have been had it not been withdrawn, he would have been promoted in the course of being appointed to that post.

[14] Secondly, the case is not on all fours with the *Department of Justice* case. In that case, the appointment which had been made at the time the

[4] At 320-322, paras [72] – [76]

dispute was declared was only a temporary appointment whereas the arbitrator treated the appointment which was being challenged as the final appointment. In this case, for all intents and purposes when the post was withdrawn, no appointment at all was made, so it was final in that sense and not pending. Should the post be reopened in future, the fairness of any failure to appoint the applicant then, should he again apply without success, would have to be considered against the decision made on that occasion. The arbitrator was not wrong to assume jurisdiction over the dispute because the referral was not premature.

[15] Thirdly, the arbitrator's finding that it was a reasonable inference to draw that on a balance of probabilities the National Commissioner acted in an arbitrary fashion, was not an unreasonable one to draw in the absence of him providing any reasons for the withdrawal of the post. It was an inference that can legitimately be drawn in such circumstances. In this regard, it is noteworthy that the legislature has gone so far as to make it a statutory presumption that when reasons for administrative action are not provided within 90 days of being requested, the action will be considered to have been taken without good reason.[5]

[16] It is also not unreasonable to infer that someone who will not explain the reason for their actions, probably either has none or knows the reasons are ones which cannot rationally justify it, especially if the functionary cannot even advance an explanation why those reasons, if they exist, cannot be made known. It is precisely because the absence of reasons can reasonably give rise to such inferences that the importance of

[5] Section 5(3) of PAJA states: "(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason." See ***Wessels v Minister For Justice And Constitutional Development And Others*** **2010 (1) SA 128 (GNP)** for an illustration of the application of this principle in the context of the failure of a Minister to provide reasons for appointing a candidate to a magistrate's post**.**

administrative functionaries providing reasons for their actions has been recognised.[6]

[17] In short, I find nothing flawed in the arbitrator's reasoning that the decision to withdraw the post after the first respondent had come out of the interview stage of the appointment process as the recommended candidate, coupled with the National Commissioner's failure to give reasons for that decision, could be interpreted to mean that the decision was arbitrary and therefor unfair to the first respondent.

[18] The applicant argued that the appropriate relief in the circumstances would have been for the arbitrator to order the National Commissioner to provide reasons for the decision. Given the obdurate failure to volunteer those reasons, if they did exist, even by the time the matter came on review, this is an argument that is difficult to take seriously. There was no evidence that at any stage the applicant tendered to do this as a way of assuaging the first respondent's aggrieved feelings. In terms of the National Instruction and administrative law there was a legal obligation to record and provide them. It would have cost the applicant nothing to do so.

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[6] See, the following authority cited with approval by Ngcobo J, as he was then, in ***Minister Of Health And Another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as*** *Amici Curiae*) **2006 (2) SA 311 (CC)** at 478-9, at para [538] , viz:

> *"[538] In In re: The Commonwealth of Australia and the Pharmacy Guild of Australia and Another Sheppard J said:*
>
> *'The provision of reasons is an important aspect of the tribunal's overall task. Reasons are required to inform the public and parties with an immediate interest in the outcome of the proceedings of the manner in which the tribunal's conclusions were arrived at. A purpose of requiring reasons is to enable the question whether legal error has been made by the tribunal to be more readily perceived than otherwise might be the case. But that is not the only important purpose which the furnishing of reasons has. A prime purpose is the disclosure of the tribunal's reasoning process to the public and the parties. The provision of reasons engenders confidence in the community that the tribunal has gone about its task appropriately and fairly. The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given the matter close enough attention or that it has allowed extraneous matters to cloud its consideration. There is yet a further purpose to be served in the giving of reasons. An obligation to give reasons imposes upon the decision maker an intellectual discipline. The tribunal is required to state publicly what its reasoning process is. This is a sound administrative safeguard tending to ensure that a tribunal such as this properly discharges the important statutory function which it has.'"*

It is absurd to suggest that after such a long period of time all that was needed was for the arbitrator to compel it to comply with obligations it had provided no legal justification for not fulfilling in the first place. It further supports a view that it was struggling to find reasons to justify the decision.

[19] A more serious issue is whether it necessarily followed, as the arbitrator appeared to reason, that the only appropriate relief in this case is effectively a form of protected promotion. The applicant argued that where the post did not exist it is inherently unreasonable to provide a remedy in the form of a protected promotion *in lieu* of appointment to such a non-existent post, since that relief presumes the existence of the post. It does not seem the arbitrator considered this. Instead, she appears to have treated the first respondent's case like others where a successful appointee unfairly obtains the benefits of the appointment which ought to have accrued to the applicant who would otherwise have been appointed.

[20] I am inclined to agree that it is difficult to agree that the arbitrator could reasonably have deemed it reasonable to compensate the first respondent with a form of protected promotion where the post does not exist and nobody else unduly benefitted from his unfair treatment. Notwithstanding the wide discretion as to the kind of relief an arbitrator can award in terms of s 193(4) of the Labour Relations Act , 66 of 1995 ('the LRA'), the relief granted fell outside the bounds of a reasonable exercise of her discretion.

[21] Nonetheless, in my view it would have been appropriate to have awarded some kind of compensation by way of a *solatium* to the first respondent for his manifestly unfair treatment by the applicant, and the relief awarded by the arbitrator will accordingly be substituted with an award of compensation in the form of a lump sum.

Order

[22] The arbitrator's award in case number PSS 280-10/11 is reviewed and set aside insofar as the relief awarded in paragraphs 33 and 34 of the award are concerned.

[23] The relief awarded in paragraphs 33 and 34 of the award is substituted with the following award of compensation:

23.1 The applicant must pay the first respondent compensation equivalent to two months' remuneration at the rate of remuneration he received in July 2010.

[24] The compensation payable in terms of paragraph 23.1 above must be paid within 15 days of the date of this judgment.

[25] The applicant must pay the first respondent's costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: S K Dayal
Instructed by: the State Attorney

For the First Respondent: J L Basson
Instructed by: Grosskopf Attorneys