

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

CASE NO C89/98

In the matter between:

DR GABEBA ABRAHAMS

Applicant

AND

SOUTH AFRICAN CULTURAL HISTORY MUSEUM(CAPE) 1st Respondent

URSULA BULBRING (in her capacity as commissioner) 2nd Respondent

—

JUDGMENT

—

MLAMBO J.

1. This is an application in which the applicant seeks to review and set aside an award issued by the Second Respondent (“Bulbring”) in her capacity as a commissioner of the Commission for Conciliation Mediation and Arbitration (“the Commission”).

2. The applicant joined the services of the First Respondent (“the museum”) in 1980. According to her she was supposed to start as a museum human scientist which, she says, was in line with her

qualifications. She states that her letter of appointment stated that she was to start as a human scientist but instead when she started her position was changed to that of student assistant (non-white). Her position as human scientist (professional officer) was only clarified two years later.

3.The applicant states that in February 1990 she approached the museum's assistant director Mr Roux, and complained about being ignored for promotion over the past ten years. She states that in that period a number of white employees some similarly qualified and other with less qualifications were promoted into management above her. She states that Roux explained the situation away by stating that management wanted to keep her in research. Roux however undertook to investigate a specialist scientist position where she could possibly be accommodated. She was offered this position after some weeks, which she accepted. However she was paid as an assistant specialist scientist. The situation was corrected sometime in July 1991 when the post of assistant specialist scientist was scrapped.

4. In 1995 applicant states that she again applied to have her position properly regraded. She was asked to submit her curriculum vitae which she did. Roux later informed her that her request would be treated as an application for promotion and not for the correction of her grading.

5. On 13 November 1995 she was informed that her promotion was not possible due to a shortage of funds and a change of priorities in terms of the future direction of the museum as well as the need to maintain a balance within the institution in terms of remuneration of professional officers. The applicant disputed this decision and a number of initiatives were embarked upon to try and settle the resultant disagreement. Eventually on 3 April 1996 it was agreed by all concerned that the applicant had to acquire a doctorate before the upgrading of her position was reviewed. It was also agreed that the review would be finalised within six months of the applicant acquiring the doctorate.

6. On 30 July 1996 another meeting was convened and the Respondent was informed that applicant had acquired her doctorate. During September 1996 the applicant was requested to submit further information and documentation which apparently related to her educational qualifications and experience. On 6 December 1996 she was informed the her application was again turned down for the same reasons of affordability, change of priorities and maintaining some balance.

7. It appears that the applicant appealed unsuccessfully against the decision. She then referred the dispute to the Commission first for

conciliation and when that failed she requested the Commission to arbitrate the dispute. Second Respondent was appointed as the commissioner to resolve the dispute through arbitration.

8. The arbitration proceedings were due to start on 26 November 1997. On that day the applicant sought a postponement as a result of the illness of her legal representative. This was refused by Bulbring. The arbitration proceeded on that day and on 27 November 1997. Bulbring issued her award on 18 December 1997. Her award was :

“AWARD

I find in favour of the museum. Abrahams has no right to upgrading/ promotion to the position of senior specialist scientist and the failure of the museum to upgrade Abrahams is not an unfair labour practice.’

9. In this application the grounds advanced to review and set aside the award are articulated as follows in the applicant’s founding affidavit:

“It is respectfully submitted that the commissioner failed to apply her mind to the legal and factual status of South African Cultural Museum and its employees prior to framework autonomy being granted and its subsequent status.

The commissioner furthermore failed to apply her mind to the nature and status of the Personnel Administrative Standards (PAS) and Personnel Administrative Measures (PAM) and the applicability thereof to employees of the museum.

These two crucial issues play a vital role in determining whether

whether my position within the museum was a correct one and whether I was entitled to be regraded/promoted to the position of Senior Specialist Scientist.

It is furthermore submitted that the commissioner's failure to postpone the matter so as to allow Mr Spamer to recover was grossly unfair under the circumstances and resulted in a miscarriage of justice."

10. The Labour appeal Court has stated that the standard with which awards of the Commission should be tested is justifiability. **Carephone (Pty) Ltd v Marcus NO & Another (1998) 19 ILJ 1425 (LAC)**. In other words there should be a rational link between the reasons furnished for the award and the evidence placed before the commissioner. Therefore the objective of this court is not to determine whether the conclusion arrived at by the commissioner is correct, this being the objective of a court considering an appeal.

11. Central to the applicant's case is her criticism of the commissioner's conclusion that the Personnel Administration Standards (PAS) were not solely determinative of whether the applicant was entitled to promotion. The commissioner concluded that in addition to the PAS the museum had a discretion and was entitled to consider other factors before taking a decision on whether it should promote the applicant.

12. It is clear from the award that Bulbring considered the impact of the PAS and the Personnel Administrative Measures (PAM) to the applicant's

situation. Bulbring found that the status of the PAS was indirectly preserved. She found that despite such preservation of the PAS it would be applied in a flexible way until a new system was introduced. She considered the applicant's argument that the retention of the PAS did not allow the museum any discretion. She rejected this argument this objection stems from her reasoning that the PAS did not remove the Board's discretion and that the language of the PAS was not directory. She further found that the PAS made no provision that once certain requirements were met upgrading or promotion was an automatic right. She also considered the lack of evidence showing how the PAS was applied in the Public Service and as to how other specialist scientists had progressed according to the PAS. She then concluded that the applicant did not have a right to promotion.

13. In this regard it is common cause that the Cultural Institutions act was amended in 1992. Section 6 of this Act provides:

“(1) A council may appoint such persons as it may deem necessary to perform the functions of the declared institution concerned.

(2) The determination of the remuneration and other conditions of service of persons appointed under subsection (1) shall be in accordance with a scheme approved by the Minister...”

In terms of this section the Minister approved framework autonomy which was a scheme giving increased authority to the museum and its Board. This led to the

PAS being replaced by the PAM. However because no fixed rules and guidelines were in place the PAS continued to apply but not as before, this time as a guideline. On the basis that the PAS had status of a guideline this gave the museum a discretion in matters within its domain and the exercise of this discretion the museum was entitled to consider other factors which were relevant.

14. The fact of the matter is that at that time the PAS was no longer the sole determinative measure when it came to promotions. In fact the museum was enjoyed increased autonomy over certain issues, such as promotions. Even though the PAS was preserved, it was no longer the only source of reference. Collogically---- stated the PAS had been demoted. Viewed from this angle I don't see on what basis it is suggested that Bulbring did not apply her mind properly to the material before her. Her reasons demonstrate clearly that she understood the PAS and PAM and how these were to be applied. I cannot agree therefore that there is any basis on which Bulbring can be criticised.

15. Bulbring then went on to consider whether the PAS was applied in a fair manner in relation to the applicant. In doing so she also considered whether the criteria relied on by the Board in not promoting the applicant were acceptable criteria. These criteria were afford ability, changed priorities in terms of the future dissection of the museum, and balance within the institution in terms of the remuneration of professional staff. She then says the following in her award:

1. **“Each of the criteria of afford ability, changed priorities and balances of remuneration of professional staff is to my mind a valid consideration and are contemplated in annexure B. Affordability is a valid consideration given that the museum needs to operate within budgetary constraints. It was argued by the union that he additional R 18 00.00 to Abrahams ‘s salary would not “break the bank”. To my mind the question is not whether blood can be squeezed out of a stone rather how management in its discretion allocates limited resources. As for changed priorities and the decision not to focus on archeology, this is a relevant consideration and contemplated in annexure B. This decision is not to encourage archeology is an exercise of management prerogative and it is not for me to say whether this is correct. It is legitimate criterion for the exercise of management discretion. The issue of balancing employees’ remuneration is expressly contemplated in annexure B which sees the need to balance career paths between a career in management and that of specialist scientist and not to skew the balance in either direction.**

It appears that the museum has taken a view that archeology is not their primary priority, that they need to balance other employees’s careers and institutional needs against the risk of losing Abrahams if they do not promote her. This is a decision which the museum, in their exercise of its discretion needs to take. It is not for me to replace the museum’s discretion unless there is evidence of bias or improper purpose. I do not find that to be the case and find that the Pas has been applied in a fair manner to Abrahams.”

16. It is clear therefore that Bulbring considered all the issues placed before her. That she applied her mind to those issues is evidenced by her detailed reasons in the award. Whilst it is doubtful whether Bulbring is correct in relation to the applicability of the PAS that however---on its own is not sufficient to lead to the award being set aside. Her arrival at the conclusion is backed by careful consideration of the PAS and the PAM and other relevant documents. It cannot therefore be said that she failed to apply her mind to the matter before her. Thus in my view the applicant has failed to persuade the court that Bulbring committed a reviewable irregularity.

The application is therefore dismissed. There is no order as to costs.

MLAMBO J.

Date of judgment: 26 July 1999.

For the applicant: Theon Smith & Associates.