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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR 1381/01

2002-11-20

In the matter between

T MAJOE Applicant

and

CCMA Respondent

J U D G M E N T

LANDMAN J: Mr Thulani Majoe was the head of Department of Commerce at the Hector Peterson Secondary School in the Western Cape.

During 2000, the Department of Education of the Free State published a list of vacancies on its establishment. One of the vacancies was for a level 4 post i.e. the principal at

the Ikemisetseng Primary School, Bothaville. The closing date for applications was 23 March 2000. Mr Majoe applied for the post.

His experience fell a few months short of the minimum experience of seven years as a teacher (which was prescribed for this post).

Mr Majoe met the minimum academic qualifications which were required. Although his experience was less than required, his application passed the shifting stage but the interviewing committee did not short-list him. Mr Majoe was aggrieved by this.He processed a complaint which was that the Free State Education Department had committed an unfair labour practice by overlooking him for promotion or appointment on the basis of invidious or irrelevant considerations and that the department did not follow the agreed procedures and policies set out in the Education Labour Relations Council Resolution 5/1998.

An arbitrator appointed by the bargaining council dismissed the application for relief. In his award the arbitrator said:

"The core of this case is to respond to the requirements of the advertisement of the vacancy for principal post level 4,

(exhibit D). It has been stated clearly that the minimum requirement for post level 4 is seven years minimum experience required. From the applicant's testimony and evidence provided, he does not have seven years experience by six years nine months as he agreed that he had a broken service in between. According to the Employment of Educators Act 76 of 1998, s6(b)(i)and (ii) state clearly that the head of department may only decline the recommendation if any procedure collectively agreed upon for the appointment or promotion has not been followed. Therefore Mr Majoe knew the post required a person with seven years experience, not six years.

Furthermore, the Education Labour Relations Council Resolution 5 of 1998 stated that failure to comply with this procedure will lead to an application being declared null and void or will be eliminated by shifting."

In his conclusion the arbitrator says:

"The applicant knew that he does not have seven years experience. Secondly, he admitted that in his application form and Curriculum Vitae that he provided contradictory and wrong information in which the first shifting stage discovered the errors made by the applicant."

Mr Majoe was dissatisfied with the award and lodged an application in terms of s144 of the Labour Relations Act 66 of 1995 to review and set aside the award. The Member of the Executive Council of the Free State has opposed this application. The application to review the award of a bargaining council is susceptible to review in terms of s33 of the Arbitration Act 42 of 1965 and not the LRA. Arbitration is conducted under the auspices of a bargaining council and takes place under the Arbitration Act. However, I am prepared to treat the present application as one brought in terms of the Arbitration Act of 1965.The limited grounds of review apply.

I am also prepared to accept that the application has been brought timeously. The MEC has raised several points *in limine*. The first point is that the arbitrator did not have jurisdiction to consider the dispute.

There are two issues relating to this point which need to be decided. Was Mr Majoe entitled to complain about his failure to be appointed by relying on item 2(1)(b) of the LRA. The answer must clearly be no.

Item 2(1)(b) reads as follows:

"For the purposes of this item an unfair labour practice means any unfair act or omission that arises between an employer

and employee involving (b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee."

There is a clear distinction between an application for appointment and an application for promotion. Item 2(1)(b) does not permit a complaint relating to unfair conduct regarding the appointment of an employee and therefore, regardless of who Mr Majoe's employer was at the relevant stage, he was not entitled to rely upon this item.

He could in the past have relied on item 2(1)(a) which provides a remedy for discrimination on a variety of grounds also in relation to an application for appointment.

This item was repealed by the Employment Equity Act 55 of 1998 with effect from 9 August 1999. In any event, Mr Majoe's complaint does not relate to one of discrimination.He does, however, allege that any shortcoming in his experience should be overlooked by reason of s25 of the EEA. This section does not have application in the present case.

The second leg is that Mr Majoe was not in line for promotion.He was an applicant for employment and therefore could not bring his case within the ambit of item 2(1)(b).

Ms Van Zyl, who appeared for the MEC, submitted that

the applicant was, at the time of his application for the relevant post, in the employment of the Education Department of the Western Cape, hence, not his employer was not the employer with regard to the advertised post, being the Education Department of the Free State. It was submitted that at the time when Mr Majoe applied for the relevant post, no employment relationship was in existence between the MEC, and the applicant.

Mr Khan who appeared for Mr Majoe submitted that his client was employed by one part of the state and so should be regarded as an employee of the state, consisting of the provinces when he was seeking promotion.

There may be situations where this is the case. But this is not one of them. The Employment of Educators Act 76 of 1998(the Educators Act) distinguishes between the Educator Establishment of the Department of Education and the Education Establishment of "a provincial department of education." Each province has its own education establishment. The head of department of a provincial department of education is in terms of that Act the Employer (save as otherwise provided in s5(3) of the Educators Act) of Educators in the service of that department. See also s31(b)

of the Educators Act.

Transfers of educators within provinces is generally within the power of a head of department. Transfers between provincial departments also take place. The post of principal of the primary school at Bothaville would have been an advancement or a promotion in the sense that it would have been a higher post with commensurate renumeration and status for Mr Majoe. But as the post was one advertised widely, and in which applications were invited from all qualified candidates across the provinces, it entailed at least as regards outsiders (i.e. those educators not employed by the Free State Education Department) an application for appointment.

I need not express an opinion whether an educator in the Free State who aspire to such a post would be applying for promotion. That will have to be left for another occasion. It follows that the application must be dismissed.

This brings me to the question of costs. There is no doubt that Mr Majoe *bona fide* believed that he had been wronged. There is an element of novelty in the matter regarding the question of cross-provincial promotions or appointments. Mr Majoe is now employed at the Diteko

Secondary School in the Free State as a deputy principal on 12 months probation. He is therefore an employee of the MEC.

The Department of Education of the Free State should have taken this point *in limine* at the beginning of the arbitration hearing. It should not have waited until the review to take this point. And a great deal of costs have been incurred. This, in my view, is a case where the law and fairness does not require an order for costs.

In the result the application is dismissed but no order is made as to costs.