IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN
CASE NO C80/2000

In the matter between:

PROVINCIAL ADMINISTRATION WESTERN CAPE
(DEPARTMENT OF HEALTH & SOCIAL SERVICES) Applicant

and

MBULELO BIKWANI First Respondent

HOSPITAL PERSONNEL TRADE UNION
OF SOUTH AFRICA Second Respondent

FRITZ GILIOMEE Third Respondent

JUDGMENT

JAMMY AJ

1. The Applicant in this matter seeks an order reviewing and setting aside the First Respondent's award dated 19 December 2000 in his capacity as arbitrator under the auspices of the Public Health and Welfare Sector Bargaining Council in an arbitration between the Second Respondent, representing the Third Respondent, on the one hand and the Applicant on the other.

2. An acronym frequently used in the documentation and the award, is ADOESS, relating to the departmental post of Assistant Director

Occupation and Equipment Safety Service. The issue to be decided by the arbitrator was whether the failure by the Applicant to appoint the Third Respondent to fill the advertised vacancy of that post, amounted to a residual unfair labour practice as contemplated in schedule 7B(2)(i)(b) of the Labour Relations Act 1995 as amended. The arbitrator was empowered, if that was found to have been the case, to award an appropriate remedy as contemplated in schedule 7B(4)(1) and (2) of the Act.

3. It is common cause that another person, by the name of Cyster, was appointed to the position in question and the First Respondent's award, at the conclusion of the reasons and analysis recorded by him to substantiate it, was in the following terms.

"I award that the employer remunerates the employee as if he was employed as ADOESS from the date of Cyster's appointment. The employee will keep his current post with a view that the employer will give him first option when a position of similar rank becomes vacant in the future".

4. The Applicant's post of ADOESS had been vacant for a period of some three years and was advertised internally in March/April 2000, eliciting some seven or eight applications. All the Applicants were interviewed by a panel of three persons comprising the Applicant's Deputy Director: Administration, its Deputy Director: Health and Safety and its Deputy Director: Laundry Services.

5. The Third Respondent was one such Applicant but was not successful, the eventual appointee being the said Cyster. It was, as I have indicated, the Third Respondent's perception of unfairness in that appointment and his exclusion therefrom, which constituted the unfair labour practice alleged to have been perpetrated against him. It is common cause that

prior to the commencement of the arbitration hearing, the parties held a pre-arbitration meeting at which, in the context of the Second Respondent's general contention that it was the Third Respondent and not Cyster who should have been appointed to the vacant post, it was agreed that the issues in dispute between them and for determination by the arbitrator would be limited to -

(i) whether a structured questionnaire should have been used by the panel; and

(ii) whether the Third Respondent had more "*knowledge and experience"* than the successful candidate.

The First Respondent was apprised of this agreement and it was not disputed in the course of the hearing that these were the only two points that were in issue between the parties.

6. The internal advertisement for applications for appointment to the vacant post specified certain educational requirements in that regard and also detailed the duties relative to the post. It emerged from evidence submitted in the arbitration by a member of the interviewing panel that the appointee would in essence be providing a service to the Department of Health in the context of training staff at academic health centres, engineering workshops, community health centres and laundries. Communication with the very considerable number of employees working in these areas, most of whom were either semi- or unskilled, was an essential requirement and communication skills in that context were vital. Length of managerial service in the public sector was not necessarily a relevant factor, the key assessment by the panel being whether the Applicant concerned possessed the communications skills required of a good lecturer with a thorough understanding of, and ability to interpret and explain, the Occupational Health and Safety Act.

7. Testifying in that regard, one of the panel members, Mr E Mathys, the Deputy Director: Occupational Safety explained that the *modus operandi* of the panel was to formulate beforehand a list of questions which related to the criteria for the post. The subject matter of each question was summarised in a prepared document set out in grid form. In the course of each interview each panel member recorded the Applicant's answers to the various questions and allocated points or ratings to each such answer.

8. Following the interview concerned, the panel members then met, discussed and reached consensus regarding the allocation of points to the candidate in question. Documentation presented to the First Respondent in that regard indicated that out of a possible seventy points, the successful Applicant, Cyster, scored fifty, another Applicant, Swartbooi, scored forty-eight, the Third Respondent scored forty-three and the remaining candidates had lower scores.

9. On 20 June 2000, the interviewing panel prepared a comprehensive document presenting its substantiated recommendations which, in accordance with established practice, were submitted to and scrutinised by the Applicant's Department of Human Resource Management. In the result, recommendation that Cyster be appointed to the vacant post was approved and implemented.

10. Expressing his dissatisfaction with the outcome, the Third Respondent sought reasons for this decision and was advised by the Applicant's Directorate of Human Resource Management in writing to the effect that all relevant criteria having been considered, it was determined in the course of the selection process that his knowledge and exposure with regard to the critical requirements of the post were not comparable with those of the nominated candidate. He was consequently regarded as less suitable for appointment to the post.

11. The subsequent reference of the matter by the Third Respondent to conciliation and eventually to arbitration resulted in the pre-arbitration agreement to which I have made earlier reference, the issues in dispute being, as indicated, therein defined. This notwithstanding however, the Third Respondent's case as presented to the First Respondent was structured on the contention that since the Provincial Administration was obliged to utilise what was referred to as "structured questionnaires" in the interviewing process, the questions put by the individual panel members should have been identically phrased and that failure to do so would result in prejudice. It was apparent from discussions which the Third Respondent had with other unsuccessful candidates that questions were not presented "in precisely the same way". This was unfair, it was contended, as different standards were being applied. Furthermore the Third Respondent's knowledge of and exposure to the core job requirements was more extensive than that of the successful Applicant and he was patently the best person for the job, entitling him, in the context of the arbitration, to "protective promotion".

12. It is appropriate at this stage for reference to be made to what, in the course of the arbitration hearing, was at that time the unchallenged evidence from certain Karen Rossouw, an expert in human resources and who testified as such in her capacity as a personnel practitioner in the Applicant's Department of Health, responsible for ensuring that correct procedures are followed in filling vacant posts. The Department, she said, issues a guideline to interviewing panels recommending the use of pre-planned questionnaires. In the context of the present dispute she had examined the grid used by the panel members and in her view it was, she testified,

"… more than sufficient, - the only pre-requisite that we ask for is that the grid or questionnaire covers each and every duty, recommendation and

post-requirement that was advertised, and of course that the same grid be used for each candidate. That would serve the same purpose as a specific questionnaire, and we also ask that the panel of course stick to the grid or questionnaire absolutely closely. Of course you will have follow-up questions over and above those on the grid or questionnaire, but that is okay because that can be expected from candidate to candidate, but as long as each candidate gets asked the same questions but that is in line with the terms of the questionnaire." *(sic)*

13. Developing that evidence, the panellist Mathys testified that -

"You can't ask the same question word for word … but the gist of all the questions was the same."

14. The First Respondent was not impressed by the *conspectus* of this evidence. The relevant sections of the schedule to the Act, he records, classify any conduct by an employer *vis a vis* an employee that is not objective and explicable as arbitrary and thus unfair. This is what he says -

"The employer in this matter interviewed employees for the post of ADOESS. It appointed one of the employees by the name of Cyster in the post and when the employee contested the appointment the employer gave an unsatisfactory explanation on why the employee was not appointed.

This explanation was unsatisfactory even at the Arbitration hearing. The employer called witnesses who were sitting in this interview. The witnesses contradicted themselves at the hearing … Both witnesses could not explain convincingly why they preferred Cyster over the employee, when the employee was more experienced and qualified than Cyster.

Mathys also confessed that with hindsight, a pre-planned questionnaire

was and is necessary to prevent disputes of this nature. The unconvincing explanation by the employer is as a result of lack of a pre-planned questionnaire. It is self-evident that such weakness in this interview has made the conduct of the employer arbitrary and without objectivity. A pre-planned questionnaire is meant to take away the subjectivity and introduce objectivity in an interview and logically the absence of such leads to subjectivity creeping. That will lead to decisions based on competencies that have nothing to do with the requirements of the job.

The employer's contradictions and lack of an objective report of the interview, rather than cryptic notes that the employer cannot explain, made me come to the decision that it failed to prove that its conduct was fair and objective. Therefore I find that the employer committed a RULP as contemplated in schedule 7(b)(1)(b) of the Act".

15. It is settled law in the Labour Courts that reviews of Arbitrations performed under the auspices of Bargaining Councils are not regulated by the Labour Relations Act 1995 but by the Arbitration Act 42 of 1965.

Eskom v Himstra N.O. and Others (1999) 10BLLR 1041 (LC)

Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews N.O. and Others (2000) 10BLLR 1219 (LC)

16. In both those cases the court referred to, but declined to follow, the judgment in

Transnet Limited v Hospersa and Another (1999) 20ILJ 1293

in which the court, referring to the grounds of review defined in **Carephone (Pty) Ltd v Marcus N.O. and Others (1998) 19ILJ 1425 (LAC),** concluded that -

"… the standard test of review of awards of the CCMA as set out by the Labour Appeal Court applies equally to awards issued in terms of the Arbitration Act. One reason is the similarity between s145 of the LRA and s33 of the Arbitration Act. The other reason is that inconsistencies and confusion could prevail if this court were to apply different standards of review".

17. Counsel for the Applicant in this matter submits however that whether or not it is correct to say that an Arbitrator assigned by a Bargaining Council (which performs a dispute resolution function as an accredited agent of the CCMA, itself an organ of State) is required to apply the principles of rationality referred to by the Constitutional Court in **Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA 2000(2) SA674(CC),** the facts of the present matter render it unnecessary to decide that issue since this application for review must be determined on the basis of the standards set by section 33 of the Arbitration Act.

18. That section provides that an award may be set aside where:

"(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained"

19. What, in my reading of the First Respondent's award, emerges patently therefrom is that his finding of a residual unfair labour practice on the part of the Applicant in the context of section 2(1)(b) of the Schedule, is sourced in what he perceived as the Applicant's failure to provide a reasonable explanation why Cyster and not the Third Respondent was

appointed to the vacant position in question. The Applicant's perceived inability to provide such an explanation was, he determined, caused by its failure to utilise a pre-planned questionnaire, to prepare a proper report and the subjective view taken by certain of the panellists of perceived arrogance on the part of the Third Respondent.

20. The emphasis placed on the issue of the form of questionnaire utilised in the process arises, it would seem, from the Third Respondent's testimony that he had ascertained from the other unsuccessful candidates that the questions, and the manner of their presentation, to them differed from those to which he had been subjected. The same questions should have been put to each Applicant in the same form and the fact that this was not the case constitutes the unfairness of the interviewing process for which he contends.

21. The rationality of this argument is questionable to say the least when it is related to the relief sought by the Third Respondent, namely that it was he and not Cyster who should have been appointed to the vacant post - ignoring, incidentally, the position of the other unsuccessful candidates who, if the argument has substance, must equally have been prejudiced in the interview process. Of some passing interest in that context moreover, is the fact that the Third Respondent was not even placed second in the final result.

22. The predominant weight accorded by the First Respondent in his award to this specific issue indicates to me moreover, a disregard of the pertinent expert testimony presented to him by Karen Rossouw to the effect that, in the context of the pre-interview consultations between the interviewing panellists and their mutual assessment of the post-interview results before making their recommendations, both the structure of the process, the manner of its implementation and the formulation of its results, were fair

and acceptable in all respects. That testimony, as I have stated, was unchallenged in the course of the Arbitration hearing and save for a brief allusion to the fact of its presentation, is disregarded completely in the First Respondent's "analysis of evidence and argument".

23. What is relevant thereto however is the First Respondent's attitude to Ms Rossouw's testimony as expressed in his comments at the conclusion of her evidence-

"We may - if the whole issue is going to be about the grid, which it looks like at this stage, then definitely I may need a neutral independent expert opinion on the issue for me to make a decision. Ms Rossouw is your witness, the employer's witness and you called her in as your expert to advance your case. When I am saying to advance your case I am not trying to suggest that she is taking your side, I am suggesting that you asked her after knowing that she is the person who knows this thing and all that, you asked her as an employer. I believe that there are two things that we can do. Either I get an independent expert or alternatively take this grid, send it to the Institute of Personnel Management for their own assessment and they must give me a report. That report then I will include in the award that I would have to write". *(sic)*

24. It is apparent however from the substance of the award that having indicated his intention to adopt this course of action prior to formulating it, the First Respondent at no time did so.

25. That issue was not revisited until, in extraordinary disregard of the fact that, having delivered his award, he was now *functus officio* in the arbitration process, the Second Respondent saw fit, on 13 November 2001, the date of set down of the hearing of this application, to present to this court a further "explanatory affidavit", dated that day, in which,

identifying himself as the arbitrator of the dispute between the parties, he makes the following remarkable statements -

"2 One of the issues in dispute was whether the employer complied with their policy of using a pre-planned questionnaire in interviewing the employee.

3 The employer introduced a "grid" and argued that the "grid" qualified as a pre-planned questionnaire as contemplated by the policy.

4 We agreed at the arbitration to get expert opinion on the "grid" from a Consultant who is an expert in the field.

5 This step was by implication disqualifying Ms Karen Rossouw as an expert because of her inadequate experience and association with the employer.

6 The opinion was sought from Mr Tiisetso Tsukudu of Tsukudu and Associates on or around the 16th November 2000. Mr Tsukudu was the President of the Institute of People Management at the time.

7 His opinion was that the "grid" by all standards did not qualify as a pre-planned questionnaire as contemplated by the policy."

Annexed to this affidavit is an affidavit by the said Tsukudu, similarly dated 13 November 2001, reading as follows:-

" I, the undersigned,

TIISETSO TSUKUDU

Do state under oath that:

1. I was consulted by Mr Bikwani with regard to an arbitration that he was chairing between **PROVINCIAL ADMINISTRATION WESTERN CAPE (DEPARTMENT OF HEALTH AND SOCIAL SERVICES) and HOSPITAL PERSONNEL TRADE UNION OF SOUTH AFRICA** obo Fritz Giliomee.

2. His brief was whether the "grid" that he faxed to me qualified as a pre-planned questionnaire for the purpose of an interview.

3. My opinion was that the "grid" did not in any standards qualify as a pre-planned questionnaire.

4. At the time of the brief I was a partner in Tsukudu Associates, of which I am still, an Organizational Development and Human Resources Consulting Company. I am also the Immediate Past President of Institute of People Management (IPM) and the At - Large delegate to the World Federation of Personnel Management Association."

26. A number of issues arise from these affidavits. The opinion of Mr Tsukudu could patently not have been sought on 16 November 2000 in that the arbitration itself commenced on 4 December 2000. It is apparent that Tsukudu was consulted by the First Respondent, outside the arbitration proceedings, as the opinion that the grid did not qualify as a pre-planned questionnaire as contemplated by the policy, is reflected in his finding, although without reference to Tsukudu or any consultation with that individual. No expert's report in that context forms part of the record.

27. The record does not substantiate the averment that the Applicant's representative in the arbitration proceedings, Cloete, agreed to this procedure, stating merely to the First Respondent that "it is your call if you want to do it". The suggestion that the First Respondent would be entitled

to seek the consent of the parties to engage in extra-curial consultations with a witness whose evidence would not be subject to cross-examination or rebuttal and whose identity as the source of this "evidence" would nowhere be reflected in the record, does not bear scrutiny. In **Lazarus v Goldberg and Another 1920 CPD 154 at 157,** the court cited with approval an earlier decision to the effect that -

"Nothing is more clearly laid down in the text books than that arbitrators are judges in deciding matters submitted to them, and that they ought to follow those broad rules laid down for judicial investigation; and that no rule is more clear than that they should not proceed to examine parties or witnesses in the presence of only one party, that nothing may be done in *audita altera parte* so as to give the opposite party the opportunity of answering or rebutting such evidence".

28. It is also apparent from the First Respondent's affidavit that he now in effect acknowledges that he ignored the evidence of Karen Rossouw in favour of the "evidence" of Tsukudu. Quite apart from what in my opinion would be a reasonable inference of bias in that context, it is nowhere apparent from the record that the Applicant was aware that Rossouw's evidence had "by implication" been disqualified and her testimony rejected. In fact that testimony was vigorously relied upon by the Applicant in its closing submissions to the First Respondent.

29. There is considerable judicial authority supporting the principle that courts and adjudicators will be reluctant, in the absence of good cause clearly shown, to interfere with the managerial prerogative of employers in the employment selection and appointment process. In the Public Service that process is governed by the Public Service Act 1994, Section 11 of which provides as follows -

"Appointments and filling of posts

1 In the making of any appointment or the filling of any post in the Public Service -

(a) no person who qualifies for the appointment transfer or promotion concerned shall be favoured or prejudiced;

(b) only the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer in question, and such conditions as may be determined or prescribed or as may be directed or recommended by the Commission for the making of the appointment or the filling of the post, shall be taken into account".

The section confers a discretion in the repository of power in the appointments process and courts will be reluctant to usurp those powers and functions and to make decisions which have the effect of appointing Applicants to posts in the Public Service. Where disputes arise in the context of the process and are remitted to arbitration, the arbitrator is in a similar position to that of an adjudicator called upon to review a decision made by a functionary or a body vested with a wide statutory discretion. This analogy was illustrated in the Industrial Court case of "

Goliath v Medscheme (Pty) Ltd 1996 (17) ILJ 760 at 768:

"Inevitably, in evaluating various potential candidates for a certain position, the management of an organisation must exercise a discretion and form an impression of those candidates. Unavoidably this process is not a mechanical or a mathematical one where a given result automatically and

objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointment will not always be the correct one. However, in the absence of gross unreasonableness which leads the court to draw an inference of *mala fides*, this court should be hesitant to interfere with the exercise of management's discretion".

30. So too in

George v Liberty Life Association of Africa Ltd (1996) 17ILJ 571,

the Industrial Court held that an employer has a prerogative or wide discretion as to whom he or she will promote or transfer to another position. Courts should be careful not to intervene too readily in disputes regarding promotion and should regard this as an area where managerial prerogatives should be respected unless bad faith or improper motive such as discrimination are present.

31. Again in

Ndlovu v CCMA and Others (2000) 12 BLLR 1462 (LC),

a review application in which a State employee claimed an unfair labour practice because he had not been promoted in circumstances where he was sufficiently qualified for the post for which he had applied, Wallis A J said this at 1464:

"It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is

merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed.

The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided a decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise".

32. I am satisfied from the documentary evidence before me and the submissions made in that regard that in the instant case no legal or evidential basis whatsoever has been established which would serve to discharge the onus, unquestionably borne by the Third Respondent, to establish the unfairness of which he complains or which would justify the decision of the First Respondent to award the Third Respondent what I have earlier referred to as a protective promotion. That concept has been examined in a number of cases in the Labour Courts. It is a form of promotion set out in the Public Service Staff Code, part B/6V1/111, item 9 of which states that -

"1 Protective promotions are effected on the recommendation of a (Public Service or Provincial Service) Commission to protect the position of officers or employees … who are found to have been prejudiced in the filling of a promotional post after such post has been filled"

Such recommendation may only be made if the Commission -

"without any doubt establishes that the officer or employee concerned is indeed the most suitable candidate for the particular promotional post.

Only one candidate can be the most suitable candidate at any specific moment and the protective promotion of only one candidate can be considered at a time"

(Part III, Item 9(3)(a) of the Staff Code).

33. It is apparent that the function of protective promotion lies solely with the Public Service Commission which may only exercise this power once it has established beyond doubt that the officer or employee concerned "is indeed the most suitable candidate for the particular promotional post".

See, on the concept generally :

The Department of Justice v The Commission for Conciliation Mediation and Arbitration and Others (unreported Case No. C718/00)

34. For all of the above reasons and having regard to the grounds of review prescribed in Section 33(1) of the Arbitration Act 1965, I have concluded that the First Respondent's Award in question in this matter cannot be sustained. His disregard of critical evidence, his misconception of his functions and the extent of his powers and authority, constitute gross irregularities which leave this court with no alternative other than to set the award aside.

35. I have some difficulty however with the issue of costs. The Third Respondent's case was prepared and administered on his behalf, to all intents and purposes to the stage at which heads of argument were filed by the parties, by the Second Respondent, a trade union of acknowledged standing. It appears that at that stage, for reasons not explained to the court, he was left to fend for himself and it was apparent in the course of

this hearing that he is wholly unfamiliar with court process and the niceties of legal analysis and argument in straightforward, let alone complex matters involving esoteric issues of law. That he was concerned and disgruntled at what he perceived to be an unfair process of selection and appointment by the Applicant is apparent and, to all intents and purposes as far as he was concerned, that concern was endorsed in due course by an arbitration award in his favour. He is not responsible for the flaws which have emerged in that award and for which, in my view, the First Respondent is solely answerable. The First Respondent has not opposed this application and abides the decision of this court. No order for costs against him is therefore competent and in my view, equity in the circumstances of the matter dictates that the Third Respondent should not, in addition to the reversal of fortune which he will now suffer in the context of this judgment, be penalised further.

36. The order which I accordingly make is the following :

36.1 The award of the First Respondent made under the auspices of the Public Health and Welfare Sector Bargaining Council and dated 19 December 2000 is reviewed and set aside.

36.2 There is no order as to costs.

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B M JAMMY

Acting Judge of the Labour Court

28 January 2002

Representation:

For the Applicant:

Advocate C S Kahanovitz instructed by the State Attorney

Third Respondent

In person