

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No: JR 1531/03

In the matter between:

DE NYSSCHEN P

Applicant

and

THE GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

1st

Respondent

G.G. SEBOTH (*Commissioner*)

2nd

Respondent

THE MEC DEPARTMENT OF EDUCATION

(NORTH WEST PROVINCIAL GOVERNMENT)

3rd

Respondent

JUDGMENT

REVELAS AJ

- [1] The applicant seeks to set aside an arbitration award delivered by the second respondent (“the arbitrator”) and have it substituted with an award to the effect that the third respondent committed an unfair labour practice in not appointing her in the upgraded position she had been acting in. In the alternative, the applicant seeks on order that the matter be remitted to the first respondent to

be arbitrated afresh.

- [2] The applicant had been in the employ of the third respondent since 1997 when she was appointed to the position of Director (Human Resources Management) with effect from 1 November 1997, in the Department of Education for the North Western Province.
- [3] During 2001, the third respondent revised its organisational structures and in the process, created eleven posts at the level of Chief Director and one post at the level of Deputy Director-General. The functions attached to the post of Director: Human Resources, occupied by the applicant, was subject to a grading exercise and was subsequently graded as a level 4 (Chief Director) post.
- [4] The upgraded post of Chief Director (Executive Manager) Human Resources Management (“CDHRM”) was advertised nationally. The applicant was critical of the advertisement of the post. She contended that the post and salary of the present Superintendent General of the Department of Education (Dr AM Karodia) was not advertised, therefore the upgraded post in which she was the incumbent, should similarly not have been advertised. The applicant nonetheless applied for the CDHRM post in respect of which she claims she had a legitimate expectation to be appointed to. She was shortlisted for the post along with Mr T.S. Molelle and Mr K.J. Oagile and attended the interviews conducted by the selection committee on 21 February 2002.
- [5] The selection process for filling the Executive Manager posts was

approved by the third respondent on 29 October 2001. In terms thereof Thomas International (as a service provider), would perform the initial screening of applications, the short-listing of applicants (six maximum) and conduct competency based interviews with those short-listed candidates of which the applicant was one. The selection committee appointed by the third respondent had to compile a final short-list of not more than three candidates based on the recommendations of Thomas International and then interview these candidates. The committee was also required to verify the educational qualifications, citizenship and experience and submit final recommendations on the suitability of the candidates. The aforesaid had to take place with due consideration of the applicable employment equity targets for the occupational levels of the Department's top management (chief director and higher) and senior management (director).

- [6] The selection committee in question comprised of the following persons: the third respondent's Superintendent General, Dr A.M. Karodia, who was also the chairperson of the committee, Mr. P. Tjie and Mrs L Sebegu who were Provincial Department Heads and Mr S.F. van Blerk of Thomas International.
- [7] The applicant pointed out that whereas she applied for the post of Executive Manager: Human Resources Management, Mr T.S. Molelle (who was eventually appointed to the post) applied for three posts at Chief Director level.

- [8] On 21 February 2002, the interviewing panel recommended to the third respondent that the applicant be appointed to the post of Executive Manager: Human Resources, and that Mr Molelle was also suitable for that post, however more suitable for the post of Executive Manager: Educational Support. This report was termed the “final” report.
- [9] In June 2002, a further report which was also deemed to be a final report, was issued by the same panel. Therein Mr Molelle was not expressly recommended for any of the specific executive manager’s posts, but said to be suitable for all three chief director’s posts. The post of Executive Manager: Educational Support was re-advertised shortly after the first “final report” and remained unfilled. In the June 2002 report, the recommendation in respect of the applicant remained unvaried. Copies of both reports were annexed to the applicant’s founding affidavit.
- [10] The applicant subsequently wrote a letter to the third respondent expressing her dissatisfaction with the outcome of her unsuccessful application for the CDHRM post, and requested certain disclosures and reasons. Dr Karodia, the chairperson of the interviewing panel declined to disclose certain information regarding Mr Molelle who was ultimately appointed in the post she had wanted to be appointed to. Dr Karodia did however provide her with the actual recommendations and the list of factors taken into account in assessing candidates and in making recommendations. It appears that the applicant was initially recommended as a result of her

“excellent track record” and experience. In the February 2002 report, the applicant is described as “Appointable”. Her several outstanding qualities are also listed. Finally the report stated as follows:

“Therefore this panel recommends Ms de Nysschen for the post of Human Resources with Mr Mollele as the panel’s first choice. However, the panel feels that his contribution to Education Support Services is far more advantageous to the department”.
(My underlining)

The support services position was subsequently re-advertised but never filled. In the second report, already referred to, Mr Molelle was recommended without qualification.

- [11] The applicant then referred a dispute about an unfair labour practice to the first respondent and this dispute was eventually arbitrated by the second respondent (“the arbitrator”) who held that no unfair labour practice was committed and in particular, that the correct procedures of assessment and interviews were followed in the appointment of the successful candidate (Mr Molelle). Under the heading “AWARD”, the arbitrator specifically noted that the applicant was not the only candidate for the post by the panel and:
- “The post was advertised and open for competition. The criteria Applicant chose to use as having not applied to her was not the deciding factor for the appointment. Several criteria and recommendations by the assessing authority and the interviewing panel was also considered”.**

[12] The applicant's case before the arbitrator was that she was unfairly treated in that the criteria set out for appointment was not applied to her. She relied mainly on the fact that she had acted for a long period in the position in question before it was advertised. She was of the view that her career path, retention of skills and other criteria was not considered. The arbitrator found that no evidence was presented that the incorrect criteria was implemented to appoint Mr Molelle. The arbitrator accepted the evidence of Dr Karodia that Mr Molelle (who had applied for three posts) was the stronger candidate, but gives no reason for doing so. In my view, it was necessary for the arbitrator to do so, particularly since the applicant had acted in that position for five years and Mr Molelle had not. Further, Mr Molelle was initially recommended for the support services post which was later re-advertised, before a second report, recommending him, was issued. Certainly that calls for a valid explanation.

[13] There was no compelling evidence to support a view that Mr Molelle was indeed the stronger candidate. If the fact that he is a black (African) person and the racial demographic factors determined that he should be appointed, that should have been expressly given as the main reason by the arbitrator. It was not. It is also of great significance in this case that a gender demographic distribution in place for the North West province. That should have played a role in the applicant's case, since the prescripts for the employment equity targeting of women was approved by the respondent on 17 October 2001. In my view, the appointment of

Mr Molelle, instead of the applicant, is indicative of a certain arbitrary reasoning which was unreasonable and unfair, and was unjustifiably perpetuated in the arbitration award.

[14] It is common cause that there was a deviation from the recommendation of the interviewing panel. There was no evidence that the correct procedure was followed in doing so, but even if it were, the arbitrator had to assess the substantive fairness of such a step. She did not.

[15] The applicant argued very strongly, that the third respondent was bound to apply only the criteria in the Public Service Act 103 of 1994 and its Regulations, and not “self-imposed” criteria. The applicant, *inter alia*, relied on the Public Service Regulation C.6 (a chapter in part V of the Regulations) which reads as follows:

‘C.6 If an executive authority increases the salary of a post as provided under regulation V C.5, she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent –

(a) already performs the duties of the post;

(b) has received a satisfactory rating in her or his most recent performance assessment; and

(c) starts employment at the minimum notch of the higher salary range’.

- [16] The applicant also referred me to Regulation 24(b) of the South African Police Service Employment Regulations 1999 (government notice R389 of 14 April 2000), which is worded the same as the Public Service Regulation C.6 referred to above, as well as the judgment of the Supreme Court of Appeal (“the SCA”) in *The Public Servants Association v The National Commissioner of the South African Police Service*, case no 573/04, dated 25 November 2005. The Police Service Employment regulation in question (regulation 24(6)) was the subject-matter in that case. The SCA was called upon to make a declarator as to whether or not the National Commissioner of the South African Police Service had a discretion not to appoint an incumbent in an upgraded post. The majority of the court held that despite its permissive language (the operative word being “may”) the national commissioner was obliged to retain the incumbent of an upgraded post if the requirements of the sub-regulation are met.
- [17] The decision of the majority of the SCA was then overturned by the majority of the Constitutional Court (“the CC”) (under case number CCT 68/05), where it was held that the approach of the SCA was too inflexible and found that the national commissioner indeed had a discretion to advertise the post and not to appoint the incumbent of such a post, but held that the discretion must be exercised in the context of the regulations, the act under discussion and the Constitution (page 38, paragraph 61 of the CC judgment).
- [18] It was pointed out (page 44, paragraph 72 of the CC judgment) that

the Constitution provides for a balanced approach. On the one hand, fair labour practices and affirmative action must be observed. On the other hand effectiveness, efficiency, high ethical standards and progressive human resource policies are crucial and the question at hand had to be interpreted in that context.

[19] The discretion of the executive authority in the case before me, is therefore not an unlimited one. Although the incumbent does not enjoy a right to automatic promotion in an upgraded post, the discretion *not* to promote should be exercised in a way which does not constitute an unfair labour practice and does not fall foul of the balanced approach called for by the Constitutional Court in the abovementioned judgment. Section 23(1) of the Constitution provides that everyone is entitled to fair labour practices. If the executive authority exercises his discretion in a way that is in conflict with fair labour practices, his decision cannot be unassailable. To determine whether the discretion is fairly exercised will always depend on the facts of the matter. In the case referred to above, the SCA and the CC did not decide the matter in respect of a specific individual or particular factual matrix, but the principles set out by the CC applied to the facts of this case, has the result that the third respondent's decision had to be interfered with by the arbitrator.

[20] It was undisputed that by appointing Mr Molelle as Executive Manager: Education Support, as suggested by the interviewing panel, would neither have prejudiced the Department or Mr

Molelle. Neither would the applicant be prejudiced.

[21] Even if the criteria imposed by the third respondent were the proper ones, Mr Molelle's appointment contradicted the criteria of career pathing, continuity, staff motivation and retention of skills. If the applicant was appointed in the post (in which she was the incumbent) the State would not have incurred the financial burden of a new appointment in that post and the support services post could have been filled, preventing an additional work load in that department.

[22] Even though I agree with the third respondent's submission that he was not bound only to the criteria in the Public Services Act, such criteria as he did impose, were imposed in a manner which, given the facts of this case, make no sense. The unfairness of not appointing the applicant in the post she applied for is clear.

[23] In my view, the facts of this case demonstrate that the third respondent exercised his discretion unfairly in that none of the objectives of the Constitution were achieved by sidelining the applicant.

[24] The application for review should succeed for all of the above considerations. I do not believe that any facts could be led at a *de novo* arbitration hearing which would change the inherent unfairness of the failure to retain the applicant in her post. The applicant is to be appointed and remunerated as if she was successful in her application.

[25] In the circumstances I make the following order:

1. The award of the second respondent under case number PSGA 3533 dated 11 July 2003, is hereby set aside and substituted with the following:

- “a. The failure of the third respondent to promote the applicant to the post of Executive Resources Management and Development Manager, constituted an unfair labour practice.
 - b. The applicant is to be employed and remunerated at the level of Chief Director (level 14) with retrospective effect as from 1 July 2002”.

2. The third respondent is ordered to pay the applicant’s costs.

Elna Revelas
Acting Judge of Labour Court

Date of hearing: 26 October 2006

Date of judgment: 24 November 2006

On behalf of the Applicant:

Adv. M.R. Hitge, instructed by Nienhaber and Wissing Attorneys

On behalf of the third Respondent:

Adv. G.I Hulley, instructed by The State Attorney