IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN CASE NO : D187/2006

In the matter between:

KWADUKUZA MUNICIPALITY Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL First Respondent

K MADONSELA N.O. Second Respondent

B.S.P. PILLAY (represented by the SOUTH AFRICAN MUNICIPAL WORKERS' UNION Third Respondent

_

JUDGMENT

PILLEMER, AJ:

[1] The Applicant in this review application is the KwaDukuza Municipality. Third Respondent is an employee of the Applicant who sought redress in the South African Local Government Bargaining Council alleging he had been a victim of an unfair labour practice. Third Respondent was successful in an arbitration and was effectively promoted

to a grade 2 level by means of what was described as a "protected promotion". The Applicant was not satisfied with the result and launched the present proceedings to have the award issued by Second Respondent, an arbitrator who published the award under the auspices of the bargaining council, reviewed and set aside.

[2] The review was launched way out of the time limits allowed under the Labour Relations Act, 1995 ("the LRA") with the result that condonation for this default is sought as an integral part of the review application papers. The explanation for the delay is full. It candidly reveals serious lapses on the part of municipal officials and identifies negligence and administrative errors that occurred after attorneys were instructed, explains that the matter was overlooked and misfiled in their offices and ignored by the municipal officials, who must have realised that something was amiss if they had given the matter any consideration at all since they knew of the problem with the time limits, but never followed up with the attorneys to ascertain why there was no progress in the matter. The review only eventually saw the light of day after the Third Respondent had taken steps to enforce the award and, even then, there was an unsatisfactory further delay while the papers were being prepared and before they were eventually issued. I

do not propose to set out the detail of the reasons for the delay in this judgment as, correctly in my view, it appeared to be common cause that, notwithstanding the default, the application at the end of the day falls into the category where condonation will only be granted if prospects of success are good, but if they are good, the default is not so gross, the delay so excessive or the explanation so poor that the Applicant should be shut out of court. The unsatisfactory conduct can be dealt with adequately in such a case by an appropriate costs order and, in the result, the fate of the condonation application rested on the fate of the review. The matter was argued on that basis.

[3] Although initially there was some jurisdictional challenge as to the nature of the proceedings that were launched in the bargaining council, this was not pursued in argument and correctly so. It is plain that by the time the matter was ripe for arbitration all the parties appreciated the nature of the application to be a referral of an alleged unfair labour practice relating to a promotion in respect of which the bargaining council had jurisdiction. The bargaining council had jurisdiction to determine the dispute and the challenge to jurisdiction was bad.

[4] The Third Respondent challenged the fairness

of the appointment process dealt with below. Although he did not seek an award setting it aside or claim relief that impacted on the parties who had been appointed, in the light of decisions in the Labour Appeal Court that seem to contemplate that it may be necessary for all interested parties to be joined whether or not they will be affected by the relief sought, the Third Respondent took steps to join them all. They were all given notice but seem to have waived their right to be joined or at the very least consented to the matter proceeding without their participation. The contention in the papers that the arbitration had been flawed because of an alleged non-joinder was, wisely in my assessment, not pursued in argument. That challenge is also without merit.

[5] The Third Respondent's complaint in a nutshell was this. He contends that he was qualified to be considered for appointment to a post falling within the senior management grades of 1-3 and in particular to the post of Director Traffic/Crime Prevention (a grade 2 post). He relied upon the applicable collective agreement and the Applicant's own categorisation of the grade 1-3 posts in question as "new posts" which as a result should have been advertised. Had they been advertised he would have had an opportunity to apply to fill the one of the posts. Appointments were made without advertising the

posts which he understandably contended was unfair in relation to him. If he had been successful the consequent appointment would have constituted a promotion for him and thus, he contended, he was the victim of an unfair labour practice by the failure to advertise the posts. The relief he sought was promotion to a grade 1 post on what he called "protected promotion", intending thereby that he be treated by way of benefits and salary as if he had been promoted but would continue with his current job.

[6] With the constitutional changes to local government, reorganisation and restructuring became necessary country wide. Placement of the existing workforce into the changed structures produced challenges for the local authorities and the trade unions representing the membership employed by the municipalities. The bargaining council facilitated a collective agreement in the council dealing with these matters. The Third Respondent relies upon that collective agreement, which is known as the SALGBC Placement Policy. Clause 3.4.1.4 thereof deals with new posts and, under the heading "new posts", reads as follows: These are posts, which carry duties and responsibilities that do not exist in any form in the present structures. These posts shall be advertised both internally and externally and shall be filled giving preference [firstly] to internal

candidates from designated group, [then to] internal candidates from non designated groups and [finally to] external candidates. It was the Third Respondent's case that clause 3.4.1.4 applied to the posts he was interested in and for this he relied upon decisions taken by the Applicant at a Placement Committee meeting and the public circular issued pursuant to that meeting which had classified the posts in question as "new posts" and accordingly of the kind that had to be advertised. This followed upon the resolution of council recorded as follows " Council declared all positions on level 1-3 as falling outside of the placement category as a means of promoting transparency. The above positions were in anyway (sic) classified as New Posts, which in terms of the guidelines had to be advertised both internally and externally." It might well be that the posts were not really new posts as defined but "as a means of promoting transparency", whatever that phrase may have been intended to encompass, were deemed by the Applicant to be such and were treated as if they were.

[7] The applicant eventually found itself on the horns of a dilemma. On the one hand because nothing had been done pursuant to the decision to advertise the posts after two years had passed it had employees in a pool who had been permitted to act in these posts for an extensive

period and had expectations arising out of this. On the other hand advertising the posts could be challenged and, on top of that, lead to the persons in the pool losing their employment, which could also be challenged. It decided to make appointments into these posts without advertising them notwithstanding its earlier decision to treat them as new posts and to advertise them. The Applicant recognised that this may well lead to dissatisfaction and it is recorded in a minute that what was being done was contrary to the normal recruitment procedures and must be done in a manner that "avoids future challenges and expectations". Applicant had managed to manoeuvre itself into a position where whatever it did someone would have been unhappy and would have cried foul. It made its decision and faced up to the challenge of the applicant contending that it was not unfair to have dealt with the problem in the manner it did because that approach avoided retrenchments.

[8] The arbitrator disagreed and she took the view that the Applicant was bound primarily by the collective agreement. She pointed out that the LRA places a premium on collective agreements

and, even balancing the decision against what she referred to as "the noble intentions of council to avoid retrenchments" of those in the pool, she concluded that this was not a good enough reason to escape the consequence that failing to comply with the collective agreement was unfair *viz-a-viz* Third Respondent and, in the result, amounted to an unfair labour practice in relation to the Third Respondent.

[9] The Arbitrator had in mind that the LRA conferred a wide discretion on her in relation to remedy (s193(4)) and decided that it would be fair to say Third Respondent would have been appointed to one of the posts. She did not know which one and so decided that a middle ground of grade 2 should apply and then directed the Applicant to grant the Third Respondent a level 2 protected promotion which she explained would amount to the Third Respondent remaining in his current position but enjoying all the benefits and salary scale that are applicable to a level 2 position. She directed that the protected promotion should take effect from the day in which the contested positions were filled. She then classified the award as compensation and ruled that the compensation arising from the protected promotion had to be paid within 30 working days from the date of her award.

[10] Ms Nel, who appeared for the Applicant, raised three main arguments in support of the challenge to the award. In the first place she contended that notwithstanding the Applicant's own decision as published that categorised the grade 1-3 posts as posts that would be advertised and as new posts, they were not actually new posts because it was not possible for them to fall within the definition of a post "which carried duties and responsibilities that do not exist in any form in the present structures". She submitted that the Third Respondent bore the *onus* of proving that these were new posts as defined and contended that since all he did was rely upon the council resolution, that was not enough to discharge the *onus*. I do not agree. It may well be that these are actually not new posts as defined, but that is how they were categorised by the Applicant and it never chose to change its stance. It appreciated that it was deviating from its own policy when it decided not to advertise as it had undertaken to its employees it would. It hardly lies in its mouth to contend that the arbitrator acted as no reasonable arbitrator could have acted in accepting at face value the Applicant's own position in relation to these posts. The argument that the arbitrator was obliged to interrogate the validity of the Applicant's stated position and on which Third Respondent placed reliance before finding that there had been

unfairness in not following what it had publicly undertaken it would do does not commend itself to me. In my view the arbitrator was entitled to deal with the matter on the basis that it was unfair not to advertise after having designated these posts to be new and having undertaken to advertise on the basis of the collective agreement. Ms Nel's second argument related to the alleged failure of the arbitrator to have regard to clause 3.1.10 of the collective agreement. This clause provided for employees who could not be placed to be held in a pool for a period of at least six months after which if they could not be placed for retrenchment processes to be put in place. As I read the award, the arbitrator did take the problem of possible retrenchments into account and her award in fact refers to the noble intentions of avoiding retrenchments. She balanced that against the violation of the collective agreement and found the reason not to be sufficient on balance to avoid the consequence that what had occurred was an unfair labour practice. A reasonable arbitrator could well come to this conclusion and in my assessment this challenge to the award must also fail. The third challenge was based upon the nature of the relief. Compensation had to be paid in 30 days and, as Ms Nel pointed out, working out the value of the difference in benefits and salary over an entire working career is only possible using an actuary and even then there are a whole host of unknown factors that would render that result unsatisfactory. In addition

she argued that protected promotion is not an appropriate form of compensation for someone who has not proven that he would have been successful, but only that he was unfairly denied the opportunity to compete. In addition there has to be a cap on compensation of a year's remuneration in terms of section 194(4) and the award is open ended.

[11] Protected promotion is a concept that is recognised by the Public Service Code and in a minority judgment of the Labour Appeal Court such an Order would have been granted on the facts in that case (see Goldstein JA in Department of Justice v CCMA and others [2004] 4 BLLR 297 (LAC) see also Willemse v Patelia NO and others [2007] 2 BLLR 164 (LC))). However in a recent judgment the SCA held that it is impermissible for a court to substitute its own decision – to give an effective promotion - for that of the employer (see Min of Defence v Dunn [2007] SCA 75 RSA at paragraph [39]). Paragraph 1 of the Award seems to do this, but then again the arbitrator clarified her award by describing what had been awarded as compensation under section 194 of the LRA. On either basis I am satisfied that it was wholly inappropriate and unreasonable as a remedy or as a measure of compensation for the reasons advanced by Ms Nel. In fact had the arbitrator properly applied her mind to the question of compensation she would have found that there was insufficient material

before her to enable her to hold that any actual damages had been suffered. She had to determine the amount of compensation, if any, that would appropriately compensate the Third Respondent for unfairness in denying to him the opportunity to compete for a post for which he seems to have had the requisite qualifications and in which he may have succeeded had he competed and been considered. Ms Nel contended that the evidence did not prove that the Third Respondent was in fact qualified, but since Third Respondent when he testified alleged he had the qualifications and this was not challenged in the arbitration and appeared to be accepted by all involved in the proceedings I am of the view that the matter is properly dealt with on the basis that he had the qualifications and had a chance if he had been given the opportunity to apply, but there was no probability of success. It does not seem to me that in such a context the amount of compensation can ever be substantial. It is only a most exceptional kind of case where there is a certainty that the complainant would have been appointed if considered that actual damages can be proven (as was the case in Willemse v Patelia NO and others [2007]2 BLLR 164 (LC). This is not one of those cases. Accordingly apart from out of pocket expenses, if any, compensation in a case like this can only be for a *solatium* to redress the injuria. I consider that one of the purposes of the award of compensation for an unfair labour practice in an appropriate

case will be to compensate for the *injuria* of being treated unfairly (compare Reckitt & Coleman (SA) (Pty) Ltd v Bales [1994] 8 BLLR 32 (LAC) at 48; Harmony Furnishers (Pty) Ltd v Prisloo [1993] 14 ILJ 1466 (LAC)) and, in this instance, of unfairly being denied an opportunity to compete. The public policy and constitutional considerations that underlie imposing a punitive element in an award of compensation against an Organ of State that are set out in Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at para [69]-[72] apply in the present case so no punitive award should be made.

[12] Ordinarily I would have remitted the matter to the Arbitrator to quantify compensation. I was informed from the bar that the arbitrator is deceased. In those circumstances I am in as good a position as another arbitrator who would have to be appointed to deal with the compensation on the evidence that was before the Second Respondent. Mr Seery, who appeared for the Third Respondent, argued that the matter should be remitted for evidence to be led on damages because damages or compensation were not the relief that had been sought and this aspect had for that reason not been fully canvassed. He accepts that there is no evidence of damages having been suffered other than in the general sense that had Third Respondent been considered and had he been promoted he would

have been better off. I do not consider that it is appropriate to remit the matter for further evidence. The Third Respondent had his chance to lead whatever evidence he was advised to lead and there is no basis for reopening the case to enable him to change the nature of his relief. I have also borne in mind that the dispute has festered since November 2005 and it is in everyone's interest that finality is achieved. In those circumstances I intend to set aside the award and, since I take the view that an award of compensation is appropriate relief to substitute the award of compensation that should have been made by the Arbitrator and thereby avoid the delay and additional expense involved in remitting the matter to the bargaining council for another arbitrator to do this exercise.

[13] In my assessment lump sum compensation that takes the form of general damages is appropriate to compensate for the *injuria*. Ms Nel submitted, and I agree with her, that compensation of R5,000 will do justice to the case.

[14] The award of the Second Respondent accordingly falls to be set aside and replaced with an award directing the Applicant to pay compensation to the Third Respondent in an amount of R5,000, which shall be paid on or before 1 August 2008.

[15] It follows from my decision that the review succeeds that the prospects of success on the review are such that condonation should be granted. That leaves the question of costs of the condonation part of the application. The Applicant sought an indulgence on the basis of an explanation that had many unsatisfactory features with the result that, even though successful in relation to the condonation aspect of the application, it should pay the costs associated with the condonation application. Applicant is also liable to pay the wasted costs of the adjournment of the matter on 16 November 2006 when it was adjourned due to the absence of a record. In relation to the main review the result is such that even though the Applicant has been successful, that is only partial success and I intend to make no order as to costs on the review portion of the application. It would be an impossible task for a taxing master to determine what part related to condonation and what to the main review and I consider that it would be fair to take a robust approach and allocate half of the costs to the condonation aspect.

[16] The order I make therefore is the following:

[16.1] The late launching of this review is condoned.

[16.2] The award of the Second Respondent dated 14 November 2005 under case no KPD030502 issued under the auspices of the First Respondent is reviewed and set aside and replaced with an award directing the Applicant (Respondent in the arbitration) to pay as compensation to the Third Respondent (Applicant in the arbitration) the amount of R5,000 and to make that payment on or before 1 August 2008.

[16.3] The Applicant is ordered to pay the wasted costs occasioned by the adjournment of the application on 16 November 2006.

[16.4] The Applicant is ordered to pay one half of the Third Respondent's costs in the application.

_____

M PILLEMER

ACTING JUDGE OF THE LABOUR COURT

Date of Judgment: 10 July 2008.

APPEARANCES

For the Applicant: Adv C Nel

For the Respondent: Adv T Seery