

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT DURBAN**

**CASE NO: D 610/08**

**Reportable**

**In the matter between:**

**STERLING MARK ANTHONY TITUS**

**Applicant**

**And**

**SOUTH AFRICAN POLICE SERVICES**

**First Respondent**

**SUPERINTENDENT N P NDLOVU**

**Second Respondent**

**JUDGMENT**

**Conradie AJ**

1. This is an application to have an Arbitration Award, issued under the auspices of the Safety and Security Sectoral Bargaining Council (Bargaining Council) on 18 February 2005, made an order of court.

2. According to the Applicant he is bringing this application as a precursor to contempt of court proceedings against the First Respondent for its alleged failure to comply with the provisions of an Arbitration Award.

**Background**

3. A dispute arose between the Applicant and the First Respondent in relation to his unsuccessful application for a post in the Detective Branch

as an investigator at the rank of Captain,

4. After an initial evaluation, a promotional panel was tasked with determining the most suitable candidates for the available posts. No interviews were held in respect of the posts and candidates were selected on the basis of the documents before the panel.

5. The panel decided to promote the Second Respondent (Ndlovu) and an inspector Dlodla to the two available posts which the Applicant was interested in. The Applicant was not successful with his application for promotion.

6. The Applicant was aggrieved by the decision not to promote him as he felt that he was the best candidate for the position. After following the internal grievance process, the Applicant referred an unfair labour practice dispute (promotion) to the Bargaining Council.

7. After numerous delays the Arbitration took place on 27 October 2004 and 18 January 2005. The Arbitration Award was handed down on 18 February 2005.

8. The arbitrator appointed to hear the matter, Mr Molony, found that the entire promotion process was flawed.

9. Whilst the relief sought by the Applicant was that he should be promoted to the post, the Arbitrator found that the failure by the panel was so material and serious that the appropriate award should be that the entire process be started afresh.

10. Following on the award, the First Respondent convened a different panel to assess the two candidates that had been promoted and the Applicant on the same papers that served before the first panel. The new panel came to the same conclusion as the initial panel that Ndlovu and Dlodla be promoted

into the post.

11 .The Applicant's reaction to the First Respondent's decision not to promote him was to lodge another grievance in respect of the promotions on the basis that the First Respondent had not redone the process as required. The Applicant once again referred an unfair labour practice dispute to the Bargaining Council. An arbitration in respect of the dispute was held on 18 April 2008.

12.The arbitrator, Mr Mdledle, was of the view that he was required to decide whether the First Respondent complied with the award of Mr Molony. He was further of the view that if the award was not complied with then that would be the end of the matter as the second process followed would be null and void in that it contravened an existing award. Mr Mdledle went as far as to say that this would mean that the Second Respondent was acting illegally and as such the second process would be a nullity.

13. Mr Mdledle then concludes that the process was not commenced *de novo* and as such the award was not implemented. He was also of the view that the First Respondent was *"engaged in an unlawful illegal activity in contravention of the arbitration award and therefore the process which was followed thereafter which resulted in the appointment of again LF Dlodla and NMP Ndlovu was against the law."* The arbitrator then set aside the promotion of the two individuals but did not make an order promoting the Applicant.

14. Following on the issuing of the award, and allegedly as a result of the failure of the Respondent to give effect to the award of Mdledle, the Applicant took steps in order to have the award made an order of this Court, which

order was granted on 3 February 2009.

15. After the First Respondent received the court order it withdrew the promotions of Dludla and Ndlovu to the rank of Captain. However, as Ndlovu had since been promoted to the rank of Superintendent with effect from 1 August 2005, his position was not affected and it appears from the papers that Superintendent Dludla had left the services on 18 July 2007.

16. The fact that the First Respondent is of the view that it has complied with the second arbitration award seems to have motivated the Applicant to now seek to rely on the first award. The two awards differ in that although both awards set aside the promotions of Dludla and Ndlovu, only the first award orders that the promotion process be started *de novo*. According to the Applicant the First Respondent did not comply with the first award as it did not redo the promotion process. This resulted in Mdledle finding the process invalid, which according to the Applicant means that the *"net result is that the process falls to be conducted as per the first award"*.

17.It is also clear from the papers that what the Applicant seeks is to be treated as if he had been promoted in 2001. It is therefore necessary for him to keep this matter alive in order to try and extract some kind of compensation from the First Respondent. In his replying papers the Applicant states, with reference to the first award of Molony, that *"if I am successful in the promotion process, my promotion would be back dated to 1 October 2000"*.

18. The Applicant has raised a point in limine in this matter that the award of Molony which was issued in 2005 has prescribed. There are several decisions of this court which have dealt with the prescription of Arbitration Awards. In *Police & Prisons Civil Rights Unions on behalf of Sifuba v Commissioner of the SA Police Service and Others* (2009) 30 ILJ 1309 (LC)<sup>1</sup>

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<sup>1</sup> Paragraph [33] at 1318.

it was held that *"If an arbitrator's award is not made an order of court it will prescribe after four years*<sup>2</sup>. *On the other hand, a party's right to enforce the award by way of application to have it made an order of court prescribes within three years of the publication of the award.*"<sup>3</sup>

19.1 align myself to the above approach to prescription in respect of Arbitration Awards. As the award of Molony which the Applicant seeks to make an order of this Court was issued on 18 February 2005, and this application only launched on 22 May 2009, it is clear that not only has the Applicant's right to enforce the award by way of application to have it made an order of court prescribed but also the award itself has prescribed.

20. As far as costs are concerned I can see no reason why the Applicant should not pay the First Respondent's costs occasioned by it having to oppose this unsuccessful application.

In the circumstances I make the following order:

21. The application is dismissed with costs, including the cost of Senior Counsel

**Conradie AJ**

Date of hearing: 2 December 2009

Appearance for: B K Thaver instructed by

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<sup>2</sup> See s 13(l)(f) and (i) read with section 11(d) of the Prescription Act

<sup>3</sup> See also *Mpanzama v Fidelity Guards Holdings (Pty) Ltd* [2000] 12 BLLR 1459 (LC); *PSA obo Khaya v CCMA & Others* [2008] JOL 213 (LC)

Applicant: Henwood Brifter & Caney

Appearance for First: J Heimstra SC instructed by the State  
Attorney

Date of judgment: 5 February 2010