IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Not Reportable
CASE NO. D 201/10

In the matter between:

J FERREIRA	Applicant
and	
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	First Respondent
R LYSTER N.O	Second Respondent
DEPATRMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
SA NTINGA	Fourth Respondent

DATE OF HEARD: 19 August 2011

DATE OF REASONS: 25 August 2011

JUDGMENT

REDDY AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act (the LRA)[1] to review and set aside or correct an arbitration award dated 8 February 2010 under case number PSGA 422-07/08 handed down under the auspices of the General Public Service Sectoral Bargaining Council.

[2] The Applicant seeks to have the award set aside and to remit the matter back to First Respondent for a *de novo* arbitration hearing before another commissioner due to non-availability of a proper record. The Third Respondent in whose favour the award was issued opposes this application.

Factual background

[3] The Applicant is employed by the Third Respondent as an administration officer. She applied in 2005 for the post of court manager, Nqutu Magistrates' Office, which had a salary level 10 and a rank of assistant director attached to it. The Applicant was ranked first by the interview panel and the Fourth Respondent was ranked second.

[4] The Fourth Respondent was promoted to the post.

[5] The Applicant found out in 2007 that she had been ranked first and thereafter lodged an unfair labour practice dispute in terms of section 186 (2)(a) of the LRA, that

[1] 66 of 1995.

is, a dispute relating to alleged unfair conduct by the employer in respect of a promotion.

Preliminary issue

Condonation for the late filing of the opposing affidavit

[6] The Third Respondent applied for condonation for the late filing of its opposing affidavit. The affidavit was not attached to a Notice of Motion. The Applicant's representative was obliged in consenting to the application being heard without the Notice of Motion.

The delay

[7] There is a dispute about the length of the delay.

[8] The notice in terms of rule 7A (8) of the Labour Court Rules and the record were served by registered post on 20 August 2010.

[9] The Applicant submitted that even if the state attorney (the Third Respondent's representative) had until the end of August 2010 before the *dies* for filing the opposing affidavit began to run, it would still filed the affidavit late. The affidavit was due, on the applicant's submission on or before 14 September 2010.

[10] The Third Respondent submitted that it was directed by this Court to file an opposing affidavit within fourteen days of 4 April 2011– being the date of the directive. On this argument the opposing affidavit was due on or before 18 April 2011.

[11] The opposing affidavit was delivered in May 2011.

Reasons for the delay

[12] The Third Respondent submitted that there were long delays in putting together a record of the arbitration proceedings. It is common cause that the First Respondent did not submit the common bundle placed before the Second Respondent, the tape recordings of the proceedings or hand written notes of the Second Respondent.

[13] On 28 January 2011, the applicant's attorney served the indexes to the various bundles and the heads of argument. On receipt of these, the state attorney suggested in a letter dated 2 February 2011, that a meeting be held with the Applicant's attorneys to reconstruct the record. The Applicant's attorney's response was to decline the invitation – more on this later.

[14] The court directive was received by the state attorney on 13 April 2011 and it had to consult with the Third Respondent and its Pretoria counterpart, who represented the Third Respondent in the arbitration proceedings. The attorney who was present during the arbitration hearing, one Perumal, was on leave until 4 May 2011 and due to her work commitments was only available on 10 May 2011 to consult.

[15] Once instructions were received, the opposing affidavit was drafted and signed on 19 May 2011, served on the Applicant on 20 May 2011 and filed at Court on 23 May 2011.

[16] The Third Respondent submitted that in light of the Court Directive, the delay was not excessive as it amounted to just more than a month.

Prospects of success

[17] The Third Respondent briefly dealt with the various grounds of review and submitted that it had excellent prospects of succeeding in the main application. For the reasons set out hereunder, it will be apparent that the Third Respondent did indeed have excellent prospects of success.

Prejudice

[18] It was submitted that not to condone the late filing of the affidavit was more prejudicial to the Third Respondent than to the Applicant.

[19] Given that the only relevant document in the record before me was the award, the interests of justice required that I have recourse to the pleadings and therefore, the opposing affidavit, when hearing the Applicant's grounds of review.

[20] The explanation for the delay by the Third Respondent has periods where nothing seems to have been done by the state attorney, however given the lack of a record and the Third Respondent's prospects of success, the interests of justice require me to condone the late filing of the opposing affidavit.

Grounds of review

1. *The Second Respondent did not adjourn the matter on 29 January 2010.*

[21] The arbitration hearing was set down in November 2009 for hearing on 29 January 2010. The Applicant's counsel was double-booked for that day and attempts were made to have the matter postponed. The First Respondent did not postpone the matter.

[22] On the day in question, the Applicant requested that the matter stand down for an hour, which was granted, to allow her counsel to adjourn his other matter and thereafter attend her arbitration hearing. The Applicant's counsel did not appear an hour later and the arbitration hearing proceeded in his absence.

[23] It is not recorded in the award that the Applicant requested that the matter be adjourned. The Third Respondent in its opposing affidavit confirms that no application for an adjournment was made by the Applicant.

[24] Despite the Applicant not applying for an adjournment, the Second Respondent did apply his mind to an adjournment of the proceedings. He recorded in the award that the matter had been adjourned on many occasions in the past, the Applicant had her attorney present and that it was in the interests of justice that the matter continues.

[25] The Applicant submits that her attorney was inexperienced and she (the Applicant) did not prepare "comprehensively" with her attorney. It is claimed by the

Applicant, that her attorney's inexperience was obvious as her attorney did not lead her in chief or cross -examine the Third Respondent's witnesses.

[26] The Second Respondent recorded in his award that "Applicant's attorney, for reasons which were not fully explained, took no part in the proceedings, and did not lead the Applicant in chief, and did not undertake any cross-examination of Respondent's witnesses; thathe elicited all Applicant's evidence from her, and assisted her in cross-examination of the Respondent's witnesses."

[27] The Applicant elected her legal representatives. That they were either not available or not able to represent her and she chose to continue being represented by them is not a reviewable irregularity.

[28] Further the Applicant had from November 2009 to engage another counsel or another attorney who would have been prepared to represent her on the day in question. She did not do so.

[29] I accordingly find that the Second Respondent did not commit a reviewable irregularity in not adjourning the matter.

2. *The Third Respondent did not consider the Applicant's written argument*

[30] The Second Respondent recorded in the award that the argument submitted by the Applicant's counsel

> "contained references to documentary evidence which had never been presented at the arbitration, and which in terms of the fundamental principles relating to the admissibility of evidence, I cannot take any account of."

As the Second Respondent was bound to determine the matter on the evidence before him he could not consider argument on evidence which was not placed before him. I accordingly find that the Second Respondent did not commit a reviewable irregularity.

3. The Second Respondent did not make a finding on procedural unfairness

[31] The Applicant did not record in her referrals to conciliation and arbitration any procedural irregularities. From the award, there is no record of any procedural issues being raised by the Applicant.

[32] In her replying affidavit, the Applicant records her procedural grievances as follows:

> "No documentary proof existed or has been tendered how Mr Manual applied his mind, what he considered, what weight he attached to service delivery and how he balanced equity with service delivery in promoting the Fourth Respondent to the post."

[33] These are issues relating to the substantive fairness of the promotion. They do not in any way imply any procedural irregularities such as the Applicant was not afforded a proper interview or that she had to answer questions that were different from other applicants for the post or that a different panel interviewed her or that she could not attend the interview and was not afforded another opportunity to be interviewed or that the panel was not qualified to conduct the interviews.

[34] Further, the Applicant does not submit that she presented evidence at the arbitration hearing that the promotion of the incumbent to the post would have compromised service delivery. I must conclude that such evidence was not presented.

[35] I find that the Applicant did not raise any procedural issues for the Second Respondent to decide and that he did not commit a reviewable irregularity in this regard.

4. The Applicant's evidence was unchallenged and the Second Respondent did not make a finding in this regard

[36] It is recorded in the award that the Applicant's evidence was challenged when it was put to her in cross-examination that:

a. she had no expectation of being appointed merely because she was recommended and
b. she was not appointed because of employment equity;
c. white women were over-represented in her occupational class;

[37] It is clear that the Second Respondent found that the Third Respondent was bound by principles of employment equity and it had to apply the policy nationally and provincially. The Applicant's claim to the promotion merely because she was the recommended candidate does not take into account principles of equity at the national and provincial level and the relief she sought could not be supported by the evidence before him.

[38] This ground of review must also fail.

5. *The Second Respondent could not have reached the conclusion that he did had he considered that the Applicant only conceded that the Third Respondent could change the recommendation if it had***:**

a. applied its mind fairly, objectively and rationally;

b. applied proper reasoning, justification and rationaliity;

c. a proper and valid employment equity plan;

d. consistently applied the plan;

e. balanced efficiency with representivity;

f. properly analysed the national, provincial and office plans.

There was no written proof of how the Third Respondent applied its mind.

[39] The Third Respondent led the evidence of two witnesses, one Chirwa, who had drafted the employment equity plan and one Manual, who had the power to accept or reject the recommendations of the selection panel.

[40] Chriwa testified that the selection panel was obliged to implement the plan and consider the office in question and the national and provincial demographics.

[41] The Applicant's only challenge was that if he considered the office in question she qualified in terms of race and gender. His response was that in terms of the national and provincial demographics this was not so.

[42] The Applicant did not challenge the employment equity plan.

[43] Manual testified that he did not accept the recommendation of the panel that the Applicant be promoted as this was contrary to the employment equity requirements. Apart from challenging that if the office itself was the only criterion, the Applicant would have qualified in terms of race and gender (which Manual conceded) no other challenge was put to the witness. It was not put to him in cross-examination that his decision was arrived at in an arbitrary, unfair and inconsistent manner.

[44] The award and the opposing affidavit do not record the Applicant putting questions in terms (a) to (f) above to the Third Respondent's witnesses. One would

expect that the Applicant would have recorded these questions and the answers in response had she done so. Given that no mechanical or manuscript record of the proceedings exist, it would have been imperative for the Applicant to submit her notes in this regard. As her attorney did not assist her during evidence, the least she could have done was to record the evidence. As no concurrent notes from the attorney or the Applicant have been submitted, I must conclude that these issues were not placed before the second respondent. I must therefore accept the award and the opposing affidavit as being correct in not recording these issues as being presented by the Applicant.

6. *The common bundle that was before the Second Respondent was dissected by the Applicant's written argument but the written argument was not considered by the Second Respondent***.**

[45] This ground is dealt with above and I find that the Second Respondent reasonably dealt with the issue of the written argument.

7**.** *It was unchallenged that even if her race group was over represented the Third Respondent could still appoint her at the office level.*

[46] The Second Respondent recorded that Manual's concession in this regard was limited to office level only and did not include a consideration of the national and provincial demographics.

[47] The Applicant's only challenge to the application of equity was that, if it was applied at the office level, she should have been appointed. She did not in any way challenge the application of the policy nationally or provincially, which is where the justification for her not being promoted lies. I must therefore conclude that the Second Respondent correctly found against her on these grounds.

8. No reliance was placed on the fact that Mr Hartzer, the Provincial Head of Human Resources, sat on the panel and recommended the Applicant for the post.

[49] The Applicant's representative, during his address to Court, amended this submission to reflect that it was the human resource department and not Hartzer that sat on the panel.

[50] It is disputed by the Third Respondent that this evidence was placed before the Second Respondent. This also does not appear from the award itself. This ground also fails.

9. *The Second Respondent erred in not finding that the Third Respondent's actions were invalid, unfair, unreasonable and unjustifiable***.**

[51] This is not evident from the award and is disputed by the Third Respondent.

[52] The exercise of the Third Respondent's discretion as employer can only be interfered with if it is demonstrated that the discretion was exercised capriciously, in a biased manner, or for insubstantial reasons or based upon any wrong principle. See in this *Arries v Commission for Conciliation, Meditation and Arbitration and Others.*[2] The evidence before the Second Respondent did not require him to interfere with the Third Respondent's discretion.

10. *The Second Respondent's decision that the Third Respondent did not act incorrectly, arbitrarily or unfairly was not corroborated by the evidence.*

[53] The Second Respondent recorded in the award that the Third Respondent's witnesses referred to policies and documents during their evidence. He also recorded that there was no challenge to the documents or as recorded previously in this judgement.

[54] I find that the Second Respondent assisted the Applicant as best he could without creating a suspicion of bias in favour of the Applicant during the proceedings.

[55] The award speaks to each issue raised by the Applicant and the only inference to draw is that the Second Respondent considered all the relevant and material issues

[2] (2006 27 ILJ 2324 (LC)..

fully and fairly as envisaged in paragraph 268 in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.[3]

11. *No record*

[56] The Applicant submitted that as no record exists, the matter must be remitted for a hearing *de novo.*

[57] The history of this application shows that the Applicant's attorney could have put together a better record than she did had she met with the state attorney and attempted a reconstruction of the record or had she taken any notes during the arbitration proceedings.

[58] As recorded earlier, the state attorney invited the Applicant's attorney in February 2011 to meet to reconstruct the record. In her letter dated 11 February 2011, the Applicant's attorney stated that there would be no purpose in doing so as the Second Respondent would "certainly" not certify a reconstruction which has little or no prospect of validity or agreement on the contents as delivered at the arbitration.

[59] What led the Applicant's attorney to believe that an attempt at reconstruction could not be agreed or that the resulting record would be invalid is not explained. It certainly appears to be a premature attitude to have adopted when the parties had not even met on the issue of reconstruction.

[3] [2007] 12 BLLR 1097 (CC).

[60] The Applicant's attorney stated further in her response that to set a date for the meeting with the consent of all the "stakeholders" would be "another difficult hurdle to overcome".

[61] It is also not recorded in the papers who the stakeholders, that the attorney refers to, were. Apart from the attorneys involved, (and perhaps the Applicant) I see no reason for any other person to have attended a meeting to reconstruct a record.

[62] Why it would have been difficult to arrange a meeting is not elaborated in the papers and does not make any sense, especially in light of the Applicant being *dominus litis*.

[63] What is also curious about the issue of the record is that this Court issued a notice to the Applicant's attorney on 4 June 2010 that the record had been delivered by the First Respondent. On 28 July 2010, the Applicant's attorney was advised by this Court that the record had not been uplifted by the Applicant. The Applicant's attorney's response on 4 August 2010 was to write to the First Respondent (and copying the Labour Court and the state attorney) requesting the hand written notes of the Second Respondent.

[64] It became apparent to the Applicant's attorney at some point that written notes or mechanical recordings of the proceedings did not exist and that the Second Respondent's copy of the combined bundle could not be found.

[65] The record consists of the contents of the First Respondent's file (largely notices of set down and attendance registers) and the award, and was filed in August 2010.

[66] When one looks at the various grounds of review raised by the Applicant, it is clear that the record that was filed would not be of significant assistance to this Court when hearing the review application - which is all the more reason for the Applicant's attorney to have accepted the invitation by the state attorney to attempt a reconstruction of the record. It emerged during the address by the parties that each representative had some portion of the combined bundle in its possession. To my mind, it was imperative that the parties had to meet to reconstruct the record as best they could so that the matter could reach finality as soon as possible – a long time had passed since the promotion occurred in 2005.

[67] Further, the Applicant or her attorney did not make available any notes that they may have taken during the arbitration proceedings.

[68] The Applicant appears to lack *bona fides*. It is not for the Applicant to bring a review application, not comply with the rules of court and stymie a proper hearing of the

issues by not producing the record, and to opportunistically use the lack of a proper record as a ground of review.

[69] I further find that to remit the matter for a hearing *de novo* is not in accordance with the objects of the LRA. The promotion occurred in 2005. It is now six years later. The award, the pleadings and the parties' addresses were sufficient for me to deal with this application and to finalise the matter than to remit it for another hearing.

[70] The Second Respondent did not commit any reviewable irregularity. He dealt with the matter fairly, competently and objectively. He decided the matter on the evidence before him and went so far as to assist the Applicant as if she were not represented. The decision reached by him is a decision that a reasonable commissioner would have reached.

[71] Having considered the pleadings and the argument, I exercise my discretion to make the following order:

1. The late filing of the Third Respondent's opposing affidavit is condoned,
2. The review application is dismissed;
3. There is no order as to costs.

_____

Reddy AJ

Appearances:

1. For the applicant: S van Vollenhoven instructed by Nirashieka Bramdeo Attorneys
2. For the Respondent: M Moodley instructed by the state attorney