REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D439/12

In the matter between**:**

JOSHUA MBONGENI NGCOBO **Applicant**

and

STANDARD BANK OF SOUTH AFRICA **First Respondent**

COMMISSIONER NHLANHLA MATHE **Second Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Third Respondent**

Heard: 22 May 2013

Delivered: 25 September 2013

Summary: Unfair labour practice relating to promotion or appointments. There is no right or entitlement to a promotion or an appointment to a post. Arbitrators and courts must be reluctant to interfere with the employer's prerogative to promote or appoint unless there is unfairness. Employee not appointed to a position failing to show unfairness in the process of selection. Application for review dismissed.

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] This is an opposed application to review and set aside an award issued by the Second Respondent (The Commissioner) under case number KNDB16326-11 acting under the auspices of the Third Respondent (The CCMA). The award was issued on 29 April 2012.

[2] In his founding affidavit, the Applicant had contended that the application was brought in terms of section 158 (1) (g) of the Labour Relations Act ("The Act"). A preliminary point was raised by the First Respondent in its written heads of argument to the effect that the application under the said provision was clearly misconceived and legally impermissible as what the Applicant sought to review was an award. This point was however not pursued as it was common cause that what the Applicant sought to review was an arbitration award. An application for condonation in respect of the late filing of the Applicant's replying affidavit was also granted.

Background to the application:

[3] The Second Applicant is still in the employ of the First Respondent as an Officer Processing. At the time the dispute was referred to the CCMA, he had occupied the position of Supervisor (Grade SBG07) in the First Respondent's processing department. In April 2010, the First Respondent had appointed a team of consultants in order to create an appropriate structure for its Cash Centre Department in Durban. This process had resulted in a proposed new structure with new job descriptions defined and graded using an independent Grading Committee. Extensive consultations were held with the representative union, SASBO regarding the new proposed structure.

[4] In terms of the new structure, the old positions of Supervisor (SBG07) were made redundant, and new positions of Team Leader were created and graded at level SBG09. The First Respondent's contention was that these new positions were more complex and were not merely an upgrade of the former positions of Supervisor. This had necessitated that 17 Team Leader positions be advertised. Fifty candidates including the Applicant (who was then a Supervisor) had applied for those vacancies. The candidates were all briefed

on the assessment criterion which was based on 25% current performance; 50% interview process and 25% Evalex psychometric evaluation. The latter is an assessment tool used for profiling candidates to determine their suitability for certain roles, and in this case, whether a candidate was suitable for the role of Team Leader.

[5] The Applicant's application for one of the 17 positions was unsuccessful. The First Respondent's contention was that he was rated B for current performance, meaning that he had conclusively met performance levels. In the interview however, he was not in the top 20 of the short-listed candidates as he had performed poorly. The results of the Evalex evaluations were equally not favourable as he was rated as being unsuitable for the position. Following this process, the Applicant was then appointed to the position of Office Processor, which was basically at the same level as that of the previous position of Supervisor. These arrangements emanated from an agreement with SASBO that all employees who were unsuccessful during the selection process in respect of newly created posts were to be accommodated in positions which were at the same level as the positions they had occupied prior to the restructuring process.

[6] The Applicant had lodged a grievance on 30 September 2011 and alleged that the First Respondent had committed an unfair labour practice. A grievance hearing was held on or about 04 October 2011. The hearing had concluded that the Applicant had not been unfairly treated. He had then escalated the matter to two higher levels, and on each occasion he was informed that there was no merit in his grievance. He had then referred a dispute to the CCMA and alleged that the First Respondent had committed an unfair labour practice by not appointing or promoting him to the position of Team Leader. Conciliation having failed, the dispute was then referred for arbitration. At arbitration, the First Respondent had closed its case without calling any witnesses. Nevertheless, the commissioner's conclusions were that on his own version, the Applicant had failed to establish that the First Respondent had treated him unfairly by not appointing him to the position of the Team Leader.

The award:

[7] At paragraph 5 of the award, the commissioner had stated the following;

> 'The employee is employed in the capacity of a team leader SBG07 in the condonation refused as degree of lateness is excessive. Referral is 424 days late-extremely excessive. Employer cash centre' (Sic)

It was common cause that the issue the Commissioner had to determine related to whether the First Respondent had committed an unfair labour practice. The issue of condonation was not a matter before the Commissioner, and the above paragraph signifies those instances where a Commissioner had clearly used a template in writing the award and had not proof read it prior to submitting it. This is a clear case of lack of vetting prior to awards being issued to the parties. Other than this embarrassing omission, the substance of the award was as follows;

[8] In his analysis, the commissioner had stated that where there is a dispute in terms of section 186 (2) (a) of the Act pertaining to the employer's prerogative to promote or appoint, the determination involves a two-fold enquiry. The first question is whether the employer acted unfairly, and secondly, whether had it not been for the unfairness, whether by the act or omission, the employee would have been promoted or appointed. The second part of the enquiry only became relevant in the event that the employee succeeded in proving that the employer acted unfairly. If that onus (on the employee) is not discharged, he cannot succeed and that would be the end of the enquiry.

[9] On the facts, the commissioner had further found that the employer had re-organised the structure of the positions in the workplace, and that newly created positions were advertised. The Applicant had applied for one of the positions, was short-listed and interviewed. This was done in line with the First Respondent's recruitment policies. In the commissioner's view, the recruitment process was fair and transparent, and the Applicant did not at any stage complain about being unfairly discriminated against. The commissioner further concluded that the Applicant as a witness had "fared poorly" on

account of his evidence being generally not probable, and had contradicted himself on important aspects of his evidence.

[10] The commissioner had also described the Applicant as verbose, stubborn, argumentative and unable to prove how and by whom he was forced to apply for the position as he had alleged. The commissioner further added that there was no merit in the Applicant's claim that the First Respondent had failed to apply the Evalex programme fairly. Based on the evidence, the commissioner had concluded that the Applicant had merely applied for the position that became available after restructuring and had performed poorly both at the interview and at Evalex. It was the Applicant's poor performance when presented with an opportunity that resulted in him not being appointed.

Grounds for review:

[11] In his founding affidavit, the Applicant had stated that the award was reviewable on the following grounds;

> 11.1 'The Second Respondent committed gross irregularity by taking into account the First Respondent's version only and not giving consideration to my version.
>
> 11.2 On a balance of probabilities, my version is more probable than that of the First Respondent when looking at the evidence in totality
>
> 11.3 The commissioner committed a gross irregularity, exceeded his powers and misconducted himself in making the award he made. The award is not rationally justifiable in the light of the evidence in the matter'

[12] In his supplementary affidavit, the Applicant had amplified the grounds for review by stating the following;

> 12.1.1 'The Second Respondent misdirected himself in making the following findings;
>
> 12.1.2 That the First Respondent was involved in a restructuring. This is in contrast with his earlier finding that "collective agreement was not produced".

It turned out that what was being referred to as a collective agreement was an exchange of e-mails between the employer and the employee'.

12.1.3 That there was no unfair conduct on the part of the employer. This despite the fact that the First Respondent did not prove that the restructuring if at all, was legally permissible;

12.1.4 That the Applicant had failed dismally to prove that the First Respondent had, by so restricting (sic), committed an unfair labour practice as envisaged by Section 192 (2) of the Labour Relation Act as amended.

12.1.5 This despite the common cause fact that the Applicant's previous post was phased out and replaced by the grade SBG09 which is a grade higher than SBG07 as it had added responsibilities to it'. (Sic)

Applicable test on review:

[13] The appropriate test which must be applied by a court reviewing the decision of a commissioner is to be found in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1]. Navsa AJ stated the test in the following terms;

> 'To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star:* Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair'.

[14] Various explications of the *Sidumo* test have been explored in countless decisions by this court and the Labour Appeal Court. An exposition of three of the more recent Labour Appeal Court judgments is to be found in an article by Anton Myburgh SC (*The LAC's Latest Trilogy of review judgments: Is the*

[1] *(2007) 12 BLLR 1097 (CC) at para.110*.

Sidumo Test in decline?)[2]*.* The more recent and decisive explication of the Sidumo test is to be found in *Herholdt v Nedbank Ltd* [3]; where the Supreme Court of Appeal per Cachalia JA restated the test on review in the following terms;

> 'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable'.

Evaluation:

[15] As it was correctly pointed out on behalf of the First Respondent, it is indeed difficult to understand the nature and extent of the Applicant's grounds of review. On the whole, as can be gleaned from his founding affidavit, supplementary affidavit and heads of argument, he appears to be attacking the commissioner's award on all grounds contemplated in section 145 (2) of the Act. Even if he might have been entitled to do so, at the very least, a basis of that attack should have been laid. It is not sufficient for parties in an application for a review, to simply regurgitate the provisions of section 145 of the Act and hope that the court will find something sustainable to review and set aside an award.

[16] Since the Applicant had alleged that the Respondent had committed an unfair labour practice by not appointing or promoting him to the newly established position of Team Leader (SBG09), the question in view of the restated review test in *Herholdt (supra)* is whether there is any basis for a conclusion to be

[2] (2013) 34 ILJ 19
[3] (701/2012) [2013] ZASCA 97 (5 September 2013)at para.25

made that there was a defect in the arbitration proceedings, which fell within any of the grounds envisaged in section 145 (2) of the Act, and if so, whether the result arrived at by the commissioner can be said to be unreasonable.

The legal framework: Unfair labour practice (appointments and promotion):

[17] An unfair labour practice is defined in section 186 (2) of the Act to mean any unfair act or omission that arises between an employer and employee involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.

[18] In *SAPS v SSSBC, Robertson NO and Noonan*[4] Cheadle AJ had summarised the principles relating to promotion as follows;

18.1 There is no right to promotion in the ordinary course, only a right to be given a fair opportunity to compete for a post. The exceptions are when there is a contractual or statutory right to promotion.

18.2 Any conduct that denies an employee a fair opportunity to compete for a post constitutes an unfair labour practice.

18.3 If the employee is not denied the opportunity of competing for a post, the only justification for scrutinising the selection process is to determine whether the appointment was arbitrary or motivated by an unacceptable reason.

18.4 The corollary of this principle is that as long as the decision can be rationally justified, mistakes in the process of evaluation do not constitute unfairness justifying an interference with the decision to appoint.

18.5 Because there is no right to promotion in the ordinary course, the appropriate remedy, as a general rule, is to set aside the decision and refer it back with or without instructions to ensure that a fair opportunity is given. Since the interest is the fair opportunity to

[4] *(unreported P426/08 – 27 October 2010) at para. 41.*

> compete, it follows that that should be the appropriate remedy rather than appointing the applicant to the post (or to a post on equivalent terms) or to compensate (there being no loss). There are two exceptions. This principle does not apply to discrimination or victimisation cases in respect of which different and compelling constitutional interests are at stake. It also does not apply if the applicant proves that but for the unfair conduct, she would have been appointed.

[19] In its heads of argument, the Respondent had correctly pointed out that employees do not have a right to promotion, and that the employer has a right to appoint or promote employees whom it considers to be the most suitable. In my view, from this proposition, it is implicit that similarly, employees do not have any entitlement to either a promotion or appointment. In the absence of a contractual or statutory right, only in clear circumstances such as where the employer's discretion was exercised frivolously, capriciously or unreasonably in not appointing or promoting an employee (See *Arries v CCMA and Others*[5]) would arbitrators and the courts interfere with that discretion.

[20] In his award, the commissioner had identified the issues to be decided as whether the dispute before him was one of an unfair labour practice relating to promotion, and if so whether the employer had committed an unfair labour practice. The commissioner had also acknowledged that it was within the employer's prerogative to promote and appoint an employee, and that a determination needed to be made as to whether the employer acted unfairly, and whether had it not been for the unfairness, the employee would have been promoted or appointed. To this end, the commissioner was fully aware of the nature of dispute he had to determine and the approach he had to adopt in determining that dispute.

[21] One of the main complaints the Applicant had raised was that the commissioner committed gross irregularity by taking into account the First Applicant's version only and not given any consideration to his version, which in his view was more probable. This contention is without substance in that

[5] [2006] 27 ILJ 2324 (LC).

firstly, the Applicant does not state in what material respects his version was probable. Secondly, it was common cause that the First Respondent had closed its case without calling any witnesses. It is not known which other version the Applicant is making reference to as the only testimony before the commissioner was his own. The mere fact that a party had closed its case without having called witnesses does not imply that a commissioner must of necessity, conclude that the only version before him or her is probable, and therefore rule in favour of that party. Even where the other side had not given evidence in an opposed arbitration, a commissioner is still obliged to make findings of fact based on an assessment of the credibility and the probabilities or improbability of the version proffered by that single witness. (See *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others*[6] and *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*[7]).

[22] In this case, the commissioner had assessed the credibility and reliability of the Applicant's version and concluded that as a witness, the Applicant had fared poorly in that his version was generally not probable and that he had contradicted himself on important aspects of his evidence. In this regard, the commissioner had found that contrary to the Applicant's contentions, a restructuring process did take place, and that the Applicant's contention that he was forced to apply for the position was without a basis. The commissioner had also concluded that the Applicant's complaints surrounding the use of the Evalex tool were equally baseless. The commissioner had described the Applicant as being verbose, stubborn and argumentative and ultimately concluded that the Applicant had on a balance of probabilities, not shown that the First Respondent had committed an unfair labour practice.

[23] In coming to the above conclusions, the commissioner had stated that it was common cause that the employer had re-organised the structure of positions in the workplace. On the other hand, the Applicant disputed that the First Respondent had restructured. The basis of the Applicant's contention was that the commissioner in his award had stated that the alleged agreement entered into with SASBO relating to the restructuring was not produced and

[6] [2011] 4 BLLR 404 (LC).
[7] [2003] (1) SA 11 (SCA).

that what the First Respondent had referred to in the arbitration proceedings was merely an "exchange of e-mails between the employer and the employer"[8] (sic).

[24] In its arguments, the First Respondent submitted that the Applicant's contention that there was no restructuring was incomprehensive, nonsensical, and incredulous as the position he used to occupy was made redundant, and that he had applied for one of the 17 positions of Team Leader created after the new structure was implemented. As appears from the record of the arbitration proceedings, the issue of the alleged agreement between the First Respondent and SASBO was dealt with in the context of what appeared to be a preliminary issue raised on behalf of the First Respondent at the commencement of the arbitration proceedings. The commissioner had dealt with that issue in the following terms:

> 'My ruling is simply the following, that the CCMA appears to have to deal with the matter. The view I take is that firstly, the agreement has not been proven before me. Secondly, whether or not the agreement exists, it seems to me that the Act does not envisage that the CCMA's authority to determine whether either as a result of the implementation of the agreement of the agreement or as a result of any conduct after the implementation of the agreement that the CCMA should not be able to determine whether any unfairness in relation to promotion or demotion occurred'[9]

[25] From the above, it is apparent that in determining whether the First Respondent had committed an unfair labour practice in not appointing or promoting the Applicant, the commissioner did not rely on the existence of an agreement relating to restructuring. He was on the whole, satisfied that on the facts, there was a restructuring process embarked upon which had involved SASBO. The commissioner had made a finding in this regard. It is therefore strange for the Applicant to persist with his claim in this application that there was no such restructuring.

[8] [at para 6 of the award]
[9] [At p16 and line 5 of the record]

[26] In his founding affidavit, the Applicant had also stated that he was employed as a Team Leader/ Supervisor on grade SBG07. A dispute arose between him and the First Respondent arising from his demotion during 2011. The First Respondent had evaluated his grade and created a new grade which was named grade SBG09[10]

[27] From these averments, the difficulty faced by the First Respondent in meeting the Applicant's case becomes even more apparent. On the one hand, the Applicant alleged that there was a demotion, whilst on the other, he avers that there was an evaluation of his grade which entitled him to a promotion in compliance with the First Respondent's promotion policy. In the same vein, he also appears to be challenging the legality of the restructuring process. From the facts before the commissioner, the restructuring process did not merely entail an evaluation of posts or entitled the Applicant to an automatic promotion. That process had ended up with certain posts, especially those of supervisors being declared redundant, and replaced with new ones which involved new job descriptions, grading, and more responsibilities. There is therefore no substance in the Applicant's contention that the First Respondent was not involved in restructuring, and the commissioner's finding in that regard cannot be faulted.

[28] The Applicant had further complained that the commissioner had misdirected himself by making a finding that he (Applicant) had failed dismally to prove that the First Respondent had committed an unfair labour practice. In this regard, the Applicant's contention was that it was "common cause that the supervisor post was phased out and replaced by the team leader post which had added responsibilities added to it" (Sic). It is again not clear on what basis the Applicant contended that the commissioner's finding that there was no unfairness is flawed.

[29] In attempting to make sense of what the Applicant's complaint is, it was common cause that after the restructuring process, 17 Team Leader positions were created. The Applicant was one of the 50 employees who were afforded an equal opportunity to compete for those 17 positions. It is not known on

[10] [at para 7.1 of the founding affidavit].

what basis the Applicant alleged that he was forced to apply for any one of those posts, unless he assumed that he either had a right or was entitled to one of the posts without going through some form of assessment. It is further not known on what basis he had alleged that he was treated unfairly as having been given an equal opportunity like other candidates, his rating was below par on two out of the three assessment criterion. It does not appear from his grounds of review or from the arbitration proceedings that he had challenged the fairness of the assessment criteria or contended that he was indeed a better candidate than any of the successful candidates.

[30] The only thing that the Applicant sought to challenge as appears from his heads of argument is the use of the Evalex assessment tool. In this regard, he merely contended that there was no evidence placed before the commissioner that this tool was administered by competent people. It was common cause that the Applicant had not placed the assessment criteria in dispute. It is not known in what material respects the use of this tool had prejudiced his chances of appointment. Even if there is a remote possibility that the use of this tool was disadvantageous to him, needless to say, there appears to be no complaint in respect of the interview process in which he fared badly. As has been the case throughout this application, it is indeed difficult to understand on what basis the Applicant is alleging that he was either entitled to a promotion, or at most, entitled to an appointment over the other successful candidates.

[31] It is worth repeating at this stage that employees neither have a right nor an entitlement to a promotion or appointment to senior positions except in those instances identified in *SAPS v SSSBC, Robertson NO and Noonan (supra).* To hold a contrary view would result in mediocre and incompetent employees occupying positions they should otherwise not occupy. At worst, it would result in a culture of entitlement which is increasingly becoming pervasive within workplaces. Employers have a prerogative as to whom they seek to promote or appoint as long as that discretion is exercised fairly by giving that employee equal opportunities to apply for the post and also by the use of a fair assessment or recruitment criteria. Unfairness cannot merely be

established from the fact that an employee's expectations of an appointment or promotion were not met.

[32] In the light of the above, there is no basis to conclude that the decision reached by the commissioner is one that a reasonable arbitrator could not reach on all the material that was placed before him. The commissioner's conclusion that the Applicant had failed on a balance of probabilities to show that the First Respondent had committed an unfair labour practice was reasonable and therefore unassailable.

Costs:

[33] This application typifies a long line of cases that should not have found its way to this court. It is symptomatic of instances where the dispute resolution mechanisms of the CCMA and court processes are wantonly abused by employees who for some obscure reason feel entitled to positions either by appointment or promotion without realising that they have no such entitlement or right. The CCMA and this court should not be used as avenues to willy-nilly appoint and promote employees who have a sense of entitlement when they cannot match that with competencies. This court in particular should show its displeasure at such abuse.

[34] In considering a cost order, I have taken into account that the parties still have an on-going employment relationship. This relationship however becomes insignificant when regard is had to the conduct of the Applicant in pursuing this application. I have further taken into account the commissioner's view in his award when he considered a cost order at the stage of arbitration. In his award, the commissioner had described the dispute brought by the Applicant at that stage as "farcical". It is at that point and in view of the commissioner's strong views on the matter that the Applicant should have counted stock and relented. He had however, remained obstinate and persisted with his self-righteous approach that he was indeed entitled to the appointment. It is in the light of this frivolous and vexatious conduct on the part of the Applicant that considerations of law and fairness dictate that a cost order should follow the results.

Order:

[35] The Applicant's application for a review is dismissed with costs.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicants: Mr. M Mfungula (Noxaka Mfungula and Co)

For the Respondent: Mr. D Cithi (Mervyn Taback Inc)