REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no: D640/12

In the matter between:

MINISTER OF POLICE **APPLICANT**

and

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL **FIRST RESPONDENT**

COMMMISSIONER KAREN CHARLES **SECOND RESPONDENT**

SEWLALL RANOO **THIRD RESPONDENT**

Heard: **19 December 2013**

Delivered: **9 May 2014**

Summary: Arbitration award – review of – promotion – affirmative action – no existence of employment equity plan – arbitration award rational – review dismissed.

JUDGMENT

HARKOO, AJ

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent (the "commissioner") under case number PSSS 156-10/11 as well as an application for the condonation of the late filing of the application for review. The third respondent opposes both the review application as well as the condonation application and seeks to make the award an order of court.

[2] At the outset of these proceedings, both counsel for the applicant and the counsel for the third respondent have agreed that this court shall adjudicate the merits of the review application, taking into consideration all the papers filed herein and make a ruling that will be applicable to both matters. I shall therefore deal primarily with the review application.

Background

[3] During the year 2009, the Post which is the subject matter of this review application was advertised by the applicant in terms of the National Instruction 2/2008. The contested Post 1014 had been on the category band C (level of captain). The total number of posts to be filled within this round was one hundred and twelve (112) in terms of the national demographics, inclusive of all race groups. Eleven (11) of these posts had to go to African males, ten (10) to Coloured males and six (6) to Indian and White males.

[4] The third respondent applied for the post, a promotional post that was available on the Vispol Support system at the Durban Central Police Station. Warrant Officer Ngubo also applied for the post and was interviewed together with other shortlisted candidates.

[5] The third respondent scored 76.66% while Warrant Officer Ngubo scored 66.33%; the third respondent scored the highest points.

[6] The evaluation panel recommended the third respondent for the position but the Provincial Commissioner rejected the recommendation of the evaluation panel. The Provincial Commissioner instructed the evaluation panel to reconsider its recommendation and consider equity in accordance with the Equity Plan. When rejecting the recommendation of the evaluation panel, the Provincial Commissioner, failed to record the reason for her decision in writing, as is required in terms of paragraph 4 (12) (f) of National Instruction 2/2008.

[7] The evaluation panel was then reconstituted and Warrant Officer Ngubo, who obtained the second highest score at the interview, was then recommended for the post and subsequently appointed.

[8] The third respondent having been aggrieved by the outcome referred an unfair labour dispute to the first respondent.

The arbitration hearing

[9] At the arbitration, the applicant was represented by Mr Ngema, a legal adviser from the Legal Services Department of the applicant and the third respondent was represented by Advocate Van Vollenhoven.

[10] The applicant presented the evidence of Mr Johannes Phetolo Ramathoka who was employed at the national office of the applicant, who was responsible for facilitating a diverse workforce within the organisation by implementing the provisions of the Employment Equity Act and by developing the equity plan,

and conducting equity inspections. The applicant also presented the evidence of General M Ncgobo who sat on the panel that had considered the third respondent's documents and interviewed him. The third respondent testified on his behalf.

[11] The second respondent, the Commissioner, having considered all the evidence before her, made the following award:

> '148. The respondent (applicant) has committed an unfair labour practice;
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> 149. The respondent (applicant) is directed, within 21 days hereof, to promote the applicant (third respondent) to the rank of Captain, on the basis of a protected promotion, with all the retrospective benefits and remuneration attached to the salary level that he would have received had he been appointed to post 1014, "Cluster Information Centre" Vispol Support, Durban Central on the 1 August 2010,
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> 150. The respondent's (applicant's) HR department shall calculate the amount due in regard to the retrospective remuneration and benefits as set out in paragraph 149 on objective criterion and this amount shall be paid by the respondent, less statutory deductions, into the applicant's (third respondent's) bank account within 30 days of service of this award on it;
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> 151. There is no order as to costs.'

It is this award that the applicant seeks to review.

Grounds for review

[12] The applicant contends that there was no justifiable rationale between the finding of an unfair labour practice on the evidence before the second respondent and accordingly, the second respondent acted unreasonably in handing down the award in favour of the third respondent. Furthermore, by

directing the employer to promote the third respondent, the second respondent effectively usurped the power of the National Commissioner of Police and her decision falls to be reviewed and set aside.

The test for review

[13] In *Sidumo and Another v Rustenburg Platinum Mines and Others*[1], the Constitutional Court held that in the light of the constitutional requirement (section 33 (1) of the Constitution[2]) that everyone who has the right to administrative action that is lawful, reasonable and procedurally fair, 'the reasonableness standard should now suffuse section 145 of the LRA[3]'. The Court set the threshold test for reasonableness of an award or ruling as follows: '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.'[4]

[14] The test was pointed out by Whitcher, AJ in *Birjalal v Ethekwini and Others*[5] as follows:

> "The test as to when the Labour Court will interfere with a CCMA or Bargaining Council award, often referred to as the *Sidumo* test, has been recently restated by the Supreme Court of Appeal in the following terms in the case of *Herholdt v Nedbank Ltd and Another*[6]:
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> '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

[1] (2007) 28 ILJ 2405 (CC) also reported at (2007) 12 BLLR 1097 (CC).
[2] The Constitution of the Republic of SA, 1996.
[3] Act 66 of 1995.
[4] At para 110.
[5] (2014) unreported, handed down on 25 March 2014 case no: D1183/11 at para 4.
[6] (2013) 11 BLLR 1074 (SCA) at para 25.

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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if the effect is to render the outcome unreasonable'.

The material before the commissioner

[15] The evidence of Mr Johannes Phetolo Ramathoka, who testified on behalf of the applicant was briefly as follows:

(a) He was responsible for distributing equity targets to all the divisions. The Equity Robots meant equity targets. The purpose of the equity plan had been to ensure a diverse workforce using the national figures. The business unit was a provincial one. Interview panels had to take this plan into cognizance when making recommendations. Preference had to go to African males, Coloured males and African females to ensure diversity within the province.

(b) The contested post 1014 had been under category, band C (level of captain). The total number of post to be filled within this round was 112 in terms of the national demographics, inclusive of all race groups.

(c) African males had been undersubscribed by 143 employees and the Indians had been oversubscribed by 300. To promote African male would have been fair discrimination because this promotion would enhance representivity.

The National Office required that only 6 Indian males could be appointed during this promotional phase, as opposed to 11 African males. These 6 Indian males had to be appointed depending on the operational needs of the

province, for example, if they possessed scarce skills. He stated further that 6 Indian males could have been promoted because they made up 2.5% of the 112 appointees and 79% posts have to be given to Africans.

(d) The Equity Robot permitted the appointment of 12 Indians, 6 of which could be Indian males. He however, was unable to explain how, notwithstanding the oversubscription of Indian males by 300, the Equity Robot, permitted the appointment of 6 Indian males.

(e) He explained that neither the implementation plan nor the provincial equity plan had been part of the bundle of documents before the selection panel. The figures were reflected in the equity robots. He conceded that the national instruction refers to an employment plan and not targets or robots.

(f) The applicant had obtained 13% more than the incumbent. The fact that he did score the highest score did not create an expectation to be promoted. All of the recommended candidates had been suitable for the position.

(g) All the panel recommendations had to be taken to the Provincial Commissioner because these appointments were for commission offices. He agreed that the Provincial Commissioner ought to have kept written records to justify the decision to instruct the panel to change its recommendation.

[16] The evidence of General M Ncgobo, who also testified on behalf of the applicant was briefly as follows:

(a) He sat on the panel that had considered the third respondent's documents and had interviewed him. The panel had recommended the third respondent for the position.

(b) The third respondent scored the highest marks of 76.6%, based on how he presented himself at the interview. The panel considered the competency of the candidate as supreme. The other three individuals had also been competent and could have been promoted to the post but some candidates where more highly competent than the others. The third respondent happened to be highly competent and presented himself very well during the interviews.

(c) At that time, the panel believed that the third respondent's appointment would have been in line with the demographics and that it would have enhanced representivity within the province. He explained that the panel had available to them a guideline on the figures and this had, perhaps, been the Equity Robot. He confirmed that 6 Indian males could have been appointed and that had been why the panel recommended the third respondent.

(d) Once the process had been finalized all the documents were taken to the provincial office for ratification because the province had the best picture of the demographics.

(e) He had gone to see the Provincial Commissioner personally in this regard. He presented the recommendation to the Provincial Commissioner. There had been written records of this presentation at cluster level. The Provincial Commissioner had not tendered any reason to him for not approving the recommendation and had merely instructed him to reconsider the recommendation and consider representitivity.

(f) He did not know how the Provincial Commissioner had chosen which post to send back for the consideration. He had not been given any further plans or demographics before reconsidering the decision. In

essence the panel had not considered any equity reports, robots or plans and in fact merely did what the Provincial Commissioner had asked. The panel merely substituted the first African applicant with that of the Indian male; that because Ngubo scored the second highest and he was African, he was to replace the second respondent in the further recommendation.

(g) The post had been a critical post in operations and planning. Ngubo, the incumbent had worked in the charge office and he conceded that this promotion would not have been in his (Ngubo's) career stream.

[17] The third respondent's testimony was briefly that:

(a) He had completed 27 years of service with the applicant and he was the best candidate for the post. He had been in the position before the advertisement of the post.

(b) The equity targets read that 6 Indian males could have been promoted. The evaluation panel was privy to these targets when making the decision to recommend him for the post. He did not dispute the targets.

(c) The Provincial Commissioner gave no written reason as to why she referred, the recommendation to appoint him to the post, back to the evaluation panel.

(d) He requested a copy of the re-convened recommendation document after the promotion list had been published. He was handed the document which had no signatures of the panelist and this made him believe that the panel had not physically re-convened; otherwise their signatures would have appeared on the document. It was only sometime after the grievance was lodged that the document had been signed and the signatures appended, apart from that of the chairperson.

(e) The position called for some skills and he had been sent on the pre-requisite training course. The post had not been in the incumbent's (Ngubo's) career stream. There were no documents that confirmed that the incumbent could have acquired the necessary skills and the know-how within the specific period of time.

(f) The decision to substitute him had been unfair because he was the most suitable person for the post. Had the Provincial Commissioner followed a fair process he ought to have been appointed because he had been the best candidate for the position.

(g) The remedy he sought was a promotion backdated to 1 March 2010 and the difference in remuneration between levels 7 and 8, compensation of 12 months and costs of the arbitration.

Analysis

[18] Appointments to post levels 2 to 12 and the bands A to MMS, are regulated by National Instruction 2/2008. This instruction provides, *inter-alia*, for applications, requirements for the appointment of evaluation panels, functions of evaluation panels, evaluation of applications, criteria for selection of candidates and consideration of recommendations and approval of post promotions. The contested post, being under category band C, fell within the confines of this document.

[19] The third respondent contends that the Provincial Commissioner's failure to provide reasons for not approving the recommendation of the evaluation panel indicates that the decision of the Provisional Commissioner was irrational, arbitrary and unjustifiable.

[20] The relevant provisions of the National Instruction are contained in paragraph 12 (f), which reads as follows:

> 'The National –, Divisional or Provincial Commissioner may accept or reject the findings and recommendations of the evaluation panel. If the National –, Divisional or Provincial Commissioner does not approve a recommendation of an evaluation panel, he or she must record the reason for his or her decision in writing.'

[21] The second respondent found that the 'Provincial Commissioner's obligation is clear and prescriptive. She is left with no discretion in this regard; she "*must*" record her reasons in writing'[7] and that the 'failure of the Provincial Commissioner to record her reasons in writing is testimony to the failure of her to apply her mind properly to the issue at hand'[8]

[22] In *Judicial Services Commission v Cape Bar Council*[9], the Supreme Court of Appeal, stated:

> '…I cannot see how the inference of an obligation to give reasons can be avoided. It is difficult to think of a way to account for one's decisions other than to give reasons',

then referring to *Bell Porto School Governing Body v Premier, Western Cape*[10], the Court stated further:

> 'The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is a reviewable or not and so may be deprived of the protection of the law'

and then dealt with the purposes for which reasons should be given, by stating that:

[7] At para 98 of the award.
[8] At para 107 of the award.
[9] 2013 (1) SA 170 SCA Case No (2012) ZA SCA 115 at para 44.
[10] 2002 (3) SA 265 (CC) at para 159.

'…These purposes where articulated with admirable clarity by Laurence Baxter - *Administrative Law* (1984) at 228 in the following statement, which was endorsed by Schultz, JA in *Transnet Limited v Goodman Brothers (Pty)* 2001 (1) SA 853 (SCA) (2001 (2) BCLR 176) at para 5:

'In the first place, a duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conductive to public confidence in the administrative decision-making process. Thirdly – and probably a major reason for the reluctance to give reasons – rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal for review. Finally, reasons may self a genuine educative purpose, for example where an applicant has been refused on the grounds which he is able to correct for the purpose of future applications'.[11]

[23] Clearly, the Provincial Commissioner has a duty: to apply her mind to all the information placed before her, in particular the recommendation of the evaluation panel, to exercise the powers in a manner that is not irrational or arbitrary and to furnish justifiable reasons for her decision. In terms of the National Instruction, she was required to provide written reasons for not accepting the recommendation of the evaluation panel; the failure to do so illustrates that she did not apply her mind and acted irrationally and capriciously. Her instruction to the evaluation panel to revisit the recommendation with the scant reasoning that they had not met representivity cannot suffice.

[11] Judicial Services Commission (*supra*) at para 46.

[24] It must be borne in mind that the panel merely replaced the third respondent with the second placed applicant as he was the first African. General M Ncgobo stated that he did not know how the Provincial Commissioner had chosen which post to send back for reconsideration. He furthermore confirmed that the evaluation panel did not consider any equity reports, robots or plans and in fact merely did what the Provincial Commissioner had asked of him.

[25] The second respondent's finding that the procedural failure of the Provincial Commissioner to furnish her reasons in writing demonstrates her failure to apply her mind properly to the issue at hand, therefore, cannot be faulted.

[26] I turn now to the issue of the Employment Equity Plan. Section 20 (1) of the EEA[12] provides that: 'a designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce'; the applicant is such an employer.

In *Munsamy v Minister of Safety and Security and Another*[13], Whitcher AJ, pointed out that:

> 'Employers are obliged to make the workplace equitably representative and may use discriminatory affirmative action measures to do so. An employer may, however, not prefer one group of designated employees over another group of designated employees who are supposedly over-represented in the absence of proper proof of such representativeness and a valid employment equity plan which permits the action of the employer.[14]

and further pointed out that:

> '... where an employer used affirmative action measures to prefer one designated group over another who were supposedly overrepresented, the

[12] The Employment Equity Act 55 of 1998.
[13] (2013) 7 BLLR 695 (LC).
[14] Munsany *(supra*) at para 18.

> employer must prove the following to establish that its conduct was in line with a defensible equity plan: (i) that there was an over-representation of the discriminated group and an underrepresentation of the preferred group in the level of the post in question: this requires the conduct of a proper workplace profile audit; (ii) that the measure is sufficiently coherent and not open to arbitrary application or abuse: (iii) that the measure is permitted by the Act; (iv) an equity plan that permits the disputed measure, either expressly or by clear implication; (v) that the measure is intended to correct inequitable representation in the workplace; and, (vi) that the measure arose out of proper consultations, ie there had been proper consultation on the particular measure.'[15]

[27] In the present matter, no equity plan was placed before the evaluation panel. Ramathoka testified that the equity robots were a simpler derivative of the plan. The applicant was unable to explain, at the arbitration hearing, how, notwithstanding the oversubscription of Indians by 300, the equity robot permitted the appointment of 12 Indians, 6 of which could be Indian males.

[28] Ramathoka explained that the appointment of an Indian male would be made in instances of scarce skills; however, he contradicted the statement by explaining that there had been no bar to Indians been appointed, save that only 6 Indians could be appointed. He was unable to explain that if 12 posts had been allocated to Indian males and females and only 9 of them had been filled by both males and females, why then could the applicant not be promoted to this position given the fact that there were 3 remaining positions still available to Indians, male and female.

[29] Furthermore General M Ncgobo testified that the selection panel was of the view that 6 Indian males could have been appointed and that had been why they had recommended the third respondent.

[15] Munsamy *(supra)* at para 29

[30] In *Gordon v Department Of Health: KwaZulu-Natal*[16], the Supreme Court Of Appeal, stated:[17]

> '…It has been found that measures that are found to be inherently arbitrary and/or irrational cannot be said to have been designed to achieve the objective of the constitutional imperative of equality. The decision in *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T) illustrates this at 480A-D where the court said:
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> > 'I am respectfully in agreement with the learned the judge in the *Public Servants Association*[18] case that a policy or practice which can be regarded as haphazard, random and over-hasty, could hardly be described as measures designed to achieve something. They must indeed be a rational connection between the measures and the aim they are designed to achieve.. .'.

[31] Clearly, the figures and/or targets presented by the applicant, at the arbitration hearing were irreconcilable, contradictory and haphazard. The second respondent correctly found that the lack of explanation for the incongruity of the figures lends itself to the probability that the action of the applicant 'had been arbitrary and had no rational basis'

[32] Furthermore paragraph 8 (d) of the National Instruction 2/2008 provides that 'Applicants should, as far as possible, only be recommended for posts in their career streams so as not to disrupt the core business of the Service'.

[33] General M Ncgobo testified that Ngubo, the incumbent had worked in the charge office and that this promotion would not have been in his career stream. The third respondent on the other hand had been in the position before the advertisement of the post; he scored the highest points of 76.66% being 13% more than the incumbent.

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[16] (2008) 11 BLLR 1023 (SCA) at para18.
[17] *Gordon (supra)* at para 18.
[18] *Public Servants Association of SA and Another v Minister of Justice and Others* 1997 (5) BCLR 577.

[34] Moreover, the evaluation panel believed that the third respondent was not only the best person for the position on merit; it also believed that he would also enhance representivity, based on the equity robots that had been placed before them.

[35] The second respondent, accordingly, correctly found that: 'the decision to substitute the third respondent appears arbitrary and unfair, given that:

138.1. there had been posts allocated to Indian males in the promotional phase,

138.2. that he (the third respondent) had been the most suitable for the position based on the respondent's (applicant's) own selection panel's scoring and

138.3. that he would have enhanced other core values and goals of the respondent, such as service delivery.'[19]

[36] The applicant, in it's heads of argument, submits that by 'directing the employer to promote the third respondent, the second respondent effectively usurped of the power of the National Commissioner of Police and her decision accordingly falls to be reviewed and set aside'. I do not agree with these submissions.

The Supreme Court of Appeal in *Solidarity obo Barnard v South African Police Service*[20], stated:

> 'It is safe to assume that the interviewing panels are constituted to serve a purpose. They are a management tool, comprised in the present case of senior police officers to be of assistance to the National Commissioner when he makes a final decision on whether to fill a vacancy. Thus, one can conclude

[19] At para 138 of the award.
[20] (2014) 2 BLLR 107 (SCA).

> that even though he is not bound by a panel's evaluation and recommendation, the National Commissioner must at the very least give consideration to and engage with what is put before him by them. He discounts relevant and material factors at his peril, rendering him liable to legal challenge.'[21]

In *Naidoo v Minister of Safety and Security and Another*[22], the court stated:

> 'Whilst acknowledging the management prerogative this court would nevertheless interfere with a decision made by a functionary if it is proved that the decision maker acted irrationally, capriciously or arbitrarily, was actuated by bias, malice or fraud or failed to apply his or her mind or unfairly discriminated. The Labour Relations Act 66 of 1995 requires employers to treat employees fairly when they apply for promotions and in this regard section 186 (2) is relevant'[23]

The applicant's argument that the second respondent usurped the National Commissioner's powers is clearly misplaced.

[37] In the light of the above, I am satisfied that the second respondent applied her mind objectively to the issues before her, carefully considered all the evidence before her and arrived at a well reasoned award. The outcome is not one which a reasonable decision maker could not reach; there is therefore no reason for this court to interfere with the award.

[38] In view of the findings of this Court on the merits of this matter, I see no point in granting the application for the condonation of the late filing of the review papers. The review application therefore falls to be dismissed.

[39] Insofar as the issue of costs are concerned, I see no reason why the costs should not follow the result.

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[21] *Solidarity (supra)* at para 60.
[22] (2013) 5 BLLR 490 (LC).
[23] *Naidoo (supra*) at paragraph 70.

Order

[40] I therefore, make the following order:

40.1. The application for the condonation of the late filing of the review application is dismissed;

40.2. The application for the review of the award is dismissed;

40.3. The arbitration award issued by the third respondent under the auspices of the first respondent dated 16 March 2012, under case number PSSS156-10/11 is made an order of court.

40.4. The applicant is ordered to pay the costs of this suit.

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Harkoo, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate C M Ndala

Instructed by: State Attorney (KwaZulu-Natal)

For Respondent: Advocate S Van Vollenhoven

Instructed by: R Ramdayal Attorneys