IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT: BRAAMFONTEIN

Case No: JR868/10

Reportable

In the matter between

PSA obo M P TLOWANA **Applicant**

and

MEC OF AGRICULTURE **Respondent**

Heard: 24 February 2012

Delivered: 24 February 2012

Summary: Review of an award - the third respondent seriously misdirected himself and therefore committed a gross irregularity.

JUDGMENT

CELE J

[1] The applicant seeks to have an arbitration award dated 1 March 2010 issued by the third respondent under the auspices of the second respondent reviewed, set aside and substituted in terms of section 158(1) (g) of the Labour Relations Act[1]. During the presentation of this matter, and in the event of the applicant being successful, an option that the matter be remitted to the second respondent was tabled. It has been conceded by both representatives that there is no longer any need for such remittal by this Court because all the evidence is before it.

[1] Act Number 66 of 1995.

[2] The first respondent opposed this application in its capacity as the employer of the applicant's member, that is Mr Tlowana who is the employee in this case and I will also be referring to him as such. At the commencement of this hearing, a condonation application for the late filing of the employee's answering affidavit was dealt with and condonation was granted, albeit reluctantly by Court. Mr Tlowana commences employment with the first respondent some time in 1998. In July 2005, he held the position of an Assistant Director.

[3] On 22 July 2005, the first respondent advertised the position of a Manager Cooperate Services: Sekhukhune. It was one of the posts advertised for five areas. The employee applied for the Sekhukhune post together with a number of other people including the fourth respondent. In the list of recommendations, he was no. 1 while the fourth respondent was no. 2. There was a differential margin of about 2% between the two of them. The interviewing panel recommended his appointment.

[4] The first respondent appointed the fourth respondent instead. The employee was aggrieved by his non-appointment and assisted by his union, he referred an unfair labour practice dispute relating to promotion. The matter was arbitrated upon and the award was issued in favour of the first respondent. The employee successfully applied for the review and setting aside of that arbitration award and the order of this Court remitted the matter to the second respondent for a *de novo* arbitration hearing before a different Commissioner or Arbitrator. It so happened that I was the Judge seized with the matter at the time.

[5] In the meantime, the fourth respondent successfully applied for a horizontal transfer from the contested post to another. The first respondent re-advertised the contested post which then had become vacant. Again the employee applied for the post. He was recommended for and finally appointed at that post. He sought compensation for the delayed appointment. He referred an unfair labour practice dispute relating to promotion for conciliation. Conciliation failed to resolve it. He referred it to arbitration and he then came before the third respondent in

this case. The third respondent in the arbitration award issued, found no fault on the part of the first respondent and dismissed the referral.

[6] The applicant union has then assisted the employee in filing this review application. A number of grounds for review have been outlined by the applicant as they appear on pages 281 onwards of the pleadings. From these, it is clear that the attack here is based on the submission that the third respondent committed a gross irregularity in the conduct of the arbitration proceedings in that:

- He misdirected himself in relation to the whole nature of the inquiry or his duties connected there with.
- He committed such a misdirection that culminates cumulatively to a failure of justice or that is so fundamental as to vitiate the award.
- He showed lack of understanding of the issues before him and as such he could not identify where the issues lay.
- The Arbitrator failed to deal with the substantive merits of the dispute.

[7] I think for purposes of my judgment, I will just limit the probe into these grounds. I have obviously applied my mind to the rest of the other considerations.

[8] During the arbitration hearing, the issues in dispute were wider than they are now. The applicant had challenged the applicability of the Employment Equity Act (EEA)[2] in relation to the advertisement as the advertisement made no mention of the applicability of the EEA. The Commissioner dealt with all of these issues. I need not revisited them and to the extent that any attack is made on the applicability of the EEA, the decision reached by the third respondent appears to me to be reasonable and without a defect.

[9] What remains for the decision of this Court is how the fourth respondent

[2] 55 of 1998.

was appointed, and therefore how the EEA was applied. Evidence tendered by the employee was that the fourth respondent was not equipped with the knowledge of the Persal system. The Persal system was listed as a requirement for any candidate who wanted to apply for the post in question. The employee made an allegation in his testimony that the short-listing process involved the picking up of people that were favoured even though they did not meet the set requirements.

[10] The issue before me is whether in appointing the fourth respondent the first respondent acted rationally and applied its mind appropriately to the considerations that were essential in applying the provisions of the EEA. I must therefore at this stage express my gratitude to the submissions that have been made on behalf of the applicant by Mr Desai. The heads of argument that have been handed in are very relevant to the issue or the probe in question. I am looking at the decision in *Minister of Finance and Another v Van Heerden,*[3] [where Moseneke J had the following to say:

> 'The provisions of section 9(2) do not prescribe such a necessity as test because remedial measures must be constructed to protect or advance a disadvantaged group. They are not predicated on a necessity or purpose to prejudice or penalise others, and so require supporters of the measure to establish that there is no less onerous way in which the remedial objective may be achieved. The prejudice that may arise is incidental to but certainly not the target of remedial legislative choice.'

Further in that decision the following appears:

> 'This substantive notion of equality recognises that besides uneven race, class or gender attributes of our society there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and prevent the creation of new patents of disadvantage. It is, therefore, incumbent on courts to scrutinise in each equality claim the situation of the complaints in society, their history and vulnerability, the history, nature and purpose of

[3] [2004] 12 BLLR 1181 (CC) para 43.

> the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of values of our Constitution.'[4] [Footnote omitted]

[11] What follows from this case is that when affirmative action is applied one should not act irrationally as there are guiding principles that must be followed. In *South African Police Services v Zandberg,*[5] Pillay, J had the following to say:

> 'Opening the post to all groups does not mean that a higher standard applies when assessing suitability and merits for posts for non-designated groups than when posts are restricted to designated groups. Applying a higher standard for non-designated groups implies that a lower standard is use to appoint persons from designated groups. By implication less suitable and less meritorious people fill posts reserved for designated groups. That cannot be the intention or the letter and spirit of the EEA. Equality means fairness and justice, to the candidate and to the people they serve. Fairness and justice cannot prevail if candidates who are less than best, who are less suitable and less meritorious are appointed.'

[11] In *Stoman v Minister of Safety and Security,*[6] the following appears:

> 'I am respectfully in agreement with the learned Judge in the *Public Service Association* case that the police or practice which can be regarded as haphazard, random and overhasty, could hardly be described as measures designated to achieve something... In order to honour constitutional ideas and values, and to strive to truly move towards the achievement of a substantive equality, proper plans and programs must be designed and put into place. Mere random and haphazard discrimination would achieve very little, if anything, and might be counter-productive.'

[12] There are various other relevant decisions that pertain to the consideration that should be put in place when an affirmative action

[4] *Van Heerden* at para 27.
[5] [2010] 2 BLLR 194 (LC) at para at 198 E-G
[6] 2002 (3) SA 468 (TPD) at 480 A-D

stance is taken. See in this respect *Department of Correctional Services v Van Vuuren* [1999] 11 BLLR 1132.

[13] I return to the facts that are before me and in that process, I need to investigate whether the appointment of the fourth respondent was or was not done in some haphazard, random or overly hasty manner. It had become common cause that the fourth respondent was not equipped with one of the essential requirements that were listed in the advertisement. It is clear therefore that even the fact that she was short-listed was an attribute belonging to a haphazard and random manner. However, at the stage when the Minister concerned had indicated that she wanted to have affirmative action taken, appropriate steps had to be taken to ensure that rationality prevailed in the selection of a proper candidate. The formula adopted or proposed by the Minister after she had deliberation with the panel or panellists was that a female person who was listed as member 2 in any of the five posts, who had a differential of 2 or less than 2 had to be preferred. That was not irrational. It was a formula that was well conceived. The problem is that someone who had no ability to work with Persal system had escaped detection in an earlier stage. The fourth respondent was not supposed to have been short-listed in the first place because she did not meet the very minimum requirements.

[14] That had prejudicial effects on the member of the applicant. Had she been discounted under the post at Sekhukhune, the applicant stood a great chance to be appointed. A female might have been found in another of the five regions, such as in the Capricorn region where there is a female who is no. 4. It could probably happen that there might have been a way of accommodating that female if she had all the prerequisites.

[15] Clearly therefore, when the third respondent was invited to apply his mind to the material evidence that suggested that the fourth respondent was not properly selected, the third respondent seriously misdirected himself and therefore committed a gross irregularity.

[16] The arbitration award in this case therefore cannot stand. I am entitled to intervene by reviewing it and by setting it aside and in so doing I am called upon to substitute and say that the member of the applicant, in this case Mr Tlowana, deserved to have been promoted from the date on which the fourth respondent was appointed. The amount of compensation to which he is entitled is the same as was testified to during the arbitration hearing. I believe there is no issue about that because this was never raised as an issue. The applicant has been successful. I do not want to dissuade people from coming to this Court. I have no reasons to award a costs order against the first respondent, and therefore:

1. I order the first respondent to compensate Mr Tlowana to the extent claimed by him.

2. The respondent has to pay interest but that interest must be paid from today. So to the extent that the payment will remain outstanding it must be calculated from today's date.

3. The payment is to be made within 30 days from the date of this order.

4. No costs order is made.

5. I remind the first respondent's representative that there is a costs order awarded against them for the condonation application.

_____

Cele J.

Judge of the Labour Court

APPERANCES:FOR THE APPLICANT:

FOR THE FIRST RESPONDENT: