



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT PORT ELIZABETH)

CASE NO.: PA 1/11

Reportable

In the matter between:

GEORGE NOONAN

(Third Respondent in the Court *a quo*)
and

Appellant

**SAFETY & SECURITY SECTORAL
BARGAINING COUNCIL**

(First Respondent in the Court *a quo*)

First Respondent

JOHN C ROBERTSON N.O.

(Second Respondent in the Court *a quo*)

Second Respondent

MINISTER OF POLICE

(Applicant in the Court *a quo*)

Third Respondent

Heard: 01 March 2012

Delivered: 01 June 2012

CORAM: TLALETSI JA, NDLOVU JA, LANDMAN AJA

Summary: Appeal against a refusal to review an arbitration award. Employer failing to comply with obligation to check application form of rival applicant for promotion. This failure causing procedurally unfair promotion process. Appellant not proving he would have been

promoted but for the procedural unfairness. Appellant compensated for unfair procedure.

JUDGMENT

LANDMAN AJA:

1. Captain George Noonan, the appellant, appeals against the whole of the judgment delivered by the Labour Court (Cheadle AJ) dated 27 October 2010, which set aside an award of the Second Respondent and substituted it with an order that “The referral of the dispute is set aside with no order as to costs”.

The background

2. The South African Police advertised Post 1436, Section Head: Evaluation Services (with rank of Superintendent).
3. The appellant, Captain (now Superintendent) V P Matshaya (“the third party”), Capt Landu and others, applied for the post.
4. The selection panel sat on 28 October 2004. The panel ranked and recommended for promotion, in order of preference: the third party, the

appellant and Landu. The third party was subsequently appointed to the post and promoted to Superintendent with effect from 1 December 2004.

5. The appellant referred a dispute in terms of s 194 of the Labour Relations Act 66 of 1995 to the Safety and Security Sectoral Bargaining Council, the first respondent. Commissioner Maepe conducted the arbitration proceedings and handed down an award, dated 4 April 2006. He ordered the “protected promotion” of the appellant to the rank of Superintendent.
6. The Minister of Safety and Security (now the Minister of Police, the third respondent), to whom I shall refer as “the Minister”, launched a review application in respect of Maepe’s award. The appellant and the Minister agreed that Maepe’s award should be reviewed because the third party had not been joined in the arbitration proceedings.
7. The third party was joined. The dispute was subsequently set down for arbitration *de novo* before the second respondent on 20 November 2006.
8. The second respondent issued an award dated 16 August 2008. He found that the third respondent committed an unfair labour practice against the appellant and awarded the appellant promotion.
9. The Minister launched a review application to set aside the second respondent’s award.
10. The court *a quo* set the award aside. Hence this appeal with leave of the court *a quo*.

The award

11. In view of the narrow compass upon which the appeal was argued the following summary of the award will suffice:

(a) The third party received a verbal warning, which was still valid when he submitted his application for the post. The third party failed to disclose it and in fact indicated that he had not been convicted of any disciplinary offences during the period of his current rank or post level;

(b) The third party's failure to disclose his prior disciplinary record resulted in the selection panel not being able to apply its mind to the integrity and suitability of the third party;

(c) The selection panel's failure to apply its mind to this aspect (suitability of the third party on the grounds of his prior disciplinary record), whether intentional or not, rendered its recommendation of the third party invalid;

(d) The fact that the National Commissioner condoned the third party's failure to include his verbal warning in his application did not affect the action or conduct of the SAPS *vis-à-vis* the appellant in relation to his application for promotion. The condonation was, in any event, *ex post facto* the incident complained of by the appellant;

(e) Had the true circumstances been known to the selection panel at the time, it would have rejected the third party's application and the appellant would have been afforded a proper and fair opportunity to advance his candidature on the basis of his application;

(f) Had the panel been aware of the true situation it would have recommended the appellant as the number 1 choice and the National Commissioner in due course would have appointed the appellant to the post in question; and

(g) SAPS committed an unfair labour practice relating to promotion in not promoting the appellant to the position of Section Head: Evaluation Service (post 1436), which prejudiced him in his career progression within the SAPS.

12. The Arbitrator went on to make the following award:

1 *The conduct of the employer (South African Police Service by way of its authorised representatives) in failing to promote the employee (Capt. G Noonan) to the rank of Superintendent (level 9) in the post of Section Head: Evaluation Services (post 1436) with effect from 1 December 2004, constitutes an unfair labour practice relating to promotion as envisaged in Section 186 (2) of the Labour Relations Act No. 66 of 1995.”*

2 *The employer is ordered:*

2.1 *To promote the employee to the Rank of Superintendent (level 9) at the Station where he is currently posted, on the same terms and conditions as the employee would have enjoyed had he been promoted on 1 December 2004 and to amend the employee’s service record accordingly.*

2.2 *Pay the employee, subject to lawful deductions for tax, in an amount equivalent to the difference in quantum of salary,*

benefits and perquisites which he actually received during the period of 1 December 2004 to the date of this award and the quantum of salary, benefits and perquisites that he would have received had he been promoted to Superintendent (level 9) on 1 December 2009 to date of this award.

- 3 *The employer must complete 2 above within 30 days of the date of this award.*
- 4 *No order is made against the 3rd Party (Superintendent V Matshaya).*
- 5 *Interest is payable as provided for in Section 143 (2) of the Labour Relations Act No. 66 of 1995 on the amounts referred to in 2 above.*
- 6 *There is no order as to costs.*

The review application

13. The grounds (a curious mix of statements, opinion and complaints) upon which the Minister sought to review the award may be summarised as follows:

- (a) The award was not rational or justifiable in relation to the reasons given for the findings or the documentary or oral evidence placed before the Arbitrator.
- (b) The evidence before the Arbitrator was that both the appellant and the third party were promotable and had met the requirements of the post and furthermore that the manner in which the applications were evaluated was not challenged and indeed was accepted to be fair.

- (c) It was not in dispute that the National Commissioner had the final decision to approve or reject the recommendation of the selection panel and further it was not disputed that, despite the non-disclosure of the previous conviction by the third party, this was condoned by the National Commissioner as he was empowered in terms of paragraphs 15(2), (3) and (4) of NI 1/2004.
- (d) There was no evidence that the appellant would have been promoted but for the non-disclosure. The Arbitrator's finding was not in itself sufficient to support the grant of the relief contained in the award. The appellant had to prove that but for the non-disclosure or false information, he would have been appointed to the post or that there was a causal connection between the act complained of and the prejudice suffered.
- (e) In terms of NI 1/2004, the National Commissioner is not obliged to promote the next candidate if it is found that the recommended candidate is unavailable for promotion for whatever reason and has the discretion to either re-advertise the post or to appoint any of the recommended candidates.
- (f) The Arbitrator, by appointing the appellant usurped the powers of the National Commissioner and therefore exceeded his powers.
- (g) The Arbitrator did not apply his mind to all the material placed before him; alternatively took into consideration irrelevant factors in arriving at his decision. An Arbitrator should regard promotion as an area of managerial prerogative unless bad faith or improper motives are present, which were neither alleged nor proved by the appellant. It is insufficient for a complainant to allege that he was the better candidate compared to the successful candidate, he must in addition, prove that he was better than any of the other candidates applying for the job.

- (h) The evaluation of candidates for promotion is not a mechanical or mathematical one and it is quite possible that the assessment of candidates and the resultant appointment will not always be the correct one. However, in the absence of gross unreasonableness which leads to the inference of *mala fides* arbitrators should be hesitant to interfere with the exercise of management's discretion.
- (i) It is insufficient for a complainant to say that he or she is qualified by experience, ability and technical qualifications; he or she must also show that the decision to appoint someone else in preference to him or her was unfair. If the employer's decision to appoint another candidate is rational, no question of fairness can arise. Ultimately the finding of the Arbitrator leads one to conclude that the decision is so unreasonable that no reasonable decision maker could have arrived at such decision and therefore stands to be reviewed and set aside.

The judgement

14. The judgment of the court a quo can be summarised as follows:

- (a) There is no right to promotion in the ordinary course; only a right to be given a fair opportunity to compete for a post.
- (b) Any conduct that denies an employee an opportunity to compete for a post constitutes an unfair labour practice.
- (c) If the employee is not denied the opportunity of competing for a post then the only justification for scrutinising the selection process is

to determine whether the appointment was arbitrary or motivated by an unacceptable reason.

- (d) 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.
- (e) As a general rule the appropriate remedy is to refer the decision back in order to allow the complainant a fair opportunity to compete. The exception being where there has been discrimination or victimization and there are compelling constitutional interests at stake or if the applicant proves that but for the unfair conduct, he or she would have been appointed.

The nub of the appeal

15. Mr Grobler, who appeared for the appellant, in the course of developing his submissions:

- (a) conceded that, even if the third party was notionally thought away from the competition, the appellant could not show that he would have been promoted to the post and rank in question.
- (b) conceded that the relief awarded by the second respondent should be confined to compensation and that the compensation should be limited as prescribed by s 194(4) of the LRA.

(c) confined his challenge to the court *a quo's* approach that, only if the procedural unfairness is such that it denies an applicant a fair opportunity to compete, should the appointment be set aside.

(d) relied *only* on the third party's non-disclosure of his disciplinary sanction as his contribution to the unprocedural fairness of the process.

Evaluation

16. The National Commissioner, as he was entitled to do, decided that the selection process for the post would be done without the need to conduct interviews (a so called "Paper Board"). See clause 9(1) of the National Instruction. Subsequent to the appearance of the advertisement the following steps were followed:

- (a) Several applications for the post were received.
- (b) The HR department verified the contents of the applications.
- (c) The panel consisting of Assistant Commissioner Novuka (chair), Senior Superintendent Kunto and Superintendent O Meyer convened.
- (d) The secretary, who was not part of the panel, read out the application forms one by one to the panel.
- (e) A short list was agreed upon. The appellant, the third party and Captain Landu were shortlisted.
- (f) The applications that were shortlisted were read to the panel.
- (g) Each candidate was scored immediately after it had been read.
- (h) The third party scored the most marks. The appellant scored the next highest marks. But the marks were only part of the evaluation.
- (i) The panellists did not view the applications before the process was concluded.
- (j) No minutes were kept of the proceedings.

- (k) The panels submitted a list of three for appointment. The third party, was placed first on the list, the appellant second with Captain Landu third.
- (l) The National Commissioner subsequently appointed the third party to the post.

The fairness of the process

17. It is common cause that the third party had received a verbal warning which was valid at the time he submitted his application for the post. It is also common cause that the third party failed to disclose this in his application. He indicated, as the second respondent correctly observed, that he had not been convicted of any disciplinary offence during the period of his current rank or post level.

18. The National Instruction deals with the case of an employee who has a disciplinary conviction and wishes to apply for promotion in this way:

Clause 12(3) provides that:

“Employees against whom department or criminal investigations are pending and employees who have been convicted of any criminal offence or at a disciplinary hearing during the period in which they have been holding their present rank, may apply for *advertised posts* and their applications must be considered and the panel must pay due regard to the merits or seriousness of the case(s).”

And clause 15(3) provides that:

“An employee against whom an investigation (departmental or criminal) is pending, and an employee who has been convicted of any criminal or disciplinary action during her or his service in the present rank, must include full particulars of the investigation(s) or conviction(s) in her or his applications. Failure to disclose this information may result in the

withdrawal of promotion of such employee. The same applies to an employee who provided false information in her or his application.”

19. The effect of this is that an employee, such as the third party, is at liberty to apply for the post. But he was obliged to disclose an applicable disciplinary conviction.

20. In terms of the National Instruction the existence of a criminal conviction or a conviction of a disciplinary infraction is linked to the concept of “suitability” for the post. This is stressed in clauses 1, 6(1), 7(3)(c), 9(3), 9(10), 10(2)(f), 12(1)(f), 13(10)(b) and 15(2).

21. Suitability is defined in clause 1 of the National Instruction as:

“Suitability of an employee to function effectively at the next higher post level and may be affected by previous findings of misconduct against the employee, previous convictions of the employee or pending investigations into misconduct or criminal offences allegedly committed by the employee.”

22. The requirement of “suitability” arises at three stages of the promotion process.

- (a) Prior to the consideration of an application.
- (b) In the consideration of the application.
- (c) After approval of promotion.

(a) Prior to the consideration of an application.

23. Suitability as defined is so important that it must be established before an application is considered. Clause 9(3) reads:

“A panel must be satisfied that an application complies with the requirements referred to in paragraph 7(2), before the application is considered. If an application does not comply with the said requirements, the application must be rejected.”

Clause 7(2) refers to clause 6(1). Clause 6(1), *inter alia*, requires that every applicant must before or on the closing date for an advertised post be suitable for that post.

(b) In the consideration of the application.

24. Clause 9(10) requires that:

“A panel must be satisfied that a recommended candidate complies with the requirements for promotion as stipulated in paragraph 6(1) and that the candidate is suitable for promotion to the post.”

25. If no interviews are conducted, only information contained in candidates' applications may be considered by the panels. Personal knowledge of a candidate by members of the panel may not be taken into account to favour or prejudice a candidate. And: “all applications must be evaluated against the criteria in paragraph 12”. See clause 10(1) of the National Instruction. Clause 12(1) in turn requires that:

The selection of a candidate must be based on the following criteria:

- (a) Competence based on the inherent requirements of the job or the capacity to acquire, within a reasonable time, the ability to do the job;
- (b) Prior learning, training and development;
- (c) Record of previous experience;
- (d) Employment equity in line with the Employment Equity Plan of the relevant business unit;

- (e) Evidence of satisfactory performance;
- (f) Suitability; and
- (g) Record of conduct.

(c) After approval of promotion

26. Finally the approval of a promotion is conditional and a promotion will only become effective, after compliance with the following requirements:

- “(a) receipt of a letter by the employee stating that she or he
 - (i) accepts the promotion to the post offered to her or him,
 - (ii) has no personal or other circumstances which may adversely effect her or his ability to function in the post offered to her or him,
 - (iii) has declared all convictions during the period of her or his present rank and pending criminal or disciplinary cases or actions, and
 - (iv) is able to render services for at least 24 months in the higher post;
- (b) receipt of a certificate by the commander of the employee stating that the employee is still suitable for promotion in all respects, and
- (c) the employee taking up the specific post offered to her or him within the time period specified by the National Commissioner. See clause 13(10) of the National Instructions. (My emphasis.)

27. The second respondent took the view that the third party's failure to disclose his disciplinary sanction was unfair. He accepted the evidence of Meyer. Meyer had been a panellist. He was called by the Minister. He expressed the view that the third party's application would have been disregarded by reason of the non-

disclosure and that had the panel been aware of the true situation it would have recommended the appellant as the number 1 choice.

28. The court *a quo* criticized the second respondent for relying on Meyer's evidence to decide a question of law and then for failing to find that clause 13(10) allows for condonation of the lapse after disclosure and after the candidate has had an opportunity to make representations. The court *a quo* pointed out that the National Commissioner also has the power to condone such a lapse. The court *a quo* was also of the view that to deny an applicant who had a relevant disciplinary sanction, such as the third party, an opportunity to compete would constitute an unfair labour practice.

29. Although the second respondent may have relied on Meyer's evidence as regards a question of law, clause 9(3) requires the first selection panel to be satisfied that an application complies with the requirements referred to in paragraph 7(2), before the application is considered. If an application does not comply with the said requirements, the application must be rejected.

30. In this case a verification process was not undertaken by the selection committee. The verification process was conducted by the HR department but it did not discover the non-disclosure.

31. Meyer's evidence becomes important because he testifies what the panel would have done had it known of the non-disclosure. Mr Gqamana, who appeared for the Minister, submitted that this was Meyer's own opinion. It may be an opinion but it is the opinion of a panellist who was called by the Minister and who was not challenged as a hostile witness.

32. The second arbitrator formed the view that he was entitled to invalidate a decision of the National Commissioner. The National Commissioner could

condone a non-disclosure in terms of the National Instruction. The National Commissioner condoned the third party's lapse by letter dated 1 June 2007 ie some three and a half years after the promotion became effective. Even if the National Commissioner could condone the lapse (which the third party did not explain to the second respondent) it does not have the effect of condoning any procedural or substantive unfairness of the selection process.

33. The court *a quo's* view is that if the third party's application was rejected without being considered, he would be denied the right to compete and this would constitute an unfair labour practice. This view is based on clause 12(3). But it is only an applicant who discloses his or her criminal convictions or disciplinary sanction that may be considered. Where an applicant does not make disclosure that applicant is acting unfairly, and is not entitled to rely on clause 12(3).

34. The effect of the third party's non-disclosure is that the panel, which in the first instance must be informed of the disciplinary infraction, was unaware of it and therefore could not evaluate its seriousness in the context of the requirements for the post in question.

35. A further effect of the non-disclosure is that the other shortlisted candidates were competing against a candidate who had possibly entered the contest illegitimately. I say possibly because without disclosure and without an evaluation of the disciplinary sanction as required by the instruction it cannot be said whether the third party would have been shortlisted or selected as one of the three candidates.

36. The court *a quo* took the view that the unfairness of the non-disclosure and its consequences were not material unless it affected the opportunity for promotion which it held was not the case here.

37. This approach overlooks several aspects. The first is that there was no disclosure by the third party at all. The second is that the National Commissioner condoned the failure after the appointment was made. The third is that it downplays the value of process and lends support to possible dishonest practices. Fourthly it devalues the role of the first selection panel. And importantly it prejudiced the appellant as he would possibly have been ranked first on the list of recommendations.

38. Mr Gqamana submitted that the court *a quo* correctly held that the ranking of the candidates recommended for the post was irrelevant. He pointed to the National Instruction which states that no one has a right or expectation of promotion and that the highest scoring candidate too has no such right. See clause 3(3) of the National Instruction.

39. Mr Grobler submitted that whilst the National Instruction allows the National Commissioner to appoint any of the recommended candidates (or indeed to re-advertise the post) it does not follow that the preference ranking has no relevance or importance. The National Instruction requires the National Commissioner to justify the appointment of a candidate other than the recommended candidate (first ranked candidate). See clause 12(5) of the National Instruction.

40. It is true that the National Commissioner and not the first selection panel makes the appointment but the structure of the National Instruction confers upon the first selection panel important duties, inter alia, to select the most suitable candidate. See clause 9 of the National Instruction.

41. Where an applicant incapacitates the first selection panel from performing its task he or she defeats the purpose of having a first selection panel and illegitimately advantages himself or herself. And, of course, disadvantages the other candidates.

42. Not only this, but the non-disclosure enables the non-disclosing candidate to rise through the process to a stage where the National Commissioner is able to condone the lapse. This is manifestly unfair. Every applicant is obliged to apply his or her mind carefully to the application form and to complete it honestly and diligently so as to compete fairly with other candidates.

43. The remaining question is whether the South African Police Service is any way responsible for the consequences of the third party's omission and its unfair effect on the promotion process.

44. The system, as contemplated in the National Instruction, is that applications for promotion, requires that:

(a) A commander must verify the information in the application of an employee under her or his command and must certify the information to be correct. Clause 7(6).

(b) A commander must, inter alia, ensure that a candidate has declared all pending investigations or undeleted disciplinary convictions in her or his present rank. Clause 7(7).

45. The third party's commander certified his application but clearly the commander did not properly verify the correctness of all the information. This omission constitutes the causal connection between the third party's omission and SAPS's responsibility for the unfairness of the process.

46. In the result, I am satisfied that the second respondent's finding that the SAPS had committed an unfair labour practice in relation to the promotion practice involving the appellant was one which a reasonable decision maker could have made.

Compensation

47. The appellant must be compensated for the procedural unfairness. Instead of competing on equal terms he was competing against a candidate whose handicap would be later revealed; but not by himself. Compensation must be fair and equitable and not exceed twelve months remuneration. I am of the view, taking all the circumstances into account, including the extent of the breach of the rules of fairness, that nine months compensation would be fair and equitable.

Costs

48. Costs should follow the result as there is nothing exceptional about the legal issues or the application of the law to the facts.

Order

49. The following order is made:

[1] The appeal is upheld to the extent that paragraph 67.1 of the order of the court *a quo* is altered to read:

1. "The award of the second respondent is reviewed and amended to read:

1. *The conduct of the employer (South African Police Service by way of its authorised representatives) regarding the promotion process concerning the employee (Capt. G Noonan) to the rank of Superintendent (level 9) in the post of Section Head: Evaluation Services (post 1436) constitutes an*

unfair labour practice relating to promotion as envisaged in Section 186 (2) of the Labour Relations Act No. 66 of 1995.

2. *The employee is entitled to compensation for procedural fairness.*
3. *The employer is ordered to pay the employee, within 30 days of the date of this award, an amount of compensation equivalent to nine months remuneration payable to the employee as at 1 August 2008 being the date of the award.*
4. *No order is made against the 3rd Party (Superintendent V Matshaya).*
5. *Interest is payable as provided for in Section 143(2) of the Labour Relations Act No. 66 of 1995 on the amount referred to in 3 above.*
6. *There is no order as to costs.”*

[2] The third respondent is to pay the costs of the appeal.

Landman AJA

I agree

Tlaletsi JA

I agree

Ndlovu JA

Appearances:

For appellant: Adv M Grobler instructed by Chris Unwin
Attorneys

For third respondent: Adv N Gamana instructed by the State Attorney

LABOUR APPEAL COURT