REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1682/08

In the matter between:

SOUTH AFRICAN POLICE SERVICES **APPLICANT**

AND

SAFETY AND SECURITY SECTORIAL

BARGAINING COUNCIL **First Respondent**

R. MOLETSANE N.O. **Second Respondent**

CAPTAIN M.S. MONYAKENI **Third Respondent**

Heard: **22 DECEMBER 2011**

Delivered: **20 JANUARY 2012**

Summary: Review proceedings – Application to review and set aside the arbitration award made by the Second Respondent on 19 June 2008 in which the Second Respondent awarded compensation against the Applicant based on an unfair labour practice. One cannot in a piecemeal manner only record the aspects that appease you and that fit in with the outcome you want to reach. An arbitrator is a finder of fact and must diligently search for the facts hidden amongst perceptions of parties. In the event, like in this case, where the facts have been recorded haphazardly and no proper factually based reasoning was proffered as

to why certain very relevant evidence, constitutes a gross irregularity committed by the author of the award. Award reviewed and set aside- award substituted - No Unfair Labour Practice was committed.

JUDGMENT

SWANEPOEL AJ

Introduction

[1] This is an application to:

1.1 Review and set aside the arbitration award issued by the Second Respondent on 19 June 2008 under case number PSS 830/06/07.

1.2 Refer the matter back to the First Respondent to be heard afresh by another arbitrator than the Second Respondent.

1.3 Cost if opposed

1.4 Further and/or alternative relief.

[2] The Third Respondent opposed the relief sought and requested that the matter be dismissed with costs.

The facts

Applicant's submissions

[3] The Third Respondent applied for an internally advertised post on 13 September 2006 for the position of Assistant Director: Social Services – Disability Management (post 6000 level 10). The requirements were listed as follows:

1. Registered as a Social Worker with the SA Council for Social Services Professional and receipt for paid-up registration fees (2006),

2. Recognised BA degree or equivalent qualification in Social Work,

3. Managerial/project management experience in the field will be an advantage (*Sic).*

4] The core functions:

1. Participate in policy, project planning, international liaison and research programmes regarding disability issues,

2. Executive middle and senior management responsibilities when nominated to do so,

3. Co-ordinate Disability Management Programmes,

4. Evaluate and co-ordinate feedback received from Provinces,

5. Assist management in the implementation of the disability management strategic plan.

[5] On 20 October 2006, an Evaluation Panel to entertain the Post Promotions Phase 2: Level 2-12 2006/2007 applications, chaired by Assistant Commissioner N.C. Nomoyi was convened.

[6] The minutes indicate that for Post 6000, 6 applications were received of which 1 was disqualified. Two were not recommended and three others were shortlisted. The Third Respondent was recommended. It is recorded in the minutes that the panel, together with the chairperson agreed to all the recommendations because they fell within the requirements with the Equity Profile of Personal Services.

[7] On 2 November 2006, the Divisional Evaluation Committee Meeting[1] was conducted. This meeting was chaired by Divisional Commissioner Stander. The purpose of it was to consider the recommendations made by the Evaluation Panels for the aforementioned posts. The chairperson informed the meeting that the minutes kept by the Evaluation Panel did not conform to the requirements since the details of the first three candidates as well as their scoring was not indicated. Stander also stated that the minutes were not in

[1] Referred to as the Divisional Panel by the Second Respondent, but for the sake of correctness, I will refer to it as set out here whenever I do not quote the Second Respondent.

line with the Employment Equity (EE) targets of the division as well as of the Component and the operational environment was not taken into account. He therefore ruled that the minutes would be ignored and that it would be replaced by the Divisional Evaluation Committee Meeting's minutes.

[8] When the recommendations for Post 6000 were considered by this Divisional Evaluation Committee Meeting, it noted that the Third Applicant scored 73.3% whilst the other two candidates scored 60% each. The decision of the latter was to re-advertise the position since the short listed candidates had little or no experience in the core functions of the post advertised. (The Third Respondent had been employed by the Applicant for some six months at the time.)

[9] The Critical Analysis for Personelle Services for the period 1 October 2006 – 31 December 2006 indicated an under-representation of 21 African males in salary levels 9 – 10 existed.

[10] The post was re-advertised externally and Superintendents Gerber, a White woman and Ryan, a Coloured woman, were appointed in the vacant positions. (This was however, an external advertisement, which meant that another circular and policy – 6/2005 regulated the process.)

[11] The Third Respondent referred an Unfair Labour Practice dispute to the First Respondent. (His referral had nothing to do with the appointments supra. His dispute related to the post-promotion phase where he was recommended by the Evaluation Panel but not by the Divisional Evaluation Committee Meeting was irregular. He intimated that his recommendation should have been referred to the National Commissioner by the Evaluation Panel and should not have been considered or blocked by the Divisional Evaluation Committee Meeting.)

<u>The Arbitration process and award</u>[2]

[2] In this part of the judgment, I am quoting the facts as contained in the award. Where the evidence I consider relevant was not quoted by the Second Respondent I will elaborate on the omitted evidence presented to him during my evaluation of the evidence.

[12] The Third Respondent testified that he met all the requirements for the post as prescribed by the National Instruction 1 of 2004.

[13] He stated that the recommendations of the Evaluation Panel should have been sent to the Nation al Commissioner for consideration as prescribed by the National Instruction and the Directives of the National Commissioner's office.

[14] He should have been appointed by the National Commissioner because he was a suitable candidate.

[15] The Divisional Evaluation Committee Meeting did not have the right to reject the recommendation of the Evaluation Panel.

[16] Senior Superintendant J. Ramathoka testified that he was performing his duties in the Divisional Career Management (Equity Section) division of the Applicant.

[17] He testified that the Third Respondent should have been appointed since the African males were under-represented by 21 candidates. Indian, Coloured and White females were over-represented by respectively 4, 1 and 19 candidates.

[18] Senior Superintendant Nkabinde, the Third Respondent's third witness, testified that she was a Manager in the Disability Management Section and she was a panel member of the Evaluation Panel at which the Third Respondent was recommended for the post *because he had potential* (my italics).

[19] She also testified, inter alia, that the Divisional Commissioner had to make the final decision.

[20] Director Stratford testified on behalf of the Applicant that she was part of the Divisional Evaluation Committee Meeting. She stated that in terms of Clause 13(3) of the National Instruction the Divisional Commissioner had a discretion whether to promote candidates as per the recommendations made.

[21] The Third Respondent did not have sufficient experience to meet the requirements.

[22] Since the minutes of the Evaluation Panel were not sufficient, they declared the minutes null and void an issue she admitted during cross-examination the Divisional Commissioner had no power to do.

[23] She admitted during cross-examination that the Divisional Commissioner did not have delegated authority to consider applications for promotion for salary levels 8 and higher.

[24] She testified that the replacement of candidate Mathebe BE with candidate Ishmael RF was a typographical error.[3]

[25] Senior Superintendant Kemp was the next to testify. He headed the sub-section Promotions at Head Office and was thus responsible for all internal promotions. He was part of the team that drafted the National Instruction.

[26] According to Kemp, the Divisional Commissioner had authority to consider all promotions below salary level 7 and the National Commissioner authority to consider all promotions from salary level 8 and above.

[27] The recommendations of the Divisional Evaluation Committee Meeting are sent to the National Commissioner and not those of the Evaluation Panel for consideration and approval.

[28] If the Divisional Commissioner does not recommend a candidate for promotion, he/ she would not send anything to the National Commissioner.

[29] An Evaluation Panel can submit its recommendations directly to the National Commissioner.

[30] During cross-examination, Kemp agreed that the Divisional Commissioner was at a far higher level than the requirements of Clause 13(2) of the National Instruction when she chaired the panel. (*Sic.)*

[3] The relevance of this remark by the Second Respondent was not taken further and the reason why he mentioned it remains unanswered.

[31] The panel also consisted of more members that the requirement of 5 as per Clause 8(3) of the National Instruction [this panel consisted of 7 members inclusive of the chairperson].

[32] The Divisional Commissioner was supposed to appoint panels, not be part of a panel that she appointed. (*Sic.)*

[33] The Divisional Commissioner did have the authority to consider and approve recommendations for salary levels 8 and higher.

[34] The successful candidates also testified. Superintendent Ryan testified that she applied when the post was advertised externally since she had the necessary two years experience at that time. Superintendent Gerber also testified that she did not apply when it was advertised internally since she did not meet the two-year experience requirement but by the time it was advertised externally, she met that requirement.

Award

[35] In his analysis, the Second Respondent remarked that the issue revolved mainly around the interpretation of National Instruction 1 of 2004.

[36] He recorded that in his view some of the witnesses incorrectly interpreted the National Instruction and some made assumptions.

[37] The Second Respondent then analysed Clause 13(1) and 13(5), and concluded that in *lieu* of the Clauses mentioned above the National Commissioner and not the Divisional Commissioner had to consider Post 6000 since it was a level 10 post. He found that there was non-compliance with the National Instruction since the National Commissioner was not given an opportunity to consider the recommendation of the Third Respondent by the Evaluation Panel.

[38] He then recorded

1. ‘Even if I am wrong, above in terms of the interpretation, clause 8(2) requires that the Chairperson of the panel for level 8-10 posts must be at the level of a Director. In the Applicant’s [Third Respondent’s] case, the Chairperson of the

Divisional Panel was above that of a Director. That was non compliance with the National Instruction'. (*Sic)*

[39] He then also recorded that there was another violation of the National Instruction in that the Divisional Evaluation Committee Meeting consisted of more than 5 members and was in violation of Clause 8(3).

[40] He then continues to remark as follows:

1. 'I fully agree with Senior Superintendent Kemp – the main witness for the First Respondent, that the Divisional Commissioner should not have been part of the panel she appointed. In my view, the idea of excluding the Divisional Commissioner from sitting on the panel is for her or him to make an independent decision without his or her mind be contaminated.(*Sic*)

2. The National Instruction does not give powers to the Divisional Panel to nullify the minutes. In any case, even the minutes of the Divisional Panel that was chaired by Stander were not a true reflection of what transpired in that the panel's replacement of candidate Mathebe with Ishmael was not supposed to have happened."

[41] On substance, he found that the Applicant did not comply with the Employment Equity Plan, which in terms of priority statistics indicated that African males were under-represented. The fact that the post was re-advertised and Coloured and White women were appointed was a show of bad faith on the part of the Applicant.

[42] He found that whilst Ryan and Gerber did into apply for the post when initially advertised as they did not have two years experience at that stage they were appointed when the posts were externally appointed despite the fact that the Third Respondent was not appointed despite the fact that he met the minimum requirements of experience when he applied for the post internally. (*Sic)*

[43] He held that the Applicant committed an unfair labour practice by not promoting the Third Respondent. He held that he could not appoint the Third Respondent to the vacant post of Assistant Social Work Manager: Forensic

Social Work advertised internally during October 2007 and externally during January 2008 wherein the Applicant was also short listed but no one was appointed since the issue was never canvassed during evidence and the Applicant could still challenge the outcome was he not appointed. He also remarked that others who had applied might be prejudiced should he order the Applicant's appointment.

[44] He held that compensation would be appropriate and motivated this as follows:

1. The way that the Divisional Panel chaired by Stander dealt with the matter left much to be desired ordering to such an extent that he felt a cost order was appropriate.

2. The appointment of over-represented candidates and the ignoring of under-represented disadvantaged persons who met the minimum requirements he regarded as bad faith standards that should not be encouraged.

[45] He ordered the Applicant, based on the gross irregularity committed by Commissioner Stander (*sic)* on behalf of the Applicant and the bad faith on the part of the Applicant that the Applicant should pay the Third Respondent 12 months compensation at the level of an Assistant Director's salary. Curiously, he did not set the appointments of Gerber and Ryan aside and ordered that a new Evaluation panel be constituted to consider the applications, including the Third Applicant's afresh, which I would have thought would have been the preferred way to go.

<u>Grounds for Review</u>

Ground 1

[46] The Applicant professed that the Second Respondent committed a gross irregularity in holding that the issue in these proceedings revolved around the interpretation of National Instruction 1 of 2004. The matter was a matter of factual dispute and not a matter of interpretation. The matter did not

revolve around circulars as the Second Respondent wrongly assumed. The matter dealt with promotion policy and how the process unfolded.

Ground 2

[47] The Second Respondent misdirected himself in reading the circular in part and not in totality. This led to the Second Respondent concluding a reasonable arbitrator properly applying his or her mind would not have arrived at.

Ground 3

[48] The Second Respondent read Clause 13(1) and 13(5) of the National Instruction but did not take Clause 13(6) into consideration. Had he done so he would not reasonably have reached the conclusion he did.

[49] The Second Respondent unreasonably concluded that recommendation of the panel for post level 8 and higher had to be submitted to the National Commissioner and not to the Divisional Commissioner for consideration and approval without reading Clause 13(6). The abovementioned Clauses, read together, constituted the promotion policy of the Applicant. It was therefore irregular and unreasonable to take one Clause and read it in isolation.

[50] A reasonable fact-finder properly applying his mind to the task given to him/her would not have done so. Therefore, the Second Respondent committed a gross irregularity. The Second Respondent unreasonably held that the Applicant did not comply with the National Instruction when the Chairperson was senior to the rank of a Director. The policy required that the Chairperson should be at the level of director or anyone senior to that could chair the panel.

Ground 5

[51] The Second Respondent came to another unreasonable conclusion when he held that to have a panel consisting of more members than the

stipulated minimum constituted a failure to comply with the National Instruction.

Ground 6

[52] The Second Respondent's finding that the Applicant did not comply with its Employment Equity Plan was unreasonable since Equity was not an issue. The issue was relevant experience in core functions for the post.

Ground 7

[53] The Second Respondent did not understand the issue before him since the internal advertisement, which was post-promotion, required that a candidate had to have been a Captain for at least 2 years before applying for promotion.

[54] Since the external advertisement was not a post-promotion the two years experience requirement fell away. Nonetheless, the successful candidates had more experience in the core functions for the post but in rank did not have two years experience as Captains.

[55] The Second Respondent did not appreciate the distinction between internal post-promotion advertisements and external advertisements.

Ground 8

[56] The Second Respondent exceeded his powers by ordering the Applicant to pay the costs of the Third Respondent on a party and party scale since the First Respondent did not have such an order in its Rules.

[57] During Ms. Kgatla's address to me, on a question I raised with her, she intimated that should I see it fit and proper she would not have an objection, should I grant a review and set aside the award if I determine the dispute in terms of Section 145(2) read with (4) of the Labour Relations Act.[4]

[4] Act 66 of 1995 as amended

Third Respondent's submissions[5]

[58] The Third Respondent stated that he had the requisite experience in the core functions of the post hence the Divisional Panel (sic) had recommended him as the preferred candidate for appointment.

[59] The Second Respondent correctly identified the issue to be determined as whether or not the Applicant committed an unfair labour practice and to award appropriate relief.

[60] The Second Respondent found that central to this dispute was the correct understanding and application of the National Instruction and this finding could not be faulted as the promotion was highly regulated by the said circular and the application thereof was indispensible. The Second Respondent relied on evidence put before him and analysed it before making the award in favour of the Third Respondent.

[61] The application of Clause 13(6) related to post levels up to 7 and was thus irrelevant to this matter. Clause 13(6) did not clothe the Divisional Commissioner with powers to disapprove a promotion to level 8 and higher posts.

[62] The Second Respondent did not err in his interpretation of Clause 13(1) read with 13(5); the recommendation of post levels 8 and higher had to be submitted to the National Commissioner for consideration. Therefore, the award was reasonable.

[63] The Third Respondent denied that anyone senior to a Director could chair the evaluation panel.

[64] The Second Respondent was not wrong when he found that the panel of more than the stipulated minimum constituted failure to comply with the policy.

[5] Even though the papers filed by the Third Respondent were not properly attested to, I mentioned it here. It might have been an oversight that an incorrect copy was filed in the court file. I am sure that had it been not a mere oversight, Ms. Kgaka would have drawn my attention to it. Be that as it may, the decision I reached was not influenced by it.

[65] The Second Respondent was presented with evidence pertaining to the Employment Equity Plan and such evidence was not disputed.

[66] The Third Respondent met the requirements of Clause 6(1) read with paragraph 2.1 of the waiver document dated 1 September 2006, which reduced the 3-year requirement of Clause 6(1) to 2 years, making him the best candidate for the position.

[67] He denied that the Second Respondent could not have made the cost order.

Evaluation

[68] It is trite law and enshrined in Section 23 of the Constitution[6] that everyone has the right to fair labour practises. In terms of Section 186(2) (a) of the Labour Relations Act,[7] an Unfair Labour Practise is defined as any act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, in respect of an employee.

The Second Respondent found in the Third Respondent's favour and did not promote him, but awarded him 12 months compensation for what he found to have been an unfair labour practice committed by the Applicant. He went even further and ordered the Applicant to pay the costs of the Third Respondent.

[69] Mr. Moshoana on behalf of the Third Respondent, argued that I could only adjudicate on the grounds of review raised by the Applicant and not venture outside those, which I intend to do, even though I had some other difficulties with the award rendered outside of those raised in review.

[70] In this matter, I agree with Ms. Kgatla, who appeared on behalf of the Applicant, that the Second Respondent lost track of the true issue placed in front of him and got embroiled in the interpretation of National Instruction 1/2004. According to the transcript of the recording, both parties agreed on 16 May 2008 that he would be required to interpret the National Instruction. He requested that a person that participated in the second Divisional Evaluation

[6] Act 200 of 1996
[7] Above n 1

Committee Meeting be called as a witness, to which the Applicant's representative, Mr. Sithole obliged. Mr. Sithole also called Senior Superintendent Kemp to testify purely on the National Instruction and its specific purpose and process. The Second Respondent did not file an explanatory affidavit to explain or motivate his award leaving some pertinent questions unanswered. However, from the complete record that has been put before me I have been able to fill in the gaps by comparing the transcripts to his award.

[71] Tip AJ in *Standard Bank of SA Ltd v CCMA and Others*,[8] held that relief by way of review would be available:

'[w]here a commissioner sitting as arbitrator has misconstrued oral or documentary evidence, or has ignored or misapplied relevant legal principle, to an extent that is inappropriate or unreasonable, then such commissioner has failed in the task under the Act'.

[72] This approach was echoed in *Carephone (Pty) Ltd v Marcus NO and Others,*[9] where the test in this regard was succinctly stated as follows:

'[I]s there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?'

[73] In *Marapula and Others v Consteen (Pty) Ltd* (1999) 20 ILJ 1837 (LC) it was held as follows:

'The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer's version, an investigation where questions of demeanour and impression are measured against the content of the witnesses' evidence, where the importance of any discrepancies or contradictions are assessed

[8] (1998) 19 ILJ 903 (LC) at para 24.
[9] (1998) 19 ILJ 1425 (LAC) at para 37.

and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety.'

[74] The judgement in *S v Civa,*[10] is particularly apposite. In particular, it was held as follows:

'The evidence must be weighed as a whole, taking account of the probabilities, the reliability and opportunity for observation of the respective witnesses, the absence of interest or bias, the intrinsic merits or demerits of the testimony itself, any inconsistencies or contradictions, corroboration, and all other relevant factors. It is in the context of this overall scrutiny of the evidence that demeanour, if there are sufficient indications thereof to be significant, must be assessed.'

[75] Based on the above, and taking into account that which is about to follow, it is clear that the Second Respondent did not apply his mind properly to the real facts placed before him.

[76] The facts were as follows:

1. The Third Respondent had been employed by the Applicant since 1 April 2006.

2. He applied for promotion on 13 September 2006 and recommended by the Evaluation Panel.

3. When the recommendation was forwarded to the Divisional Evaluation Committee Meeting, he was found to be lacking in experience on the core responsibilities.

4. Therefore, he was not recommended.

[10] 1974 (3) SA 844 (T) at 846H – 847A.

5. In his evidence as per the transcribed recording, he clearly was not intent on considering anything other than his own personal perception of the meaning of the National Instruction any consideration. He maintained throughout that he did not meet the minimum requirements, in fact, he met the maximum requirements and he stated unequivocally that he had to be appointed no matter what because he met the requirements and was scored a 73.3%, being the highest score of the three that were recommended by the Evaluation Panel.

6. During cross-examination, he did not even attempt to provide any explanation other than that he met the grade and was therefore entitled to be appointed. He even went so far as to proclaim that not even the National Commissioner had an option – he had to be appointed because he scored a 73.3%, was an African male.

7. Through the evidence presented by all the relevant witnesses, including Nkabinde (Third Respondent's witness) one central aspect stands out – even though he may have met the criteria – he lacked experience in the core functions.

[77] The fact that the Second Respondent ignored these pertinent aspects and proceeded to find against the Applicant constituted a gross irregularity making the award susceptible to interference by this Court.

[78] In Southern *Sun Hotel Interests (Pty) Ltd v CCMA and Others*,[11] Van Niekerk J held that:

'In summary, section 145 requires that the outcome of the CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within the band of reasonableness, but this does not preclude this Court from scrutinising the process in terms of which the decision was made. If a commissioner commits some or other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the

[11] (2009) 11 BLLR 1128 LC at para 17.

basis of the record of the proceedings, that result is nonetheless capable of justification.'

[79] Therefore, I hold that the Applicant's first ground for review must success. The Second Respondent did not apply his mind to the issue in the case.

[80] As to the second ground, namely that the Second Respondent misdirected himself in not reading the circular in totality leading to him drawing a conclusion a reasonable arbitrator properly applying his mind to, I do agree with the Applicant.

[81] It is trite that one needs to read and interpret any document [or legislation] keeping the origins, context, purpose and totality of the document in mind.

[82] The National Instruction was drafted to regulate the process pertaining to promotion of employees employed in the Applicant's service. It was amended by the circular dated 1 September 2006[12] but was still the document utilised to regulate and direct the process to be followed pertaining to promotions.

[83] If the Second Respondent in fact perused the National Instruction duly and properly, applying his mind properly he would not have reached the decision he had. I specifically refer here to his finding in paragraph 48 of his award:

'In my view, if one reads clause 13(1) together with clause 13(5), the recommendation of the panel for post level 8 and higher must be submitted to the National Commissioner for consideration and for recommendation of post 1 to 7 must be submitted to Divisional or Provincial Commissioner for approval.' (Sic)

[84] When one properly peruse the National Instruction, it is clear that it is the duty of the Divisional Commissioner's office to perform the administrative duties pertaining to the promotion and consideration of filling vacant post in SAPS.

[12] See para 66 above.

[85] Clause 5(1)[13] vindicates that the Divisional Commissioner: Personnel Services is responsible to advertise all funded vacancies identified for promotion purposes.

[86] Clause *8* deals with the appointment of evaluation panels.

'8(1) ... Divisional Commissioners must appoint panels to consider the applications for promotions...

8(2) ... Levels 8 – 10 Chairperson of the panel must be on the level of a Director. Members of the panel must at least be on the level of a Senior Superintendent or equivalent rank.

8(3) Panels must, as far as reasonably possible, be representative. Panels must consist of no more than 5 members; but not fewer than 3 members, including the chairperson. At least one member of the panel must have relevant competence regarding the job requirements of the advertised post.'

[87] Therefore, before any recommendation can be made to the National Commissioner the process as envisaged above needs to be followed, and, only those applicants, who met the grade and who are to be recommended to be appointed – their details had to be forwarded to the National Commissioner for his consideration and approval. To find that the Divisional Evaluation Committee Meeting should have automatically forwarded the recommendation of the Evaluation Panel to the National Commissioner was an incorrect interpretation of the National Instruction. No reason was proffered by the Second Respondent why he accepted the version of the Third Respondent and rejected the evidence presented by Kemp, but on the face of the evidence presented, it is clear that the Second Respondent misconstrued the meaning and process explained in the National Instruction. As such, his action constituted a gross irregularity, which prejudiced the Applicant.

[88] Kemp testified to this – explaining the process in full – all evidence relating to the contents of the National Instruction was tendered and put before the Second Respondent. It was properly ventilated by evidence and there was no reason for the Second Respondent to merely ignore the evidence of the

[13] National Instruction 1/2004

Applicant and accept the evidence of the Third Respondent as to what the role of the Divisional Evaluation Committee Meeting was.

[89] Kemp testified that he was a co-author of National Instruction 1/2004. He was given a rather difficult time by the Third Respondent's representative, he was frequently interrupted and battled to present his evidence when asked questions during cross-examination. He, for example, did his utmost best to explain that the recommendations of the Divisional Commissioner were the recommendations that were to be presented to the National Commissioner.

[90] Kemp took time to explain the context of the promotion process in detail remarking significantly that the recommendation that had to be considered by the National Commissioner was that made by the Divisional Commissioner who could only make recommendations based on the recommendations made by the Divisional Evaluation Committee Meeting.

[91] No matter how difficult Mr. Mthimunye tried to make the situation, how many times he interrupted Kemp and tried to discredit him, Kemp stood his ground. He was not evasive (like the Third Respondent) had no background detail of the matter and did nothing to discredit himself or to create the impression that he was biased, judgmental or had any reason to take sides in the matter. He answered all the questions with candour and a clear knowledge of the meaning and contents of the National Instruction. He even warned the Second Respondent not to consider Clauses 13(1) and 13(5) in isolation but to read it with Clauses 10 and 11 to establish the real and correct meaning of it.

[92] He admitted that indeed the Divisional Commissioner violated Clause 8(3) when a panel consisting of more than five people was convened. He also admitted that the National Instruction did not indicate that the Divisional Commissioner could chair the Divisional Evaluation Committee Meeting, but stated that noting in the National Instruction prevented the Divisional Commissioner from chairing it.

[93] The Second Respondent drew an adverse conclusion based on the fact that the panel exceeded the number of members and declared it such a

significant violation that it was part of his motivation to find that the Applicant acted in bad faith towards the Third Respondent.

[94] I do not agree that the actions of the Applicant were committed in bad faith. No evidence to establish this was presented.

[95] In *CUSA v Tao Ying Metal Industries and Others*,[14] per Ngcobo J it was held as follows:

'It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in *Sidumo*, the matter was put thus:

"It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues."'

[96] Therefore, as far as the second ground for review is concerned, the Applicant must also succeed. The Applicant was not, *in lieu* of the abovementioned granted a fair hearing. The matter was not fairly and fully determined. The Second Commissioner did not apply his mind to the evidence presented on behalf of the Applicant nor did he motivate or explain why he found that indeed the fact that the Applicant violated Clause 8(3) was evidence that it acted in bad faith. The mere recital of caselaw does not constitute a proper and fair reason for the Second Respondent to draw the conclusion that an unfair labour practice was committed. Caselaw set precedent that must guide and practically give meaning to statute but, the mere recital thereof without applying and comparing details can never be

[14] [2009] 1 BLLR 1 (CC) at para 76

regarded as proper reasoning on proclaiming that an unfair labour practice was committed.

[97] The Third ground for review dealt with the reading of Clause 13 (1) and (5) and not incorporating clause 13(6) in the process, I thought it wise to specifically record the contents in this judgement. It deals with the consideration of recommendations and approval of promotions.

‘13(1) The promotion of employees to level 8 and higher must be submitted to the National Commissioner for consideration.

13(2) Upon the receipt of the recommendations of the divisional panel, the Divisional Commissioner must satisfy him/herself that the process took place in accordance with this Instruction.

13(3) If the Divisional Commissioner is of the opinion that a recommendation for promotion does not address the representativity at the level of the post in the business unit where the post is situated, but decides to nevertheless approve such a promotion, she or he must record this in writing with a full motivation.

13(4) The Divisional Commissioner must, about the promotion of employees to level 8 or to higher levels, forward all the relevant documentation and recommendations to the National Commissioner.

13(5) The National, Provincial or Divisional Commissioner may accept or reject the findings and recommendations of an evaluation panel. When the National, Provincial or Divisional Commissioner does not approve a recommendation of an evaluation panel she or he must record the reasons for her or his decision in writing

13(6) If the Divisional Commissioner does not approve the promotion of a recommended candidate, she or he may consult with the relevant Deputy Provincial Commissioner, Area Commissioner and in the case of Head of Divisions, with the relevant Head of the Component or the evaluation panel if she or he deems it necessary and either promote another candidate of her or his choice from the preference list submitted by the evaluation panel, or direct that he post be re-advertised.’

[98] Therefore, the actions of the Divisional Commissioner, who ruled that the post be re-advertised was fair and in line with the provisions of the National Instruction. I reiterate that Nkabinde – the Third Respondent's own witness testified that the reason why he was recommended was because they thought he had potential – she did not testify that he was recommended because he met the criteria for the position. Her evidence was transcribed as:

*'...*So obviously the fact that he was (indistinct) out of the other two, he was the one (indistinct). If (indistinct) I remember one of the (indistinct) was the fact that he did not have the experience (indistinct)...*'*

This panel therefore was in the wrong when it recommended him, making the interference of the Divisional Evaluation Committee Meeting even more in line with the spirit and meaning of the National Instruction.

[99] Therefore, the Applicant also has made out a case on this ground for review.

[100] The fourth ground also dealt with Clause 13(6) and I do not intend commenting more on it other than to hold that indeed the Second Respondent committed a gross irregularity by ignoring this sub clause.

[101] Having stated that, however, if the Second Respondent prudently perused the National Instruction he might have come across Clause 10(3*)*

> *"The chairperson of the... divisional evaluation panel must submit the recommendations of the panel, any applicable reports and the reason for its review of the recommendation of area or competent panel's recommendations to the relevant Provincial Commissioner or Divisional Commissioner.*

[102] From the abovementioned it is obvious and clear that the Divisional Evaluation Committee Meeting did not err in not referring the Third Respondent's application straight to the National Commissioner. Kemp testified that only when a promotion concerned a position at National Head

Office could a panel convened by the National Commissioner make recommendations directly to the National Commissioner.

[103] The Fifth and Sixth ground for review related to the Second Respondent's finding that the Applicant did not comply with the National Instruction when the chairperson of the panel was more senior than the level of a director.

[104] The Third Respondent did not proffer any valid reason as to why he was prejudiced by the chairperson being at a rank higher than a Director is. The panel and the structure of the panel were attacked by the Third Respondent claiming it to have been unfair. The Second Respondent held as follows in paragraph 50:

'Even if I am wrong above in terms of the interpretation, clause 8(2) requires that the Chairperson of the panel for level 8 -10 must be at the level of a Director. In the Applicant's case, the Chairperson of the Divisional Panel was above that of a Director. That was non-compliance with the National Instruction.'

[105] The fact that the chairperson was at a rank higher than a Director did not prejudice the Third Respondent. Bottom line prevailed – he had been with the Applicant for a rather short time. Whether the Chairperson was of a rank higher than that of a Director and whether the panel consisted of 5 or seven people had no, if any, bearing on the validity of his application for promotion. If indeed there were merits in his application, one would have suspected that someone on the extended panel would have drawn the attention of the Chairperson to such aspects. The fact that his recommendation lacked merit can be deferred from the evidence presented by Nkabinde as stated above.

[106] No evidence was presented by the Second Respondent as to what prejudice he suffered. He did not even address the issue of prejudice. All he maintained throughout his evidence was that the National Commissioner – and no other panel - was supposed to have considered his application and should – without having a choice in the matter – have appointed him because he met the maximum [his words] requirements. Being so fixated on his

interpretation of the National Instruction, he too lost track of the real issue, or what he had to prove to succeed with his dispute.

[107] In his evidence, he stated that his interpretation was the only correct interpretation. He even intimated that the fact that the National Instruction clearly stated, as I set out elsewhere in the judgement, that he had no vested right to be appointed purely based on the fact that he was scored the highest he stated that he was entitled to be appointed and that was that, the National Instruction was wrong.

[108] I therefore hold that the Third Respondent was not prejudiced by the fact that the Divisional Evaluation Committee Meeting consisted of more than the five members nor was he prejudiced by the fact that the chairperson was at a higher rank than that of a Director. Given the above, the Second Respondent committed a gross irregularity when he found that the non-compliance, or violation as he had phrased it, constituted an unfair labour practice.

[109] The Employment Equity Plan of the Applicant forms the basis of the next ground for review.

[110] The Second Respondent held that the Applicant did not comply with it. The Applicant claimed that the Equity Plan was not the issue, the relevant experience in core functions for the post was the real issue.

[111] In the preamble to the Employment Equity Plan the following is stated:

'This Employment Equity Plan is therefore geared to:

- Promote the Constitutional right of equality and the exercise of true democracy, ·
- Eliminate unfair discrimination in employment within the South African Police Service;·
- Ensure proper and effective implementation of Employment Equity within the South African Police Service to redress the effects of past practices;·

b) Achieve a diverse workforce broadly representative of the South African community; and·

c) Promote economic development and efficiency in the workforce.'

[112] Under the heading '*Executive Summary'* the following is, amongst other things, stated:

'1. The transformation process will help to expedite the promotion of diversity and the successful implementation of the Employment Equity Plan based on equal dignity and respect for all, and ensuring reasonable accommodation available for people with disabilities. Effective procedures have been implemented to monitor and evaluate reasonable progress towards Employment Equity in every sphere of employment in the South African Police Service with the objective of achieving service delivery improvement which permeates across all sectors of Human Resource practices.

2. In terms of the plan, it is the National Commissioner who "is responsible for the championing of the Employment Equity Plan as well as the overall management and implementation of the plan".

3. The South African Police Services has taken the approach of implementing the Employment Equity Plan per business unit. Due to the huge size of SAPS' 120 017 members and the spread throughout the different provinces, it is impractical to develop a single Plan that will integrate all the dynamics in the business units. SAPS has consequently subdivided the organisation into business units which will be manageable, large enough to have a standardized approach and small enough to cater for specific needs and unique circumstances, but the ultimate objective being alignment with national demographics since SAPS is a National Institution.'

[113] Based on this, the document handed in at the arbitration hearing, indicating that the critical analysis personnel services period 2006/10/01 – 2006/12/31, being a national document, has no, if any evidentiary value of the specific numbers in the business unit wherein Post 6000 was situated.

[114] Ramathoka's evidence was centred on the statistics he prepared pertaining to the numbers needed. He however did not explain or proffer any reason why his evidence, contradicting that of the Equity Plan handed up

differed. His statistics did not conform to the strategy outlined in the plan as to how the equity situation should be corrected.

[115] The Employment Equity Plan sets out "numeric targets". The South African Police Service commits itself anew to reach equity targets agreed upon in this Section 20 Plan in favour of the designated group by the year 2004.[15] In the process of striving to achieve the Equity targets of this Section 20 Plan the SAPS has to create capacity within the organisation. To ensure the realisation of this process, posts must become available to apply and promote Employment Equity by making use of the following options/opportunities:

1. Natural attrition.

2. Movement to the ideal establishment.

3. Offering severance package or any other available programme subject to cabinet approval. Should cabinet approve severance packages or any other similar programmes for the South African Police Service, the implementation or execution of such severance package programme should be geared to support this Section 20 Plan in redressing the imbalances in the organisation. This means that designated members/officials be appointed in the vacancies created by personnel who take severance packages.

4. Continuous implementation and close monitoring of the six focus areas of affirmative action including other relevant programmes.

[116] Indeed, when perusing this it is clear that there was no obligation to fill Post 6000 by adhering to the Equity Plan as averred by the Second Respondent or the Third Respondent. Further to this, it is noteworthy that the

[15] In terms of Clause (5)(3) of the National Instruction designated group includes all African, Indian and Coloured males and females and White females.

two successful incumbents[16] – which were appointed after the external advertisement, fell within the scope and definition of the designated group.

[117] In *SA Police Service v Zandberg and Others*,[17] Pillay J, held that

'Equity means fairness and justice to the candidate and to the people they serve. Fairness and justice cannot prevail if candidates who are less than the best, who are less suitable and less meritorious are appointed.'

[118] Given the fact that the Applicant did not meet the relevant experience requirement and that was indicated as the reason why he was not regarded as a suitable candidate, I hold that indeed the Equity Plan had no, if any bearing on the refusal of the Divisional Evaluation Committee Meeting to recommend the Third Respondent for the position. After all, it would create an intolerable position if a person had to be promoted purely because there was a 'numeric deficiency' pertaining to his specific gender and race group. It also would have been against the spirit and the proposed way to deal with the matter as set out in the Equity Plan of the Applicant.

[119] I therefore hold that on this ground for review the Applicant must also succeed.

[120] The Eighth ground for review stated that the Second Respondent did not understand that issues before him since the Third Respondent applied internally whilst the successful incumbents reacted to the external advertisement of the post on a later date. The Second Respondent found as follows in paragraph 56:

'While the Second And Third Respondents did not apply for the post when it was initially advertised internally as they did not have the two years experience, they were appointed to the posts when they were externally advertised and the Applicant was not appointed despite the fact that the Applicant met the minimum requirements of experience when he applied for the post internally.'

[16] Throughout the Arbitration, the Second Respondent requested evidence as to who was appointed in the position the Applicant had applied for. At some stage, it seemed as if the evidence reflected Superintendent Ryan to have been the successful incumbent.
[17] (2009) 31 *ILJ* 1230 at 1235I.

[121] If indeed, both the successful incumbents indicated that they did into apply when the post was internally advertised because they did into have the required two years experience, it should have alerted the Second Respondent to verify and confirm that when the Third Respondent applied he indeed met the requirements. Indeed, the Third Respondent testified that he had been in the position at the Department of Correctional Services since 1999 and that he performed similar duties there. However, given the fact that he had been with the Applicant for a mere five months by the time he applied for this post, the lack of experience in the procedures and practices of the Applicant should have been pertinently clear to the Second Respondent. The evidence also echoed the fact that he lacked the required experience.

[122] Given the fact that the Third Respondent did not meet the requirements pertaining to experience, seen in context with the fact that he was not guaranteed the promotion even if he achieved the highest score and that no legitimate expectation was created that he would be appointed, it remained the prerogative of the Applicant to not appoint any applicant and to advertise the position afresh. The fact that it was advertised afresh was an action the Applicant could do in accordance with the National instruction and as such the Second Respondent committed a gross irregularity when he did not take the prerogative of the Applicant as employer or the fact that the Divisional Evaluation Committee Meeting acted within the scope of its duties when it ordered the position to be advertised again.

[123] As far as the issue of the two successful candidates are concerned, I interpose here to state the following.

1. After perusing the record it seems that the matter was eventually withdrawn against them since- after all- it was pertinently asked by the Second Respondent and stated by the Third Respondent's representative – that the ONLY (my emphasis) issue before the Second Respondent related to the internal process – not the external process. The Second Respondent then, on application by the Third Respondent's representative allowed them to rejoin the successful incumbents – stating that should he decide to set the appointments aside they needed to have been heard.

2. Later on in the minutes of the arbitration, it is stated that Ryan was appointed in the position. However, then again, the distinction was drawn between the two processes and the Second Respondent even remarked that since the Third Respondent applied but was not shortlisted when the post was advertised externally, he still had the right to dispute the appointment of Ryan and/or Gerber.

3. Given the fact that the re-advertisement was a second event that had no real bearing on the reason why the Second Respondent referred this matter to the First Respondent, their appointment was not related –and- it was regulated by another circular 6/2005. (As Kemp had testified when asked about the difference between internal and external advertisements.)

4. Further to this- he was not even shortlisted the second time around- had he been shortlisted then it might have had significant bearing on the current matter.

[124] Therefore; the only issue before the Second Respondent related to the factors related to the internal process.

[125] In *Khula Enterprise Finance Ltd v Madinane and Others*,[18] it was held as follows:

'The failure by an arbitrator to appreciate and decide the true issue that he or she is called upon to determine is a gross irregularity which justifies the review and setting aside of an award. See in this regard the remarks of Francis AJ (as he then was) in the *SA Revenue Service* matter.

"It is crucial that an arbitrator who is conducting arbitration proceedings knows what the true issues are that he is called upon to determine. Where he issues an award which is based on a failure by him to appreciate the true nature of the issue before him, he commits a gross irregularity which violates the entire proceedings."

Such a failure denies the parties their right to have the issues fairly determined.'

[18] (2004) 25 ILJ 535 (LC) at paras 13 and 14.

[126] I need to interrupt myself here. Indeed, the National Instruction stipulates that In terms of Clause 2(f) of the National Instruction 'recognised experience' mean any relevant experience in the Service or the Public Service at the required level. However, given the fact that the post advertised was not a level 8 post, but a level 10 post and that the Third Respondent had but five months of experience in the services of the Applicant I hold that not even this clause would have vindicated or entitled the Third Respondent to be appointed to the position.

[127] I also, for the sake of completeness need to quote the following clauses:

Clause 3(3) provides:

'The fact that a candidate, on average, obtained the highest rating in the assessment or highest marks or percentages during their PEP evaluation or was recommended for promotion, does not establish any right or legitimate expectation on the part of the candidate to be promoted to the advertised post or any other post.'

Clause 4(2) states that 'no employee has any right or legitimate expectation to be promoted to an advertised or any other post.'

[128] Therefore, I hold that if indeed the Second Respondent took all the facts put in front of him into account, he would have reached a different conclusion that the one he reached. His actions constituted a gross irregularity allowing me to interfere with the award he made.

[129] In *Anglo Platinum Limited v CCMA and Others,*[19] Cele J held that:

'.... this evidence was available to the second respondent. For him to have reached a contrary decision, means simply that he failed to apply his mind appropriately to such evidence and thus committed a gross irregularity. On the basis of this finding alone, the arbitration award he issued in this case cannot stand.'

[19] JR 129/09 not yet reported by the time of this judgement.

[130] On par with this abovementioned judgement, I find that the Second Respondent's actions constituted a gross irregularity and as such cannot stand.

[131] *In Tedco Plastics (Pty) Ltd v National Union of Metalworkers of SA and Others,*[20] it was decided that:

'Furthermore, in *Matthews v Hutchinson and Others* (1998) 19 ILJ 1512 (LC) Landman J listed a large number of "misdirections" committed by the commissioner with regard to his treatment of the evidence before him. These included drawing conclusions not supported by the evidence, ignoring material evidence and relying on unreliable hearsay evidence. Landman J then went on to state as follows:

"In the result the cumulative effect of the misdirections amount to a gross irregularity and failure of justice. The commissioner did not apply his mind to the evidence and the subtle nuances of the evidence. He misunderstood the import of the evidence and attributed motives to the applicant, which could not reasonably be drawn. He relied on suspect evidence."

It would also seem that it is a logical consequence of the approach in the *Matthews*' decision that where there has been only one serious misdirection, but it is central or fundamental to the entire award, that in itself can give rise to the same result, i.e. a finding that there has been a failure of justice.'

[132] Based on the fact that the Applicant must succeed in its application, the resultant cost order the Second Respondent made falls away and need not be addressed by me.

[133] Finally, after the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* judgment,[21] it has become increasingly difficult for aggrieved parties to successfully review awards made by commissioners, panellists and arbitrators. This however, places an extra burden on both the Bargaining Councils, [and the CCMA for that matter] and its commissioners, arbitrators and panellists to ensure that the facts placed before them are diligently, accurately and factually comprehensively recorded. Evidence presented

[20] (2000) 21 ILJ 2710 (LC) at paras 8 and 9.

[21] (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC)

during all phases of the hearing – inclusive of those solicited during cross-examination and the evidence of experts, must be duly, properly and accurately recorded and dealt with in the award. One cannot in a piecemeal manner only record the aspects that appease you and that fit in with the outcome you want to reach. An arbitrator is a finder of fact and must diligently search for the facts hidden amongst perceptions of parties. In the event, like in this case, where the facts have been recorded haphazardly and no proper factually based reasoning was proffered as to why certain very relevant evidence, such as the evidence presented by Kemp, was not regarded as reliable, constitutes a gross irregularity committed by the author of the award. Bargaining Councils [and the CCMA] cannot scrutinise the evidence recorded on tape, digitally or otherwise, but that does not absolve if from ensuring that facts are comprehensively and accurately relayed in the awards rendered.

[134] I am fully aware that the Labour Relations Act[22] requires only brief reasons why a certain conclusion is drawn and award is made, but that should not be interpreted that relevant, vital and persuasive evidence should simply be brushed aside and ignored. Nor does it entitle a commissioner, arbitrator or panellist to simply declare that a specific party's evidence is the preferred evidence without properly substantiating the statement. Care must be taken and decisions must be properly motivated to enable any one reading the award the ability to understand the reason why a specific conclusion was drawn.

[135] In this matter, had the Applicant sought costs against the First of Second Respondent, given the above mentioned, I might have been persuaded to consider such an order.

[136] For the reasons as set out above, I believe that the award must be set aside.

[137] The remaining question is whether I should refer the matter back to the First Respondent for a hearing *de novo*. When deciding to refer the matter

[22] Section 138(7)(a) Act 66 of 1995 as amended.

back I need to consider not only the interest of the Third Respondent but also those of the Applicant.

[138] Ms. Kgatla agreed that in terms of Section 145(4) of the LRA,[23] I do have the authority to determine the dispute in a manner I considered appropriate. Mr. Moshoana did not address me on this issue, simply requesting that the review should be dismissed with costs.

[139] In *Mondi Kraft (Pty) Ltd v PPWAWU and Others*,[24] Landman J held that:

'There may well be instances where the court is unable to make a finding without a full record of the proceedings. But where a defect as defined in section 145 is obvious from the award and the admitted facts before it, and if, from the award and the admitted facts, the court is satisfied that it has before it all material evidence relative to a particular point and is thus able to make a finding that there is no rational objective basis justifying the connection made by the arbitrator between that material and the conclusion he or she eventually arrived at on that point, the court is placed in a position to set aside the award...'

[140] Having had regard of Section 145 (2)(a)(ii) of the LRA,[25] it is obvious and clear that indeed the Second Respondent committed a gross irregularity in the conduct of the arbitration proceedings rendering it within my power to determine the dispute in a manner I consider appropriate, I have taken into account the following:

1. The matter relates to a situation dating from the non-appointment of the Applicant in 2006.

2. To send it back now to be re-heard by another arbitrator would be pointless and futile.

[23] If the award is set aside, the Labour Court may-
(a) determine the dispute in the manner it considered appropriate; or
(b) make any order it considers appropriate about the procedures to be followed to determine the dispute.
[24] (1999) 8 LC 1.11.49
[25] Above n 1.

3. Based on the extensive record of the arbitration hearing I am in the position to consider all the evidence presented.

[141] I have taken into account the fact that the Third Respondent was employed by the Applicant for a mere five month period by the time he applied for the promotion.

[142] I also have taken into account that as such it would have been impossible for him to be properly experienced to perform his duties at the level of an Assistant Director: Social Services – Disability Management specifically that of the Applicant. He tried to remedy the situation by testifying at the arbitration hearing that he did not in his application indicate that he had experience with international liaison and research programmes regarding disability issues whilst he did have such experience. He however had to stand and fall by that which was contained in the application he presented.

[143] Since the applications was to be evaluated on information contained in the candidates' applications only and no personal knowledge of the candidates by members on the panel could have been taken into account to either favour of prejudice a candidate, the Divisional Evaluation Committee Meeting could only go on what they had before it.[26] A bland statement that he possessed all the requisite experience was not enough. Throughout the evidence as stated above one fact emerged – he did not have the required experience needed. He could not substantiate his averments that he possessed the required experience. Even if he did, it would in any event not have assisted him because none of it formed part of his application.

[144] His reliance on the fact that a score of 73.3% should automatically have entitled him to be appointed does not hold water. The comparison he made with the appointment of Frank as Chaplain – who also scored 73% has no relevance – it was not only the score achieved that made one a suitable candidate. He denied that in terms of the National Instruction he had no automatic right to be appointed.

[26] Clause 10(1) of the National Instruction.

[145] He did not meet the criteria as per Clause 12 of the National Instruction.[27]

[146] The Divisional Evaluation Committee Meeting acted within its scope when it did not accept the recommendation of the Evaluation Panel and substituted it with its own.[28]

[147] Based on the fact that the Third Respondent did not meet the required experience in the core responsibilities there was therefore no need to submit his application to the National Commissioner for his recommendation and approval.

[148] In the result the application must succeed, I need to consider whether the costs should follow the result. I have taken into account that;

1. There is an existing employment relationship between the Applicant and Third Respondent.

2. The Third Respondent should not be prejudiced by the errors in judgement made by the Second Respondent.

3. Equity, justice, and fairness, being the spirit of the LRA must prevail.

Order

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[27] Criteria for selection of candidates:
12(1) 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 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.

[28] 10(2) states that all recommendations of area or competent panels together with all relevant applications of candidates must be submitted to the provincial or divisional panel for consideration, which panel may review the area or competent panel's recommendations and substitute it with their own. The conditions for review... may include, but are not limited to
.....
- e. Suitability of the candidate.

Accordingly, I make the following order:

1] The arbitration award of the Second Respondent is reviewed and set aside.

2] The Applicant did not commit an Unfair Labour Practice when it did not recommend or promote the Third Respondent on 20 October 2006.

3] The matter is dismissed.

4] I make no order as to costs.

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A.H. Swanepoel

Acting Judge in the Labour Court

Appearances:

For the Applicant:	Ms. M Kgatla
	State Attorney
For the Third Respondent:	Mr. G.N. Moshoana
	Mohlaba & Moshoana Inc