REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 259/11

In the matter between:

KwaZulu-Natal Department of Transport	**Applicant**
And	
AM Hoosen and 23 Others	**First Respondent**
GPSSBC	**Second Respondent**
Commissioner P Stilwell	**Third Respondent**
Mkabela, MS	**Fourth Respondent**

Heard: 3 February 2015

Delivered: 17 September 2015

Summary: Protected promotion – meaning of promotion

JUDGMENT

WHITCHER J

Introduction

[1] This is an application to review and set aside an arbitration award handed down by the Third Respondent (the commissioner) on 30 November 2010 in the GPSSBC, under case number PSGA 444-08/09. The late filing of the review application, filed 4 days late, is condoned. The first respondents, AM Hoosen and 23 others, oppose the review.

[2] The commissioner found that the promotion of the fourth respondent, Mr Makabela, to the rank of Chief Provincial Inspector was unfair towards the first respondents. First, he found that Mr Makabela did not meet the minimum requirement even for the lower post used as a 'launching platform' for his promotion. Second, Mr Makabela's rise in rank was not in accordance with prescripts regulating promotions in the public service. His promotion above the first respondents appeared arbitrary, irregular, unfair and the product of a quirk of fate.

[3] The commissioner did not set aside Mr Makabela's appointment but instead ordered that the department remedy the unfair labour practice towards the first respondents "by initiating a recruitment process" for the appointment of another Chief Provincial Inspector. The commissioner ordered costs against the applicant for the day of 7 July 2010.

Background

[4] In January 2003, Mr Makabela, then occupying a post level 8 position as a Principal Provincial Inspector (PPI) within the department's Public Transport Enforcement Unit, was selected to provide bodyguard services to the provincial MEC for Transport in a new Special Operations Task Team. This career move was characterised by the department at the time as a transfer. Mr Makabela kept the same salary and job grade although he acquired the new designation of Senior Protection Officer.

[5] In November 2003, while deployed as a Senior Protection Officer, Mr Makabela was informed that his 'salary position' was upgraded from post level 8 to 9.

[6] In 2007, the MEC became Premier of KwaZulu-Natal. Mr Makabela wrote to a senior manager asking to formally return to his erstwhile unit, the PTEU, as a uniformed officer, with a 'translation' in rank. He added that his former colleagues in the PTEU made him feel unwelcome. This had something to do with their not saluting him for, in uniform, Mr Makabela still had the same number of bars upon his shoulders as they did.

[7] In August 2007, with his current salary unaffected, Mr Makabela returned to the PTEU he had left as a Principal Provincial Inspector (PPI) in 2003. Although his designation in the special operations team was Special Protection Officer at post level 9, he initially took up the rank once again of a PPI in the PTEU.

[8] His trade union complained that Mr Makabela should in fact hold an equivalent rank in the PTEU of Chief Provincial Inspector (CPI) and not PPI as the former was the equivalent grade within the PTEU commensurate with grade of the post Mr Makabela occupied in the special operations team. The department complied with this request on the authority of Ms Cunliffe, Senior General Manager, Corporate Services. Cunliffe referred to the process as a 'translation in rank'.

[9] The first respondents initially pursued a grievance against the department, seeking similar elevation in rank to Mr Makabela. They claimed that they too had provided bodyguarding services for extended periods but had, inconsistently, not been upgraded. Their dispute ended up as an unfair labour practice dispute relating to promotion. The relief they sought was either being upgraded themselves, compensation or the setting aside of Mr Makabela's promotion.

The arbitration award

[10] On the evidence before him, the commissioner accepted that Mr Makabela did not have a senior certificate, a minimum requirement for the post of PPI and CPI. He found that "it offends one's sense of logic and fairness that a person who should never have been appointed to a post in the first place could have used that post to ascend to an even more senior position."

[11] The commissioner also found that Mr Makabela's assumption of the post of CPI in the PTEU constituted a promotion. He accepted the first respondents' argument that promotions in the public service could only occur by means of a specific process, involving advertisements and open competition, which did not occur in Mr Makabela's case. The arbitrary and irregular manner in which he became a CPI amounted to an unfair labour practice relating to promotion in that the individual complainant PPIs were wrongly blocked and prevented from applying for promotion to the CPI post Mr Makabela now occupied.

Grounds of Review

Jurisdiction

[12] In the first instance, the applicant challenges the jurisdiction of the GPSSBC to have heard the matter. It points out that the first respondents' initial complaint took the form of grievance in which they sought elevation to Makabela's grade. Consequently, the real dispute was one of mutual interest. The failure by the commissioner to appreciate his lack of jurisdiction is a reviewable irregularity.

[13] The applicant correctly point out that jurisdictional rulings are made by the reviewing court on objectively justifiable grounds, not on the reasonableness test set out in *Sidumo*[1]. They incorrectly, though, try to confine the first respondents to the name they gave their dispute at its genesis. Neither the original grievance form, nor the certificate of outcome issued by a commissioner is wholly determinative of the nature of the dispute. Instead, as the Constitutional Court held in *CUSA v Tao Ying Metal Industries and Others*, "a commissioner is required to take all facts into consideration including the description of the nature of the dispute, the outcome requested by the Union and the evidence presented during the arbitration"[2].

[14] The first respondents contend that the surrounding facts, the way the dispute was articulated at the GPSSBC and the relief sought in closing

[1] *De Milander v MEC Finance: Eastern Cape & Others (2013) 34 ILJ LAC at para 24*

[2] *[2009] 1 BLLR 1 (CC)*

argument all placed their dispute within the ambit of section 186 (2) (a) of the LRA. They argue that an original and separate grievance seeking their own upgrading, while permeating aspects of the promotion dispute, did not destroy or exclude their claim that they had suffered an unfair labour practice when Mr. Makabela was promoted above them. This submission is, in my view, objectively right. Consequently, the commissioner committed no irregularity in not stopping the case at the outset for lack of jurisdiction.

Was there a promotion?

[15] The centrepiece of the first respondents' case before the GPSSBC was that Mr Makabela's promotion by the department was unfair to them. The applicant disputes that any promotion occurred. This too is a jurisdictional issue. If there was no promotion but simply a 'translation in rank' as the applicant contends, then the GPSSBC lacked the power to determine the fairness of such an event.

[16] I sympathise with the commissioner who remarked that the evidence before him about how Mr Makabela came to attain the rank of CPI was not very clear. Despite the department's stout semantic efforts to characterize Mr. Makabela's increase in salary and rank between the time he left the PTEU in 2003 and rejoined it in 2007 as anything but a promotion, this position is ultimately untenable. It does not matter precisely when the promotion occurred, or what the employer purported to call it; a promotion plainly happened. It may have been in 2003 when Mr. Makabela's 'salary position' was upgraded. It may have been in 2007, when a senior manager authorised another bar upon his shoulder as a CPI. It is quite possible that both of these career events qualify as a promotion, the one enabling the other.

[17] The applicant's argument that Mr. Makabela was not promoted in 2003 but simply benefited from his Special Protection Officer post being upgraded from level 8 to 9 cannot be sustained. The department promoted Mr.

Makabela the moment they permitted him to remain in the upgraded post and afforded him the appropriate higher salary.[3]

[18] The argument that, after Mr. Makabela's transfer back to the PTEU, the decision to change his designation from a PPI to CPI was not a promotion is also unsustainable. *The Concise Oxford Dictionary* (9 ed), defines 'promote' as to advance or raise (a person) to a higher office, rank. When Makabela was transferred back to the PTEU, it was initially at the rank of PPI, albeit with his grade 9 salary level intact. The department may well have thought they were merely correcting an error in assigning (or 'translating' to) him the rank commensurate with the grade he held in the special operations unit. However, by definition, this act was a promotion. The other processes the applicant mentions to describe this career event, such as 'translation with post', find no expression in the regulations prescribing how employees in the public service move from one rank to another.

[19] As a result the commissioner was objectively justified, on the evidence before him, in finding that a promotion occurred.

Was the promotion unfair?

[20] The first respondents bore the onus in this matter. After a discovery application, documents recording the educational qualifications of Mr. Makabela were entered into evidence. The commissioner found that these tended, *prima facie*, to show that Mr. Makabela, who was joined in the proceedings, did not possess the minimum educational qualifications even for the post of a PPI. As expected, evidence also showed that a senior certificate was a requirement for the position of CPI. Notwithstanding the absence of any evidence of such a qualification in Mr. Makabela's personnel file, a memorandum from Mr. P. Govender, of Management Advisory Services on 15 October 2007, contains the probably erroneous assurance that Mr. Makabela met the minimum requirements for elevation in rank to a CPI. Ms Cunliffe relied on this information in purporting to 'translate' Mr. Makabela's rank. Mr. Makabela

[3] see *Mathibeli v Minister of Labour [2015] 3 BLLR 267 (LAC) at para 16*

did not avail himself of the opportunity to rebut any of the documentary proof that he lacked a senior certificate qualification, nor did the department manage to do so.

[21] The commissioner's finding, not particularly strongly challenged in argument by the department, was that this alone was sufficient to render Mr. Makabela's promotion unfair. The first respondents were wrongly blocked in future from ascending to a CPI position because Mr. Makabela now occupied it. This finding is not unreasonable whether or not, at the time Mr. Makabela was promoted, a vacant post existed. It seems logical that with Mr. Makabela's occupying a senior rank in PTEU, the career-prospects of his juniors will suffer some limitation. In addition, Mr. Makabela's colleagues will, on a day to day basis, have to treat someone who has no right to command them, as their superior officer. This is not a trivial issue in a uniformed and rank-conscious environment such as law enforcement. This problem is confirmed by Mr. Makabela's original motivation to have his special operations unit rank 'transferred' to him, which was that his colleagues considered him their equal and declined to salute him.

[22] The commissioner also accepted the first respondents' argument that Mr. Makabela's promotion did not occur within the framework set out in Part VII of the Public Service Regulations. The department found it difficult to contest this aspect of the case. They had placed all their eggs in the basket of denying any promotion took place. The best they could do to deny unfairness was to contend that Mr. Makabela was not promoted to any *vacant* CPI post. He was simply assigned his proper rank.

[23] Having considered the regulations setting out the process by which posts in the public service are supposed to be created and filled and how promotions are supposed to take place, I am not sure that the fact that Mr. Makabela was promoted against a non-vacant, non-existent, or specially created post assists the applicant. It is, though, unnecessary for me to decide this point. Even if the commissioner's decision-making was unreasonable in finding that the promotion of Mr. Makabela was irregular by want of compliance with the Public Service Regulations, I have already

endorsed his finding that Mr. Makabela's promotion was irregular by want of his meeting the minimum criterion for the position. This irregularity persists whether Mr. Makabela assumed a vacant CPI post or was simply assigned a higher rank.

Remedy

[24] The remedy the commissioner ordered would, in the highly regulated world of the public service, cause a post to have to be created when there was no evidence that there was objectively a need for another CPI position in the PTEU. A remedy that places an unfairly treated employee in an available post he or she would certainly have been promoted to, but-for the unfair action of the employer is perfectly reasonable. Imposing, as a remedy for the unfairness experienced by the individual respondents, the creation and filling of a post that in the ordinary course would not have existed seems to me, however, to be an overreach on the part of the commissioner. His decision on remedy is one that another decision maker could not reasonably have arrived at based on the totality of the evidence.[4] It is overly onerous to the employer, imposes a long-term inefficiency in its operations and is logically unconnected to the nature of the unfairness the evidence revealed the individual respondents underwent. The unfairness experienced by them was of a negative nature. In other words, they did not establish a case that any of them ought to have been promoted to a CPI. Their issue was that Mr. Makabela ought not to have been appointed as a CPI, thus rising above them and also impeding their future career prospects. It strikes me that there is a remedy available that properly and more justly remedies the true unfairness in this case. The commissioner ought to have grasped this nettle instead of ordering the recruitment of another CPI.

Conclusion

[25] Ordinarily I would have remitted this matter back to the commissioner to decide relief anew. However, I note that sufficient evidence exists on the record before me to fairly and properly replace the commissioner's order

[4] (2014) 35 ILJ 943 (LAC) at para 20.

with my own. The only person who might benefit from the leading of further evidence or argument on the remedy to be offered to the respondents is Mr. Makabela. He was however joined in the proceedings and elected not to place any evidence or argument before the bargaining council or this court. He has had his chance to influence the outcome of the case insofar as it affects him. I also note with some alarm how long ago the actions that form the basis of this matter happened. I think it is in the interests of all parties that finality is achieved.

Order

[26] The order I make therefore is the following:

(i) The portion of the award relating to remedy of the third respondent, dated 30 November 2010, under case number PSGA 444-08/09, issued by the first respondent, is reviewed and set aside. It is replaced with an award directing the applicant to reduce the rank of Mr. Makabela to that of a Principal Provincial Inspector on or before 30 September 2015. Mr. Makabela's salary is to remain the same.

(ii) There is no order as to costs

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Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	P Schumann Instructed by Lambert & Associates
FIRST RESPONDENT:	Peter Hobden, Tomlinson Mguni James