

SOUTH AFRICA / JUDGMENT

Ncane v Lyster NO and Others (DA27/15)

[2017] ZALAC 1; (2017) 38 ILJ 907 (LAC); [2017] 4 BLLR 350 (LAC) (10 January 2017)

[2017] ZALAC 1

COURT

Labour Appeal Court

BEFORE

Tlaletsi, Ndlovu, Landman

CASE / FILE NUMBER

DA27/15

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IN

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 27/15

In the matter between:

H N NCANE
Appellant
and
R LYSTER NO
First Respondent
SAFETY AND SECURITY
SECTORAL
BARGAINING COUNCIL
(SSSBC)
Second Respondent
NATIONAL COMMISSIONER
OF THE SOUTH
AFRICAN POLICE
SERVICE
Third Respondent
S
KHAMBULE
Fourth Respondent

Heard:

8 November 2016

Delivered:

10 January 2016

Summary: The appellant

applied for promotion to the post of Captain in the SAPS. Another candidate was recommended and appointed.

The appellant unsuccessfully

challenged the decision in arbitration proceedings on a number of grounds. On review the Labour Court

awarded him an extra point for

prior learning but although unhappy with the score awarded by the panel for experience awarded him

compensation and not protective

promotion. On appeal, and in the absence of a cross-appeal against

this order, the LAC was bound

by the Labour Court judgment as regards

the aforementioned score. As regards the score awarded for

appellant's experience,

the LAC held that an arbitrator may

only interfere with an employer's substantive decision to

promote a certain person (as

opposed to a procedural decision where

objective criteria have set) where the decision is irrational,

grossly unreasonable or mala

fide unless the employer has set an

objective standard. The decision reached by the arbitrator was

a reasonable one. The

appeal was dismissed with costs.

Coram: Tlaletsi DJP,

Ndlovu JA and Landman JA

Neutral citation: H N

Ncane v National Commissioner of the South African Police Service

(LAC: DA 27/15)

JUDGMENT

LANDMAN JA

Introduction

- [1] Warrant Officer HN Ncane, the appellant, appeals with leave of the Labour Court (Nel AJ) against part of the judgment delivered on 8 December 2014 granting compensation for an unfair labour practice concerning the South African Police Service, the third respondent (the SAPS), to promote the appellant to the position and rank of captain.
- [2] Two applications for condonation for lapses attributable to the appellant were lodged. There was no objection to the granting of these applications. The delays have been adequately explained and consequently condonation was granted.

The background facts

- [3] In promotional phase 1 2009/2010, SAPS advertised “post 337 Wentworth, subcomponents: Detective service station: Sub-section commander, Captain level 8”. The appellant, a warrant officer on level seven, was eligible to apply and did so as did other applicants. Eight candidates were shortlisted for interviews, including the appellant and the fourth respondent.
- [4] The promotion process was governed by National Instruction 2 of 2008 of the SAPS (the National Instruction).
- [5] The interview panel scored the candidates on three criteria namely competency, based on the interview questions and answers, prior learning, training and development and lastly record of previous experience.
- [6] According to the testimony of Major-General Chiliza, the chairperson of the three-person interview panel, qualifications are scored by awarding a maximum of 10 points, as follows:
- ‘Holding a Matric certificate - 5 points
- Holding a ‘National Diploma/Undergraduate’ degree – 1 point
- Holding an ‘Honour’s degree or a B. Tech then that is a first post-graduate’ or ‘National Higher Diploma’ – 1 point
- Holding a Master’s degree – 1 point
- Holding a Doctorate – 1 point
- Completing a Detective course- 1 point.’
- [7] It is only necessary to present the appellant’s and the fourth respondent’s scores as regards prior learning and training. Appellant was scored 7 (Matric 5, Nat dip and LLB 1, (Detective course 1). The fourth respondent was scored 6 (Matric 5, Detective course 1).
- [8] As regards competency, the appellant was scored 5 while the fourth respondent was scored 6.
- [9] The Major-General took the view that experience is taken into consideration by the fact that the appellant and other candidates were shortlisted. In addition, experience was adjudicated on the answers given to questions put to candidates by the panel. The appellant was scored 5 and the fourth respondent 6.
- [10] The appellant became a constable on 11 June 1991. He was promoted to sergeant on 1 January
1996. On 1 April 1999, he was promoted to inspector (now again known as a warrant officer). At this time, he joined the detective branch. He became a group supervisor, then an acting branch commander and finally a crime office commander.

- [11] The fourth respondent became a constable on 8 April 1994 until he was promoted to sergeant on 1 July 1996. He was assigned to the detective branch on 10 January 2000. He was promoted to inspector on 1 July 2001. He became a group supervisor after this date.
- [12] The scores totalled 17 for the appellant and 18 for the fourth respondent.
- [13] In accordance with National Instruction, where two candidates of the same race or gender apply for a promotion, the candidate with the highest score must be recommended for promotion.
- [14] In this round, Warrant Officer Lutchman scored the highest points followed by the fourth respondent. The appellant and Yarley scored equal points. Lutchman and Yarley were eliminated as Employment Equity came into play. The result was that the fourth respondent was recommended by the panel for promotion and was subsequently promoted.

The arbitration

- [15] The appellant was dissatisfied and referred a dispute (against SAPS) concerning an alleged unfair labour practice to the Safety and Security Sectoral Bargaining Council. Certain documents that should have been kept by the panel that interviewed the candidates were not disclosed simply because the individual scores allocated by each panellist were consolidated on one sheet of paper.
- [16] The arbitrator heard evidence and found in favour of SAPS.

The judgment of the court a quo

- [17] The appellant was dissatisfied with the arbitrator's award and launched an application to review and set aside the award.
- [18] The appeal is directed only against paragraph 22 of the judgment of the court a quo which contains both the reasons of the court a quo and the order that was made. The result is that it is unnecessary to summarise the entire judgment. But I must record that the court a quo awarded the appellant one extra point in respect of appellant's qualifications. Although the court a quo was concerned about whether the panel had evaluated the appellant's experience correctly the court did not award him an extra point for this. The appellant's amended score totalled 18 as against the fourth respondent's score of 18.
- [19] There is no appeal and no cross-appeal as regard the award of an extra point to the appellant for holding an LLB degree. The result is that this Court is not at liberty to reconsider this finding and it stands.
- [20] The order appealed against in paragraph 22 of the judgment reads:

‘Given the fact that I am unable, on the evidence before me, to state that the applicant ought to have been preferred to the fourth respondent, I cannot afford relief in the form of the protected promotion he seeks. The only appropriate relief, in the circumstances, is compensation for the applicant. In this regard, I consider it fair and equitable that the applicant be awarded five (5) months compensation calculated at the rate of his remuneration as per the date of the arbitration award, being 11 December 2011.’

[21] The appeal, from the appellant’s perspective, rests on the foundation that the court a quo has reviewed the decision of the first respondent, an arbitrator of the Safety and Security Sectoral Bargaining Council, and has found that SAPS committed an unfair labour practice ie; the failure to promote the appellant was substantively and procedurally

unfair. Ms A Naidoo, who appeared for the appellant, emphasised that the appellant did not appeal against the court a quo’s award of an extra mark in respect of his qualifications. On this premise, the issue is whether an arbitrator, acting reasonably,

should have ordered the “protected promotion” of the appellant. The appellant contends that as the court awarded that

extra point and as the court a quo conceded, in granting leave to appeal, that in the light of his experience the court should have found that he should have been promoted, and therefore the court should have granted the appellant different relief ie protective promotion, the appeal must succeed.

[22] Ms LR Naidoo, who appeared for SAPS, accepted that SAPS was limited in its opposition to the appeal because SAPS had not cross-appealed. Her principal contentions can be summarised as follows:

(a) A piecemeal dissection of the point allocation made by the court a quo runs contrary to the general approach adopted by the court regarding promotion. See *Goliath v Medscheme (Pty) Ltd*[1] where it was said:

‘Inevitably, in evaluating various potential candidates for certain position, the management of an organization must exercise discretion and form an impression of those candidates. Unavoidably this process is not a mechanical or mathematical one where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointment will not always be the correct one. However, in the absence of gross unreasonableness, which leads the court to draw an inference of mala fides, this court should be hesitant to interfere with the exercise of management’s discretion.’

(b) It would be artificial and speculative to seek to analyse the score allocated for experience in the manner advocated by the appellant as the panellists had the benefit of observing the candidates during the interviews and making assessment of their suitability in relation to the experience; and

- (c) In the absence of mala fides and 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 promote. Accordingly, even if it is found that the appellant should have scored one point more for experience, it would only place the appellant, one point ahead of the fourth respondent. This finding, in the absence of any mala fides, cannot entitle the appellant to protective promotion.

Evaluation

[23] At the outset, it is essential to appreciate how an arbitrator must approach a dispute concerning an unfair labour practice as defined in section 186(2)(a) of the Labour Relations Act 66 of 1995 ie “any unfair act or omission that arises between an employer and employee involving unfair conduct by the employer relating to the promotion ... of an employee....” The Labour Court is obliged to approach a review on the same footing save that the ambit of its decision may be limited by the grounds of review. Likewise, this Court will approach an unfair labour practice in the same way save that in arriving at our decision we may be limited by the grounds of review and also the grounds of appeal.

[24] The purpose of promoting an employee is usually because the employer’s organisation has a vacancy for a person to perform a particular task and candidates for promotion are employees functioning at a lower level who possibly have the qualifications,

skills and ability to perform the tasks of the higher position. Good labour relations dictate that an employer must act fairly towards its employees. In the context of promotion, this means that an employer must abide by the law and the objective standards and criteria that it has set for promotion including eligibility for the post and ensure that an eligible employee has a fair opportunity to compete for the post.[2] It is usually said that this leg of the promotion process must be procedurally fair. But as the aim of a fair process is to achieve a fair substantive result, procedural unfairness may result in the final decision itself being substantively unfair.

[25] When it comes to evaluating the suitability of a candidate for promotion, good labour relations expect an employer to act fairly but it also acknowledges that this is not a mechanical process and that there is a justifiable element of subjectivity or discretion

involved. It is for this reason that the discretion of an arbitrator to interfere with an employer’s substantive decision to promote a certain person is limited and an arbitrator may only interfere where the decision is irrational, grossly unreasonable or mala fides. See on this *Goliath v Medscheme* (supra).[3]

[26] But where an employer provides that certain rules apply as regards the decision to promote or to recommend a candidate for promotion, eg as in this case, the candidate who scores the most points must be recommended by the panel, good labour relations requires an employer to be held to this. A failure to comply with the rules may result in substantive unfairness.

[27] In the case where another person has been promoted to the post then the unsuccessful candidate must show that this is unfair. And as Wallis AJ (as he then was) said in *Ndlovu v Commissioner for Conciliation, Mediation and Arbitration and Others*:^[4]

‘That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer is rational it seems to me that no question of unfairness arises.’^[5]

Qualifications and prior learning

[28] Before turning to an examination of the scores, I should deal with the appellant’s submission that as the individual scorecards were not made available that the process was unfair. But the evidence is that the individual scores were collated/consolidated and the average score became that of the entire panel. Nothing turns on the missing individual scorecards.

[29] The scoring of candidates on the basis of prior learning is an objective standard. The National Instruction makes reference to the NQF (National Qualification Framework) so that the qualifications were to be rated according to this standard. These scores were compiled on the strength of documentation presented by each candidate. There was some debate about whether a candidate should be given one point for each diploma or degree that he or she may possess, but as the total is limited to 10 points, it must be accepted that one point is awarded in each category regardless of the number of diplomas or degrees. The Major-General wrongly regarded a B Tech as a post-graduate degree.

[30] The appellant submits that, applying the criteria mentioned by Major-General, he should score an 8 as the LLB degree is a post-graduate degree. The appellant was awarded his LLB by the University of Zululand in 2007. It is not a post-graduate degree. It was not preceded by any other degree. It is therefore a first degree. A National diploma and a first degree are rated on the same level. Although the appellant has both a national diploma and a first degree, they are counted as one on the criteria listed by the Major-General.

[31] The court a quo considered that the appellant’s LLB counted for one extra point. There is no cross-appeal and the appellant does not challenge

this finding therefore this decision prevails.

Competency

[32] No complaint is made as regards this factor. The appellant was scored a 5 and the fourth respondent a 6.

Experience

[33] Initially, Major-General created the impression that experience is taken into consideration by the fact that an applicant was shortlisted. This proposition would ignore the criteria of experience in respect of which marks must be allocated. But later in his evidence, Major-General explains that experience for the position is not measured by years of service nor solely on the candidate's

curriculum vitae but on a candidate's response to questions put to a candidate by the panel.

[34] There can be no quarrel that experience may be distinct from the length of service. Undoubtedly, the panel was entitled to interrogate a candidate's record of experience in order to determine the extent of the candidate's experience. But no such questions were put to the appellant and the fourth respondent. The result is that the panel was left with the record of experience.

[35] The record of experience shows that when the appellant became an inspector in 1999 he joined the detective branch. He became a group supervisor, then an acting branch commander and finally a crime office commander. The fourth respondent was assigned, after he became a sergeant, to the detective branch on 10 January 2000. He was promoted to inspector on 1 July 2001 and became a group supervisor.

[36] A layperson may think that the appellant's experience is closer to that which a layperson may think a captain would exercise. But the evaluation of this aspect is primarily for that of the panel composed of experienced senior police officers. However, I share the uneasiness of the court a quo that the appellant may not have been correctly scored for performance. In the judgment for leave to appeal, the court a quo suggests that it was arguably, inter alia, that the appellant had more experience than the fourth respondent. But an arbitrator may only interfere where the decision is irrational, grossly unreasonable or mala fides. The arbitrator did not interfere with the panel's evaluation.

[37] The question is whether the decision of the arbitrator on this leg was one that a reasonable arbitrator would have reached? The arbitrator paid attention to the requirements for promotion including experience. He was satisfied that the appellant had had a fair opportunity to compete for the post and that any errors were not such as to vitiate the process. He was satisfied that the appointment of the fourth respondent was rationally justifiable. I am of the view that it cannot be said that the arbitrator's decision is one that a reasonable arbitrator would not reach.

[38] The result is that the court a quo's allocation of one extra point for prior learning and qualifications leaves the appellant and the fourth respondent level as regards their total scores. On this basis, it cannot be said that the appellant should have been promoted above the fourth respondent. Protective employment is not warranted. This means that the award of compensation by the court a quo is the appropriate relief.

[39] Both parties sought costs on the basis that costs should follow the result. But the test is whether it would be in accordance with the law and fairness to grant costs. See section 162 of the LRA. The appellant had an arguable case and in so far as the court a quo, in its judgment on Leave to Appeal, appeared to concede that he should have succeeded in that court. The appeal was not a frivolous one. It would be fair to make no order as to costs.

[40] In the premises, the appeal must be dismissed and costs of the application for leave to appeal and the costs of appeal should be awarded to SAPS.

Order

[41] I would make the following order:

1. The appeal is dismissed.
2. There is no order as regards costs.

AA Landman

Judge of the Labour Appeal Court

Tlaletsi DJP and Ndlovu JA concur in the judgment of Landman JA

APPEARANCES:

FOR THE APPELLANT:

Adv A Naidoo

Instructed by

FOR THE THIRD RESPONDENT: Adv LR Naidoo

[1]

[1996] 5 BLLR 603 at 609-610

[2] See *Khumalo and Another v MEC Education* 2014 (5) SA 579 (CC) at paras 62-63, *Nainaar v Department of Works, KZN and Others* (D839/05) [2015] ZALCD 26 (19 May 2015) and *Manana v Department of Labour and Others* [2010] 6 BLLR 664 (LC).

[3] See also *Ngcobo v Standard Bank of South Africa and Others* (D439/12 [2013] ZALCD 33 (25 September 2013).

[4]

(2000) 21 ILJ 1653 (LC).

[5] At para 12.

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