



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Not of interest to other Judges

Case no: JR 1904/12

In the matter between:

DIPHAPANG JACOB MOKOALEDI

Applicant

and

MINISTER OF HEALTH

First Respondent

DEPARTMENT OF HEALTH (GAUTENG)

Second Respondent

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

Third Respondent

COMMISSIONER LUFUNO RAMABULANA

Fourth Respondent

THEMBA DICKSON SKHOSANA

Fifth Respondent

Heard: 19 July 2013

Delivered: 30 July 2013

Summary: Review: Unfair Labour Practice Dispute relating to promotion. Following a recruitment process undertaken to fill a vacant

position of Middle Manager Security at Baragwanath Hospital Baragwanath Hospital, Applicant was not appointed by the Second Respondent. The Applicant contends a legitimate expectation to be so appointed. The Arbitrator dismissed the Applicant's claim as to an unfair labour practice.

JUDGMENT

MADDERN, AJ

Introduction

[1] This is an application to review the arbitration award of the Fourth Respondent determined under the auspices of the Third Respondent under case number PSHS703-11/12 in terms of which the Fourth Respondent, to whom I shall refer as "the Commissioner", dismissed the Applicant's claim as to an unfair labour practice regarding the non appointment of the Applicant by the Second Respondent as Head of Security on Level 11 at Chris Hani Baragwanath Hospital ("Baragwanath Hospital")

[2] The Applicant raises various grounds of review.

The Facts

[3] The Applicant joined the Department of Health in October in 2007 in Assistant Director Level, Level 10. The Applicant then joined Baragwanath Hospital on 17 of February 2010. The Applicant's appointment at Baragwanath Hospital followed a request for transfer initiated by the Chief Executive Officer, Ms J. More, of Baragwanath Hospital. This request for transfer was dated 3 of February 2010 and is marked "DJM1" to the Applicant's papers. It is this document which forms the cornerstone of the Applicant's case ("the transfer request").

- [4] Following the transfer request directed to Dr Rahman, the Chief of Operations, the transfer was approved and the Applicant was then transferred to Baragwanath Hospital on 17 February 2010.
- [5] In August 2011, the Applicant noticed that the Second Respondent had advertised for the position of Head of Security at director level (level 11) at Baragwanath Hospital.
- [6] The Applicant was invited for an interview and proceeded to be interviewed on 12 October 2011.
- [7] An appointment was made of someone other than the Applicant and the appointee assumed the position in December 2011.
- [8] The Applicant requested minutes of the interviews held on 12 October 2011 for the post reference 70270595 for the Middle Manager, security position. This was on 6 December 2011 and on 19 December 2011; the Second Respondent declined to provide the Applicant with the minutes of the interviews as well as the score sheets, on the basis that the information was regarded private and confidential insofar as it related to other candidates that competed for the post.
- [9] The Applicant then proceeded to refer a dispute to the Third Respondent. The matter proceeded to arbitration and was completed on 15 June 2012 which then culminated in the issue of an arbitration award by the Commissioner on 30 July 2012.

The Arbitration

- [10] The Commissioner, after dealing with an initial preliminary issue relating to the submission by the Second Respondent of documents pertaining to the interviews conducted for the position and with contentions by the Applicant that the late production amounted to a procedural irregularity, the Commissioner confirmed that the Applicant would suffer no prejudice which could not be remedied by affording

the Applicant time to peruse the documents disclosed by the Second Respondent.

- [11] The evidence of the Applicant was introduced and from this evidence it was apparent that the Applicant's contention was that he had been promised the position by the CEO, Ms More at the time of his transfer to Baragwanath Hospital in February 2010. The Applicant contended that when he then reported at Baragwanath Hospital he was informed that the post did not exist but that when the post was created the post would be given to him. In this regard, the Applicant conceded that in relation to this promise, it was essentially his word against that of the CEO, Ms More.
- [12] In relation to the powers of Ms More to appoint the Applicant, the Applicant conceded that he assumed that the CEO would have the power to appoint him but that he was not aware of what powers the CEO had or did not have. When the position was advertised, the Applicant raised the issue of the CEO's promise made to him that he be appointed in the position and he was advised that the procedure dictated that the post be advertised and that, consequently, the Applicant was required to apply, which he did.
- [13] It was the Applicant's version that notwithstanding the recruitment procedure, he was nonetheless assured of the position regardless of any other applicants. In this regard, while the Applicant was asked whether he regarded himself as the most suitable candidate, all that the Applicant indicated was that he did regard himself as the suitable candidate in accordance with the advertisement that he had seen in the paper. Beyond this the matter was not explored any further in the evidence and the Applicant's legal representative withdrew a further question directed in relation to this issue and did not pursue the issue any further in relation to the Applicant's evidence or case.

[14] For the Second Respondent, the evidence of Ms More was introduced. Ms More confirmed the request for a transfer of the Applicant from Leratong to Baragwanath Hospital. Ms More was impressed with the Applicant and believed that he could make a difference at Baragwanath Hospital. At the time, there was no post higher than a level 10 but she intended to secure the creation of additional higher posts for Baragwanath Hospital. What Ms More indicated was that in view of the good work done by the Applicant, all that she could do, within her powers, was to increase the number of notches applicable to the level on which the Applicant was on, but that she could not move the Applicant to another level. The recruitment process involving advertising and interviewing would then need to be followed for this to happen. Ms More was not part of the recruitment process so when the post was created in 2011, the Applicant was required to apply. Ms More confirmed that in her view it was 'a pity that when the time came for appointment... that he did not make it'. In relation to the Applicant's contention that he was given an expectation to be appointed at a level 11, the evidence of Ms More was that the Applicant was not given any such promise or assurance.

The Award

[15] The Commissioner recorded in his analysis of the evidence and findings that it was not in dispute that Ms More preferred the Applicant to be appointed into the post, Head of Security at level 11 but that the CEO, Ms More, was not part of the process and consequently could not have exercised her preference.

[16] The Commissioner also considered the participation by the Applicant in the recruitment process and the apparent failure of the Applicant to contest his suitability in relation to others for the position. In essence, the Commissioner found that there was no evidence to suggest that the Applicant had been promised the appointment as Head of Security and that the transfer request could not be regarded as proof of the

promise. The Commissioner proceeded to dismiss the Applicant's case.

Grounds of Review

- [17] While the Applicant contends numerous grounds for review of the Commissioner's award, in essence, the Applicant contends that the evidence supported the Applicant's claim as to a legitimate expectation and that the Commissioner should have found accordingly. The Applicant also challenges the reliance by the Commissioner on evidence relating to failure to challenge the outcome of the interview process and in this context the Applicant contends that the Commissioner ignored the Applicant's evidence that he only participated in the process on receipt of advice to do so. Further, had the Second Respondent furnished the information requested in relation to the interviews when the information was requested, the Applicant would have been placed in a position to challenge it.
- [18] It is the view of this Court that the Commissioner appreciated the nature of the dispute before him. While the Applicant contended that his non-appointment was unfair, the basis for the Applicant's contention was that the position had been promised to him by the CEO. The Applicant does not rely on any unfairness in relation to the interview process nor did the Applicant, in evidence, establish that but for the unfair conduct of the employer in relation to the interview process, the Applicant would have been appointed.
- [19] In relation to the contentions as to the legitimate expectation, it is quite apparent that the document which the Applicant contends formed the basis of his legitimate expectation, namely the transfer letter marked "DJM1", deals solely with the issue of the Applicant's transfer. The letter was also not addressed to him. Counsel for the Applicant conceded that no substantive right in favour of the Applicant

was created by “DJM1. Consequently, the sole basis on which the Applicant contends that a promise was made to him by the CEO that he would be so appointment was the Applicant’s own assertions. These, however, were countered and denied by the CEO, Ms More. The Commissioner was then left with two conflicting versions which the Commissioner then sought to resolve on the basis of an assessment of the probabilities.

[20] In relation to the contention by the Applicant as to a legitimate expectation, the Applicant relies on the judgment of *Glen Duncan v the Minister of Environmental Affairs and Tourism and Others*.¹ The authority on which the Applicant relies, ostensibly on the basis that the doctrine is indeed part of South African law, is misplaced. In fact the Court (per Brand JA with Streicher, Mlambo, Malan JJA et Leech AJA concurring), after considering the original role of the doctrine of legitimate expectation starting from *Administrator, Transvaal v Traub*² and the cases which then followed as well as the development of the doctrine in English law and the extensive academic research and analysis, concludes:

‘These publications will undoubtedly be of valuable assistance when eventually the time comes in an appropriate case, as it presumably will, for the Courts to cut the Gordian knot. But this is not that case. Even if substantive protection of legitimate expectations were to be recognized as part of our law, the Applicant has, in my view, failed to lay the foundation for his claim of a legitimate expectation to acquire a long term license in respect of the Endeavor.’³

[21] For the purposes of the Applicant’s review, on the facts before the Commissioner, the Fourth Respondent, the Applicant failed to establish that any representation was made to him in clear, unambiguous terms devoid of any qualification. The letter of transfer

¹ *Duncan v The Minister of Environmental Affairs and Tourism and Others* 2010 (6) 374 (SCA).

² *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).

³ *Duncan* above n1 at para 14.

on which the Applicant would rely establishes no representation of any kind. Quite apart from this, the Commissioner's finding that even if a representation or a promise of some kind was made to the Applicant, the CEO, Ms More was not competent nor did she have the power to make such a representation or promise. On the probabilities, this issue was fully and fairly determined by the Commissioner and no sustainable ground of review arises. Consequently, then, even if for a moment the prospect of a legitimate expectation on a substantive basis is entertained, the Applicant failed to establish that the representation on which he relied was either competent or lawful for the decision maker to make.⁴

[22] In the premises, I make the following order:

1. The Application to review the arbitration ruling of the Fourth Respondent under case number PSHS703-11/12 is dismissed.
2. The Applicant is ordered to pay the Second Respondent's costs.

Maddern, AJ

Acting Judge of the Labour Court

⁴ *Duncan, supra*, at para 15.

APPEARANCES

For the Applicant: Advocate LLJ Makae

Instructed by: Maoba Attorneys

For the Respondent: Advocate Dlamini

Instructed by: State Attorney, Johannesburg

LABOUR COURT