



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case no: JR 2621/10

In the matter between:

TRUDON (PTY) LTD

Applicant

and

THE CCMA

First Respondent

MOTSOENENG N.O

Second Respondent

JANENE DE BEER

Third Respondent

Heard: 04 March 2013

Delivered: 22 March 2013

Summary: Review of an award on the alleged basis that the commissioner ignored relevant material placed before her.

JUDGMENT

MOSHOANA, AJ

Introduction

- [1] This is an application to review and set aside an award issued by the second respondent acting under the auspices of the first respondent.
- [2] The second respondent found that the third respondent was unfairly demoted and that the applicant committed an unfair labour practice in relation to promotion. She ordered the applicant to reverse the demotion and pay the third respondent an equivalent of one-month salary as compensation. In relation to promotion she ordered the applicant to promote the third respondent to a position of Corporate Communications Manager with effect from 16 September 2010 and to pay her benefits and remuneration applicable to that position. Aggrieved by the award, the applicant launched the present application. The applicant's counsel told the court that the portion of the award dealing with demotion is not under attack. The attack was directed to the promotion finding

Background facts

- [3] During 1996, third respondent commenced employment with the applicant as a Relations Manager. In 2007, after consultation between her line manager and an entity called Hay Group, her position was re-graded to one of Stakeholder Relations Manager. Around August 2010, she was demoted to an Events Coordinator.
- [4] On 10 April 2010, whilst at an athletic event in Durban, the third respondent was offered a promotional position and she accepted it. Subsequently, she learned that the position she was offered was advertised and prospective candidates are being interviewed, she lodged a grievance. The grievance could not be resolved internally; she referred a dispute to the first respondent.

- [5] The second respondent was appointed to resolve the dispute through arbitration. She resolved the dispute on the terms set out above. Aggrieved by the award, the applicant launched this application.

Evaluation

- [6] In its founding affidavit, the applicant raised as grounds for review that there was wrong conclusions as the third respondent failed to discharge her onus, the award is unreasonable for failing to consider certain aspects in relation to demotion, failed to take into account the evidence that the third respondent was made an offer for the position, the determination amounts to gross irregularity and that an appropriate relief should have been one of compensation. In its supplementary affidavit, the applicant raised the issue of lack of jurisdiction in that the matter is a contractual one.
- [7] As required in this court, the applicants filed heads of argument. In its heads, it confined itself to the issue of lack of jurisdiction, reasonable expectation of promotion, failure to apply mind to emails dispelling the expectation to promote, lack of authority to appoint and that the claim was extinguished by the conduct of the third respondent applying. In court, Advocate Mnyatheli, appearing for the applicant sought to expand the grounds and submissions by arguing that the promotion contravened the applicant's policy. The second respondent ought to have taken the policy into account, so the argument went.
- [8] The test for review has been reduced to whether the decision of an arbitrator falls within the bounds of reasonableness. This being a review, the rightness or wrongness of the award does not feature. The attack on jurisdiction is misplaced. The issue whether a contract was concluded is not the dispute but an issue in a dispute. What determines the jurisdiction is the dispute itself not an issue in a dispute. In my view the attack on jurisdiction cannot be upheld.
- [9] Regarding the question of reasonable expectation, I agree with a submission that such generates a procedural right. However the dispute

was about an unfair conduct on the part of the applicant in relation to promotion. Therefore denial of a procedural right amounts to an unfair conduct. I also agree that the expectation does not create a contractual right. It is clear from the award of the second respondent that she considered the giving of a reasonable expectation is a conduct that gave rise to an unfair labour practice. In other words, by giving a reasonable expectation, the applicant conducted itself in an unfair manner in the circumstances where the third respondent is not appointed as promised. I cannot fault this conclusion. The section refers to any unfair act or omission. The operative word there being unfair. The determination of fairness is largely left to a person like the second respondent. Any act or omission as long as it evinces unfairness in relation to promotion qualifies to sustain a claim of unfair labour practice.

- [10] The challenge on the remedy issue is equally misplaced. In terms of section 193 (4), an arbitrator determines the matter on any terms he or she deems reasonable. The power of the reviewing court to interfere is circumscribed. Regarding the extinguishing of a claim, I find no basis in law to conclude that the third respondent did. It is not apparent on the record that she accepted that she applied for the position. On the contrary she disputed a version that she was advised to apply by Smith, who ironically failed to testify to bolster the version already denied.
- [11] On the issue of the policy, it is common cause that the applicant placed no evidence before the second respondent with regard to the policy. There is no evidence whether it was applicable at the time. Uncontested evidence of the third respondent was that there was a practice of promoting without advertising. Counsel for the applicant argued that the fact that the policy formed part of the bundles was sufficient for the second respondent to take it into account. I cannot agree. If the second respondent did that, that on its own is an irregularity. It was incumbent on the applicant to lead evidence suggesting the prohibition in the policy.
- [12] It is inappropriate for a party to not raise an issue at arbitration and latter complain that an arbitrator has ignored a fact. How can an arbitrator

ignore a fact unknown to him? Bundle of documents are prepared for convenience of the parties when the matter is being arbitrated. A material is properly placed before an arbitrator if reference is made thereto in evidence. To simply lump an arbitrator with documents with a hope that he or she will navigate through them and find a material that supports a party's case is more leaving things to chance. If an arbitrator's attention is not directed to that document, then the material is not properly placed before him or her.

Order

[13] In the results, I make the following order:

[14] The application for review is dismissed with costs.

Moshoana, AJ,

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate M Mnyatheli

Instructed by: Makaula Zilwa Inc, Sandton

For the Third Respondent: Attorney J D Crawford of Crawford and Associates,
Parkwood

LABOUR COURT