IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: D273/14

In the matter between:

SOUTH AFRICAN SOCIAL SECURITY AGENCY	**Applicant**
and	
CCMA	**First Respondent**
B PILLEMER N.O.	**Second Respondent**
PUBLIC SERVANTS ASSOCIATION obo	
DHANABAGLAM KARIKAN	**Third Respondent**

Heard: 5 November 2015

Delivered: 12 April 2016

Summary: Onus - in arbitrations decided entirely on written submissions, unless the party who does not bear the onus' version is inherently improbable or contradicted or supplanted by better evidence, the arbitrator is bound to find in this party's favour on a disputed point – dispute of right – contractual disputes.

JUDGMENT

WHITCHER J

[1] The Second Respondent ('the arbitrator') found that Ms. Dhanabaglam Karikan ('the employee') should have been promoted to the rank of senior administrative officer as of 1 March 2000. She ordered that the employee be retrospectively promoted to that position.

[2] The Applicant seeks to review the award in terms of section 145 of the LRA. The application is opposed by the Third Respondent on behalf of the employee.

[3] In 1983, the employee began working for the erstwhile Department of Social Development as a clerk. Before its abolishment as a condition of employment in 2001, employees were entitled to enhancements in salary or grade after working a certain period of time and upon recommendation by their supervisor. These were called Rank and Leg promotions and were normally available, in turn, after three years. Employees could, however, be promoted 'out of turn' six months earlier upon the recommendation of a supervisor.

[4] During 1994, the employee's supervisor recommended that she was promotable 'out of turn'. In 1997, a moderating committee lowered the supervisor's recommendation to her being promotable "in turn". The employee lodged a grievance against this decision which ended up in the Public Service Commission ('the PSC'). In 2004, after a number of deplorable delays, the PSC found that the department's decision was incorrect. It ordered that a new assessment be done.

[5] In the meantime in 2006, SASSA, a state agency, took over the functions the department earlier performed. The employee was transferred into SASSA's employ, with all rights and obligations transferred to the new employer in terms of a Bargaining Council resolution. The correspondence from the PSC directing that a new assessment be done was lost and SASSA only in 2011 assembled a new committee. This committee found that the employee was indeed promotable out of turn as her supervisor had suggested sixteen years earlier and a payment was made to her in lieu of financial loss.

[6] The employee was not satisfied. Notwithstanding the payments, she felt that she had not attained the rank that was her due. Her complaint was that the

failure in 1994 to promote her 'out of turn' had had run-on effects in her career. Before Rank and Leg promotions were abolished she would have attained the rank of a senior administrative *officer* at salary level 8. However, she was stuck at salary level 7 at the time and still within the *clerk* cadre of the public service.

[7] The employer raised three points *in limine* challenging the jurisdiction of the CCMA to hear this dispute. These were that the dispute was not about a promotion but about a translation in rank or grading; that the issue was about the interpretation of a contractual provision and not a promotion; and that the dispute that emerged in the hearing had not been conciliated. The arbitrator dismissed these points.

[8] The essence of the arbitrator's finding in favour of the employee on the merits was that, had the employee been promoted 'out of turn' in March 1994, she would have attained rank promotions every three years thereafter, until this mechanism for career advancement was abolished in 2001. This meant that in March 1997, the employee should have been promoted from assistant to administrative officer proper. Again, after three years, in March 2000, she should have been promoted to senior administrative officer.

[9] Fortifying the arbitrator's understanding was the fact that a comparator employee existed: a Ms. Govender, who was in an identical position to the employee and who was retrospectively promoted following a successful grievance.

[10] An important feature of the hearing was that the parties agreed to dispense with oral evidence and to swap written statements with supporting documents as evidentiary material.

Grounds of review and evaluation

[11] The Applicant first contends that its three points *in limine* were so unsatisfactorily decided that no reasonable decision-maker would have found as the arbitrator did. On the contrary, there is nothing the matter with the arbitrator's finding that she had jurisdiction over the dispute as an unfair labour practice relating to promotion. The employer's own documentation

referred to translation in rank as a promotion. It self-evidently was a promotion as Ms. Karikan's status and salary would have been elevated by such a translation in rank, thus fitting the general definition of promotion[1]. In addition, although the relief she sought was an enhancement of her grade, the underlying cause of the dispute related to the employee's contention that her rights had been breached. The employee was not seeking to create fresh rights in respect of her promotion but to enforce rights she claimed already existed[2].

[12] The related criticism that the dispute concerned an interpretation of a contractual term is also without merit. While parts of the employee's contract dealing with promotion had to be interpreted to decide this matter, to suggest that it was therefore a dispute about contract, depriving the CCMA of jurisdiction, is fallacious.

[13] The dispute before the arbitrator was furthermore properly conciliated and brought within proper time limits. The issue to be determined was whether the employee should have been promoted to the rank of senior administrative officer when SASSA considered her case anew in 2011. This issue and the attendant relief sought was the natural consequence of the employee being unfairly denied a translation in rank, 'out of turn', back in 1994 but that is not when the present dispute arose. It arose when SASSA took a position not to rectify these alleged historical wrongs.

[14] The Applicant raised a fourth point *in limine*, not raised during the hearing, that the employee's former employer, the Department of Social Development, should have been joined in the matter. It argued that since the complained of actions were committed when the department was still the employer, SASSA should not be held liable for the failings of the previous employer. Even if it were to be held liable, the department ought to have been joined as they had a substantial interest in the outcome of the matter.

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[1] See *KwaZulu-Natal Department of Transport v Hoosen and Others* (2016) 37 ILJ 156 (LC) at para 18

[2] See *Mathibeli v Minister of Labour* [2015] 3 BLLR 267 (LAC) at para 19

[15] The criticism is thus that the arbitrator did not *mero motu* consider non-joinder. I do not agree with this criticism. The Applicant is the department's legal successor. In terms of clause 6.1 of Resolution 1 of the Public Health and Welfare Sectoral Bargaining Council, all the department's obligations transferred to SASSA when it came into existence. The dispute arose from a decision of a SASSA committee who reconvened to reconsider the employee's claims, historical as they may be, in 2011.

[16] I also do not agree that the erstwhile employer has a substantial interest in the outcome of the matter and none was put forward on the papers. The department is not financially liable; the Rank and Leg promotion system, with which this case deals, was discontinued at the turn of the century; and it is unlikely that any adverse factual finding made against it in the way it handled the matter over time will affect it.

[17] I thus find that the arbitrator's dismissal of the three points *in limine* and not joining another party off her own bat, was the correct decision; this being the test in dealing with decisions on jurisdiction on review.[3]

[18] The Applicant also criticized the arbitrator for dismissing its points *in limine* in a summary manner. The arbitrator should instead be complimented for disposing of weak legal points with the minimum of verbiage. As I have earlier found, the absence in an award of detailed rebuttals of all arguments made by parties should not, in itself, be considered a sign that an arbitrator has failed to apply his or her mind to the issues[4]. Giving an argument short shrift in an award could just as well mean that an arbitrator has determined it to be irrelevant, frivolous or weak. It is whether this implied dismissal of the point is unreasonable and distorted the outcome of the matter that should be addressed on review.

[19] Turning to the further grounds of review, they are that the arbitrator failed to apply her mind to important pieces of evidence and misdirected herself on the pieces she did consider. The first point is that the arbitrator ignored the

[3] *SA Rugby Players Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC)
[4] *Mec: Department of Health, ECP v PHSDSBC and Others* (PR63/14) [2016] ZALCPE 9 (16 March 2016) at para 32

Applicant's assertion in the hearing that translation in rank could not automatically occur every three years. A supervisor needed to assess the employee and recommend such an upgrading. The employee was never assessed in respect of the 1997 and 2000 translations in rank that the arbitrator found should have automatically be granted to her. Second, the policy in place at the time prevented the employee being moved from the clerk to the officer cadre of the public service without being promoted to a vacant, advertised post. Relatedly, if the employee were to have been translated in rank every three years, she would, at most, have been elevated to the position of chief administrative clerk. This was only a grade 7 post and not the grade 8 post of senior administrative officer which she sought. Third, the arbitrator took into consideration the supposed promotion of a comparator employee, a Ms. Govender, when the employee produced no evidence of this at the hearing.

[20] Normally when disputes of fact arise in a hearing, an arbitrator decides these by evaluating the inherent probability of the versions, the reliability of the evidence and the credibility of witnesses. The cross-examination of witnesses is a particularly useful stage of the hearing for it is here that concessions are obtained or assertions made during evidence-in-chief are discredited. It would, in these circumstances, be possible for a reviewing court to assess whether an arbitrator properly and reasonably evaluated the evidence when deciding disputes of fact.

[21] In this matter, the parties elected to forgo oral evidence but to exchange written submissions instead. There is nothing *per se* wrong with this manner of conducting proceedings. However, where major disputes of fact exist, the party bearing the onus (the employee in this case) runs a significant risk in adopting such a trial format. In this case, SASSA pertinently disputed, for example, that the employee could ever have made the transition between clerk and officer cadres in the public service without promotion into a vacant post and after a normal appointment process. The employer's assertion that, even with two further "in turn" promotions being assumed to have taken place in 1997 and 2000, the employee would not have arrived at grade 8, was similarly not demonstrably rebutted.

[22] Bearing in mind upon whom the onus rests in unfair labour practice matters[5], unless the employer's version was inherently improbable or supplanted by better evidence, the arbitrator is bound to find in the employer's favour on a disputed point. This is the general position in deciding disputes of fact that arise during motion proceedings.

[23] In my view, once SASSA asserted that movement between clerk and officer streams of the public service prevented the employee from being appointed as an officer merely by translation in rank, the arbitrator was, absent any inherent improbability or better evidence contradicting that assertion, bound to find against the accusing party. The same would apply to the employer's assertion that elevation, even to the rank of chief clerk, had to occur via a competitive application process. On my assessment, the format in which the hearing took place provided the arbitrator with insufficient evidentiary material to reject the employer's version at the hearing. In the result, the finding that the employee should have been promoted to the rank of senior administrative officer in March 2001 is *prima facie* unreasonable, with the remaining question being whether there exists an evidentiary basis to displace the *prima facie* case of unreasonableness.[6] To my mind, there is none.

[24] The same applies to the evidence about Ms. Govender. The employee cited her as a comparator, while the employer denied knowledge of these facts. It then fell upon the employee to flesh out her contention in greater detail, perhaps with supporting documentary evidence, before the arbitrator could accept this inconsistency as proven and rely upon it in her award.

[25] In contrast to the findings above, I do not think the arbitrator acted unreasonably in discounting submissions by the employer that translations in rank needed the approval of a supervisor. While this fact may be accepted as proven, in general terms, if an employee is unfairly denied a promotion and, in the ordinary course of affairs, she would have been eligible for further elevation in the future but for the unfair act, it is only fair to assume that her performance would have been adequate to entitle her to those further career

[5] See section 10 of the Labour Relations Act
[6] See *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) at para 33.

advancements. To hold otherwise and provide relief only in respect of the original block to an employee's career would, in my view, deny the employee fair and equitable relief. I thus do not agree that the arbitrator misdirected herself insofar as she was prepared to infer that the employee would have been entitled to further promotions after the one unfairly withheld from her in 1994. Having said that, this principle does not assist the employee in this case because of submissions by the employer that the employee would, in the ordinary course of rank translations, not have been promoted from clerk to officer. In addition, the employer asserted that, even with the assumed further promotions in 1997 and 2000, the employee would only have ended up on grade 7. As indicated above, the employee did not demonstrably rebut these assertions within the agreed upon hearing format.

Order

[26] In the premises, the following order is made:

1. The arbitration award issued by the Second Respondent is set aside on review.
2. The award is replaced with an order that the application is dismissed.
3. There is no order as to costs.

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Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv NSV Mfeka, instructed by Hlela Attorneys
For the Third Respondent: MacGregor Erasmus Attorneys