IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case no: JR 3055/04

Reportable
In the matter between:

THE CITY OF JOHANNESBURG	Applicant
and	
JAFTA MPHAHLANI NO	First Respondent
THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	Second Respondent
C OELOFSE	Third Respondent
H VAN EDEN	Fourth Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] The applicant seeks an order in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 ("the LRA"), reviewing and setting aside the award of the first respondent ("the commissioner") dated 8 October 2004 and issued under the auspices of the second respondent as case number 220, 221 and 222/JDBC/26/05/03.

Background facts

[2] The third and fourth respondents are employees of the applicant. They were previously employed as traffic officers in the Sandton Town Council, one of the predecessors-in-law to the applicant's Johannesburg Metropolitan Police Department ("JMPD"). As a result of the applicant being created as a

single metropolitan authority for the Greater Johannesburg area during 2000 to 2001, large scale restructuring of its departments occurred. This included, amongst others, combining the traffic departments of all local authorities into one structure, the JMPD. During this process many previous employees of those traffic departments resigned or changed positions within the applicant, while others "migrated" from previous traffic departments into the JMPD. The third and fourth respondents followed the migration route and according to their answering affidavits are currently employed as Internal Affairs Officer and Metro Police Officer in the JMPD respectively.

[3] In order to be eligible for appointment to the JMPD, all traffic officers were required to complete a six month conversion or training course. It is common cause that the third and fourth respondents completed the conversion course in 2002 and 2003 respectively.

[4] Mr K D Machaba was appointed Superintendent Operations in the JMPD on 24 November 2001 and Mr M M Sethosa was appointed Inspector on 5 February 2003. It was common cause that they had at that stage not completed the required conversion course. Both their letters of appointment state that they will be expected to undergo a Metropolitan Police Officer Conversion Course in order to qualify as members of the JMPD.

[5] The recruitment policy applicable to the JMPD, provided for recruitment to be conducted in terms of a procedure where all vacancies were first advertised or "circularised" internally and only if no suitable candidates were found, were vacancies advertised externally ("the recruitment policy"). The JMPD would in addition have to obtain permission from the applicant to conduct recruitment external to the applicant.

[6] The third and fourth respondents ("Oelofse and Van Eden") were dissatisfied with the procedure used to effect the appointments of Machaba and Sethosa (who will be referred to as "the incumbents"), and referred a dispute to the second respondent. The essence of their referral was that the appointments were unprocedural and irregular in that they were made

contrary to the recruitment policy. As a result, Oelofse and Van Eden were the victims of an unfair labour practice since they were denied the opportunity to apply for those positions. If they had been appointed this would have constituted promotions for them both. They characterised the dispute as an "*ULP – promotion relating to appointment*".

[7] It is common cause that positions equivalent to those to which the incumbents were appointed were subsequently circularised internally. Oelofse applied but was unsuccessful. Van Eden did not apply because he was on leave at the time.

The grounds of review

[8] The applicant relies on the following defects in the award:

(a) There is no causal *nexus* between the allegedly unfair procedure and a substantive right on the part of the third and fourth respondents to be appointed or promoted.

(b) While the commissioner acknowledged that it is the employer's prerogative to decide upon the suitability of applicants, he proceeded to substitute himself for the employer.

(c) The commissioner ignored the evidence that after the appointment of the incumbents, there were equivalent vacancies circularised internally which the third and fourth respondents were eligible to apply for. Oelofse applied for promotion to Inspector (a position equivalent to Sethosa's) but was unsuccessful. He did not challenge that decision. Van Eden did not apply for any of the positions and contended that he may have been on leave at the time.

(d) There was no evidence that there were vacant inspector positions available in the structure of the JMPD at the time.

[9] The applicant relies in addition on the non-joinder of the incumbents as constituting a fatal flaw to the arbitration.

Evidence led at the arbitration

[10] Oelofse testified that he completed the conversion course in 2002. He explained that the positions of Inspector and Superintendent were of higher rank than a first line manager position in the JMPD. According to him Sethosa was appointed Inspector in the JMPD in 2001 without having completed the conversion course and as a result of a vacancy that had not been advertised internally or externally. As a result, the third respondent and other traffic officers were denied the opportunity to apply for this position. Sethosa had prior to his resignation been a traffic warden, but had resigned and moved to Pietersburg where he became a traffic officer. The third respondent testified that if he had been given the opportunity to apply he had no doubt that he would have been appointed to the position. He is a qualified officer with eleven years' service, and has the necessary skills and experience. If he had been given *"the right opportunity or fair opportunity he would have proven himself".* In cross examination he confirmed that when various positions, including those of inspector and superintendent were subsequently advertised, he applied but was not appointed.

[11] Van Eden testified that he had been a traffic officer for over eleven years prior to his appointment to the JMPD. He attended the conversion course and wrote the conversion exam in 2003. Sethosa was in the same class. He had not seen any adverts for the position to which Sethosa had been appointed, and appointed to this required a minimum of five year's experience. He believed that had he been given the opportunity to apply for this promotion position he would have been successful. Machaba was appointed Superintendent in 2001 and at that stage he had not completed the conversion course. The fourth respondent only became aware of his appointment in 2003 when he was moved to Soweto and saw Machaba in his office wearing the rank insignia and apparel of a Superintendent. However he conceded that vacancies for Inspector positions had at some point thereafter been advertised. He did not apply because he was probably on leave at the time. He also confirmed that Machaba had been a Deputy Chief in Mossel

Bay prior to his appointment to the JMPD as Superintendent. Notwithstanding the applicant's case that Machaba was an equivalent appointment, he alleged that this was a promotion because the JMPD had a higher status than a traffic department.

[12] The Deputy Director in the Human Resources division of the JMPD, Mr Sipho Kubheka ("Kubheka"), testified about the reasons for the appointment of the incumbents and the process that was followed in regard to each appointment. His evidence was that shortly after the establishment of the JMPD, various Directors and Deputy Directors within the JMPD had approached the head of the JMPD, the Chief of Police ('the Chief"), in regard to a prevailing skills shortage at senior employee level. It was suggested that he should consider re-hiring previously employed traffic officers, as at the time there was an urgent need to fill certain positions that could not be held in abeyance until all traffic officers had completed the conversion course. Such appointments would have necessitated a deviation from the applicable recruitment policy.

[13] Kubheka testified that Sethosa had resigned prior to formation of the JMPD and was employed in the traffic department in Pietersberg as an Assistant Inspector. A traffic officer employed in the JMPD, Lukas Vengani, whose home was in Limpopo requested a transfer closer to his home when his wife became ill. His situation was discussed with the Chief, who lent a sympathetic ear to his plight, and suggested that Khubeka should find a way of addressing the problem. He communicated with the traffic department in Pietersberg and it was established that Sethosa wanted a transfer to Johannesburg. Accordingly, a direct swap was effected between the traffic department and the JMPD as a result of which Sethosa was appointed to the JMPD. Machaba had resigned prior to the establishment of the JMPD, and because of the skills needs he was interviewed by the Chief and offered a position at a salary equivalent to the one he was earning in his former position.

[14] Kubhekha testified that at the time "*the appointments were frozen. If any appointments were to take place, they were to be done internally."* He explained the rationale for the deviation from the recruitment policy as follows: *"You see the JMPD was just a newly born organisation at that time and yes, there was a process that was also undertaken, if I may...(inaudible)through your indulgence, if I may explain this other point. We had to circularise internally to get a number of people as much as possible, because the Council expected too much from the newly established JMPD insofar as enforcement is concerned. I remember there was a situation, where we took more than seventy people from within Council. Through an exercise that we adopted, which is called the RPL, recognition for prior learning, people were trained and were prepared for taking positions as officers. Now as a result, this was a result of the expectations that were on the JMPD. Now given that situation, the request from the deputies or the chiefs of, I think, this is one of the things that made the chief to give them a sympathetic ear as well".*

The arbitration award

[15] The commissioner's finding in regard to the onus of proof was as follows:

"(a) The third and fourth respondents had discharged the onus of proving on a balance of probabilities that the applicant committed an unfair labour practice by failing to adhere to its established policies and/or practices.

(b) The respondents had been unfairly denied an opportunity to apply for positions and at least compete for same following satisfying all requirements.

(c) The respondents had been unfairly denied appointments to at least a senior rank as inspectors without any fair reason".

[16] In his analysis of evidence and argument the commissioner made the finding that the incumbents were appointed contrary to the policy and/or practice at the applicant. He found that the applicant was unable to justify this deviation, as the only rationale emanated from the Chief's "*sympathetic ear"* and "*sympathetic yes"* to their appointments. This he found to be an unfair labour practice. He found not only that third and fourth respondents had been

unfairly denied an opportunity to apply for positions and to compete with the appointees, but also that they met all the requirements for appointment and/or promotion to senior positions as Inspector and Superintendent. Although he noted that appointments and promotions were an employer's prerogative, he found they could not be said to have been fair if the primary motivation was sympathy.

[17] The commissioner proceeded to make the following order:

"7.1 The appointments of both Sethosa and Machaba were unprocedural and unfair.

7.2 Oelofse and Van Eden do qualify and meet the requirements for appointment and/or promotion to senior positions as Inspectors.

7.3 The Respondent is ordered to effect Oelofse and Van Eden's appointment and/or promotion in accordance with Condition of Service (sic) on or before close of business on Monday the 31st of January 2005.

7.4 There is no order as to costs."

The review standard

[18] It is now trite that the test for review is as expressed in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) ILJ 2405 (CC). This requires a reviewing court to consider whether the decision reached by the commissioner is one that a reasonable decision maker could not reach on the evidence presented.

[19] In considering the reasonable decision maker test, the court in *Edcon Ltd v Pillemer NO & Others* (2008) 29 ILJ 614 (LAC) at par 21, stated as follows:
"*If the commissioner made a decision that a reasonable decision maker could not reach, he/she would have acted unreasonably which could then result in interference with the award. This, in my view, boils down to saying the decision of the commissioner is to be reasonable. To my understanding the dictum in Sidumo is not about shifting from the 'reasonable employer test' in favour of the so-called reasonable employee test. Instead, meaningful strides*

are taken to refocus attention on the supposed impartiality of the commissioner as the decision maker at the arbitration whose function it is to weigh up all the relevant factors and circumstances of each case in order to come up with a reasonable decision. It is in fact the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof".

Applicant's submissions

[20] The applicant argued that there was no evidence to suggest that the respondents would have been successful had they competed for the positions to which the incumbents were appointed, or equivalent positions, with other prospective candidates. There was thus no causal nexus between the flawed procedure and a right on the part of the third and fourth respondent to be appointed. Moreover, Sethosa's appointment arose out of a direct swap between two entities within the applicant. At best, the third and fourth respondents' may have been entitled to some form of compensation as a *solatium* for the failure to comply with internal procedure, but had no substantive right to be appointed. In order to establish the existence of an unfair labour practice an employee must prove not only that the employer acted unfairly, but that he or she would indeed have been promoted if it were not for the unfair conduct. This is a difficult onus to discharge, and the third and fourth respondents have not succeeded in this regard. The applicant also referred to *Kwadukuza Municipality v S A Local Government Bargaining Council & others* (2009) 30 ILJ 356 (LC), and submitted that, similar to the issue *in casu*, there was no evidence before the commissioner to suggest that the third and fourth respondents were indeed suitable for the positions, or were more suitable than the incumbents. The third and fourth respondents rely on the fact that the process was not open to them. However if it had been advertised they would have had to compete with hundreds of other applicants, rendering their successful appointment even more remote.

[21] The order to promote or appoint the respondents is a misdirection, particularly where there was no evidence led on the relevant skills and

qualifications of the incumbents, and there was no basis on which the commissioner could have made findings regarding their suitability. In *Kwadukuza (supra)* the court cited *Minister of Defence v Dunn* (2007) 28 ILJ 2223 (SCA), to the effect that it is impermissible for a court to substitute its own decision – to give an effective promotion – for that of the employer.

[22] It was incumbent upon the commissioner to establish whether it would be reasonably practicable for the applicant to have to accommodate the third and fourth respondents in those positions. This was held to be the test in *Gordon v Department of Health: Kwazulu Natal (2008) 29 ILJ 2535 (SCA)* at para 28 (on which the respondents' rely for their contention in regard to the non-joinder point). In these circumstances it should have been clear that compensation would have been a more appropriate remedy. It would furthermore have been relevant given budgetary issues and the freeze on positions, which the commissioner failed to consider at all. He did not find that the applicant, in appointing the incumbents, acted "*inherently arbitrarily*" as in *Gordon (supra).* Here the only sustainable conclusion was that there was procedural unfairness in the deviation from the policy requiring internal advertising.

[23] The incumbents should have been joined as they had a direct interest in the matter given that they faced retrenchment in order to give effect to the award : *Public Servants' Association v Department of Justice & Others* (2004) 25 ILJ 692 (LAC); *National Commissioner of the S A Police Service v SSBC & Others* (2005) 26 ILJ 903 (LC) at 909. In *Public Servants Association (supra)* Zondo JP said the following (at para 39):

"Even if no relief was sought against the appointees, they should have been joined or at least should have been given an opportunity to be heard before the commissioner could make the finding that 'as an objective fact' they are not suitable for the positions to which they were appointed. This is so because such a finding would, with or without any relief being sought against the appointees, affect their rights and interests adversely."

The court held that the non-joinder was enough to justify the court a quo's decision to set the award aside. Further, in *Amalgamated Engineering Union v*

Minister of Labour 1949 (3) SA 637 (A) at page 657 it was held by Fagan AJA that:

"The question of joinder should surely not depend upon the nature of the subject matter of the suit,…but…on the manner in which, and the extent to which, the Court's order may affect the interests of third parties."

Third and Fourth Respondents' submissions

[24] Mr Venter, appearing for the respondents**,** submitted that the respondents' versions were not materially challenged in the arbitration, and the issue before the arbitrator was clearly one of *both* substance and procedure. The third respondent's evidence in this regard was clear – if former officers were being approached because of skills needs, why he was not approached for appointment given his substantive qualifications. The evidence of the respondents was not rebutted. It was not put to them that the procedure was fair or that the incumbents were qualified for the positions. The fourth respondent's evidence that the position of inspector required a minimum of five years' experience was similarly not challenged. Kubheka's evidence was moreover quite clearly that in the drive to fill positions, procedures were flaunted, but the opportunities were not extended to the respondents. His evidence was clearly that they "*had to circularise to get a number of people as much as possible".* This is self evident. In the light of this evidence it was reasonable for the commissioner to conclude that the appointments were not made in accordance with the applicant's procedures. The respondents presented sufficient evidence of procedural deviation and that they had the necessary substantive qualifications – it was submitted that on this leg alone a case is made out for confirmation of the award.

[25] The respondents submit in their heads of argument that the commissioner did not substitute himself for the employer but simply decided not to defer to the employer's decision – this is required by *Sidumo (supra)* where the court held:

"[79] To sum up. In terms of the LRA a commissioner has to determine whether the dismissal is fair or not. A commissioner is not given the power to

consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all the relevant circumstances".

[26] There was no evidence that the applicant either made a formal resolution authorising, or any other form of power authorising the departure from the established recruitment and advertising procedures. To this effect the applicant failed to lead the evidence of the Chief to explain the deviation from the established procedure. If indeed special grounds for the deviation existed, then a special procedure or resolution from the applicant to this effect would have been necessary, and it was required of the applicant to prove that this had been done. Furthermore, the positions were frozen, as was the applicant's testimony and permission had to be obtained from the applicant to deviate from the policy. In these circumstances the special circumstances cannot be found to exist and the award is sustainable. Moreover it was submitted that it makes no difference how many positions were advertised following the appointment of the incumbents. The fact of the matter was that an unfair labour practice had been committed at the time and the third and fourth respondents were affected thereby. In other words, when the other positions were subsequently advertised the damage had already been done, and the third and fourth respondents were entitled to relief in order to remedy the wrong that had been committed. Thus, for the applicant to argue that it would have to create new positions to accommodate them is irrelevant. The applicant ought to have reasonably foreseen that such a situation may arise. The mere fact that a position has been filled is not a prohibition in law to depriving parties of the remedies they are entitled to.

[27] On the non-joinder issue, it was submitted that given the undisputed evidence of skills shortages at the JMPD it would not follow that retrenchment of the incumbents would be necessary to give effect to the award. The incumbents are not bound by the award, no relief was sought against them *in personam* and no adverse findings were made against them either on the basis of their unsuitability or otherwise. It is trite that a third party must be

joined in proceedings if he is shown to have a direct and substantial interest in the subject matter of the litigation: *Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)*. However the incumbents do not have such an interest, as is manifest from the approach of the Supreme Court of Appeals in *Gordon (supra).* The SCA held *(a*t para 11 B):

"In the Public Servants' case there was no potential prejudice to the successful appointees as no relief was directed against them. The LAC further erred in finding that the relief sought was irrelevant in considering whether a party had a direct and substantial interest in the matter. The cases referred to by the LAC do not support this conclusion and as pointed out above they dealt with a completely separate and unrelated principle. In the circumstances that LAC's decision that ...had a direct and substantial interest in the matter and that the failure to join him was fatal to the appellant's case must be reversed".

The SCA further distinguished *Amalgamated Engineering Union* (supra) on the facts and said that where the relief sought was not directed at setting aside of the decision and reversal of the appointments, the successful appointee would have no legal interest in the matter. The SCA further stated (at para [10] G-H):

"In a situation where a number of applicants compete for a position, they provide information to the prospective employer to influence the decision in their favour. That is as far as they can take it. Once the employer selects from amongst them it is up to the employer to defend its decision if challenged. This is because the employer, as the directing and controlling mind of the enterprise which is vested with the managerial prerogative to manage it, has a legal interest in the confirmation of its decision as it faces a potential order against it. The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which can lead to his removal from the position. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests."

[28] Since there were a number of positions available at the time when the incumbents were appointed and that Kubheka testified to 70 other employees

being migrated from the applicant as a result of a re-assessment of their skills, they would all have an interest in the arbitration if the applicant's contention was correct. This would result in an absurdity. The applicant moreover did not countenance at the time that any form of retrenchment would be necessary and it cannot now seek to rely on this. In the circumstances the non-joinder did not constitute a gross irregularity. This was not an issue before the commissioner and moreover the incumbents have no personal or joint vested interest in the non-promotion or non-appointment of the third and fourth respondents.

Analysis and conclusion

[29] The contention that the arbitration was flawed on account of the non-joinder is in my view, in light of the SCA authority as set out above, without merit.

[30] I do not agree that the *Sidumo* dictum assists the respondents. Read in its proper context it is not applicable to this situation but to the deference observed in the context of a sanction imposed by an employer for a disciplinary offence.

[31] In the circumstances, it would appear to be common cause that there was a deviation from the recruitment policy. This was the evidence of Kubheka as well as the undisputed evidence of the third and fourth respondents. However, it would appear that the evidence relating to the transitional circumstances, which it was alleged by the applicant warranted the deviation, were not adequately taken into account by the commissioner. In these circumstances he concluded that that the appointment of the incumbents was unprocedural and unfair. That this unfairness may or may not have been remedied by the subsequent advertising of positions for which the respondents either did not apply or were not successful was not considered by the commissioner. The unfairness moreover does not necessarily translate into a denial of promotion to the third and fourth respondents. However, the commissioner proceeds to find without further ado that the unfair

appointments of the incumbents guaranteed a substantive right to promotion on the part of the third and fourth respondents and constituted an unfair labour practice. This is the missing causal nexus that the applicant contends taints the award as unreasonable. I agree. Such a finding suggests a giant leap in logic not supported by the evidence. The commissioner failed to have regard to the material facts, which are distinguishable from *Public Servants' Association* (supra), where the employees had in fact applied for posts – here the contention is that but for the deviation from policy the positions would have been advertised, and the respondents would not only have applied but would have been successful. Despite the tenuous connection the commissioner finds that the respondents had been "*denied appointments without any fair reason",* and proceeds (in the absence of evidence on the issue) to find that they do meet the criteria for appointment and should be so appointed. This demonstrates such a fundamental flaw in reasoning that it can only emanate from a complete disregard of relevant material, is grossly irregular and accordingly cannot be said to be a decision that a reasonable decision maker could make.

[32] The respondents appear to have contemplated the possibility that they could be awarded compensation. This is clear from the remedy set out in their referral as being "*promotion of the applicants in the positions applied for alternatively compensation for procedural unfairness*". The reference to positions applied for appears to refer to the positions they would have applied for had these been advertised. This obfuscation may have been the source of the commissioner's flawed reasoning. However even had they applied there was no guarantee of success and in this context the remedy was, in my view, wholly inappropriate and unreasonable. Moreover they had subsequently applied and not been appointed, which was a relevant consideration. At best for the respondents, I agree with Mr Hutchinson that they might be entitled a *solatium* to compensate for the *injuria* caused by the denial of the opportunity to apply for the positions to which the incumbents were appointed. However, although I agree in principle with the approach taken by Pillemer AJ in *Kwadukuza* (supra) there is no evidence before me on the basis of which the appropriate *solatium* can be determined. Nor did Mr Venter seek this remedy.

[33] To my mind the causal nexus point is dispositive of the review and I do not consider it necessary to rule on the issue of substitution or reasonable practicality. Accordingly, in my view, a proper case has been made out for setting aside the award.

[34] Although there is no reason why costs should not follow the result, in this matter both the third and fourth respondents are currently in the employ of the applicant, and submissions were made by Mr Venter that they have both since the referral of the dispute progressed whilst in the employ of the applicant. I accordingly do not consider a costs award to be in the interests of law and fairness.

[35] I do not propose to deal with the points *in limine* raised by the respondents nor the numerous allegations and counter allegations of technical and procedural defects in the pleadings and delays in the process. Given that there appears to be culpability on both sides, I accordingly adopted a substantive approach and considered the matter on its merits. The only issue which would have created cause for concern was the contention that the application was late and had not been accompanied by an application for condonation. However since this objection fell away it is no longer necessary to consider it.

[36] The only remaining issue is whether to remit the dispute to the second respondent or for this Court to substitute a decision. The applicant took the view that this Court was not in a position to determine the matter and should either remit the matter in its entirety, or remit it on a limited basis as to whether there was procedural unfairness caused by the failure to advertise and whether this constituted an unfair labour practice and entitled the respondents to a *solatium.* Mr Venter, however, relied on the anomaly that exists as a result of progress made within the ranks by the third and fourth respondents, and contended that since the matter was excessively delayed by the applicant for more than five years, a compensatory award is preferable, and urged the Court to award the respondents' what they would have been

entitled to financially as a result of the award. He did not address me on the issue of whether a *solatium* is justified for the *injuria* suffered by the respondents as a result of the denial of the opportunity to apply for the posts of the incumbents, and in the absence of evidence on this issue I cannot determine same.

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

1. The review application is granted.
2. The award of the first respondent is reviewed and set aside.
3. The matter is remitted to the second respondent for determination by a commissioner other than the first respondent.
4. There is no order as to costs.

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Bhoola J

Judge of the Labour Court of South Africa

Date of hearing: 18 February 2010

Date of judgment: 26 March 2010

Appearance:

For the applicant: Adv W J Hutchinson instructed by Moodie & Robertson

For the third and fourth respondents: Adv F Venter instructed by Van Gaalen Attorneys