



Arbitration Award Rendered

Case Number: PSSS321-23/24

Commissioner: Jana Dell

Date of Award: 1 July 2024

In the **ARBITRATION** between

SOLIDARITY obo JACOBUS FREDERICK VAN DER BERG

[Applicant]

and

SOUTH AFRICAN POLICE SERVICE

[1st Respondent]

B N A KHUBEKA

[2nd Respondent]

DETAILS OF HEARING AND REPRESENTATION:

APPROVED
[1] The matter in **PSSS321-23/24** was set down for arbitration virtually and finally heard on 12 June 2024.

[2] The Applicant, **JACOBUS FREDERICK VAN DER BERG** was represented by Mr van Staden from Solidarity. The Respondent, **SOUTH AFRICAN POLICE SERVICE** was represented by Sergeant Refiloe Leshokgohla of Legal Services. The 2nd Respondent, Ms B NA Khubeka, represented herself.

[3] The proceedings were digitally recorded, and no interpretation services were required.

The proceedings were conducted in English.

ISSUE TO BE DECIDED:

- [4] The Applicant has referred an Unfair Labour Practice as defined in Section 186(2)(a) of the LRA, 66 of 1995 dispute to the SSSBC. The Commissioner was required to determine whether the non-promotion of the Applicant resulted in an unfair labour practice.

BACKGROUND TO THE ISSUE:

- [5] During September 2022, the Applicant applied for post number 2557 for the rank of Colonel, Head of Support Services. The post was advertised internally as a post promotion. The applicant was shortlisted with other candidates. In terms of scoring, the Applicant was scored the highest but was not appointed to the post. The successful candidate is the 2nd Respondent Colonel Kubheka whom in terms of scoring, had the second highest score.
- [6] Prior to the commencement of the Arbitration, the parties had a pre-arbitration meeting and it was agreed that the following issues were not placed in dispute:
- 6.1 Date of employment of the Applicant: 3 January 1992;
 - 6.2 Applicant's current position: Lt Colonel – Finance Commander in Kliptown (PL10);
 - 6.3 Current salary: R48 000.00(FORTY-EIGHT THOUSAND RAND) per month;
 - 6.5 Position applied for: Colonel (Post 2557)- Support Services in Roodepoort (PL12)
 - 6.6 The Applicant and the 2nd Respondent were shortlisted and interviewed on 19 September 2022:
JACOBUS FREDERICK VAN DER BERG – 37/50 = 74%(Bundle R, page 67 –scorecard)
B N A KHUBEKA –35/50 = 70%- (Bundle R, page 47 –scorecard)
 - 6.7 The curriculum vitae of the 2nd Respondent is on Bundle R, page 47, whilst the curriculum vitae of the Applicant is on Bundle R, page 48;
 - 6.8 The recommendation on Bundle R, page 67, indicated that the Applicant was not suitable as the 2nd Respondent was a more suitable candidate;
 - 6.9 No reasons were stated in the recommendation as to why the 2nd Respondent was recommended above the First Respondent'
 - 6.10 The equity targets of the Respondent are on Bundle A, page 70;
 - 6.11 Bundle R, page 136 is the Equity policy of the Respondent;

- 6.12 The advertisement for the position is on Bundle A1, pages 20-23;
- 6.13 The 2nd Respondent was appointed on 1 November 2022 at a salary of about R800 000.00 per annum;
- 6.14 Bundle R2, page 80-89 is the appointment made by the Respondent;
- 6.15 Bundle R page 80 is the appointment letter of the Second Respondent;
- 6.16 The applicant lodged a grievance included in Bundle R, page 92-105;
- 6.17 The Certificate certifying that the dispute was not resolved is included in Bundle R, page 104.

[7] The parties also agreed that the following issues were disputed:

- 7.1 Whether the non-appointment of the Applicant resulted in an unfair labour practice?
- 7.2 Whether the scores provided by General Mashai were fair, correct and applicable, based on the interview of the Applicant?
- 7.3 Whether there was any proof that the non-appointment of the Applicant was due to equity?

[8] Both parties submitted a bundle of documents which was marked as follow:

- 8.1 Applicant: Bundle A1-19, A22-67, A68-105 and A106-125
- 8.2 Respondent: Bundle R1-166

[9] Both parties agreed to submit arguments on/or before 19 June 2024. The Respondent submitted her arguments as agreed but the Applicant, however, had a technological crisis and did not have any reception as he lost his phone in the river and participated in the "Fauresmith uithou-rit". He only submitted his argument on 26 June 2024. It was however considered as I am satisfied that the failure of the Applicant to submit his argument was not deliberate.

[10] The Applicant seeks an order that the first respondent be ordered to promote him to Post 2557 Head of Support Services at the Roodepoort SAPS, on MMS Band salary level 2, backdated with effect from 1 November 2022, alternatively protected promotion with effect from 1 November 2022 in a similar post, that the promotion, alternatively the protected promotion, includes all benefits, salary and status of the higher rank, alternatively that the applicant be compensated for the unfair labour practice he was subjected to.

SURVEY OF EVIDENCE AND ARGUMENT:

[11] I wish to state from the outset, that not all evidence and argument presented would be set out hereunder. Only a summary of the evidence and argument are contained herein.

SUBMISSIONS ON BEHALF OF THE APPLICANT:

[12] The following witnesses testified on behalf of the Applicant:

- **JACOBUS FREDERICK VAN DER BERG**

[13] The Applicant testified that he formally acted as the Support Head in the position laterally similar to the position he applied for from 1 February 2022 until 31 December 2022 when the post of Support Head for Kliptown was filled. On 15 August 2022, the respondent circulated a letter to notify its employees that posts will be advertised for promotional purposes (Bundle A, page 20).

[14] On 15 August 2022, another letter was circulated that confirmed the advertisement of post numbers 2531 to 3007 along with the requirements for applying for those positions (Bundle A, page 21), He stated that the requirements for applying for promotions from Lieutenant Colonel to Colonel are set out on page 44 of the applicant's bundle of documents.

[15] The Applicant applied for post 2557, being an advertised post for the Support Head at Support Services in Roodepoort SAPS. The post was a promotion to salary level 12 and to the rank of Colonel being the Support Head of Support Services at Roodepoort SAPS. This position would have raised the Applicant's yearly remuneration from Band D to MMS Band with approximately R400 000 (Bundle A, page 22)

[16] He stated that he was properly qualified to apply for the position. (Bundle A, page 48-60), was shortlisted for the position and attended the interviews, which on all accounts went very well. He stated that he was the highest scoring candidate throughout the interview process. (Bundle A, page 71)

- [17] On 11 November 2022 the Respondent circulated the list of the successful candidates being appointed from 1 November 2022 (Bundle A, page). The successful candidate for post 2557 was the second respondent BNA Kubheka (Bundle A, page80). When he became aware that he was not promoted, he applied for access to information into the promotion process (Bundle A, page 2). On 1 March 2023 he lodged a grievance against the appointment of the second respondent, and the first respondent's failure to appoint him (Bundle A, page92). On 23 May 2023 a mediation certificate was issued to the applicant for the grievance not resolved noting that 'No agreement reached' and that the 'Matter referred to SSSBC within 30 days" (Bundle A, page104).
- [18] The Applicant during his testimony disputed that the second Respondent's appointment in post 2557 was a fair appointment given that he was the best candidate throughout the whole process. He also disputed the argument that he was not appointed for equity reasons, given that nowhere throughout the whole process was post 2557 earmarked for an equity related position, nor was he informed that his non-appointment was as a result of equity reasons.
- [19] Mr van Staden submitted that the conduct of the first Respondent by failing to shortlist and subsequently appoint the Applicant in light of him being the best candidate for that position, and in light of his particular skills, experience, qualifications and the fact that he was appointed as the acting head of support for Kliptown at the time of applying for the position, is according to the Applicant irrational, arbitrary, and unreasonable in the circumstances and constitutes an unfair labour practice relating to promotion in terms of the provisions of Section 186(2)(a) of the Labour Relations Act (LRA).
- [20] They submitted that the decision by the first Respondent not to appoint the Applicant, was not based on equity requirements and should it be found that it was based thereon, that the application of the equity considerations was done arbitrarily, irrationally, and inconsistently. The testimony of Brigadier Sekwakwa (Panel member) was that the Applicant duly qualified for post 2557. She also conceded and confirmed that it is uncontested that the applicant was the best performing candidate from the interview process.
- [21] He stated that Brigadier Sekwakwa conceded and confirmed that the sole reason for not shortlisting the applicant was based on equity considerations.

The Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* 2007) 28 ILJ 2405 (CC) confirmed that the commissioner needs to decide whether the employer's conduct was fair. It is also not contested that employees have no implicit right to be promoted. What was however contested by the applicant, is that the conduct of the employer in deciding not to appoint him, comes down to an unfair labour practice. A decision taken amidst a common cause finding that the applicant was in fact

the best candidate and that he would have been promoted, if the decision was not taken, not to appoint. He therefore argued that this decision was irrational, arbitrary, and inconsistent.

[22] He further submitted that the first Respondent argued that the employer has a prerogative, and that this prerogative should be considered. In *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 871 (LC), the Court found that the Courts should not intervene unless an element of bad faith or procedural unfairness exists.

[23] It was the argument of the applicant that it is just that. The decision of the first Respondent not to appoint him deprived him of the opportunity of the advancement of a career. This was argued to have happened several times already during the applicant's employment at the first respondent, even though the applicant was the most suitable candidate for the position. This decision and the conduct of the first Respondent was submitted to equate to bad faith and a procedural defect.

[24] The Applicant therefore argued that the courts should intervene in this matter as it is in the interest of justice to do so. It is also the only way that the SAPS will be urged to look into and act on the lack in fairness of its employment processes. Another crisp issue to be decided according to him was on what criteria was applied to the candidates before appointment. The real issue is the fact that the applicant was not subjected to the criteria agreed upon by the selection committee. The agreed upon criteria never included equity. Equity was an *obiter dictum* noted by the chairperson of the committee, of which no testimony was led. It was however established through the testimony of Brigadier Sekwakwa, and the applicant that from the minutes of the committee the only agreed upon criteria to apply was that of qualifications, courses and experience and that the focus should be on Support Services and Acting Support Services (Bundle A, page68).

[25] Mr van Staden submitted that, as testified by Brigadier Sekwakwa, the Applicant was not appointed, solely because he is a white male applying for the position. This was the undisputed testimony of Brigadier Sekwakwa. She further testified that the application of an equity guideline that they applied was an absolute barrier and notwithstanding any qualifications, courses and experience that the applicant might have, he would not have been appointed in the position, because of this absolute barrier based on equity.

[26] He referred to the testimony of the Applicant as well as Brigadier Sekwakwa that confirmed that the Applicant was duly qualified to apply for the post 2557. In addition to his qualifications, he was also the most experienced in the relevant duties associated with the position. It was uncontested that given the experience, taking away all the other factors, the Applicant was by far the best candidate with the most

experience. The Applicant was shortlisted and interviewed and found to be the best candidate for the position. However, as testified by Brigadier Sekwakwa, he would never have been able to be appointed in the position because of how the panel, according to her, would have applied the employment equity policy.

[27] Given this strict and harsh application of employment equity 'guidelines', Brigadier Sekwakwa conceded that none of the agreed upon criteria would in actual fact matter, because the Applicant is a white male, and he would not be appointed. She confirmed that to her mind as a panel member, the SAPS places an absolute barrier when applying employment equity targets. Further to the above Brigadier Sekwakwa also testified that she is not aware of a 10% margin to be applied when considering employment equity in promotion applications. This testimony was in stark contrast to the first Respondent's first witness who actually testified to a 10% margin. It should however be noted that the first respondent's first witness was not part of the panel in question.

[28] As testified by Brigadier Sekwakwa, the Applicant was not appointed solely because of equity reasons. Hence, he was disqualified from being promoted because he is white, notwithstanding the fact that he was the best candidate. It was therefore submitted that this was grossly unfair towards the Applicant. In support of the unfairness of the Respondent's conduct it is noted that neither the advertisement (Bundle A, page20-23), nor the criteria used by the selection panel (Bundle A, pages 92-105), nor management throughout the grievance process (Bundle A, page64) nor anywhere throughout the dispute to hand, it was ever explained to the applicant that the post 2557 was reserved for candidates of a certain racial group only and that he would be disqualified because he is white. The first time this reason was uttered by the Respondent was with the testimony of Brigadier Sekwakwa. It is hence argued by the Applicant that on a balance of probabilities, Brigadier Sekwakwa as a panel member, used the equity consideration, only at this late stage, as a scapegoat for their unfair failure to appoint the applicant for the post 2557, a position that he duly qualified for and was by far the best candidate for.

[29] In addition to the above, Mr van Staden submitted that the 1st Respondent unfairly reserved the position for another, less suitable candidate to be appointed in that position, and now only uses equity considerations in an attempt to justify this injustice. This was supported by the testimony of the applicant referring to the scoring he received by the panel chairperson Major General Masha (Bundle A, pages 65-66).

- [30] The Applicant submitted that it was uncontested that the two panel members, best in the position to score the candidates for the position of Head of Support, was the commanders of the units, Brigadier Sekwakwa and Brigadier Lloyd. It is accordingly argued that the two brigadiers would then also be the proverbial 'reasonable persons' to compare the scoring of the candidates. Accordingly, it was argued that the chairperson of the panel, Major General Masha was irrational in his scoring of the applicant during the interview process. Noted that the Brigadiers scored the applicant in excess of 80% (Bundle A, pages 65 & 66), while Masha only scored the applicant 54% (Bundle A, page64). This is proof that the chairperson did not act reasonable, when scoring the applicant, and on a balance of probabilities did so in advancement of another candidate to be appointed.
- [31] The Applicant stated that the conduct of the first Respondent in the application of its interview and appointment process was accordingly grossly unfair towards the applicant and constitutes an unfair labour practice. Even should it be found that the equity considerations were a fair criteria to apply to the candidates, it is argued by the applicant that the respondent applied such criteria unfairly in the matter to hand as it was used not as a consideration, but the sole criteria the applicant was disqualified for. A disqualification from the process even before he had the opportunity to compete. Also, a disqualification based on a criteria, he was never informed of before or after the promotion process.
- [32] This conduct of the respondent is in essence not only a gross unfair labour practice, but also unfair administrative action towards the applicant.
- [33] The Applicant seeks an order that the first respondent be ordered to promote him to Post 2557, Head of Support Services at the Roodepoort SAPS, on MMS Band salary level 2, backdated with effect from 1 November 2022. Alternatively protected promotion with effect from 1 November 2022 in a similar post and that the promotion, alternatively the protected promotion, is with respect to all benefits, salary and status of the higher rank, alternatively that the applicant be compensated for the unfair labour practice he was subjected to.
- [34] The Applicant also wished to contest the argument of the first respondent that he cannot be appointed in another Support Head position, as it is within the commissioner's authority to award such a promotion. Noted that other similar positions are available, it is a considerable alternative.

SUBMISSIONS ON BEHALF OF THE 1st RESPONDENT:

[35] The following witnesses testified on behalf of the Applicant:

- Brigadier Elona Njikela
- Brigadier Sekwakwa

[36] Brigadier Njikela testified that she was on the Moderation committee and referred to the Equity Guidelines on Bundle R, page 93 which was applicable in this matter. She stated that according to the equity guidelines of the Respondent in Gauteng, the Applicant failed to meet the targets and that the 2nd Respondent was appointed as she was a black female who was underrepresented in terms of the guidelines. She therefore stated that the 2nd Respondent was a more suitable for appointment.

[37] She also stated that in some instances a post is not earmarked for equity and the equity targets would not matter. She however stated that the Equity targets were not the only factor and that all the other factors had to be considered as well in a post where the appointment was subject to equity. She stated that if there was more than a 10% difference between the highest scoring candidate and that of the other candidate that met the equity target, the person with the highest score would be appointed.

[38] Ms Leshokghla submitted that the Applicant challenged the substantive and procedural unfairness that he believed took place during that promotion process. She stated that he testified that the post was not earmarked for equity and therefore it could not be said that the Respondent was addressing equity and indicated that he would not have applied for the post if that were the case. During examination in chief, he was referred to page 24, nr 4 wherein the Applicant confirmed that that if the employer needed to address equity or to promote certain race/gender, such that post must be earmarked. He went further to say that the phrase says that the employer "may" and not that is not a rule that it must be represented.

[39] She stated that the Applicant concurred that the successful candidate had managerial courses such as a Supervisor course and mentorship courses, and that she had relevant qualification required for the post. He further indicated that from a percentage of 70 %, it meant that the candidate could do the job. He also stated that during his grievance he was never informed that the reason for his non-appointment was due to equity.

[40] According to her submission, the Applicant testified that Brigadier Sekwakwa and Brigadier Lloyd collectively rated him 84% and that it is for that reason that he says that the procedure was not correctly followed in that they alleged that he obtained 74% instead of 84%. The applicant testified that Major General Masha was biased when allocating his marks, and that the two above mentioned Brigadiers were in a good position to rate him based on his performance.

[41] She stated that according to Ms Njikela, the non-promotion of the Applicant did not constitute an unfair labour practice or discrimination but was addressing equity. The Applicant is a white male, and they were over-represented. According to her, this justified the non-appointment of the Applicant.

[42] According to her, the first Respondent considered lot of factors and guarded against placing an absolute barrier for the advancement of white males and that the difference in scoring was also considered.

Brigadier Sekwakwa testified that the recommendation was done collectively by General Masha, herself and Brigadier Lloyd. She further testified that, although the applicant scored the highest, the panel took into consideration the fact that they needed to appoint the second respondent in order to enhance equity.

[43] It was common cause that the applicant was scored the highest of all other candidates and that he was the best candidate. He was suitable for the post as much as the second respondent was, in that they both had the ability to function effectively in terms of the requirements of the post. The requirements being that the candidates must have an NQF level six and two years in the current post.

[44] According to her, the National Instruction on page 70 of the Respondent's bundle, regulation 4(b) states that the "fact that the candidate obtained the highest rating by an evaluation panel appointed in terms of this instruction or highest marks or percentage during his or her PEP evaluation or was recommended by his or her commander or by an evaluation panel for promotion does not establish any right or legitimate expectation on the part of the candidate to be promoted to the advertised post or any other post of a higher rank." In light of this paragraph, the respondent did not create any expectation to the applicant but merely considered the equity guideline put before them at that time.

[45] She also referred to the National Instruction 3/2015, where the National Commissioner had an obligation to promote equal opportunities and enhance equity. Therefore, she stated, when the panel made the recommendation, they were guided by the equity guideline focusing on the posts that were under-represented. The panel in appointing the second respondent adhered to regulation 4(3) (g) of

the national instruction 3/2015 on page 73 of the respondent's bundle. On page 24 of Bundle A, the panel members were also advised to give preference to candidates who may enhance representivity.

- [46] It was therefore the Respondent's submission that the appointment of the second Respondent was made solely to address equity and that it would not hamper service delivery. The Applicant was and is aware of that effect since he concurred that the second Respondent had relevant qualification and courses for the post. According to her, it could not be correct that the marks of the Applicant would be 84% or higher than 74% that he got, since the 74% was the total average of the panel members. The two Brigadiers that the applicant alleges were in the best position to rate him also could not escape the issue of equity, hence they agreed to appoint an African female. The Respondent further submitted that the Applicant knew that General Masha was never biased in any way.
- [47] She referred to *Caesar da Silva Alexandra and the Provincial Administration of the Western Cape Department of Health, paragraph 42*, where it was stated that targets were indeed targets and not quotas. Under our law of discrimination, sight must not be lost of the overview purpose of the EEA which imposes a duty on employers to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure more equitable representation in all occupational categories and levels in the workforce. Regardless of whether MR Mathy's race was primary or secondary, his appointment in some measures redresses the disadvantage he no doubt experienced in the employment context as a result of his having been classified as coloured under the dispensation. In short in so far as any racial consideration operated to affirm Mathy's appointment, such did not amount to unfair discrimination within the contemplation of section 6 of the EEA.
- [48] The Respondent therefore finally submitted that there was a need to address equity and that by appointing the second Respondent, it did not constitute any unfair labour practice.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- [49] This dispute related to the promotion of Ms **B N A KHUBEKA** as well as the fairness during the process of appointment. The issues which were not in dispute are reflected above in paragraph 6 above. The following issues were noted as issues in dispute:

49.1 Whether the non-appointment of the Applicant resulted in an unfair labour practice?

49.2 Whether the scores provided by General Masha were fair, correct and applicable based on the interview of the Applicant?

49.3 Whether there was any proof that the non-appointment of the Applicant was due to equity?

[50] Clause 4 section 10 (f) of National Instruction 3 of 2015 on page 21 of the instruction stipulates that the National Commissioner, Divisional Commissioner or Provincial Commissioner may with regard to recommendations received for promotion to be considered by him or her, designate a moderation committee under the chairpersonship of a Deputy National Commissioner or Deputy Provincial Commissioner or Provincial head, to consider the recommendations and to advise him or her on the recommendations for promotion. The moderation committee may review the recommendation and the chairperson of the moderation committee of an evaluation panel must submit the recommendations, any applicable reports and the reasons for its review of the recommendations, if applicable to the commissioner who designated the moderation committee.

[51] National instruction 3 of 2015 clause 4 (1) (b) stipulates that the fact that a candidate obtained the highest rating by evaluation panel appointed in terms of this national instruction or highest marks or percentages during his or her PEP evaluation or was recommended by his or her commander or by the evaluation panel for promotion, does not establish any right or legitimate expectation on the part of the candidate to be promoted to the advertised post or any other post.

[52] It was common cause that the Applicant and the 2nd Respondent applied for post 2557, being an advertised post for the Support Head at Support Services in Roodepoort SAPS. The post was a promotion to salary level 12 and to the rank of Colonel being the Support Head of Support Services at Roodepoort SAPS. This position would have raised the Applicant's yearly remuneration from Band D to MMS Band by approximately R400 000 (Bundle A, page 22). The score awarded to each of the candidates were the following:

50.1 Jacobus Frederick Van Der Berg – 37/50 = 74% (Bundle R, page 67 –scorecard)

50.2 B N A Khubeka –35/50 = 70% (Bundle R, page 47 –scorecard).

[53] Despite the Applicant scoring higher than the 2nd Respondent, the panel agreed on a collective score, and the 2nd Respondent, a black female was recommended as the successful candidate. The recommendation did not make any mention of equity, but merely stated that the 2nd Respondent was a more suitable candidate.

[54] In the matter of *SAPS v SSSBC, Robertson NO and Noonan* (D439/12) [2013] ZALCD 33 (25 September 2013), Cheadle AJ summarised the principles relating to promotion as follows.

*“18.1 There is no right to promotion in the ordinary course, only a right to be **given a fair opportunity to compete** for a post. The exceptions are when there is a contractual or statutory right to promotion.*

*18.2 Any conduct that denies an employee a fair **opportunity to compete** for a post constitutes an unfair labour practice.*

*18.3 If the employee is not denied the opportunity of competing for a post, the only justification for scrutinising the selection process is to determine whether the appointment was **arbitrary or motivated by an unacceptable reason.***

*18.4 The corollary of this principle is that as long as the decision can be **rationaly justified,** mistakes in the process of evaluation do not constitute unfairness justifying an interference with the decision to appoint.*

[55] The Applicant submitted that neither the advertisement (Bundle A, page 20-23), nor the criteria used by the selection panel (Bundle A, pages 92-105), nor management throughout the grievance process (Bundle A, page 64), nor anywhere throughout the dispute to hand, it was ever explained to the Applicant that post 2557 was reserved for candidates of a certain racial group only and that he would be disqualified because he is white.

[56] The Applicant referred to other advertisements of the 1st Respondent that clearly stated that the position was earmarked for equity. This position that the Applicant applied for did not stipulate that on the advertisement. It was not stated during the interview and was not mentioned at the grievance hearing. The Applicant only learned that the appointment was made to serve equity during the arbitration. The Applicant argued that the 1st Respondent attempted to hide the unfair labour practice by suggesting that the appointment was made to serve equity after the documents showed that the Applicant scored higher than the 2nd Respondent during the interview process.

- [57] During the arbitration it was uncontested that the two panel members, who were in the best in the position to score the candidates for the position of Head of Support, were the Commanders of the units, Brigadier Sekwakwa and Brigadier Lloyd. I agree that the two Brigadiers were the proverbial 'reasonable persons' to score the candidates. Despite their experience and being in the best position to score the candidates, the chairperson of the panel, Major General Masha gave very low scores to the Applicant during the interview process. The Brigadiers scored the Applicant in excess of 80% (Bundle A, pages 65 & 66), whilst General Masha only scored the applicant 54% (Bundle A, page 64). This clearly shows that the chairperson did not act reasonably when scoring the Applicant versus the scores he gave to the 2nd Respondent.
- [58] I need to state that one of the issues in dispute relates to whether the scores provided by General Masha were fair, correct and applicable based on the interview of the Applicant. General Masha was not called as a witness, and he failed to testify in the arbitration. I have therefore not been provided with any justification of the scores and the reason for the vast difference in scoring between him and the other two panel members who were in a better position to score the candidates due to their position and experience of the Applicant and 2nd Respondent.
- [59] It was further common cause that the Applicant was not provided with the reason for his non-appointment, and he only heard that the reason of his non-appointment related to equity during the arbitration. In the matter of Durban Labour Court's decision in the matter of **Govender v SAPS and others** *Kamalathan Govender v South African Police Service and others* (2013) D726/2013 (not reported), the court found that in the absence of any substantive reason or the failure to provide reasons for not being considered for the post renders the employer's conduct inherently substantively unfair. It is argued that until the date of arbitration, no reasons were ever given for not considering the applicant for the post and even during arbitration proceedings, the reasons given were unfounded and questionable.
- [60] The above matter also supports the order of protective promotion with benefits, retrospective to the date of appointment of the successful candidate. Promotion in a similar position as well.
- [61] The Applicant further alleged that the first Respondent show that the decision not to appoint him was rational, fair and in good faith In the matter of *Noonan v SSSBC and other* (*Noonan v SSSBC and*

others [2012] 33 ILJ 2397 (LAC), it was held that the Applicant does not have a right to promotion in the ordinary sense but definitely has the right to be given a fair opportunity to compete for the post.

[62] In this matter, the Applicant was denied such an opportunity to compete for the post due to the absolute barrier as testified by Brigadier Sekwakwa. The Applicant therefore argued that this in itself amounted to an unfair labour practice.

[63] Another issue related to whether the Applicant met the inherent requirements of the post in comparing it with that of the 2nd Respondent during the interview and on the post experience and qualifications. The relevant caselaw is contained in *Swarts v National Commissioner South African Police Services and others (Swarts v National Commissioner South African Police Services and others (D915/13) [2015] ZALCD)*. I agree that the Applicant indeed meets the inherent requirements of the post and this was contested by the 1st Respondent. The 1st Respondent failed to provide sufficient evidence, on a balance of probability that its decision not to appoint the Applicant and to promote the second Respondent was reasonable. The Applicant was clearly the best suitable candidate for that position according to the scores given.

[64] The Applicant was not given any reason why he was not appointed other than the 1st Respondent stating that the 2nd Respondent was the “more suitable candidate”. The only reasons provided were those contrasting reasons submitted during the arbitration proceedings.

[63] I was referred to the settlement of Solidarity with the Government of the Republic of South Africa, under the auspices of the International Labour Organization, as published in the Government Gazette the government agreed at section (b) that:

“Affirmative action shall be applied in a nuanced way, as embodied in this agreement, and the economically active population statistics will only be one of many factors that will be taken into account in the compliance analysis of affirmative action in any workplace”;

And at (c) that:

“No absolute barrier may be placed upon any employment practices affecting any persons from any group”.

[64] I agree with the above and the principle of this agreement not only binds the State and all its organs to the contents thereof but are also principles that has been found effectively sound in the South African jurisprudence. If I apply those agreed upon principles to this matter, the testimony of Brigadier Sekwakwa is in effect a true version of what transpired, that the Applicant was not appointed because of being white, this would surely not be the correct application of the above principle. I agree with the submission of the Applicant that the 1st Respondent failed to apply the equity requirements in a nuanced way, as consideration of the Applicant's experience and position was not considered according to the evidence in this matter.

[65] It was evident from the testimony of Brigadier Sekwakwa, that the Respondent placed an absolute barrier to post 2557, either by reserving the post for an individual to be appointed or reserving it for a person of colour. Despite this, it was never mentioned in the advert or during the interviews. The Applicant was indeed the best candidate, but he was refused an opportunity to reasonably compete in this promotion process and was not appointed as a result thereof.

[66] I am, in light of the above, satisfied that the 1st Respondent acted unfairly, and that this unfairness implied a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended – *Du Toit et al Labour Relations Law (4th ed) 463*.

[67] *In the matter of Noonan v Safety & Security Sectoral Bargaining Council & Others ((2012) 33 ILJ 2597 (LAC)) the court stated that the proper yardstick was "fairness to both parties"*

[68] In the matter of *South African Police Services v SSSBC & Others [2010] 8 BLLR 892 (LC)* para 15(iv) the court stated that the role of the commissioner is to oversee that the employer did not act unfairly towards the candidate who was not promoted. See also *City of Tswane Metropolitan Council v SALGBC & Others (JR 593/07) [2011] ZALCJHB 154 (26 May 2011)* at para 16.)

[69] I am therefore satisfied that the proven facts show that the decision by the Chairperson, General Mashe, was arbitrary, male fide, grossly irregular, unfair and driven by ulterior motives. His failure to testify, failure to disclose the nature of the employment was to serve equity and recommending the 2nd Respondent, despite proper justification confirms the above.

[70] I accordingly make the following award:

AWARD:

- [71] The 1st Respondent's conduct in the application for promotion by the Applicant, Jacobus Frederick Van Der Berg, was procedurally and substantively unfair and resulted in an unfair labour practice.
- [72] The 1st Respondent, South African Police Service, is ordered to grant a protected promotion to the Applicant, Jacobus Frederick Van Der Berg with respect to all benefits, salary and status of the higher rank, retrospectively from 1 November 2022.
- [73] The amount due to the Applicant, Jacobus Frederick Van Der Berg, as a result of the above protected promotion retrospectively to 1 November 2022 will be calculated and quantified by the Finance Division of the 1st Respondent on/before 15 July 2024 and should be paid to the Applicant, Jacobus Frederick Van Der Berg, on/before 31 July 2024.

Signature:



Commissioner:

Jana Dell

Sector:

Police

APPROVED