



Collaboration Space / UCT Equality Law Database / 2010

# SA POLICE SERVICE v ZANDBERG AND OTHERS

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YEAR: 2010PLAINTIFF / APPLICANT / APPELLANT: SA POLICE SERVICEDEFENDANT / RESPONDENT: ZANDBERG AND OTHERSCOURT: LABOUR COURTCITATION: (2010) 31 ILJ 1230 (LC), (2010) 2 BLLR 194 (LC)POST / PRIOR ACTION: ARBITRATIONJUDGE(S): PILLAYGROUND(S) OF DISCRIMINATION: RACESTATEMENT OF FACTS:

A white male employee of SAPS applied for a promotion. Despite being rated as the top applicant by the interview panel, the divisional commissioner appointed a black male applicant. The appointed applicant had been rated as the second most suitable applicant by the interview panel. The white male applicant took the matter to arbitration. He disputed the procedural and substantive fairness of the promotion. He argued that the advertised post was not solely for designated groups. Accordingly the position was not reserved for a designated applicant. Furthermore he argued that he was the most suitable candidate based on his scores.

The arbitrator held that the failure to promote the white male employee amounted to an unfair labour practice. SAPS was ordered to appoint the white male applicant and compensate him retrospectively. The arbitrator based its determination on the following grounds:-

The arbitrator was of the opinion that SAPS had failed to follow the correct procedure. She held that SAPS had not followed a procedure known to its members (as required by s 25 (2) of the SA Police Service Act 68 of 1995) as it advertised the post as a "no designation" post, a category not provided for in clause 5.3 of the National Instruction 1 of 2004. The latter National Instruction required the post to be advertised as either 'designated' or 'non-designated'. In determining that the post advertised was a 'non-designated' post, the arbitrator held that considerations of equity should not have applied to the selection of the successful applicant. The selection of the interview panel should have trumped considerations of equity. It was held that a 'non-designated' post required that the successful applicant should be the best applicant available and appointed on merit.

ISSUE OF LAW:

Whether the arbitrator's decision was reasonable.

DECISION, RATIO AND OUTCOME (including minority judgment where applicable):

The court held that the arbitrator's award was unreasonable and set the award aside.

Applying the arbitrator's reasoning the court reasoned that if the procedure followed by SAPS was flawed then the interview panel's outcome would in turn be questionable. As such the ordered remedy by the arbitrator to promote the white male applicant would be incorrect. The more suitable remedy would have been to set the promotion aside and have it redone.

The court held that the arbitrator had erred in the following respects:-

- There was no procedural defect in not advertising the post as either 'designated' or 'non-designated'. The omission of the national commissioner to state the designation of the post led to the implied conclusion that the post would be a 'non-

designated' post. Whether the advertised post was 'non-designated' or 'without designation' was of no material consequence as the white applicant was able to apply.

- The arbitrator conflated the advertisement requirements with the selection steps.
- The arbitrator erred in making the assumption that candidates applying for "designated" posts were not necessary the "best candidates"/"less than suitable". A "non-designated" post does not require a higher standard from candidates as opposed to that required of candidates of "designated posts".

The court detailed the components of equity in the selection process and the complementary relationship between equity under the Employment Equity Act and equity under the Constitution. It held that promoting equity in the workplace cannot conflict with or compromise the Constitutional promise of equity. Equity under the Constitution includes "equitable delivery of goods, socio-economic rights and benefits and services, including security services". As such in determining the merit and suitability of a candidate, his/her ability to delivery to the community is vital.

The Constitutional promise of equity was captured in the relevant National Instruction. It required that all the criteria for selection 'must be considered cumulatively to balance both equity in the workplace and equity in the delivery of services.'

Accordingly considerations of equity were a required part of the selection process. Equity considerations of SAPS favoured the appointment of the black male applicant. Despite the interview panel not accounting for equity concerns, the national commissioner was entitled and justified to apply such considerations in selecting the black, male candidate.

LINK TO FULL DECISION: <http://www.saflii.org.za/za/cases/ZALC/2009/97.html>

LABELS: