Employer’s failure to adhere to its promotional policy and procedure: Implications for fair labour practices

M. J. Mokabane, Kola O. Odeku* and Tokyo Nevondwe

School of Law, Faculty of Management and Law, University of Limpopo, South Africa.

Accepted 17 October, 2012

This paper highlights the importance of an employee adhering to its policy and procedure for promotion should there be need for any employee to be elevated in a workplace. The paper points that although it is desirable for an employee to adhere to its policy and procedure on promotion, where this was not done, this will not render any decision taken by the employee in this regard null and void provided there were cogent and convincing reasons for doing so. The bottom line is that there must be fairness in the exercise; defect in the procedure can therefore be cured by a fresh procedure. If this is lacking, automatically it will be tantamount to unfair labour practice and a competent adjudicating body will definitely declare it null and void. The paper also accentuates that the members of the selection panel need not be an experts neither do they need to be qualified in the particular position that is under consideration. What is required is that the panel members should have reasonable knowledge, that is, they should be in a position to make a reasonably informed decision or as is commonly said, they should apply their minds. This will suffice to make the interview worth the while of any decision. In support of the principles on promotion, the paper considers substantially numerous decided cases in order to establish whether a particular promotional exercise was fair or not.

Key words: Legitimate expectation, promotion, policy and procedure, unfair labour practice, training and development, affirmative action.

INTRODUCTION

Promotion means an act of raise in rank or position, whereas demotion means act of lowering in rank or position. In the workplace, it is common to see situations where employees challenged the employer’s decision not to promote them and sometimes for demoting them. An aggrieved employee immediate action in this regard is to seek appropriate relief and remedy from a competent adjudicating bodies. In South Africa, this is the reason why the employees usually approach the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining council arbitration, bargaining council, Labour Court, Labour Court of Appeal and the Constitutional Court. If an employee has been acting in a particular position for a while, to such employee, this creates a legitimate expectation that whenever the employer wants to fill the post, he/she will be considered automatically. But if the employee is not appointed, the employee will be aggrieved and approach the court to compel the employer to appoint him. This issue continues to generate controversies in the workplace and is always subject of litigation most of the times. The positions of the adjudicating bodies vie their decisions are well articulated thereafter in this paper.

Furthermore, because of the various inherent disputes about promotion, non-promotion and demotion, they become extremely complex sometimes to the extent that employer’s conduct, its policies and documents are subjected to scrutiny and evaluation. If the procedures and process followed by the employer were irredeemably flawed, the adjudicating body will be left with no other option to declare it both substantially and procedurally unfair.

Consequently, promotion could create office tension
and conflict because promotions are emotional process for those who succeeded in getting promotion and those who are left in their wake. An aggrieved employee needs to be assisted particularly if the employee is upset and causing a fuss over being passed over for a promotion. If this is done, the likelihood of engaging in legal battle will be avoided. The employer and the employee will save time and money on litigation which might sometimes be protracted and prosecuted from the lower court up until the apex court.

METHODOLOGY

The methodology for this article involved the application of qualitative research method as against quantitative method of research. An analysis of and engagement with contemporary literature in the field of industrial relations, labour disputes were used and these includes case laws, articles, journals and books. Other relevant statutory, legislative and policy frameworks were also thoroughly examined, analysed and applied.

PROCEDURAL FAIRNESS OF PROMOTIONS

Procedural fairness of promotions is governed by a number of principles: The bottom line allows for deviation from the ideal (Basson et al., 1998). The ideal procedure, where applications for a job are called for requires an invitation for applications, the screening of those applications, the compilation of short list, the invitation to an interview of short-listed candidates, the conduct of the interview and the ultimate selection (Brouns, 2012). Employers may, however, find themselves in a position where, for example, the number of jobs at stake combined with time constraints, prevent adherence to the ideal or a detailed and time-consuming procedure (Charlotte and Honeycutt, 2010). Adherence to the ideal is not hard and fast, as long as an employer adheres to the basic rule for a fair promotion, which was described by the CCMA as ensuring that all candidates were afforded a reasonable opportunity to promote their candidature (Basson et al., 1998). This was said in Vereeniging Van Staatamptenare obo Badenhorst v Department of Justice (1999) 20 ILJ 253 (CCMA) at 262 F-G. In the light of the aforementioned, it is clear that adherence to the ideal or bottom line of a promotion procedure is not sacrosanct or a hard and fast rule. The employer can deviate from it under certain conditions as long as the deviation concerned is not fatal or does not result in material defect to the outcome of the whole process.

The need for an employer to follow its own procedure

An employer has to follow its own procedure-the source of these procedures may be legislation, a collective agreement, company policy or an established practice (Du Plessis et al., 2001). If the employer discovers that the procedure has not been followed correctly, a fresh procedure may be conducted to cure the defects. This may include the re-advertising of the post or granting an interview which was originally refused (Du Plessis et al., 2001).

Perhaps the most often encountered and sometimes fatal mistake by employers is not to follow their own policies and procedures in deciding on promotions (Carter and Goldsmith, 2001). On the other hand, arbitrators tend to tread warily in this area; there may be reasons for preferring one employee to another apart from qualifications and experience (Du Plessis et al., 2001). The most glaring example of deviating materially from the Company Policy is found in NUTESA v Technikon Northern Transvaal (1997) 4 BLLR 467 (CCMA). Here, against the background of a policy and practice at the Technikon that posts be advertised, five posts were created with appointments of specific employees in mind, was done secretly with the other employees presented with a fait accompli. Most often, however, the failure to adhere to procedures will not manifest in complete failure as in NUTESA case, but in a failure regarding one, or perhaps more, of the steps in agreed guidelines. In the case of NUTESA, certain people were appointed to the newly-created positions without ever having been advertised. It was held to be unfair for an employer to advertise a position, setting a prescribed minimum qualification, but appoint a person who did not possess that qualification or to create a position for a specific person without advertising it internally in accordance with agreed procedures.

The Commission found that what the employer did constitute a violation of the agreed procedures. The five appointments were accordingly set aside and the employer was ordered to re-advertise the positions and follow the proper procedure thereafter. Most often, however, a failure to adhere to procedures will not manifest in a complete failure as in the NUTESA case, but in a failure regarding one, or perhaps more, of the steps in agreed guidelines. It is however expected that this judgment should have served as an eye opener to employers and discouraged or stopped them completely from committing fatal mistakes of this nature in the handling of promotions but it was in vain. The employers seem not to have learned anything from this judgment because even though they knew about it, they continued to commit the same or similar mistakes. As a result of this, arbitrators or courts were left with no option but to interfere with the executive decision or managerial prerogative of the employers and ordered them to remedy the situation.

Defects in procedure can only be cured through a fresh procedure

Often defects in procedure can only be cured through a
fresh procedure. It may well happen that an employer will be alive or alerted to the fact that it possibly treated employees unfairly in the promotion process. In such cases the defect may well be fatal, in the sense that the application of the process to the aggrieved employees will be either too little, or too late or both. In Public Servants Association obo Dalton and Another v Department of Public Works (1998) 9 BALR 1177 (CCMA) (at 1180 CD), for example, all positions were advertised as part of a restructuring exercise and employees were invited to apply for their old positions or any other position for which they wished to be considered. Following applications, an independent panel interviewed employees. The two employees, who applied for higher posts, were never invited to an interview. Following complaints, interviews by newly appointed officials of the Department were arranged, who, according to the evidence, asked only a few desultory questions during the interviews. Accepting the evidence of the employees, the Commissioner said by the time the interviews were conducted, the posts for which the applicants made themselves available had in fact been filled. This is patently unfair, as the applicants were effectively denied the opportunity of being considered for posts which they, together with other employees in the department, had been invited to apply. Similarly, it sometimes happens that an employer advertises a position, states certain requirements for that position, but nobody who applies meets those requirements. The question now is whether the employer may relax those requirements and exercises its discretion to appoint someone from the pool of applicants only. This is what inter alia happened in Nutesa v Technikon Northern Transvaal where it was held that the posts had to be withdrawn and re-advertised with new requirements. In a curious award, the conduct of the employer was found to constitute discrimination under the old Item 2(1)(a) of Schedule 7 to the Labour Relations Act, 1995. It is submitted that where a current employer is prejudiced in a failure to re-employ (stating the amended requirements) may well constitute unfair conduct relating to a promotion. The applicant in Du Plooy and National Prosecuting Authority (2006) 27 ILJ 409 (BCA) succeeded in persuading the commissioner that she had been unfairly denied promotion. The arbitrator found that Ms Du Plooy’s supervisors had ganged up against her because she had lodged a grievance concerning her non-promotion to another post. The arbitrator also rejected the employer’s claim that it had been seeking to promote affirmative action, because Ms Du Plooy was also a member of a designated group and was eminently qualified for the post for which she had applied. The prosecuting authority was ordered to promote her.

Cases continue to illustrate that complaints by disappointed applicants for promotion will not succeed unless the employee is able to prove that the employer acted in bad faith or had failed to follow proper procedures. In Monaheng v Westonaria Local Municipality and another (2006) 27 ILJ 1081 (ARB) was one such exception. The arbitrator ruled that the failure to promote the applicant was unfair because when selecting candidates the municipality had departed from its own policy. In Wasserman v SA Police Service and others (2006) 27 ILJ 2782 (BCA), the ruling in Monaheng was followed with approval.

COMPOSITION AND COMPETENCY OF THE SELECTION PANEL: IMPLICATIONS FOR PROMOTION

An employee may challenge the composition of the selection panel and the competencies of the panelists. The persons on a selection panel need not be experts neither do they need to be qualified in the particular position that is under consideration. What is required is that the panel members should have reasonable knowledge, that is, they should be in a position to make a reasonably informed decision or as is commonly said, they should “apply their minds.” In Van Rensburg v Northern Cape Provincial Administration (1997) 18 ILJ 1421 (CCMA) at 1423 B-E, the employee challenged the composition of the interviewing panel. Against the background of a staff code that prescribed that a panel should be versed in the field concerned. In the latter case, the employee, contented that none of the panelists had any qualifications in provisioning administration, nor had they expertise or knowledge to sit on the panel. In dismissing this argument, the commissioner took note of the fact that the employee did not object prior to the interviews, nor on the day of the interview. As to the required level of expertise, the following was said:

“From an ideal point of view, the panelist should have the qualifications and experience that (the employee) insists on. However, it seems to me that this approach is neither in accordance with reality, nor with the legal precepts that govern the situation. It is unrealistic because the requirements that only persons with exactly the same kind of qualification and experience that the applicant for a particular post held should sit on the panel will put a serious obstacle in the way of the smooth and efficient running of the administration, and could in fact lead to pettiness and bickering concerning the kind of qualification, etc. that is suitable for a panelist. The approach is not judicially sound for the simple reason that the law does not impose such a strict requirement. All that is required is that the persons on the panel should be in a position to make reasonably informed decision, in other words, that they should be reasonably knowledgeable.”
EMPLOYEES IN ACTING CAPACITIES DO NOT CONSTITUTE A LEGITIMATE EXPECTATION TO PROMOTION

One interesting development has been in relation to the protection of employees, appointed in acting positions by means of the unfair labour practice (Basson et al., 2000). An employer may expect employees to act in other positions for a certain period of time, and the mere fact that an employee acts in a different position does not entitle the employee to be appointed to the post.

Even where there is a “legitimate expectation” of the employee, of being permanently appointed to the post in which case is acting, this only means that the employee must be heard before the final appointment decision is made. This was illustrated in Guraman v South African Weather Services (2004) 4 BALR 586 (GPSSBC). Where the applicant claimed that the respondent’s failure to promote her in terms of its employment equity policy constituted an unfair labour practice. The commissioner disagreed, finding that the applicant lacked the experience needed for the position she applied for and that her efforts to obtain additional qualifications did not in themselves confer on her a legitimate expectation of promotion. Nor did she allege that the respondent had breached the Employment Equity Act or its own policy by not promoting her.

The application was therefore dismissed. In Classen and Another v Department of Labour (1999) 10 BALR 586 (PPSSBC) at 1266 G-H, the court held that some employees in acting positions have succeeded in challenging the conduct of the employer as unfair conduct relating to a promotion but these cases are the exception rather than the rule. As regards the benefits attached to the higher post, the CCMA in Public Servants Association and others v Department of Correctional Services (1998) 19 ILJ 1655 (CCMA) at 1671 has held that: “It would be unfair for an employee to occupy a higher post, do extra work and bear the additional responsibilities, but not be compensated in accordance with the post occupied.” The problem, of course, is that given the convenience of the solution (using acting appointments) employers tend to forget about employees so appointed. This is where the employer starts running the risk of “unfair conduct” if it does not promote the acting employee in question permanently or, at least, does not afford the employee the remuneration and the benefits of the higher post.

The Labour Court in Department of Correctional Services v Makaneni No 1 and Others (1999) 20 (7) ILJ 1910 held that the dispute relating to higher remuneration (or back-pay) where an employee is, or has been acting in a higher position, cannot be brought on its own to the CCMA as unfair labour practice. Similarly, it is important to realize that a claim for higher remuneration (or back-pay) where an employee is, or has been acting in a higher position, cannot be brought on its own to the CCMA as unfair conduct relating to the provision of benefits.”

The Labour Court in Northern Cape Provincial Administration v Commissioner Hambridge No and Others (1999) 20 (7) ILJ 1910 held that the dispute relating to higher remuneration (or back-pay) where an employee is, or has been acting in a higher position is a dispute of interest and falls outside the jurisdiction of the CCMA. It is only in conjunction with a finding of unfair conduct relating to a promotion, that a commissioner may possibly make an order relating to such compensation. In the case in Casu, the court noted that the meaning of the word “benefit” in item 2(1)(b) of Schedule 7 to the Act
was a question of law. If the CCMA commissioner had erred on that question, his/her award was reviewable. A salary or wage was an essential element of a contract of service. Other rights, advantages or benefits were derived from collective or individual bargaining or from the operation of law. The court further went on to define benefits as a supplementary advantage conferred on an employee for which no work was done or required. The word “benefit” in the Act was, at least, a non-wage benefit. A claim that an employer acted unfairly by not paying an employee a higher rate could not be said to concern a benefit in that sense. It was a salary or wage issue, and hence a matter of mutual interest (1999) 20 (7) ILJ 1910.

The award was set aside for the simple reason that a benefit is not a dispute of right but of interest. In the light of the ruling or judgment outlined in this case, it is clear that the issue of acting allowance falls within the competence and domain of the employer and for this reason arbitrators are not keen to entertain a complaint which is purely based on acting in a higher position. In order to enable the CCMA or any Bargaining Council to have jurisdiction to entertain such a complaint, the applicant must include promotion in his/her complaint or dispute. In Hoppersa and Roos v The Northern Cape Provincial Administration (1999) 10 (7) BALR 586 (PPSSBC) an appellant appealed against a Labour Court judgement wherein the court set aside a CCMA arbitration award in favour of second Appellant. The dispute, which had been referred to the CCMA, concerned the issue whether Second Appellant, who had been acting in a more senior position than her own, was entitled to be paid an acting allowance.

The CCMA made the following order:

"I hereby order the employer to pay the employee an acting allowance in an amount which equals the difference in salary between her own position and the position she had been acting in. Such acting allowance is payable for the period 11 November, 1996 to August 1997. Such acting allowance is to be paid by the employer to the employee within 30 days of receipt of the award. Respondent had launched an application to the Labour court for the review and setting aside of the foregoing award in terms of Section 145 of the 1995 LRA. Landman J. had set the award aside on the basis that the question of the payment of an acting allowance was a dispute of interest which cannot be arbitrated but should rather be dealt with in terms of the collective bargaining process."

The effect of this decision was that Second Appellant would not get the acting allowance to which the CCMA had decided she was entitled. It was against this decision that Appellants were appealing. The thrust of Appellant’s approach to this issue was that the dispute relating to Respondent’s refusal to pay an acting allowance to Second Appellant was an unfair labour practice envisaged by the provisions of item 2(1)(b) of Schedule 7 of the 1995 LRA on the ground that it related to the provisions of benefits to an employee. Appellants also contended that this was a dispute of right which could be arbitrated. The Labour Appeal Court, per Mogoeng AJA, with Zondo AJP and Conradi JA concurring, held that the Labour Court was correct in setting CCMA award aside. In Limekaya v Department of Education (2004) 5 BALR 586 (CCMA) the particular applicant referred a dispute to the bargaining council concerning “a failure to make [his] acting position permanent.” The respondent contended in limine that the council lacked jurisdiction because the dispute as designated was not something that can be arbitrated. On the merits, the respondent claimed that the applicant knew full well that she had been appointed in an acting capacity until her post was advertised. On the jurisdictional point, the arbitrator held that it was clear that the applicant’s complaint was that she had not been promoted to the post in which she was acting. While it was not expressly stated on the referral form that this constitute an alleged unfair labour practice, the arbitrator was obliged to determine the true nature of the dispute. The council accordingly had jurisdiction to arbitrate the matter.

Turning to the merits the arbitrator noted that the applicant had applied for the post in which she had been acting when it was advertised. The regulations governing employment in the public sector provide that employees should not be allowed to act in posts higher than their own for periods longer than twelve months. The applicant had been employed in the higher post for 10 months when the post was advertised. An employee person who acts in a post is not automatically entitled to be appointed to it. Nor in the circumstances could the applicant claim to have had a reasonable expectation that she would be appointed. The arbitrator held further that the applicant could not rely on the fact that she was a black female since the department’s affirmative action plan had not been implemented at the time in question. The respondent could therefore not be said to have committed an unfair labour practice by not appointing the applicant to the post. The application was dismissed.

In a case of Gurarnan v South African Weather Services (2004) 4 BALR 454 (CCMA), the applicant was employed as Chief Industrial Technician. During the course of her employment with the respondent she obtained several academic qualifications, some with the financial help in the form of bursaries of the respondent, which she believed would assist her in progressing in her career path. The respondent then initiated a policy in terms of which selected employees were “fast tracked” (promoted) to bring the composition of the workforce into line with the requirements of its employment equity policy. The applicant was invited to join this mentorship programme that the respondent wished to start. She was one of a selected group of employees who received this
invitation. The applicant believed that she had received this invitation because the respondent had recognized her potential as an employee. At the first meeting the applicant attended, she received a document that indicated that the successful completion of the mentorship programme would lead to the individual filling a new position. The applicant claimed that the respondent’s failure to include her in the fast tracking policy and its refusal to promote her to the post for which she was already performing the necessary work constituted an unfair labour practice.

Moreover, the applicant had admitted that she lacked experience for the post for which she had applied. The applicant was not the only designated employee who had been disappointed by not benefitting from the fast tracking programme. Her efforts to obtain additional qualifications did not in themselves confer on the applicant a legitimate expectation to promotion. Finally, the applicant had neither alleged nor proved that the respondent had breached the EEA or its own equity policy by not promoting her. In the light of this, it is apparently clear that an employee acting in a different, higher position for a specific period has no entitlement to be appointed permanently in that position unless the expectation is created that he might be appointed in the said position or the employer is guilty of some other unfair conduct. However, such employee would be entitled to the benefits attached to the higher post in exchange for the additional duties performed by him. The employee will have to show that he was not promoted because of the unfair conduct.

In Imatu obo Coetzer v StadTygerberg (2006) 28 ILJ 375 (LC), it was held that the mere fact of acting in a higher position does not entitle an employee to be appointed to such a post even if one could say that a legitimate expectation for promotion exists. It was further held that a legitimate expectation only entitles an employee to be heard before a decision is made. However, in De Nysscschen v General Public Service Sectoral Bargaining Council and others (2000) 21 ILJ 1066 (LAC), the Labour Court set aside an arbitration award in which the arbitrator dismissed the applicant’s claim that the employer had perpetrated an unfair labour practice by not appointing her to an upgraded post in which she had acted with distinction for nearly ten years. The court held that, although the applicant was not entitled to automatic promotion like in the decision in HOSPERSA and another v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC). The employer failed to justify appointing another candidate, who had been found suitable for several other vacant posts. The employer was ordered to appoint the applicant to the disputed post, with retrospective effect.

In Kotze v Agricultural Research of SA(2007) 28 ILJ 261 (CCMA) the commissioner found that the employer acted in bad faith by permitting the employee to act in a post for two years before informing him that he lacked the formal qualifications for the post. The employer was ordered to promote the applicant and pay him compensation. However, the mere fact that employers handle aspirants to promotion unfairly does not mean that they are entitled to be promoted (Grogan et al., 2007). So, for example, in National Commissioner of the SA Police Service v Basson and others (2006) 27 ILJ 614 (LC). The Labour Court held that an arbitrator had correctly held that the employer had treated Supt Basson unfairly by not advertising the post in which he had been acting after upgrading it. However, the arbitrator had gone too far by holding that this entitled Basson to be actually promoted to the post. The Court did not agree that an unfair labour practice has been perpetrated when an employer decided not to fill a vacant post. Moreover, while acting in the post, Basson had exercised powers that could not be lawfully delegated to him. He could not claim a legitimate expectation to be appointed to a post he had never lawfully occupied. In Mbatha and Durban Institute of Technology (2005) 26 ILJ 2454 (CCMA), the commissioner held that the mere fact that a preferred candidate for promotion did not accept the post does not entitle another short-listed candidate to be appointed. The test is whether the candidate has proved that he/she would have been appointed had it not been for the unfair conduct of the employer.

DUTY TO TRAIN AND DEVELOP EMPLOYEES

An employer should consider the development of an employee and this may involve a promotion. The court in Marra v Telkom SA Ltd (1999) 20 ILJ 1964 (CCMA) confirmed that an employer does not commit an unfair labour practice if it does not develop or deploy staff in order to gain more knowledge and experience if it is not contractually bound to do so. In this case which was referred to earlier, the employee challenged an unsuccessful evaluation partially on the basis that he was unfairly barred from acquiring skills and that he should have been rotated between departments to expose him to different technologies, equipment and learning opportunities. This argument was answered as follows:

“There is no evidence that Telkom was contractually or otherwise obliged to transfer him beyond its own operational requirements. Telkom may have lacked innovation and creativity in the way it developed or even deployed its workforce or employees. It may also be that an enterprise which does not develop its staff will not succeed. It does not however follow that an enterprise which does not use its human resources wisely, commits an unfair labour practice, within the meaning of the Act.”

The position may well be different, not only where a contractual obligation exists, but in the realms of affirmative action. If one looks closely into the issue of
affirmative action, it becomes clear that all employers must not lose sight of the fact that employment equity is here to stay and the fact that promotion is an obvious affirmative action measure and training is specifically mentioned as such a measure in section 15 of the Employment Equity Act, 1998. In other words, and in contrast to Marra case (referred to above), there is consequently a duty on employers to train and develop employees in the context of affirmative action. This means that a denial of promotion due to lack of attribute, which could have been cured by training, may well constitute unfair conduct relating to promotion. Consider in this context also the possibility that unfair conduct relating to training could constitute an unfair labour practice in itself.

In the light of the facts and legal principles outlined in this discussion, it is advisable that employers should always rotate their staff members to different sections of the organization as part of the on-the-job-training measure or tool in order to enable them to acquire more skills, knowledge and experience to do a variety of tasks at a given time. This kind of practice is advantageous and helpful to both the employers and employees. The employers will reap benefits in the sense of organizational effectiveness and efficacy in that when one or two employees are absent from duty for various reasons, the work flow will not be affected at all. It will continue to flow as if everyone is at work because the remaining employees will still do the work at hand because they are multi-skilful and knowledgeable. The employees on the other hand will be eligible for promotion to any section or component once a vacant post becomes available because they will be having the requisite skill, competencies and knowledge.

TREATMENT OF PERSONS IN UPGRADED OR RE-GRADED POSTS

Some doubts existed as to how persons in upgraded or re-graded posts have to be treated or how regulations which deal with this issue have to be interpreted. The matter came to the fore in the interpretation of regulation 24(6) of the South African Police Service Employment Regulations (2000). This Regulation provides as follows:

“C6 If an executing authority raises the salary of a post as provided under regulation V C.5, she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent:

(a) already performs the duties of the post;
(b) has received a satisfactory rating in her or his most recent performance assessment;
(c) starts employment at the minimum notch of the higher salary range.”

The majority of judgments favoured the incumbent on the upgraded or re-graded posts who happened not to be promoted once their posts have been upgraded or re-graded. One example of such a case is Basson v South African Police Service and others ((2004) 5 BALR 537 (SSSBC). In this case a police officer, Senior Superintendent Basson who was attached to Legal Services component in the Northern Cape claimed that his post had been upgraded from post level 11 to post level 12 and that because he had been required to act in the higher post, he was entitled to be promoted to that level. The arbitrator found that the police officer’s post had indeed been upgraded and failure on the part of the respondent (SAPS) to promote him constituted unfair labour practice. The arbitrator accordingly ordered the respondent to promote the applicant. As a result of this decision, the South African Police Service realized that divergent interpretation of Regulation 24(6) would bring about serious problems to it as the employer.

The National Commissioner of the South African Police Service was not satisfied with the interpretation of Regulation 24(6) by arbitrators and the courts and had already launched proceedings in the Pretoria High Court for a declaratory order that on a proper interpretation of Regulation 24(6), he was entitled either to advertise the post which he had decided to re-grade to a higher grade or to continue to employ the incumbent employee in the newly higher-graded post without advertisement. He sought a further declaratory order to the effect that such incumbent was not entitled to automatic promotion at the time Basson’s case was decided. The labour unions opposed this application.

The High Court granted the application and issued the declarations as required by the Commissioner. The High Court, in the case of South African Police Service v The South African Police Union and others (TPD) Case No. 28812/02, 31 October 2003, accordingly granted an order declaring:

“That the applicant is vested with a discretion in terms of regulation 26(6) of Regulation 389, the Regulations for the South African Police Service, published in the Government Gazette No. 21088 on 14 April 2000 either:-

1. to advertise the post which he has decided to re-grade to...
against a higher grade, or; to continue to employ the incumbent employee in the newly higher graded post without advertising the post, provided that the requirements of Regulation 24(6)(a)(b) and (c) are satisfied. That the incumbent of a post is not entitled to an automatic promotion to a more senior rank upon the decision of the applicant in terms of regulation 24(6) to continue to employ the incumbent in a post which the applicant has decided to re-grade to a higher grade. That the costs of this application be borne by the applicant.”

The Public Servants Association (the union) SCA 573/04, 25 November 2005, as yet unreported, appealed to the Supreme Court of Appeal, which was divided on the matter. Three judges stated that if the High Court interpretation of the regulation were to be held the effect would be that an incumbent of the upgraded post, who happened to be coping with all of the “new” post and doing so satisfactorily, would lose his or her employment if somebody else were appointed to it. This would infringe the incumbent’s right to fair labour practices and the right not to be unfairly dismissed. This consequence, the majority of the Supreme Court of Appeal held that it would be manifestly inequitable, particularly seeing that in sub-regulation (7) and elsewhere in the regulations, the Labour Relations Act No. 66 of 1966 as amended in 2002 and collective agreements between the service and its employees are acknowledged and, by inference respected.

The majority decided that provided the requirements of paragraphs (a) and (b) of regulation 24(6) are met, the Commissioner is not only empowered to retain the incumbent in the upgraded post without advertising it, but under a duty to do so and to do so at the salary prescribed by paragraph (c). In the view of the majority, the application to the High Court ought to have failed. The order of the High Court was accordingly set aside and the application for a declaratory order was dismissed. The majority in the Supreme Court of Appeal held that it would be manifestly inequitable, particularly seeing that in sub-regulation (7) and elsewhere in the regulations, the Labour Relations Act No. 66 of 1966 as amended in 2002 and collective agreements between the service and its employees are acknowledged and, by inference respected.

The Constitutional court ordered that:

1. The application for leave to appeal is granted.
2. The Appeal is upheld to the extent indicated as follows and the order of the Supreme Court of Appeal is replaced with the following order:
   1. It is declared that:
      (a) The applicant is vested with a discretion in terms of regulation 24(6) of the Regulation for the South African Police Service, published in the Government Gazette No. 21088 on 14 April 2000, either;
         (i) to advertise the post which he or she has decided to re-grade to a higher grade, or,
         (ii) to continue to employ the incumbent employee in the newly higher post without advertising the post, provided that the requirements of regulation 24(6), (b) are met.
      (b) The incumbent of a post is not entitled to an automatic promotion to a post upgraded by the applicant in terms of regulation 24(6).
      (c) The Commissioner’s discretion with regard to upgrading of posts in terms of regulation 24(6) must be exercised in a manner which does not result in renunciation of an incumbent employee who is not promoted to the upgraded post.
2. The cost of this application in the High Court, Supreme Court of Appeal and this court shall be borne by the applicant, the costs to include the costs of two counsels.

Conclusion

In the light of the legal principles and case law outlined, it
is clear that the employer enjoys a large measure of discretion when it comes to issues of promotion. The employer’s managerial prerogative to appoint whoever it wants to appoint as long as it followed its own promotion policy puts the plight of applicants for promotions in the hands and mercy of employers. This common law managerial prerogative is a stumbling block to applicants for posts in any given situation. The employers are empowered or authorized to appoint even a less qualified person in an advertised and vacant post in the expense of highly qualified and experienced applicants sometimes on the basis of affirmative action or even certain ulterior motives.

RECOMMENDATIONS

The employer’s promotion policies should be framed in such a way that all the loopholes which employers can use to manipulate the process are completely closed. The employer’s managerial prerogative and its wider discretion to appoint or promote whoever it wants to appoint or promote should be curtailed by putting very strict checks and balances or control measures in place. The acceptable reasons for the employer to deviate from the hierarchy of marks obtained by candidates in an interview should be enumerated to limited specific situations in order to prevent abuse of the process. Strict control measures must be put in place to serve as checks and balances to curb corruption, nepotism and brotherhood or hand-in-glove actions on the part of panellists. Required qualifications should be strictly adhered to at all times. No deviation from the promotion policy should be allowed no matter how slight it might be. Members of the panel who short-list and interview the candidates should be held accountable for their actions or decisions and if it is found that they in actual fact recommended a candidate who did not meet the requirements of the post or who was outperformed in the interview they must be held personally accountable for their own actions.

REFERENCES