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NEWSLETTER 18

SAPS v PSA [2007] 5 BLLR 383 (CC)

Interpretation of statutes – Regulation providing that National Commissioner of SAPS “may” promote incumbent of re-graded post – Ambiguity of word “may” to be clarified by reconciling commissioner’s obligation to restructure SAPS with officer’s right not to be unfairly dismissed – “May conferring discretion on Commissioner not promote incumbent, subject to proviso that displaced incumbent may not be retrenched. SAPS – Promotion (Regulation 24(6)) – National Commissioner having discretion not to appoint incumbents to upgraded posts, but may not retrench displaced incumbents. SAPS – Re-graded posts – National Commissioner has discretion to promote incumbents of re-graded posts, provided displaced incumbents not retrenched. Words and phrases – “May” (Regulation 24(6) of SAPS regulations) – Word “may” could mean either that National Commissioner has discretion to advertise re-graded posts but must promote incumbents, or that Commissioner has discretion whether to appoint incumbents – Read in constitutional context, “may” means that commissioner has discretion not to appoint incumbents, but may not retrench them.

Summary

The respondent union represented members who had acted in posts, but were not appointed when they were upgraded. The union contended that the applicable regulation required the national commissioner of the SAPS to appoint incumbents of upgraded posts if they satisfied certain conditions. The SAPS obtained a declaratory order from the High Court stating, inter alia, that the incumbents of upgraded posts were not automatically entitled to promotion to those posts, but that the national commissioner has a discretion to do so. The Supreme Court of Appeal reversed that order, finding that incumbents of upgraded posts are entitled to automatic promotion, provided they satisfy the requirements of the regulation. The regulation reads:

“If the National Commissioner raises the salary of a post . . . 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; and (c) starts employment at the minimum notch of the higher salary range.”

The majority (per Sachs J, Madala J concurring; O’Regan J dissenting) noted that the matter turned on the meaning of the word “may” in the regulation. The larger issues were the capacity of the commissioner to fulfill responsibilities entrusted to him by the Constitution of the Republic of South Africa, 1996 and officers’ right to fair labour practices. The word “may” means either that the commissioner has a complete discretion to advertise a re-graded post, or that he may upgrade a post subject to a duty to appoint the incumbent without advertising it. The meaning must be determined from the context and in accordance with the Constitution. From a constitutional perspective, the case involved three different imperatives: the commissioner’s duty to carry out his constitutional mandate, the right to fair labour practices and the achievement of equality. The South African Police Services Act 68 of 1995 and the regulations were made to authorise and systemise the restructuring and reorientation of the SAPS in accordance with the new constitutional order. Previously, posts were re-graded on an ad hoc basis. In accordance with this objective, the SAPS introduced a new promotion policy and re-graded posts on a wide scale. When a large number of posts at the rank of captain were re-graded to posts at the rank of superintendent, the SAPS was flooded with grievances. When the same exercise was adopted in the case of posts re-graded to the rank of captain, the commissioner decided not to advertise any of the posts, but to promote the incumbents if they were found suitable. The filling of upgraded posts was finally suspended in 2002.

The Court held that the regulation should be read in a manner which reconciled the need to give the commissioner the flexibility required to strengthen the leadership capacity of the service in a transparent manner, on the one hand and, on the other hand, the need to ensure that officers do not lose their employment if their posts are upgraded. This could be achieved by recognising that the commissioner has a discretion to appoint anybody to re-graded posts, but requiring him to exercise that discretion in a manner that does not lead to job losses. The Court accordingly ordered that the incumbents of re-graded posts are not entitled to automatic promotion to those posts, but that the commissioner’s discretion must be exercised in a manner which does not result in retrenchment of incumbent employees who are not promoted. **The Court held further** (per Yacoob J, Nkabinde J concurring to the extent that the judgment was consistent with that of Sachs J, O’Regan J dissenting) that there was no basis for the SCA’s findings that the process would lead to job losses if the commissioner had a discretion not to appoint incumbents, and that the regulation provided no guidelines for the exercise by the commissioner of his purported discretion.

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