

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA53/2022

In the matter between:

**DEPARTMENT OF HIGHER EDUCATION
AND TRAINING**

Appellant

And

**COMMISSIONER BHEKI SMIZA
GENERAL PUBLIC SERVICE SECTORAL**

First Respondent

BARGAINING COUNCIL

Second Respondent

PSA OBO LESETJA FRANS SEBOPELA

Third Respondent

Heard: 28 November 2023

Delivered: 22 February 2024

Coram: Molahlehi AJP, Savage JA and Malindi AJA

JUDGMENT

SAVAGE JA

Introduction

[1] This appeal, with the leave of this Court, is against the judgment and order of that Court (per Mahosi AJ) in which the appellant's application to review and set aside the arbitration award of the first respondent, the arbitrator, was dismissed with no order of costs. The appeal is unopposed.

[2] In September 2016, the appellant, the Department of Higher Education and Training, advertised a vacancy for the post of Deputy Principal: Corporate Services in Tshwane North. An extensive number of applications were received for the post, including that of the third respondent employee, Mr Lesetja Frans Sebopela (employee). The requirements of the post recorded in the advertisement were:

‘An appropriate Bachelor’s Degree or equivalent qualification relevant to the post. A relevant post-graduate degree/qualification will be an added advantage. Five (5) years’ relevant work experience. An understanding of the Department of Higher Education and Training’s strategic vision and priorities. Knowledge of all policies and legislation governing education and training as well as the Public Service and Employment Services in South Africa. Experience in managing people and projects with the ability to plan, strategically willingness to work [sic], irregular hours and travel extensively. Computer literacy (MS Word, MS PowerPoint, MS Excel, MS Excess and MS Outlook). A valid driver’s licence.’

[3] Given the number of applications received and in order to reduce the number of candidates to be interviewed, the selection committee introduced an additional selection criterion related to additional years of relevant work experience required beyond the five-year period advertised. It was common cause at arbitration that the appellant’s selection policy permitted the committee to introduce such an additional selection criterion. The applicant was not shortlisted given that he lacked the years of experience required by this additional criterion and he was not shortlisted or interviewed for the post. Aggrieved, he referred an unfair labour practice dispute to the second respondent, the General Public Service Sectoral Bargaining Council (GPSSBC).

[4] At arbitration, the employee contended that he had been treated unfairly by the appellant in not being shortlisted for the post although a less qualified employee, Mr Serai, who had fewer years’ experience than the employee, was shortlisted and interviewed for promotion. Mr Serai was not unsuccessful in his application and was not promoted to the post.

[5] The arbitrator found that, in not shortlisting and interviewing the employee, the appellant had committed an unfair labour practice against the employee and the

appellant was ordered to pay the employee eight months' compensation. Dissatisfied with the award, the appellant sought that it be reviewed by the Labour Court. The Court dismissed the review application on the basis that the arbitrator's decision was a reasonable one; and that an unfair labour practice in terms of section 186 (2)(a) of the Labour Relations Act¹ (LRA) had been committed by the appellant when it failed to shortlist the employee. The Court further held that such a decision was neither capricious nor founded on wrong principles of law. This appeal is against that decision.

Evaluation

[6] An unfair labour practice is defined in section 186(2) of the LRA as –

‘(2) ...any unfair act or omission that arises between an employer and an employee involving –

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee...’

[7] The test for the review of an arbitration award in an unfair labour practice dispute, as in a dismissal dispute, is whether the commissioner misconceived the nature of the enquiry, or arrived at an unreasonable result in the sense that the decision made is one that a reasonable decision-maker, on the material before them, could not have reached.²

[8] A determination as to the fairness of a promotion decision is typically weighted heavily on an evaluation of the process and the justification given for the promotion decision made by the decision-makers.³ An employer is required to act lawfully and adhere to the objective standards of fairness and the criteria that it has

¹ Act 66 of 1995, as amended.

² *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at paras 98 - 100.

³ *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; (2014) 35 ILJ 613 (CC) (*Khumalo*) at para 63.

set for promotion, including its own policies,⁴ in order to ensure that an eligible employee is provided with a fair opportunity to compete for the post.⁵ Conduct that does not allow an employee such a fair opportunity will usually be found to constitute an unfair labour practice.⁶ The evaluation of the suitability of a candidate for promotion is required to be assessed fairly, rather than mechanically, with a justifiable element of subjectivity or discretion reserved for the employer.⁷

[9] To succeed in an unfair labour practice claim related to promotion usually requires an employee to prove that they were not given a fair opportunity to compete for a post.⁸ This may involve evidence that the process was unfair and that despite the employee having the necessary experience, ability and technical qualifications for the post, an unfair appointment decision was taken.⁹ An arbitrator is required by section 193(4) to determine an unfair labour practice dispute on terms that are deemed reasonable and may, where it is just and equitable, in terms of section 194(4), award compensation to an employee.

[10] The evidence before the arbitrator did not show that the appellant had committed an unfair act or omission or engaged in unfair conduct in relation to the employee in the context of a promotion. Neither the shortlisting process nor the decision taken not to interview the employee was unfair. There was no dispute that the selection committee was entitled to impose the additional criterion which it did to limit the number of applicants shortlisted and interviewed and there was nothing irrational or unfair in the additional criterion imposed. There was also no dispute that the employee lacked the years of experience required by the selection committee in terms of its additional criterion imposed. Even if Mr Serai lacked the requisite experience and was incorrectly shortlisted, he was not appointed to the post and the

⁴ *Health and Other Service Personnel Trade Union of SA and others v Member of the Executive Council for Health, Eastern Cape and others* [2016] ZALAC 64; (2017) 38 ILJ 890 (LAC); *Minister of Home Affairs v GPSSBC and others* [2008] JOL 21773 (LC) at paras 19 - 20.

⁵ *Ncane v Lyster NO and others* [2017] ZALAC 1; (2017) 38 ILJ 907 (LAC) (*Ncane*) at para 24 referring to *Khumalo* at paras 62 - 63, *Ninaar v Department of Works, KwaZulu-Natal and Others* [2015] ZALCD 26; [2015] JOL 33268 (LC) and *Manana v Department of Labour and Others* [2010] ZALC 26; [2010] 6 BLLR 664 (LC).

⁶ *Transnet SOC Ltd v United National Transport Union on behalf of Coetzee and others* [2021] ZALCJHB 240; (2021) 42 ILJ 2478 (LC) (*Transnet*) at paras 3 –4.

⁷ *Ncane supra* at para 25.

⁸ *Noonan v Safety and Security Sectoral Bargaining Council and others* [2012] ZALAC 9; (2012) 33 ILJ 2597 (LAC).

⁹ See also *Ndlovu v CCMA and others* [2000] ZALC 153; [2000] BLLR 1462 (LC) paras 11–12.

fact of his erroneous shortlisting is not sufficient to prove unfairness on the part of the appellant against the employee.¹⁰

[11] The appellant was therefore not shown to have acted in bad faith,¹¹ with ulterior motive,¹² arbitrarily, capriciously¹³ or in a manner which was grossly unreasonable in relation to the employee in undertaking the promotion.¹⁴ This was so despite the erroneous shortlisting of Mr Serai. That shortlisting caused no prejudice to the employee since the employee lacked the relevant years of experience required in order for him to be shortlisted and Mr Serai was not appointed to the post for the very reason that he lacked the requisite qualification added as an additional criterion by the interview panel. It follows therefore that the failure to shortlist the employee for the post was not unfair in the circumstances.

[12] The finding of the arbitrator that the appellant had committed an unfair labour practice against the employee was therefore one that a reasonable decision-maker on the material before him could not reach. Furthermore, since there was no evidence that the employee was treated unfairly, no just and equitable basis existed to award the payment of compensation to him.¹⁵ In finding differently the Labour Court erred. Furthermore, the Court's finding that the appellant was required to comply strictly with its policies and procedures was on the facts of the matter erroneous and the shortlisting of Mr Serai in error did not translate into an unfair labour practice committed against the employee. The review application should therefore properly have been granted and the award of the arbitrator set aside.

¹⁰ *Sun International Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2016] ZALCJHB 433 at para 9.

¹¹ See *Transnet supra* at para 21, where the decision not to promote a white candidate supposedly in terms of an employment equity plan that was not yet in effect and bore no resemblance to the approved criteria was found to be grossly unfair and the stated reasons for that decision were 'dishonest and irrational'. See also *Du Plooy v National Prosecuting Authority* (2006) 27 ILJ 409 (BCA), where the arbitrator found that the applicant's superiors had ganged up to deny her promotion because she had earlier lodged a grievance concerning her non-promotion to another post.

¹² *Communications Workers Union on behalf of Starck and Telkom SA Ltd* (2005) 26 ILJ 353 (CCMA).

¹³ See *Transnet; SA Police Service v Gebashe and others* [2014] ZALCD 68; (2015) 36 ILJ 1620 (LC); *National Tertiary Education Union on behalf of Grooff and Nelson Mandela Metropolitan University* (2020) 41 ILJ 2719 (CCMA).

¹⁴ *SAPS v Safety and Security Sectoral Bargaining Council and others* [2010] ZALC 58; [2010] 8 BLLR 892 (LC) at para 15.

¹⁵ See *McGregor v Public Health and Social Development Sectoral Bargaining Council and others* [2021] ZACC 14; (2021) 42 ILJ 1643 (CC).

[13] For these reasons, the appeal must succeed. Having regard to considerations of law and fairness, a costs order is not warranted in this matter.

[14] In the result, the following order is made:

Order

1. The appeal is upheld with no order of costs.
2. The orders of the Labour Court are set aside and substituted as follows:
 - ‘1. The review application succeeds.
 2. The arbitration award issued by the third respondent is set aside and substituted with a finding that no unfair labour practice was committed against the employee, Mr Lesetja Frans Sebopela.’

SAVAGE JA

Molahlehi AJP and Malindi AJA agree.

APPEARANCES:

FOR THE APPELLANT:

M H Mhambi
State Attorney, Pretoria

FOR THE RESPONDENTS:

No appearance