



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 56/21

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY

Appellant

And

ADV T L MABUSELA N.O

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

MANDLA MAGAGULA

Third Respondent

Heard: 20 September 2022

Delivered: 13 October 2022

Coram: Waglay JP, Coppin JA et Kathree-Setiloane AJA

JUDGMENT

COPPIN JA

- [1] This is an appeal against the whole order of Snider AJ dismissing the application of the appellant (Metro) to review and set aside an arbitration award made by the first respondent (arbitrator), acting under the auspices of the second respondent (bargaining council), in favour of the third respondent (Mr Magagula). The court *a quo* granted the Metro leave to appeal to this court.
- [2] Mr Magagula, who was already employed by the Metro and at the time had six years' experience as superintendent in the Metro police, applied for the position of Deputy Chief of the Police: Security Services at the appellant, in response to an advertisement that stipulated, *inter alia*, that interested persons had to meet the following requirements: possess a relevant degree in policing management; have leadership capability with proven capability in the public sector and with at least eight years' experience in a Metropolitan Police Department, of which four years had to be at senior management level. The closing date for applications was 20 November 2015.
- [3] On 7 March 2016, Mr Magagula was shortlisted and interviewed by a selection panel. According to the panel, he achieved a score of 23.6, while the minimum threshold score was 24. He was ranked fourth in respect of the candidates. Only the two highest scoring candidates, who scored 25.2 and 30, respectively, were further considered. As part of the selection process, they were further subjected to a COGTA competency assessment, but both of them failed it.
- [4] As a consequence, Ms Manzana Mokoena, the Metro's Head of Workforce Capacity Management made a report recommending that the selection panel reconvene to consider other candidates for further assessment, or close the recruitment and selection process and start it afresh.
- [5] This recommendation was not acted upon. Instead, on 29 July 2016, the Acting head of Human Resources of the Metro at the time, Adv. Yawa, prepared a report on the matter which he submitted to the former Metro manager, Mr Khaya Ngema, in which he recommended that the third highest scoring candidate and Mr Magagula (being the fourth highest scoring

candidate) be subjected to the COGTA competency assessment. Mr Ngema accepted the recommendation.

[6] The third highest scoring candidate did not subject himself to the assessment, but Mr Magagula did and passed it.

[7] Consequently, on 19 August 2016, Adv. Yawa submitted a memorandum to Mr Ngema in which he recommended, with motivation, that Mr Magagula be appointed to the position of Deputy Chief of Police: Security Services. A proposed letter of appointment was attached to the memorandum, which Adv. Yawa requested Mr Ngema to sign if he approved Mr Magagula's appointment.

[8] Mr Ngema was amenable to this, subject to a condition that the Chief of Police, Mr Mahlabé, furnished reasons, if any, in writing, within five days, why the appointment of Mr Magagula should not be proceeded with. Mr Ngema did not sign the attached appointment letter pending the Chief of Police's response. On 31 August 2016 Mr Ngema's employment with the Metro was terminated, and a new city manager, Dr Mashazi, was appointed in his place.

[9] On 8 September 2016, Adv. Yawa, in a handover report to Dr Mashazi, advised her that the Chief of Police had still not furnished reasons why the appointment of Mr Magagula should not be proceeded with and recommended to Dr Mashazi that the appointment of Mr Magagula, as determined by Mr Ngema, should accordingly be proceeded with.

[10] Dr Mashazi and the Metro refused to comply with that request, and as a result, Mr Magagula referred an unfair labour practice dispute to the bargaining council on 28 September 2016. On 1 November 2016, the dispute was unsuccessfully conciliated and it subsequently proceeded for hearing before the arbitrator.

The arbitration

[11] Mr Magagula's case at the arbitration was, essentially, that it was unfair for the Metro not to appoint him in accordance with Mr Ngema's decision. The

Metro, on the other hand, contended that: (1) Mr Magagula did not qualify for the appointment because he did not have the requisite managerial experience within the Metro Police and had no experience at senior management level; and (2) there was no compliance with its policy in relation to his proposed appointment. The Metro made reference to its Recruitment and Selection Policy (policy) which it had adopted in terms of section 2 of the Local Government: Municipal Systems Act¹ (Systems Act), in particular, paragraph 7.1.8 which provides that no person may be appointed to a post "without undergoing due process" as per the policy; and (3) the process entailed that it was the selection panel which had to determine who the most suitable candidate for the position was and that this did not occur in the case of Mr Magagula.

[12] Mr Magagula's contentions in response, *inter alia*, were that in terms of paragraph 7.1.9 of the policy, the Divisional Head: Workforce Capacity Management was allowed to devise an alternative recruitment and selection method/procedure in exceptional circumstances in order to expedite the filling of posts and that in adopting the recommendation of Adv. Yawa, Mr Ngema had effectively adopted such an alternative recruitment or selection method.

[13] It was contended on behalf of the Metro that Mr Magagula's case was based on a misreading of the policy, in particular of paragraph 7.1.9; that there was no intention on the part of Mr Ngema personally to implement that paragraph. But that in any event, he had no power to do so and that the power was specifically reserved for the Divisional Head: Workforce Capacity Management, namely Ms Mokoena at the time, who never purported to invoke that paragraph.

[14] The arbitrator sought to interpret the relevant paragraphs of the policy. In his award dated 12 August 2018, the arbitrator concluded that the Metro had committed an unfair labour practice relating to the promotion of Mr Magagula and ordered his "promotion" to the position of Deputy Chief of Metro Police: Security Services retrospectively from 1 January 2017 and with all the benefits associated with that post.

¹ Act 32 of 2000.

- [15] In respect of the meaning of clause 7.1.9 of the policy - the arbitrator found that it essentially meant that: (1) the Divisional Head had been empowered to dispense with the normal recruitment policies and that this power was essentially a power of the City Manager, which had been delegated to the divisional head by the City Manager because the City Manager had the power to make appointments and to reject a recommended candidate; and (2) the alternative process could be introduced during the initial recruitment process and did not have to be embarked upon at the beginning of such process, as had been contended by Ms Mokoena. According to the arbitrator, the failure of the Chief of Police to object to the appointment of Mr Magagula meant that the condition stipulated by Mr Ngema had been fulfilled.
- [16] In response, the Metro brought an application in the Labour Court to review and set aside the arbitrator's award on numerous grounds. The application was opposed by Mr Magagula.
- The Labour Court
- [17] The court *a quo* (Snider AJ) considered the critical issue for determination in the matter to be whether the arbitrator had interpreted paragraph 7.1.9 of the policy reasonably and held that the meaning the arbitrator gave to the paragraph "does not stretch the bounds of reasonableness to the extent that the decision is one that a reasonable decision-maker could not reach" and, in particular, held that "the question of right or wrong does not arise".
- [18] The court *a quo* further found specifically that the arbitrator's conclusion, that paragraph 7.1.9 of the policy could mean that a deviation may be introduced at any stage of the recruitment process, was reasonable because a speedy conclusion of the selection process was necessary and that an "entire re-run" of the process was "highly undesirable". The court *a quo* further found that Adv. Yawa appropriately intervened, i.e. it was an exceptional circumstance, since Mr Magagula "had all but passed the initial phase" and "fell marginally short of the standard applied in the interviews".
- [19] The court *a quo* held in respect of paragraph 7.4.2.11 of the policy, i.e. in terms of which the successful candidate is determined by the selection panel

after the interview is finalised, “suffered the same fate” if regard were to be had for paragraph 7.1.9.; further, that the competency assessment was a key element of the recruitment process; and that paragraph 7.4.2.11 merely meant that a candidate is successful for the purposes of moving onto the next stage and “not that the candidate is successful for the purpose of appointment”.

[20] The Court *a quo* rejected the Metro’s argument that the deviation could only have been determined by the Divisional Head: Workforce Capacity Manager (i.e. Ms Mokoena at the relevant time) and essentially found that “[i]n this situation the powers are delegated to the Divisional Heads: Workforce Capacity through the City Manager and it is trite that these powers could accordingly be exercised by the City Manager”.

[21] The court *a quo* buttressed this conclusion with the further finding that in terms of section 55(1) of the Systems Act, the City Manager “is responsible in law for all aspects of the municipality’s personnel including the recruitment and selection of suitable candidates for appointment and promotion”. And that the City Manager, as delegator, did not divest himself of that power. The court *a quo* found that “at the very worst, the Police Chief’s failure to provide *commentary constituted fulfilment of the condition*” and also considered it significant that neither of the two candidates, i.e. those that ranked first and second, had a bachelor’s degree as required for the position, while Mr Magagula had such a degree in criminology.

[22] The court *a quo* reasoned as follows²:

“The deviation from the policy was something that the Acting City Manager was authorised to do. This by virtue of the fact that he was, as noted earlier, legally the head of the Municipality’s Administration, which includes the personnel encompassing recruitment, selection and appointment. Effectively, and in this regard I accept the submission made on behalf of Mr Magagula, by determining a deviation the divisional head referred to does so as a delegate of the City Manager and accordingly it cannot be argued that such a deviation could not be determined by the City Manager him or herself. Ordinarily an

² At para 59.

official who delegates a function to a subordinate is not divested of the capacity to exercise that function'.

In this Court

[23] On appeal, the following was essentially argued on behalf of the Metro that :
 (1) Mr Magague did not qualify for the appointment because he did not have the requisite experience; (2) only the selection panel could determine who the successful candidate was and in this case, it did not do so; (3) Mr Magague's reliance on paragraph 7.1.9 of the policy was misplaced and based on an incorrect interpretation of that paragraph; (4) on a correct interpretation of that paragraph, and taking into account its background and proper context, the City Manager could not legally exercise the power envisaged there and had never purported to do so; (5) in any event, the power envisaged there could only be exercised at the commencement of the recruitment process, and not at the end; and (6) insofar as Snider AJ concluded otherwise, he was incorrect.

[24] Counsel for Mr Magague essentially argued in support of the reasoning of the arbitrator and the court *a quo*. The following "core issues" were identified by the previous counsel of Mr Magague, namely, (1) whether the Metro could validly rely on the argument that Mr Magague was not qualified for appointment, in circumstances where the pre-arbitration minute records as a common cause fact that he was qualified; (2) the interpretation of certain clauses of the policy; (3) whether there was a valid deviation from the policy which resulted in an effective decision to appoint Mr Magague to the position; and (4) whether the Metro acted fairly in refusing to implement that decision.

Discussion

[25] Notwithstanding the said identification, a determination of the following issues is actually decisive of this appeal, namely: (1) the meaning of the relevant paragraphs of the policy, and aligned to that issue, whether the test on review of the arbitrator's interpretation of the policy is reasonableness or correctness; (2) whether the City Manager could exercise the power specifically accorded to the Divisional Head in paragraph 7.1.9 of the policy. It was contended, on

behalf of Mr Magagula, that the arbitrator had not been confronted with the issue of legality, but the contention is wrong as this is indeed an issue; (3) whether the purported appointment of Mr Magagula was, or would have been, legal, and if not; (4) whether the Metro's refusal to give effect to the previous City Manager, Mr Ngema's decision could reasonably be found to have been unfair and to have constituted an unfair labour practice.

The Interpretation of the policy

[26] The impression created by the view taken by the arbitrator and the court a quo is that the power envisaged in paragraph 7.1.9 of the policy originally vested in the City Manager and was delegated by the City Manager to the Divisional Head, and that even if the Divisional Head did not exercise that power, the City Manager could do so. This clearly does not appear from the paragraph itself, but appears to have been "read into" the paragraph, and to have been arrived at on their conclusion regarding the City Manager's power in terms of the Systems Act to make appointments.

[27] It is now established that the applicable test on review of a CCMA or bargaining council arbitrator's interpretation of a legal instrument is correctness and not reasonableness³. A reasonable arbitrator is not supposed to get a legal point wrong. In *National Union of Metalworkers of SA v Assign Services and Others*,⁴ the position was crisply stated as follows:

'An incorrect interpretation of the law by a Commissioner is logically a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of correctness or for being unreasonable'.

[28] As to the provenance of paragraph 7.1.9 of the policy and the policy itself – in terms of section 8 (1) of the Systems Act, a municipality has all the functions

³ See, *inter alia*, *McDonald's Transport Uptington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 2593 (LAC) at para 30; *National Union of Metalworkers of South Africa v Assign Services & others* [2017] 10 BLLR 1008 (LAC) (Assign Services); *Democratic Nursing Organisation of South Africa obo Du Toit and another v Western Cape Department of Health and others* (2016) 37 ILJ 1819 (LAC) at paras 21 - 22; *SBV Services (Pty) Ltd v National Bargaining Council for the Road Freight and Logistics Industry and others* [2018] 8 BLLR 778 (LAC).

⁴ See *Assign Services* supra at para 32.

and powers conferred by or assigned to it in terms of the Constitution⁵ and must exercise them subject to section 5 of the Municipal Structures Act⁶. Section 8(2) of the Systems Act provides that the municipality has a right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.

[29] In terms of the Systems Act, one of the ways a municipality exercises its legislative or executive authority is by developing and adopting policies, strategies and programmes (s11(3)(a)). Section 67(1) of the Systems Act specifically empowers a municipality, in accordance with the Employment Equity Act⁷ "to develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration", including in respect of "the recruitment, selection and appointment of persons as staff members", and the "promotion and demotion of staff". (section 67(1)(e)). It is not contested that it is through the exercise of this power that the Metro adopted the policy.

[30] Even though a municipal manager or city manager is responsible for the appointment of staff, other than those referred to in section 56(a) and subject to the Employment Equity Act, her or his power to do so is subject to the policy directions of the municipality or municipal council (section 55(1) of the Systems Act). The city manager therefore is himself bound by the policy.

[31] Nowhere in the Systems Act, or any other legislation for that matter, is it provided that the power envisaged in paragraph 7.1.9 originally vested in the city manager or municipal manager. This seems to have been an assumption without a basis, and it was clearly wrong. The wording of the paragraph is to unambiguous. The power vested in the Metro and in terms of the policy is to be exercised by the Divisional Head: Workforce Capacity Management, who in this instance was Ms Mokoena. She never purported to exercise it. The conclusion that the City Manager, Mr Ngema, exercised it, is also dubious

⁵ The Constitution of the Republic of South Africa, 1996.
⁶ Local Government: Municipal Structures Act 117 of 1998.
⁷ Act 55 of 1998.

because he never referred to it. But if he purported to do so, such exercise would have been illegal.

- [32] Undoubtedly, the arbitrator was confronted with a legality issue. At the arbitration, the appellant strongly maintained that the actions of Adv. Yawa and of Mr Ngema, relating to the appointment of Mr Magagula, were *ultra vires*, i.e. not within their power.
- [33] The arbitrator found it necessary to interpret paragraph 7.1.9 by essentially, implying or reading into it that the power was delegated by the City Manager to the Divisional Head, and that the City Manager himself, as delegator, could still exercise that power. The paragraph provides: “[i]n order to expedite the filling of positions in exceptional circumstances, an alternative recruitment and selection method/procedure may be determined by the Divisional Head: Workforce Capacity Management”. There is no reference to the City Manager at all.
- [34] The arbitrator went on to conclude as follows: *“In this case there was a recommendation by the panel and the recommendation did not bring fruits: as stated above in clause 7.1.9 the Divisional Head has been given the powers to dispense with the normal recruitment policies. I have no doubt that the divisional heads and the heads of departments have been given delegated powers and according to me, it does not mean that the delegated powers cannot be performed by the delegator. In this case the delegator would be the City Manager himself, and that is the reason why even if the Divisional Head has made a recommendation, the appointment or rejection will still vest with the City Manager”*. In the absence of proof, these were essentially conclusions or inferences drawn from the air.
- [35] The court *a quo*’s conclusion that the arbitrator’s interpretation was a reasonable interpretation of paragraph 7.1 is incorrect. It had no reasonable and substantial basis and did not comply with the basic tenets required for such an exercise. It not only ignored the express wording of the paragraph, but also ignored the proper context of that paragraph within the policy and the Systems Act, as well as the (relevant) provisions of that Act. There is no

provision at all, in either the policy, the regulations, or the Systems Act that the power envisaged in paragraph 7.1.9 originally vested with the City Manager and that this was a power delegated by the City Manager to the Divisional Head.

[36] On the contrary, it is the Metro's policy and not that of the City Manager. The paragraph is clear and unambiguous. The power there is reserved to be exercised only by the Divisional Head: Workforce Capacity Management. Neither Adv. Yawa, nor Mr Ngema, held that position at the time. It was held by Ms Mokoena, who never exercised, or purported to exercise that particular power. If Adv. Yawa and/or Mr Ngema purported to exercise that power such exercise would undoubtedly have been *ultra vires*, and illegal. Adv. Yawa and Mr Ngema were both bound by the policy and could not assail it.

[37] It is a trite principle in our law that if a power that was given to be exercised by a particular official was exercised by another official, who was not authorised by law to do so, such exercise would be illegal or unlawful. The first principle of administrative law and the rule of law is that the exercise of any public power must be authorised by law⁸.

[38] Counsel for Mr Magagula, for the first time on appeal, and with reference to the principle confirmed in, *inter-alia*, *Oudekraal*⁹, seemed to suggest in argument that even if what Adv. Yawa and Mr Ngema did was not legal, it stood and had consequences, unless and until set aside by a court.

[39] The difficulty with that argument, in the context of the nature of the dispute referred by Mr Magagula, is that effectively he sought to declare the Metro's refusal, to give effect to Adv. Yawa's and Mr Ngema's illegal actions, to have been an unfair labour practice. But this seems to be inherently contradictory. It is difficult to envision that a failure to give effect to an illegality can ever be an unfair labour practice.

⁸ See, *inter alia*, Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan

Council 1999 (1) SA 374 (CC) at para 58.

⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) (Oudekraal)* at para 26.

[40] Surely the validity of Mr Magagula's appointment, which would have occurred only upon the signing of the proposed appointment letter, depended on whether there was compliance with the policy and not merely on the factual existence of Adv. Yawa and Mr Ngema's actions. Here there was no compliance with the policy. In *Oudekraal*, the court qualified the position as follows: "If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for as long as the initial act is not set aside by a competent court."¹⁰ That was clearly not the case here.

[41] In any event, Adv. Yawa's and Mr Ngema's illegal actions were effectively a nullity and did not give rise to legal rights. The Metro did not simply ignore those illegal acts, but expressly refused to give effect to them and made that case before the arbitrator. The Metro was legally entitled and obliged to do so. The conclusion to the contrary was wrong.

[42] Since the point of legality is decisive of the matter, it is not necessary to deal with the other points that had been raised.

[43] It follows that the appeal must succeed. Taking the facts, the law and fairness into account, a costs order is not appropriate. There shall therefore be no costs order.

[44] In the result, the following is ordered:

Order

1. The appeal is upheld;
2. The order of the Labour Court is set aside and substituted with the following order:

"1. The award of the first respondent, acting under the auspices of the second respondent, dated 12 August 2018 in case GPD 091638 is reviewed and set aside and is substituted with the following: 'The applicant's claim is dismissed'.

¹⁰ *Oudekraal* supra at para 31.

2. There is no costs order.”

P Coppin

Judge of the Labour Appeal Court

Waglay JP and Kathree-Setiloane AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:

GI Hulley SC with him KT Mokhatla

Instructed by Mogaswa & Associates

FOR THE THIRD RESPONDENT:

G Fourie SC

Instructed by Ramafolo M Attorneys