



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JA 140/2021

In the matter between:

BONGANI MASHABA

Appellant

and

UNIVERSITY OF JOHANNESBURG

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second respondent

COMMISSIONER VAN STADEN

Third Respondent

Heard: 6 September 2022

Delivered: 18 October 2022

Coram: Waglay JP, Coppin JA et Tokota AJA

JUDGMENT

TOKOTA AJA

[1] The appellant has been in the employment of the University of Johannesburg, the first respondent, since 1 October 2014 as a Facilitator in the Centre for Academic Staff Development. On 19 January 2018, the first respondent advertised the position of Senior Co-ordinator in a newly created division. The appellant applied for the position but did not make the final shortlist of candidates to be interviewed. He registered an internal grievance within the University claiming that he should have been shortlisted and subsequently appointed. His complaint was dismissed.

[2] After the abortive internal grievance process, the appellant referred a dispute of unfair labour practice relating to promotion in terms of section 186(2)(a) of the Labour Relations Act¹ (LRA) to the second respondent for conciliation. The third respondent failed and the matter was referred to arbitration. The third respondent was appointed as the commissioner who presided over the arbitration process. The third respondent dismissed the dispute holding that there was no unfair labour practice committed by the first respondent. An application to the Labour Court to review the decision of the third respondent was also dismissed but leave to appeal to this Court was granted by the Labour Court.

[3] The Academic Planning and Staff Development division within the University is headed by Dr Manon who holds the title of Senior Director. The post in question was created in this division.

[4] The requirements of the created post were, *inter alia*, that the incumbent had to have experience in understanding how to generate reports; manage funds; interface with the finance section of the University with counterparts at the Department of Higher Education and Training; and manage with counterparts at Council for Higher Education with University counterparts at South African Qualification Authority. In the advertisement, the requirement of academic qualification was an Honours Degree/Master's Degree which was inserted as a recommendation. Ms Osman testified that this academic qualification should have been inserted as a requirement and not as a recommendation.

¹Act 66 of 1995, as amended.

[5] One hundred and eighty-nine applications were received by the University. Dr Manon was part of the panel that shortlisted the names of the qualifying candidates. The first shortlisting consisted of 19 candidates which included the appellant. The final shortlisting consisted of three candidates which included Ms Strydom, the candidate who was the successful candidate, but excluded the appellant. The appellant claims that he should have been included in the final list but was unfairly excluded.

[6] Dr Manon testified that the appellant did not qualify for the position in that, although he had the academic qualifications, his CV did not match the required experience as set out in the advertisement. Notwithstanding the appellant's contention that he had the necessary experience, a comparison of the advertisement and his CV supported the view of Dr Manon.

[7] It is common cause that Ms Strydom was a suitable candidate for the appointment and therefore her appointment was fair. The appellant expressly conceded this much.

[8] The commissioner accepted the evidence of Dr Manon and Ms Osman that the appellant's CV did not match with what was required in the advertisement. He accepted that the assessment on the issue was correct and that he could not see his way clear in interfering with the discretion of the employer. The commissioner relied on the case of *Arries v CCMA & Others*² and held that the discretion to promote an employee lies in the heartland of an employer. He held that on the evidence placed before him, he could find no grounds for unfair labour practice on the part of the employer.

[9] The appellant, dissatisfied with the outcome of the arbitration, took the matter on review before the Labour Court. In the Labour Court, the appellant argued that the first respondent adapted the job description in the advertisement to favour Ms Strydom to his prejudice. He argued that Dr Manon should have recused herself from the process on the grounds that first, Ms Strydom made Dr Manon her reference in her CV, and, secondly, that Dr Manon had a conflict of interests in the matter. The Labour Court rejected this argument on the basis

² [2008]11 BLLR 1062 (LC).

that although Ms Strydom was working in the same division under Dr Manon, it could find no link between the previous working relationship with Ms Strydom and the decision to shortlist her. It held that the decision of the third respondent was reasonable in the circumstances of the case and the review application had to be dismissed with no order as to costs.

[10] As alluded to above, the appellant conceded that the appointment of Ms Strydom was unassailable. He nevertheless persisted that he was more qualified for the position than Ms Strydom, in that he possessed a Master's degree, whereas Miss Strydom only possessed an Honours degree. The appellant emphasised the fact that he was not challenging the appointment of Ms Strydom but was asking for a protective promotion.

[11] During oral argument before us, Mr Mabaso for the appellant confined his argument to the issue of the alleged conflict of interest. He submitted the following: that Dr Manon was conflicted in that Ms Strydom was working in her division; that although the court *a quo* acknowledged this, it did not deal with it; that Dr Manon was biased in favour of Ms Strydom, and, based on this reason she structured the advertisement in such a way as to favour Ms Strydom; that the reason for him not being shortlisted was this conflict of interest that she should have disclosed her conflict of interests and recused herself from the process. He conceded however that the relief sought at the CCMA was inappropriate and that the relief he should have sought was for the commissioner to order compensation for him. Accordingly, he did not persist with the relief of protective promotion but argued that compensation would be appropriate relief.

[12] Mr Boda SC for the respondent contended that not only did all the committee members including Dr Manon have an interest in the matter, but they all knew the candidates (including the appellant) and declared this at the commencement of the process. He submitted that bias in the workplace cannot be equated to judicial bias. It is in the nature of things that the employer has to be biased in favour of the person it wants to employ. As far as the advertisement is concerned, he argued that it was adapted four years before the advert was placed and when it was drafted, no one would have known who the applicants

for the position would be. Mr Boda contended therefore that the argument that the advert was purpose-made to favour Strydom had no merit.

- [13] Failure to shortlist a candidate who does not meet the requirements of the advertised post cannot constitute an unfair labour practice as envisaged in terms of section 186(2)(a) of the LRA. Unless some other considerations are taken into account, other than the requirements of the post, the person whose CV does not match the requirements of the post, and is therefore not shortlisted, does not stand the remotest chance to be appointed in the advertised post

- [14] It is not necessary to deal with the question of a protected promotion in view of the concession by Mr Mabaso for the appellant. In any event, if Ms Strydom was properly appointed, as conceded by the appellant, it would be unfair to the employer to order it to pay two employees in the same position by reason of failure to shortlist one of them. After the candidates have been shortlisted, it does not follow that they will be appointed. They still have to go through the interview process. Only one person must be appointed no matter whether all of them qualify. The employer has a discretion to choose which one will be appointed. The court cannot interfere with that discretion unless it can be demonstrated that it was exercised capriciously or is vitiated by malice or fraud.³

- [15] The appointment and promotion of employees falls squarely within the domain of the employer, who has to effect the promotion in accordance with its requirements for the post. It is the employer who must select the best suitable candidate particularly where there is more than one candidate qualifying for the position.⁴

- [16] The argument on disclosure of the conflict of interests has no merit. Each of the members of the panel declared that they knew the candidate who had applied

³See: *Department of Rural Development and Agrarian Reform v General Public Service Sectoral Bargaining Council and others* [2020] 4 BLLR 353 (LAC) at para [23]. See also *SAPS v Safety and Security Sectoral Bargaining Council and others* unreported judgment case no P426/08 delivered on 27 October 2010 at para [41].

⁴See: *SAPS v Safety & Security Sectoral Bargaining Council & others* [2010] 8 BLLR 892 (LC) at paras [15] and [19] – [20]; and *Ndlovu v Commission for Conciliation, Mediation & Arbitration & others* (2000) 21 ILJ 1653 (LC) at paras [11] – [13].

for the post in question. The appellant worked in the same division as Ms Strydom, save that they were doing separate categories of work. Ms Strydom was in no different position to that of the appellant. Knowledge of a candidate does not *per se* disqualify any member of the panel from participating in the process of shortlisting or appointing a candidate. The person alleging conflict of interest must show that there was something more than knowledge of the person shortlisted and appointed.

[17]

The argument relied on by the appellant, that Dr Manon should have recused herself, implies that a member of the panel must disclose his/her knowledge of a candidate and must recuse himself/herself unless the committee members determine that he should continue with the process. In this case, all the committee members did disclose that they knew the shortlisted candidates and Dr Manon, in particular, stated that in relation to Ms Strydom, she was one of the employees of the first respondent and nothing more. There is no basis why she should for that reason have recused herself from the process. If that was the case then the whole panel would have had to recuse themselves resulting in the process simply being aborted. This defies logic.

[18]

A promotion is a process commencing with the advertisement of the post followed by shortlisting and interviews. The interviewing panel makes recommendations to the employer to appoint a candidate they found to be suitable. In my view, it is highly improper and unfair for a candidate to let the process go to its finality without challenging it and only afterwards argue that the process was irregular.

[19]

Finally, I need to add that it is a trite proposition that generally the role of a review court is not to pronounce on the correctness or otherwise of the decision arrived at by the commissioner. The test, for purposes of review proceedings, as opposed to that of an appeal, is that, objectively speaking, there must be a rational connection between the outcome or the decision and the facts on which such decision is based.

[20] With regard to the argument of compensation, again although irrelevant here, it must be said that this relief was never sought either before the commissioner or the Labour Court and it cannot be entertained for the first time on appeal.

[21] In the circumstances, I conclude that the decision of the Labour Court cannot be faulted and the appeal falls to be dismissed.

[22] The principle relating to an order of costs in the labour context is trite. Fairness dictates that there should be no order as to costs.

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

Order

1. The appeal is dismissed with no order as to costs.

 B R Tokota AJA

Waglay JP and Coppin JA concurring.

APPEARANCES:

FOR THE APPELLANT:

S Mabaso of Mabaso Inc.

FOR THE FIRST RESPONDENT:

F.A Boda SC

Instructed by Cliffe Dekker Hofmeyr Inc.