



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: DA9/2012

In the matter between:

ETHEKWINI METROPOLITAN MUNICIPALITY:

DURBAN METROPOLITAN POLICE SERVICES

Appellant

and

DUMILE JOSEPH KHANYA

First Respondent

A.S. DORASAMY N.O.

Second respondent

THE SOUTH AFRICA LOCAL GOVERNMENT

BARGAINING COUNCIL

Third Respondent

Heard: 31 October 2013

Delivered: 18 September 2014

Summary: Unfair labour practice related to promotion- Employer re-advertising position of Sergeant and adding requirement of code 15 motorcycle licence. First respondent contending code 15 motorcycle licence discriminatory because of his disability. Commissioner finding that bargaining council lacking jurisdiction- Labour Court reviewing arbitration award and awarding employee compensation. Appeal –Labour Court incorrect in reviewing award. Appeal upheld

Cross-appeal. Employees contending code 15 motorcycle licence not an essential requirement for the advertised position. Commissioner finding that previous

arbitration award that code 15 licence a requirement for the post of Sergeant. Employees failing to discharge the *onus* that employer committed unfair labour practice. Arbitration award reasonable Cross-appeal dismissed.

Coram: Waglay JP, Dlodlo et Mokgoathleng AJJA

JUDGMENT

DLODLO AJA

- [1] The Labour Court dealt with an application in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (LRA) which sought to review and set aside an arbitration award dated 17 April 2009 issued by the second respondent (Commissioner). In terms of the arbitration award, the first respondent's (Mr Khanya) claim of unfair labour practice was dismissed together with the claim of the other aggrieved employees on the grounds that the appellant had not committed an unfair labour practice. The review application was opposed. The Labour Court set aside the arbitration award in respect of Mr Khanya and ordered that Mr Khanya be compensated in an amount of R15 000.00. It is against this order that the Appellant appeals. There is also a cross-appeal on behalf of the other aggrieved employees. This matter concerns both the appeal and the cross-appeal. I might mention that there were altogether nine Applicants before the court *a quo* in this matter. Save for Mr Khanya, the other applicants are now referred to as the aggrieved employees in this appeal. We are told that at the review application stage, two of the aggrieved employees (Ms Miller and Ms Williams) had been promoted to the rank of Sergeant but that they remain parties to these proceedings insofar as the question of costs is concerned.

Background

- [2] All the aggrieved employees were in the employment of the Appellant and they held the rank of Constable within the Metro police Department. An internal advertisement known or referred to by the parties as Circular 183 was published

by the Appellant advertising the post of Sergeant. It would appear that the aggrieved employees lodged their applications seeking promotions to the rank of Sergeant. The Appellant subsequently issued another Circular that was Circular 189 which was similar to Circular 183 save that it added a requirement that interested candidates had to be in possession of a valid code 15 motorcycle licence. The aggrieved employees, except for Mr Matyobeni (who was shortlisted but not appointed), were not appointed or shortlisted for the position of Sergeant. Mr Matyobeni challenges the fairness of his non-appointment on the basis that it was unfair for him to be interviewed in English in circumstances where Zulu is his mother tongue and he maintained that he was disadvantaged by the fact that the interview was conducted in English.

[3] The reason the Appellant did not shortlist some of the remaining aggrieved employees was that they did not possess a valid code 15 motorcycle licence. Many from amongst the aggrieved employees were females, they were not shortlisted because they failed to meet the minimum criteria that of being in possession of a code 15 motorcycle licence. The contention advanced on behalf of the aggrieved employees is that a code 15 motorcycle licence is not an inherent requirement for the job and making it an essential requirement is unfair and indirectly discriminates against women who generally do not possess such a licence; and this requirement also discriminates against persons with disabilities in that the disability prevents them from obtaining such a licence. Notably, the Appellant's evidence in this regard was that the only reason it did not shortlist any woman is because they did not meet the motorcycle licence requirement. Mr Khanya on the other hand, has a disability which prohibits him from obtaining a motorcycle licence.

[4] It is common cause that the Appellant advertised the post of Sergeant by way of Circular 183 as mentioned earlier on. This advertisement was placed on the notice board where it was customary to place such advertisement for vacant positions. It is also common cause that in terms of the Appellant's Employment Practices Policy Agreement (referred to hereinafter as "EPPA") all posts must be

internally advertised on dedicated and accessible notice boards. The aggrieved employees saw Circular 183 for the position of Sergeant advertised on the notice board. According to the Appellant, the Circular concerned was posted on 23 March 2007. The closing date for the advertisement was stipulated as 5 April 2007. Circular 183 gave two essential requirements for those eligible for appointment, being (i) in possession of a post Matric certificate (M+2) and (ii) a valid code EB driver's licence. The aggrieved employees applied for the advertised post of Sergeant in terms of Circular 183 before the closing date mentioned above. However, on 18 June 2007, and by way of Circular 189, the vacant positions of Sergeants were re-advertised and the essential requirements for the post were amended to include an additional requirement of being in possession of a valid code 15 drivers' licence (a motorcycle licence).

- [5] The aggrieved employees challenged the fairness of not being shortlisted or appointed (save for the specific challenges by Mr Matyobeni) on the following basis:
- (a) that it is unfair for the Appellant not to have shortlisted the aggrieved employees on the strength of the amendment contained in Circular 189 without the Circular having been brought to their attention in terms of its EPPA;
 - (b) that a motorcycle licence which was made an essential requirement by the amendment contained in Circular 189 is not an inherent requirement for the job, and that they were therefore not shortlisted on an arbitrary ground which indirectly discriminated against women and those with disabilities;
 - (c) that the panellists on the interview panel did not have the necessary qualifications and certificates that allowed them to be on the panel.
- [6] The aggrieved employees contended that the amendment of Circular 183 by Circular 189 which inserted the requirement of a motorcycle licence was not adequately published in terms of the EPPA and accordingly that it was an unfair

labour practice for the Appellant not to shortlist them when they had satisfied the requirements of Circular 183. It is the aggrieved employees' evidence that Circular 189 was not placed on the notice board.

- [7] However, it was contended on behalf of the Appellant that Circular 189 was placed on the notice board just as Circular 183 was. For purposes of guiding the discussion that is unfolding in this regard, I find it prudent to set out *infra* clause 4.3 of the Durban Metropolitan Council EPPA:

'All vacancies shall be internally advertised on dedicated, accessible and secure notice boards to ensure that every council employee has knowledge of such vacancies and adequate time to reply.'

- [8] The nine aggrieved employees lodged disputes with the Third Respondent for conciliation consequent upon failure to have them appointed. The dispute was described as unfair labour practice pertaining to promotion. When the dispute could not be resolved, it was referred to arbitration before the Second Respondent. It was agreed that the arbitration would be held in two phases: firstly for employees that were not shortlisted and secondly for those shortlisted but not appointed. It is common cause that in relation to both phases of the arbitration process, the Second Respondent found that the Appellant had not committed any unfair labour practice and proceeded to dismiss the aggrieved employees' claims.

Evidence led before the arbitrator

- [9] Ms Ritha Chetty (Chetty) testified that she was a Constable and has been in that rank for the past 14 years. She told the arbitrator that even though she had previously applied five or six times to be promoted to the next rank, she had never been successful. She would be told that she was unsuccessful and, at times, she failed the test that normally precedes the interview. But she emphasised that this time, she was not given any reasons why she was not even shortlisted. She, however, assumed that this was as a result of not having a code

15 motorcycle licence. When asked which of the two Circulars she responded to when she applied, she told the arbitrator that she applied in terms of Circular number 183 which did not have the requirement of code 15 motorcycle licence. She, however, conceded that she had heard from other people about the “changes in advert” but she never saw such changes herself. Asked what exactly she heard from people she answered “I have heard males were appointed and females were not because they obviously [did not] possess a code 15 motorcycle licence.” She told the arbitrator that she never saw Circular 189 and only saw it for the first time when it was produced at the arbitration hearing.

- [10] In cross-examination, Ms Chetty conceded that in 2004/2005, she was a party to a grievance that was lodged as a result of which an arbitration award was issued in terms of which a code 15 motorcycle licence was made a requirement for the post of Sergeant. It emerged that some employees that were parties to the grievance (including Ms Chetty) were compensated in an amount of R10 000 each in terms of the arbitration award consequent upon the employer having issued an incorrect advertisement. Ms Chetty testified further that the employer did not give employees a fair chance to procure such a licence as it advertised the post just after the award prescribing the code 15 licence requirement was published. In her view, management failed also to assist the staff to procure such a licence. Importantly, Ms Chetty in cross-examination categorically stated that it was practice for her to frequently check what was displayed on the notice board and that is the reason why she saw Circular 183. She emphasised that she saw Circular 189 in the morning of the arbitration hearing. She conceded that an error in Circular 183 could be cured by the re-advertisement of the post, that is, if the Appellant intended to correct the error. Asked specifically in cross-examination if for any reason she did not see the amendment would it be the fault of the Appellant, Ms Chetty responded and stated that “I would think it [is] the fault of the Council because it was supposed to be brought to – it should be in parade, it [is]part of parade information.”

[11] Ms Loretta Marlene Williams testified that she applied for the advertised post of Sergeant in terms of Circular 183 and not in terms of Circular 189. She testified that she did not know about Circular 189. She conceded in cross-examination that if management made an error in Circular 183 it was quite entitled to correct same by way of re-advertisement. Not much came from this witness.

[12] Mr Khanya testified that he applied for the post of Sergeant as advertised in both Circulars 183 and 189. According to him, he met all the qualifications required except for additional qualification which was a motorcycle licence. Mr Khanya testified that he could not meet the latter requirement not because he did not have it at the time but because “[he] cannot have it in the future because of a medical condition that prevents [him] from meeting that requirement.” Respondents’ representative during examination asked the following question:

‘Q: “Are you telling this court that through your medical condition, you were discriminated from getting a job?”

Mr Khanya responded thus:

“It is my feeling simply because as I stress that it’s not a requirement that I can meet next year, it’s not a requirement that I can meet in the future. Therefore if I am prevented from being considered for a position of a sergeant, it means in terms of my progression I don’t have a future at Metro Police.”

Q: “...are you saying that Metro Police by putting bike licence as an essential, they are discriminating against people who are with disabilities?”

A: “Yes, yes. It solely means that.”

Q: “So, you are telling us that because you’ve got this disability, you’ll never be promoted within this unit?”

A: “Under the current circumstances, yes.”

Q: “If I hear you correctly, there are areas in Metro police where discrimination is being promoted?”

A: "It will seem that simply because if you don't have this requirement because of a medical condition which fortunately was well documented to the powers be and they are fully aware of it, it amounts to pure discrimination. Also if I may add, simply because in my application form I had detailed the medical condition as it is a requirement on the application form wherein you have an operation or a medical condition, which hinder you in the advertised post, you need to summarise that."

Q: "So you are telling this court that the inclusion of the motorbike licence disadvantaged you about mobility?"

A: "Yes."

[13] It is important to note that, according to Mr Khanya's testimony, he saw both Circulars 183 and 189 and that he saw Circular 189 appended to the notice board just as Circular 183 was appended on the notice board. Mr Khanya also testified in cross-examination that he knew of a few people in Metro Police with disabilities. He specifically mentioned a Captain who was involved in an accident with his motorcycle and had his ankle or leg amputated. Mr Khanya expressed the view and based on his experience that it was strange that such a requirement was made for the post of Sergeant in that Sergeants never rode motorcycles in their supervisory duties. According to him, even when they escorted very important persons, Sergeants used motor vehicles and not motorcycles. In cross-examination, Mr Khanya emphasised that the requirement of code 15 motorcycle licence is discriminatory and prevents upward mobility in terms of rank. It was put to Mr Khanya in cross-examination that if he was raising discrimination then he was in the wrong forum in that he should rather be at the Labour Court and not at arbitration.

[14] Zabuzile Petros Matyobeni testified that when he entered the interview room, he was not asked which language he preferred to be interviewed in. Similarly when he entered the examination room he was never asked which language he would prefer to write his examination in. According to him, both the examination and the subsequent interview were conducted in the medium of English language. Mr

Matyobeni testified before the arbitrator that he attended a township school named Jabile High School in Johannesburg which was one of the “bantus schools”. Asked if he was comfortable with all the questions in his examination as well as in the interview, Mr Matyobeni explained that he found some questions not comfortable at all. He testified that he would have done well both in the examination and interview if his own mother tongue which is IsiZulu was used. According to his testimony, he only knows what he described as “more of communicative English” but that if it is too formal then he gets what he described as “a little bit of problem”.

- [15] In cross-examination, Mr Matyobeni was asked if he indicated to the panel that he wanted to be communicated to in Zulu language. He answered that he did not do that. Asked, if he did not think that it was important for him to indicate to the panel that he was not comfortable in English, Mr Matyobeni answered in the negative saying “*No, at that time I didn’t.*” The cross-examiner asked Mr Matyobeni in which language was the test conducted to which question the answer was English. He put to Mr Matyobeni that he obviously passed the test. Mr Matyobeni answered merely that “*I’ll presume so.*” There were a lot of unwarranted and frivolous objections to the pertinent questions asked in cross-examinations.
- [16] The crux of Mr Matyobeni’s testimony is that the use of the English language in the test and interview disadvantaged him. If his own language had been used, he would have been better able to answer questions put to him. He strangely, though, conceded that he had passed the written test (conducted in English) and hence he qualified to proceed to the interview stage. He also agreed in cross-examination that all candidates were asked three questions in the interview. Mr Matyobeni testified that he met all the requirements for the post applied for. According to him, he had potential for the job because he had previously acted in that position.

- [17] Mohamed Saeed Ally was a Constable at the time he testified before the arbitrator. He asked to be allowed to hand in a document containing his evidence in chief. The arbitrator allowed this. His testimony was that he is stationed at what he called *"the South substructure in Isiphingo"* and that the history in the Metro police shows that 80% of the members that were appointed to the positions of Sergeants came from the *"central command"*. He unsuccessfully applied five times in the past for promotion to the rank of Sergeant. According to Mr Ally, members based in the substructures were disadvantaged and not promoted. He opined that it would be fair if the panellists were drawn from substructure members as well. Mr Ally was concerned that there should be an equitable number of people from the "substructure" that should also be appointed. Mr Ally was of the view that he was more qualified for the appointment in that he had previously acted in the position of Sergeant and in that of an Inspector. He emphasised that after the interview he was not informed telephonically, in writing or verbally whether he got the position. It was put to Mr Ally in cross-examination that the staff vacancy circulars contained a clause that read as follows: *"Applicants who have not been contacted or notified within three months from the closing date of the advert, should consider himself (sic) unsuccessful"*. But whilst Mr Ally had no quarrel with the above quoted clause, he insisted that after having gone through the whole process as he did, fairness demanded that he be informed of the result.
- [18] Ravendren Lutchmiah testifying in chief was asked if he was given any reason why he was not appointed or interviewed. Mr Lutchmiah answered that he believed that it was because he failed the test. Asked if he in fact failed the test he answered firmly "yes." He had no knowledge of the person who set the test, marked it and moderated same. Asked if he was told that he failed, Mr Lutchmiah answered "that's correct." Asked if he was comfortable with the test, he answered that he was not because there was one or two questions asked which he thought were strange with respect to the advertised position. He testified that when writing the test all the candidates were squashed next to each other. This witness brought a strange scenario as he testified that he was aggrieved about failing the

test even though (according to him) all the appointees copied most of his answers. He testified that he was aggrieved by the fact that a person who copied most of his answers passed the test but he himself failed the test.

- [19] In an endeavour to explain this somewhat laughable assertion, Mr Lutchmiah stated that maybe he failed because of his bad handwriting. He was very concerned that somebody can copy his answers and gets *'the interview and gets appointed.'* He expressed a view that maybe he should have been appointed as well. When Mr Lutchmiah was asked if the squashing of the people did affect him psychologically, he answered as follows:

'Psychologically, to really answer, when we got in the room and we saw all that in one table there were these people sitting and I said to the people and to myself, the people that are now going to be appointed, had already been chosen, because the only reason that this test is being done is only because of a formality, because if somebody is going to bring a whole lot of people into a room to write an examination like that there, then I believe to my knowledge I really assumed that, you knew, this is a done deal.'

- [20] It comes clearly from Mr Lutchmiah's evidence in essence that he was worried that so many people came to write the test and were to be accommodated into one room resulting in congestion. When confronted in cross-examination about the candidate that copied his answers and passed the test whilst he himself failed, Mr Lutchmiah stated that he ought to have reported that incident as it amounted to a crime.

- [21] Denzil Pillay, an officer with 20 years' experience in the Metro Police also testified before the arbitrator. The gist of his evidence is that he previously acted in the position of Sergeant and that therefore he had expertise for the job. He was not informed about the outcome of the interview he underwent. He testified that he had no problems at all with the panellists, the three questions asked and the answers he gave. He was of the view that he performed well in the interview as he left the room full of confidence. It is only when he was not appointed that

he thought there was some bias and *mala fides* in the whole process. He did not know and could not know how the other candidates answered questions in the interview – this he conceded in cross-examination. Mr Pillay was once also a patrolman. He has training in many fields including working with motorcycles, vans, “freeways and numerous other stations”. He testified that after 20 years without a promotion he found that he was working backwards. In his view, the management treated him unfairly. He applied for promotional posts unsuccessfully more than 10 times. He failed to understand why he was not promoted in that he had no criminal record, he did not abuse sick leave and he always reported for duty timeously. Each time he failed to secure promotion he would be told to come next time.

- [22] Only one witness testified before the arbitrator on behalf of the Appellant: Manesakumarar Chin, a Senior Superintendent in charge of special enforcement on the beach. He was a panel member for the post of Sergeant. He gave an account of the process from the time the advertisement was closed to the time the appointments were made. He testified that applications were received and that he, together with HR sorted them out by finding out whether the applicants met the minimum requirements for the job. According to Senior Superintendent Chin, where they found that applicants met the minimum requirements they were then submitted to a test which was held at Springfield depot. After the test (which was marked by Superintendent Zama and moderated by Chin himself) all applicants that received 25 marks out of 50 were called for the interview. All such applicants (according to Chin) came for the interview. They were asked three questions each and each question carried a maximum mark of five and they were each given an individual mark for each question that they answered until the interviews were completed. Asked how they as panellists arrived at a decision, Senior Superintendent Chin answered that decisions were arrived at through consensus. He was asked specifically what his involvement was in the setting of the test. Senior superintendent Chin explained that the test was set by two officers who worked together on this. That was Superintendent Zama together with himself (i.e. Senior Superintendent Chin). They both decided on the

questions to be asked and so they set the test. The questions related to one's performance of one's job. Question related to the South African Police Service (SAPS) because the Metro police use the same Act. He explained that the Metro Police works under the SAPS Amendment Act. Senior Superintendent Chin further explained that the questions had to therefore cover SAPS Act.

[23] When asked about the manner in which the candidates were appointed, Senior Superintendent Chin elucidated that the appointment was done in compliance with the demographic composition of the staff. He gave an example and said that otherwise there would be too many appointees of Indian descent that were going to be promoted – but they could not do that. Explaining further, Senior Superintendent Chin stated that they took the cut-off point of nine marks out of the possible 15. In other words, if the candidate scored nine and above in the interview then they would have been considered – because they considered everybody that had nine and above. This means that for a candidate to be considered, he/she had to fall within the appointable range. He revealed that the panellists consisted of himself (Chin), Superintendent Zama (a female) and Monty Naidoo. He was asked if there was any truth in the assertion that the panel was bias towards Central in that 80% of the people that were appointed were allegedly from Central. Senior Superintendent Chin refuted this allegation and labelled it as not correct saying, they as panellists, did not even look at it that way. He even singled out Bradley Myburg who was also appointed and mentioned that he came from the outer region. According to this witness there were no region based appointments.

[24] When asked why no women were shortlisted. Senior Superintendent Chin explained that the reason was because they did not meet the minimum requirement and, if they did, they would have been shortlisted. He reiterated that the majority of the applicants did not have code 15 motorcycle licence. Asked whether that was fair, the witness answered thus: "Yes, a minimum requirement, it had to be, we had to comply with that." He commented on the earlier testimonies of some of the aggrieved employees that Captains do not need a

motorcycle licence. Senior Superintendent Chin testified that the statement that Captains do not ride motorcycles is a wrong statement because there is for an example a Captain that was riding a motorcycle and she only came off it lately, that is, Captain Keal, a female. Senior Superintendent Chin further elucidated by saying that he would say a motorcycle is a requirement because in traffic, that is the easiest way to get away. According to him, it is a requirement to be complied with because in certain days it is necessary to ride a motorcycle. He hastened to add that he himself rode on a motorcycle as a Captain. He added "We need more bikes on the road, especially for the escorts and vehicles will not be able to get through the traffic."

- [25] In cross-examination, Senior Superintendent Chin testified that he was not a trained moderator. When asked if he had any formal experience to moderate examination papers, he answered as follows:

'I am not moderating exam papers. All I did was to check if, when these persons has (sic) answered the question, whether it was marked correctly, if there was no favouritism for certain people, and that's what I did. It wasn't moderating that I was checking the answers and making sure that I'm a moderator, I must have qualifications. All I did was check whether it was marked correctly and with my experience that I got to handle the situation, the questions were all asked on handling a situation on the road and it's common knowledge that policemen have to have that knowledge. So, I would use my knowledge to answer those questions and check if it was answered correctly.'

- [26] Asked if he would accept that the best persons got the job, Senior Superintendent Chin testified that if a person during the interview scored nine and above, he would have got the job based on his merits and demographic composition. In other words, the appointment was not based purely on merits, but employment equity had to be taken into account as well. He emphasised that Circular 183 was replaced by Circular 189. In other words, the closing date was extended and Circular 183 was changed and replaced with Circular 189. He conceded that in the past, officers were appointed to the rank of Captain even

though they were not holders of a code 15 licence. But this was changed because it is the aggrieved employees who raised a grievance and referred the matter to arbitration and the arbitrator found that code 15 motorcycle licence had to be an essential requirement for the position of Sergeant. The employment equity policy had to be considered to satisfy the demographic composition of the staff. Consequently some of the highest scoring candidates were eliminated from being appointed if they were not favoured by the equity considerations. There were 12 posts to be filled and 12 names were selected according to the criteria in use and submitted to the Head of Metro Police for further consideration. Once appointments were made, the Head called those candidates who were selected for appointment to inform them. Thereafter a circular was then issued to inform the staff members. Quite apart from the above summarised evidential material, the arbitrator also had before him bundles of documents handed in by the parties. On behalf of the aggrieved employees two Unions representatives handled the arbitration proceedings. The Unions involved were the South African Municipal Workers Union (SAMWU) and the Independent Municipal and Allied Trade Union (IMATU).

The arbitration award

- [27] The arbitrator found *inter alia* that a previous arbitration award found that the motorcycle licence was a requirement for the post of Sergeant. Accordingly, the employer was entitled to amend Circular 183 with Circular 189 in order to comply with that requirement. The arbitrator found that the aggrieved employees ought to have been aware of this requirement. As far as Mr Khanya's assertion that he was discriminated against (on account of his disability rendering it impossible for him to procure code 15 licence) is concerned, the arbitrator found that there were no merits in that if the employer did not amend Circular 183 with Circular 189 it would have been faced with a challenge in that regard. The arbitrator found that the employer (the Appellant) timeously amended the initial advertisement and extended the closing date for the applications. The arbitrator made a finding that the aggrieved employees did not discharge the *onus* resting on them to prove the

unfair labour practice. A finding was also made by the arbitrator about candidates that were shortlisted but not appointed. These candidates wrote the test but were subsequently not appointed. They fell in the same group as those candidates who after passing the test were interviewed but were not appointed among the 12 successful candidates. The test sheet adduced as evidence by the employer showed that Mr Lutchmiah and Mr Naidoo scored below the cut-off line. The employer explained the process that was undertaken to select the candidates that were to be recommended for appointment. The process showed that certain candidates who scored high during the interview were not appointed to satisfy the demographic requirement. The arbitrator found this explanation to be clear and he found no unfairness. In the arbitrator's finding, the aggrieved employees in this category failed to discharge the *onus*. They thus failed to prove that the employer perpetrated an unfair labour practice.

Review proceedings

- [28] It is common cause in the Court *a quo* that the conclusion reached by the arbitrator in this matter was *inter alia* described as unreasonable, irrational and unjustifiable on various bases. On the other hand, in opposition to the review application on behalf of the Appellant, it was contended that Circular 189 was placed on the notice board and that the aggrieved employees were obliged to have inspected the notice board. It was contended as well that the job description of Sergeant obliged the Appellant to set the requirement of the code 15 licence as an essential requirement.

Discussion

- [29] Seemingly it is a critical contention at the heart of the aggrieved employees who were not shortlisted that a motorcycle licence is not an inherent requirement for the job of Sergeant. The above contention is premised on what Joseph Khanya testified to as the primary responsibility of Sergeant at the Metro Police. Mr Khanya's evidence summarised above *inter alia* is to the effect that even Sergeants that supervise motorcycle patrols do not do so on motorcycles but

they use motor vehicles. He referred to the group he called “most competent motorcycle riders” that are utilised to escort Presidents of the Country and the Premiers and testified that they too discharge their duties in motor vehicles. I undertake to deal with all this later on in this judgment.

[30] For present purposes, let us consider the case presented by the First Respondent – Mr Khanya. It is common cause that Mr Khanya acting through his Union (SAMWU) referred an unfair labour practice dispute to The South African Local Government Bargaining Council (the “Third Respondent”) for conciliation. Details of the unfair labour practice are indicated as relating to “non-shortlisting”. Conciliation was clearly unsuccessful and the matter ended up unresolved and was referred to arbitration. See: section 186(2) (b) of the LRA.

[31] Mr Khanya’s testimony was that he was not shortlisted, interviewed and promoted to the position of Sergeant due to his disability and that the Appellant was guilty of unfair discrimination against him. It is important to hasten to mention that Mr Naidoo representing the Appellant at the arbitration was pertinent in reminding not only Mr Khanya but also all concerned including the arbitrator that seeing that Mr Khanya was relying on unfair discrimination he was not therefore in the correct forum. The contention that failure to appoint Mr Khanya was “unfair and discriminatory” was persisted with during the review application. It is common knowledge that in terms of section 186(2) of the LRA, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving unfair conduct by the former relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee etc. There can be no dispute on the assertion that an act consisting unfair discrimination is regulated by Chapter 2 of the EEA. Perhaps it will clarify this aspect to refer to the relevant provisions of the EEA. Section 10 of the EEA provides as follows:

‘10 (1) In this section, the word ‘dispute’ excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the labour Relations Act.

- (2) Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.
- (3) The CCMA may at any time permit a party that shows good cause to refer a dispute after the relevant time limit set out in subsection (2).
- (4) The party that refers a dispute must satisfy the CCMA that...
- (5) The CCMA must attempt to resolve the dispute through conciliation.
- (6) If the dispute remains unresolved after conciliation –
 - (a) any party to the unresolved dispute may refer it to the Labour Court for adjudication; or
 - (b) all the parties to the dispute may consent to arbitration of the dispute.'

[32] In term of the above provisions of the EEA, disputes relating to unfair discrimination must be referred to the CCMA for conciliation. If the dispute remains unresolved, the employee concerned enjoys an entitlement to refer such unresolved dispute directly to the Labour Court for adjudication unless all the parties involved have consented to the arbitration of the dispute. Mr Khanya referred the unfair discrimination dispute to the CCMA for adjudication. The record of proceedings does not reveal that there was an agreement by all involved that Mr Khanya's unfair discrimination dispute shall be the subject of arbitration presided over by any arbitrator. Clearly the arbitrator (the Second Respondent) had no jurisdiction to arbitrate Mr Khanya's dispute. In the circumstances, the CCMA had no jurisdiction to deal with Mr Khanya's complaint and the decision of the Labour Court that found the arbitrator's award reviewable for not finding in favour of Mr Khanya claim of discrimination was erroneous.

[33] I shall now deal with issues raised in the cross-appeal. I am of the view that the Court *a quo* handled these issues correctly. In the words of Davis JA in *Wasteman Group v SAMWU and Others*:¹

‘...the commissioner is required to come to an independent decision as to whether the employer’s decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the commissioner.’

[34] The Court *a quo* correctly found that it remains the employer’s prerogative to set the standard for its employees (although in this case the employers hand was forced by its employees who won an arbitration award requiring the employer to force the requirement of a code 15 motorcycle licence for the position of Sergeant). The setting of the requirement of code 15 licence for the position of Sergeant does also not conflict with the provisions of either the Constitution or the LRA. Certainly to require code 15 licence for the post of Sergeant as an essential requirement is and cannot amount to unfair labour practice as contended by the aggrieved employees. I share the view of the Court *a quo* that the essential requirement for the post of Sergeant cannot also be said to be aimed at excluding female candidates. In any event, that was not for the arbitrator to deal with as this also was an issue of discrimination which the arbitrator could not determine..

[35] The materials which the arbitrator was obligated to consider before arriving at a decision in this matter I have summarised earlier. I may add that this Court in *Fidelity Cash management Service v CCMA*² held:

‘It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA Commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the Commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the

¹ [2012] 8 BLLR 778 (LAC) at 781D-E.

² [2008] 3 BLLR 197 (LAC) at para 98.

Act primarily given to the Commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently...'

I fully agree with the above. Very often one is inclined to interfere with the arbitrator's awards and very often it is left out of account that there are a range of reasonable findings the arbitrator can arrive at after taking into consideration all the material factors presented before him.

[36] One indeed must be conscious whenever one is called upon to review the arbitrator's award. Hence a strict application of the test enunciated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC) needs to be adhered to. The review Courts must adhere to the simple formulated test in the above authority: "*Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?*" There have been decisions after *Sidumo* matter but none can be said to postulate the test any differently. For instance in *Afrox Healthcare Ltd v Commission for Conciliation, Mediation and Arbitration and Others*³ this Court per Mlambo JP held as follows:

'The fact of the matter is that the reasonable decision-maker yardstick crafted in *Sidumo*, viewed in proper context, is none other than that in the absence of a 'rational objective basis' (the *Carephone* test) between the decision arrived at and the material placed before the decision-maker, the relevant decision is clearly not one which a reasonable decision-maker would have arrived at.'

The judge in the Court *a quo* was alive at the correct test and its proper application. The judge correctly approached the review and "travelled on the correct path" in respect of facets of this matter save for the issue pertaining to Mr Khanya.

³ (2012) 33 ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC) at para 21.

- [37] At the risk of repeating an aspect already dealt with, it is totally wrong of the aggrieved employees to endeavour to hold the Appellant to the contents of the earlier advert contained in Circular 183. I would of course understand the reliance on Circular 183 if that Circular was not subsequently amended upon discovery of an error therein contained. Circular 183 was replaced by Circular 189 which spelled out the correct essential requirement for a Sergeant post. In order to ameliorate any conceivable harm caused by Circular 189, the Appellant extended the closing date which was contained in the initial Circular 183. Certain applicants timeously noticed in the notice board that Circular 189 effectively amended or even replaced Circular 183. This clearly demonstrates that Circular 189 was indeed placed on the notice board. In my understanding, communication in matters of this nature between employer and employees is achieved through the use of the notice boards. To me, that in effect means that all employees interested to know what the employer says in matters of this nature, are under an obligation to frequent the notice board. Those that do not do so, they do that at their own peril. As regards those who were shortlisted but not appointed: none of them made out a case of unfair labour practice and the dismissal of their referral cannot be faulted.
- [38] Concerning Mr Matyobeni's complaint that he was not addressed in IsiZulu in the interview, I am of the view that his complaint does not deserve too much attention at all. Mr Matyobeni was first subjected to a written test which was in English. His fluency in English was evidenced by the fact that he even passed that test. His passing of the test qualified him for an interview. He underwent the interview also in English. He was not successful in the interview. The interview, we gather from the papers, consisted of only three questions. For Mr Matyobeni to blame his failure to pass the interview to the use of the English language is surprising. As the judge in the Court *a quo* correctly observed at no stage did Mr Matyobeni complain or even request that in his particular case IsiZulu language must be used. Accordingly, I hold that the decision of the arbitrator was indeed the one that a reasonable decision-maker could have reached regard being had to all the circumstances of this matter. The factual matrix facing the arbitrator,

also justify the conclusion he reached. It certainly fell within the range of reasonable outcomes that the arbitrator could reach based on the materials presented before him. That there are no merits in the cross-appeal is beyond question.

- [39] The question of costs in labour matters is regulated by section 162(1) of the LRA. In terms thereof, the Court may make orders for the payment of costs “*according to the requirements of the law and fairness*”. There are certain considerations which the Court must ordinarily take into account. In the instant matter, I am of the view that it would be unfair to make an order obliging the aggrieved employees to pay costs of the Appellant. Importantly, the general rule is that in the absence of special circumstances costs follow the result. However, considerations of fairness may require differently. Accordingly, I hold that there be no order as to costs.

Order

- [39] In the circumstances, I make the following order:

- (a) The Appeal by the Appellant on the issue of Mr Khanya is upheld and the cross-appeal is dismissed. The arbitration award thus stands.
- (b) There shall be no order as to costs either in this Court or the court below.

I agree.

Dlodlo AJA

Waglay JP

I agree.

Mokgoathleng AJA

APPEARANCES:

FOR THE APPELLANT:

Adv J Nxusani

Instructed by Kathy James Attorneys

FOR THE RESPONDENTS:

Adv P Schuman

Instructed by Brett Purdon Attorneys