



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PA/10/2011

In the matter between:-

NELSON MANDELA METROPOLITAN

MUNICIPALITY (NMMM)

Appellant

and

TSEDISO MKUMATELA

First Respondent

S V P MAFONGOSI

Second Respondent

NYAMEKO GQAMANA N.O.

Third Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Fourth Respondent

Heard: 24 November 2015

Delivered: 19 February 2016

Summary: Alleged unfair labour practice related to non-appointment – policy making no provision in case of deadlock concerning consensus on the appointment of a candidate – employer taking into account observers' scores in order to resolve the impasse- candidate claiming unfair labour practice and proposing arithmetical mean of panel members' score – employer not breaching policy - procedure adopted more transparent, fair and objective. Commissioner's award reasonable – Labour Court's judgment set aside. Appeal upheld.

Coram: Waglay JP, C J Musi JA et Savage AJA

JUDGMENT

C J MUSI JA

- [1] This is an appeal against the judgment of the Labour Court (Cawe AJ), wherein it set aside the award rendered by the third respondent (the Commissioner), and referred the matter back to the fourth respondent (the South African Local Government Bargaining Council) to be arbitrated by a Commissioner other than the third respondent.
- [2] The first and second respondents are employees of the appellant. Both of them applied, were shortlisted and interviewed for the position of Assistant Manager: Operations in the Environmental Services Business Unit (ESBU) (the position). Sixty two (62) persons applied for the position of which only eight were shortlisted and interviewed. The second respondent was appointed. The first respondent, being dissatisfied with the said appointment, launched review proceedings in the Eastern Cape High Court, Port Elizabeth. The High Court (Revelas J) rejected the appellant's contention that it did not have jurisdiction to adjudicate the dispute. It went on to consider the merits of the dispute and dismissed the application. The first respondent subsequently appealed to the Supreme Court of Appeal against the judgment of the High Court. The Supreme Court of Appeal, without considering the merits, dismissed the appeal on the ground that the High Court did not have jurisdiction to adjudicate the dispute.
- [3] The first respondent then referred the dispute to the fourth respondent. Conciliation did not yield a positive result. The matter was referred to arbitration. The Commissioner dismissed the first respondent's claim. The Commissioner's award, as stated above, was set aside by the court *a quo*. The appellant appeals with the leave of this Court against the judgment of the Labour Court.

[4] The appellant adopted a recruitment, selection and placement policy on 17 July 2002. It was not in dispute that the said policy was applicable to the filling of the post under discussion. The objectives of the policy are *inter alia*:

4.1 To introduce fair and objective principles and procedures for the staffing of the Municipality.

4.2 To provide guidelines for the appointment of candidates to the NMMM.

4.3 To reduce the potential for labour disputes resulting from the recruitment, selection and appointment processes.¹

[5] In terms of the policy document, the position was at middle management level and the interviews were to be conducted by the appointments committee consisting of the Human Resources Manager or his/her proxy and the Manager of the ESBU or his/her proxy. The Affirmative Action Officer and a representative of each of the two in-house trade unions had observer status. The ESBU Manager was supposed to be the chairperson of the appointments committee, however a chairperson was not appointed. The appointments committee were to send their recommendation to the Municipal Manager who would make the appointment in consultation with, the Executive Mayor. Although the observers had no voting right, they were required to keep score sheets, which were kept as part of the records of the selection process.

[6] In terms of the policy, the appointments committee should discuss suggestions on whom to appoint and attempt to reach consensus, as far as practically possible. The final decision to appoint was to be made at the discretion of the Municipal Manager, with the Executive Mayor reserving the right to change or amend that appointment.²

[7] During the interviews, the ESBU was represented by Ms Nozuko Zamxaka, Manager: Waste Management and the Human Resource Manager was represented by Mr Jamda. Ms Mdaka was the Affirmative Action Officer whilst the unions were represented by Ms Meltz and Mr Gwadela respectively.

¹ See Clause 1 of the policy document.

² Clause 4.6 of the policy document.

- [8] The scores of the ESBU and the HR representatives were diagrammatically as follows:

CANDIDATE	HR JAMDA	RANKING	ESBU ZAMXAKA	RANKING
Mafongosi	44.5	(1)	33.5	()
Skweza	42.5	(2)	40	(2)
Mkumatela	42.5	(2)	41	(1)
Malaka	41	(5)	32	(3)

- [9] The above diagram illustrates that the HR representative ranked the first respondent second and the second respondent first whilst the ESBU representative ranked the first respondent first and did not rank the second respondent amongst the top three.
- [10] The HR representative and the ESBU representative unsuccessfully attempted to reach consensus. Ms Zamxaka was of the view that the aggregate of her and Jamda's scores should be used. The result would then be that the first respondent would be ranked first with 83.5 points and the second respondent would be ranked third with 78 points. Mr Jamda disagreed.
- [11] In a report dated 3 April 2006, Ms Zamxaka wrote to the Business Unit Manager: Environmental Services and *inter alia* stated the following about the process: "On the basis that consensus could not be reached, it was noted that the final decision would have to be made by the Acting Municipal Manager and that a report indicating the deliberations would be prepared by HR. Subsequently, HR advised that the scores of all penal members i.e. including the observers (union) (sic) be added and the totals would determine the preferred candidate. This was conducted amid indication from the Business Unit that only two scores i.e. Jamda and Zamxaka should be

considered... However, at 17h45, the HR recommendation was signed by all parties with an agreement that a report would accompany such and would be submitted to the Environmental Services Business Unit Manager for a final decision.”

- [12] It is clear that reference to the ESBU Manager in the last sentence is a mistake because, firstly, in the same report, she says that the final decision would have to be made by the Acting Municipal Manager and secondly HR wrote to the Acting Municipal Manager on 6 April 2006. I pause to set out the scores of the observers before reproducing some of the contents of the HR Acting Business Unit Manager. The observers' scores were diagrammatically as follows:

CANDIDATE	UNION (Meltz)	UNION (Geraldela)	EE Mdaka
Mafongosi	40 (1)	44 (1)	39 (1)
Skweza	39 (2)	34 (2)	38 (2)
Mkumatela	31 (3)	31 (3)	36 (3)

- [13] All the observers ranked the second respondent first and the first respondent third. Therefore, everyone who attended the interviews and allocated points to the candidates, except Zamxaka, ranked the second respondent first.

- [14] On 6 April 2006, Mr Ndoyana, the Acting Business Unit Manager: Human Resources wrote to the Acting Municipal Manager setting out that interviews were conducted on 30 March 2006 for the position and who formed part of the panel. He further stated that:

‘Note that officially only the representatives from Human Resources and the applicable Business Unit were entitled to score.

A difference of opinion pertaining to the preferred candidate existed between the Human Resources representative vis a vis the representative from the

Business Unit and in an effort to attempt to reach consensus, the panel was reconvened on 3 April 2006 and in the absence of the Unions who were requested to recuse themselves during the deliberations among the representative of the Business Unit, the Human Resources representative and the Employment Equity representative. Undeniably the scores reflected on the score sheets of the Human Resources representative and that of the Employment Equity representative both supported Mr SVP Mafongosi as the preferred candidate. (Note that notwithstanding the fact that Employment Equity and the in-house Unions have no status insofar as scoring is concerned, these role-players are nevertheless allowed to complete score sheets for their own benefit. These score sheets are however always retained for record purposes.)

The aforementioned effort notwithstanding the deadlock still remained and in an effort to resolve that impasse, the two Unions were called into the meeting and requested to reveal their choice of the preferred candidate. Both Unions confirmed that, in terms of their score sheets, Mr Mafongosi was undeniably the preferred candidate.

In terms of established procedure the undermentioned documentation is submitted for your kind consideration and confirmation of Mr SVP Mafongosi as the preferred candidate.'

- [15] The second respondent was appointed by the Acting Municipal Manager. On 18 April 2006, the first respondent's attorneys, Randell-Oswald Incorporated, wrote to the Acting Municipal Manager complaining that the process leading up to the appointment of the second respondent was flawed because it was irregular, unfair and unprocedural. The first respondent requested the Acting Municipal Manager to withdraw or set aside the appointment of the second respondent. The first respondent pointed out to the Acting Municipal Manager that there was no deadlock because the aggregate point should have been considered in making the recommendation of the HR and ESBV representatives. The Acting Municipal Manager did not respond to the letter.
- [16] The parties did not adduce any *viva voce* testimony at the arbitration. They agreed that the facts were common cause and submitted a consolidated bundle of documents to the Commissioner. They agreed that the issue that

the Commissioner had to decide was whether the appellant committed an unfair labour practice by taking the scores of the observers into account.

- [17] The Commissioner rejected the first respondent's contention that the "average" scores of Jamda and Zamxaka were supposed to have been used to make the recommendation. The Commissioner found that approach too simplistic. The Commissioner also found that the committee had to adopt an unorthodox approach to break the deadlock. He said the following:

'I am satisfied that this approach was fair and sensible in the circumstances, although I am fully aware that this approach is neither sanctioned, nor prohibited by the first respondent's (Municipality) selection policy.'

He however went on to state the following:

'In addition, I am also bound by the findings of Revelas J in her judgment mentioned above that, when disagreement between the scorers occurs, it is imminently reasonable to call upon the other members of the existing panel for their input.'

He concluded that the appellant did not commit an unfair labour practice.

- [18] The Labour Court correctly found that the Commissioner could not be bound by the High Court's decision in circumstances where the Supreme Court of Appeal found that the High Court did not have jurisdiction to hear the matter. The court *a quo* concluded as follows:

'In the instant case I find that the decision maker (the Commissioner) misdirected himself by adhering to Revelas J's findings and by so doing made a decision that a reasonable decision maker could not make.'

- [19] The Labour Court found that the Commissioner did not explain why he found the first respondent's approach that the scores of the two panellists should be "averaged" simplistic. The court *a quo* was of the view that the Commissioner did not explain why he found the selection committee's deviation from the prescribed procedure acceptable.

- [20] The appellant contended that the court *a quo* adopted a narrow approach by confining itself to the question whether the Commissioner found as he did simply because he considered himself bound by Revelas J's judgment.
- [21] The first respondent contended that there could be no doubt that the Commissioner based his own findings on Revelas J's findings which could in any event not prevail because the High Court did not have jurisdiction to adjudicate the matter. He further contended that even if it is accepted that the Commissioner embarked upon his own assessment of the facts; the decision was still not one which a reasonable decision-maker could make, given the failure of the appointments committee to adhere to the provisions of the policy.
- [22] The appellant and the first respondent were *ad idem* that the Commissioner was correct in stating that the only issue that he had to decide was whether the appellant committed an unfair labour practice in taking the scores of the observers into account when the recommendation was made to the Acting Municipal Manager.
- [23] Fairness involves making a value or moral judgment. What is fair in one case may not be fair in another. The assessment of fairness is therefore a fact specific and not a fact free enquiry. There is therefore no right or wrong answer, when fairness is assessed, and the review court must therefore defer to the decision of the Commissioner. In assessing whether an unfair labour practice was committed, the Commissioner had to have regard to what was said in *National Union of Metalworkers of SA v GM Vincent Metal Sections (Pty) Ltd*³ that:
- ‘It is necessary to have regard to what was fair in all the circumstances and to apply the concept of fairness in accordance with the rules and norms that have evolved in the field of labour jurisprudence. This is not to say that a decision on fairness is a decision on a question of law in the strict sense: it is the passing of a moral judgment on a combination of findings of facts and opinions.’⁴

³ (1999) 20 ILJ 2003 (SCA).

⁴ At para 18.

[24] If the Commissioner's assessment of fairness is one that a reasonable Commissioner could make, then there would be no reason to set the Commissioner's award aside. If the decision of the Commissioner is one which a reasonable Commissioner could make then the decision of the Commissioner should prevail. This Court must, in assessing the decision of the Commissioner, be cautious not to substitute its own assessment (or determination of fairness) for that of the Commissioner.

[25] This case was badly prepared, pleaded and presented. There is no allegation that the post was a promotion post as opposed to a parallel level post for the first respondent. It was assumed that appointment to the post would not be a parallel appointment but a promotion. The first respondent rushed to the High Court to have the process leading up to the appointment of the second respondent set aside without asking the Acting Municipal Manager for his reasons for appointing the second respondent.

[26] The first respondent, in his founding affidavit in the court *a quo*, blamed the appellant for not advancing rational reasons for not appointing him whereas he did not ask for such reasons. He stated the following in his founding affidavit:

'Apart from the fact that there ought to have been no lack of consensus had the committee behaved rationally, the provisions of clause 4.6 of the policy document make it clear that the decision as to who should be appointed is a discretionary one. Such a decision would also have to stand the test of rationality and the doctrine of legality. Ignoring the legitimate scoring record would not be a rational decision unless appropriate and rational reasons were in fact advanced.'

[27] The first respondent was supposed to ask the appellant for the reasons for the appointment of the second respondent instead of him. Having received such, he was supposed to assess whether those reasons are rational before rushing to court to set the decision aside because the process was ostensibly flawed. It must be pointed out that a flawed process does not necessarily lead to a flawed decision where the decision-maker applies his/her discretion rationally. Likewise, a proper process would not necessarily lead to a proper exercise of

discretion. In this matter, the Acting Municipal Manager exercised his discretion to appoint the second respondent. There is no allegation that he exercised his discretion arbitrarily, capriciously or upon a wrong principle. What is being challenged is only the process leading up to the Acting Municipal Manager making the decision. Although it was not specifically pleaded, I will assume that the unfair labour practice relates to the non-promotion of the first respondent.

[28] Section 186(2)(a) of the Labour Relations Act⁵ reads as follows:

'Unfair labour practice means an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion ... of an employee.'

[29] The unfair conduct complained of, as I understand the first respondent, was the flawed process. The first respondent assumed that the Acting Municipal Manager approved the appointment based solely on the recommendation of the HR Business Unit Manager, who, in turn, based his recommendation on the flawed and unsanctioned process followed by the appointments committee. The unfairness seemingly lies in the manner in which the appointment committee handled the matter.

[30] In the court *a quo*, the first respondent argued that the decision of the Commissioner is not one which a reasonable Commissioner could reach because the Commissioner found that the first respondent contended that the scores of the two panellists should have been averaged whereas he argued that they should have been added up.

[31] On the facts of this case, the above submission is of no value. Whether one uses the average score of the two panel members or the aggregate of their scores; the result would still be that the first respondent would get the higher score. This is so because the aggregate of the scores were as follows:

First respondent 83,5

Second respondent 78

⁵ 66 of 1995.

The average scores would be as follows:

First respondent $83.5 \div 2 = 41.75$

Second respondent $78 \div 2 = 39$

[32] The Commissioner was aware that the mathematical basis advanced by the first respondent favoured him. Therefore whether one used the aggregate or the arithmetic mean, the result would still be the same; the first respondent would score higher. The Commissioner was of the opinion that this approach was too simplistic compared to the one which was followed and which he favoured.

[33] The first respondent contended that there was no deadlock because the first respondent would have a superior score if the scores of the two panellists with voting rights were added up. This submission is incorrect. It is clear that all the parties accepted that there was a deadlock in that the HR representative and the Business Unit representative could not reach consensus. The policy did not make provision for how the deadlock could be broken. Adding up the scores of the two panellists with voting rights was one option. Looking at the entire picture by having regard to the scores of the other panel members (observers) was another option. The latter option was chosen. The first respondent obviously favours the arithmetical option but the appellant and the Commissioner favoured the total picture approach.

[34] The Commissioner said the following in this regard:

'The only two panellist, who were entitled to score, could not reach consensus on a preferred candidate. Mr Jamda identified the second respondent as the preferred candidate, whereas Ms Zamxaka's preferred candidate was the applicant. In the circumstances, the Committee had to adopt an unorthodox approach in order to resolve the deadlock. That approach was to allow scores of the observers to be taken into account in making its recommendation to the Municipal Manager. I am satisfied that this approach was fair and sensible in the circumstances, although I am fully aware that this approach is neither sanctioned, nor prohibited by the first respondent's selection policy.'

- [35] It is clear that the Commissioner used his own reasoning and assessment to come to the conclusion that he reached. His award on this issue could have ended there. He however, decided to overkill the point by saying:

‘In addition, I am also bound by the findings of Revelas J in her judgment mentioned above that, when disagreement between the scorers occurs, it is imminently reasonable to call upon the other members of the existing panel for their input...’

- [36] This paragraph was totally unnecessary and did not influence the Commissioner's independent reasoning. It is for that reason that he started the paragraph with the words “in addition”. Those words were used to make plain that he had already reached a conclusion on the point but in addition to his reasoning, Revelas J's reasoning also found resonance. In my view, the court *a quo* was wrong in its finding that the Commissioner based his decision solely on Revelas J's judgment.

- [37] Although the observers had no voting rights they sat through the entire interview process. They observed the candidates, made notes of their answers and scored each candidate. When their scores were revealed they all, without exception, gave the second respondent a higher score than the first respondent. The first respondent's contention that the scores were thus manipulated to his prejudice is without merit. The policy is merely a guide and not the law of the Medes and the Persians. It did not seek to dictate, it merely guided. It did not even have a guide as to how a deadlock should be resolved.

- [38] The process suggested by the first respondent is open to abuse and malfeasance, because all that one panellist has to do is to give one candidate a very high score and the other a very low score in order to load the dice in favour of his/her preferred candidate. This can surely not be a fair and objective procedure to fill vacancies. The procedure adopted to request the observers to reveal their scores is indeed more transparent and objective. It is less susceptible to malfeasance than the arithmetic mean approach suggested by the first respondent. It is also not inherently unfair. The Commissioner's decision, on the facts of this case, is one which a reasonable decision-maker could reach.

[39] The matter was postponed on a previous occasion at the instance of the first respondent. Mr Partington contended that the first respondent should be ordered to pay the costs occasioned by such postponement. This matter has a protracted history in which the first respondent tried to vindicate, albeit unsuccessfully, his right. The first respondent was already mulcted in costs, which includes the costs of two counsel by the Supreme Court of Appeal. The dictates of fairness and the law militate against a costs order.

[40] The following order is made:

- (a) The appeal is upheld with no order as to costs;
- (b) The order of the court *a quo* is set aside and replaced with the following:

The review application is dismissed with no order as to costs.

C J Musi JA

Waglay, JP and Savage AJA concur in the judgment of C J Musi JA.

APPEARANCES

FOR THE APPELLANT:

Mr Partington

Instructed by Chris Baker & Associates

Port Elizabeth

FOR THE FIRST RESPONDENT:

Michael Randall Attorneys.

Port Elizabeth