



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: PA 2/2015

In the matter between:

THE HEALTH AND OTHER SERVICE PERSONNEL

TRADE UNION OF SOUTH AFRICA (HOSPERSA)

First Appellant

N.M. GXOLO

Second Appellant

M.R. PADAYACHY

Third Appellant

and

THE MEMBER OF THE EXECUTIVE

COUNCIL (MEC) FOR HEALTH, EASTERN CAPE

First Respondent

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

Second Respondent

F.A. BATWINI N.O

Third Respondent

M.D MANUEL

Fourth Respondent

Heard: 15 September 2016

Delivered: 08 December 2016

Summary: In a claim for unfair labour practice relating to promotion- The Department of Health, Eastern Cape, advertised a post of Deputy Director: Clinical Support Services. It set as a requirement that the job applicants be registered with the Health Professional Council of South Africa (HPCSA). The individual appellants, although registered as required, were unsuccessful. The

successful candidate was not registered with the HPCSA but with the South African Nursing Council (SANC). The arbitrator found that the department could not justify the deviation from the requirement set and concluded that it committed an unfair labour practice against the appellants. She ordered that the post be re-advertised. The Labour Court reviewed and set aside the decision of the arbitrator on the basis that she gave no reasons for it and remitted the matter to the Bargaining Council for arbitration *de novo* before a different arbitrator. On appeal:

Held, the department failed to discharge the evidentiary burden to justify the departure from the requirements set for the position. The deviation not only prejudiced the individual appellants but disqualified potential candidates from applying.

Held, that although the arbitrator's conclusion to the effect that the appellants discharged the onus to prove their unfair labour practice claim was not comprehensive and appeared to be terse, it could hardly be said that she did not provide adequate reasons. She fully comprehended the nature of the enquiry she was required to undertake and dealt with the primary issue. The decision reached by her, that the post be re-advertised, was justifiable on the facts.

The order of the Court *a quo* substituted with an order dismissing the review application.

Coram: Coppin JA, Landman JA and Phatshoane AJA

JUDGMENT

PHATSHOANE AJA

[1] Several applications served before the Labour Court. These included *inter alia*: The application to review and set aside the arbitration award issued under Case No: PSHS88-10/11 by the third respondent (the arbitrator) under the auspices of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC), the second respondent; the application for

condonation of the late filing of the review application by the Member of the Executive Council (MEC) for the Department of Health, Eastern Cape, the first respondent; the application to dismiss the review application by the Health and other Service Personnel Trade Union of South Africa (HOSPERSA), Ms Ntombizodwa Mirriam Gxolo and Ms Mano Ranjinee Padayachy, the first to the third appellants; and the application to join HOSPERSA in the proceedings by the MEC for Health.

- [2] The appeal is not sought against the order of the Labour Court in respect of the application for condonation of the late filing of the review application; the application to dismiss the review application; and the application for joinder. It primarily lies against the judgment and order of the Labour Court (per Lallie J) in granting the application for the review and setting aside of the arbitration award issued under Case No: PSHS88-10/11 and remitting the matter to the Bargaining Council for arbitration *de novo* before a different arbitrator. The appeal comes before us with leave of that Court.
- [4] The dispute between the parties concerns an alleged unfair labour practice relating to the promotion of Ms Ntombizodwa Mirriam Gxolo and Ms Mano Ranjinee Padayachy, the second and third appellants, by the Department of Health, Eastern Cape (the department).
- [5] On 25 October 2009 the department advertised a post of Deputy Director: Clinical Support Services. One of the requirements was that the job applicants must have “current registration with the Health Professional Council of South Africa (HPCSA)”. Gxolo and Padayachy were both registered with the HPCSA. They applied for the position but were unsuccessful. Padayachy was ranked in the fourth position whereas Gxolo, sixth position. Ms Marisha Desree Manuel, the fourth respondent, was appointed. Gxolo and Padayachy took no issue with the panel scores as allocated to competing candidates. Their major grievance was that Manuel did not satisfy the requirements for the position in that she was not registered with the HPCSA but with the South African Nursing Council (SANC). According to Gxolo, as allied workers, this was the only position they could be promoted to. In other words, the advertisement targeted only HPCSA members. She says that they would not

have had a problem had the advertisement specified that the incumbent be registered with either the HPCSA or the SANC, but it did not.

- [6] Ms Charmaine Jagers, referred to as Ms Jacobs on the transcribed record of the arbitration proceedings, is an Assistant Director: Administration. She testified in the case of the MEC for Health, Eastern Cape. The position of Deputy Director: Clinical Support Services was newly created on the staff structure and had been identified as critical. The advertisement was circulated to the relevant managers to ensure that the requirements set out therein were correct. She says that during the shortlisting process the panel had regard to the job applicants with appropriate experience and engaged in a specific field. It also agreed to consider other candidates registered with other professional bodies apart of the HPCSA.
- [7] The National Education, Health and Allied Workers Union (Nehawu) was the only trade union that responded to the invitation to attend the shortlisting process and the interviews. According to Jagers, Nehawu had no quibbles with the procedures adopted during the appointment process. Manuel scored higher than all the other candidates that were interviewed. She had qualifications in a health related field (nursing qualifications) as set out in the advertisement and was registered with the SANC. Ms Jagers could not explain why it had been set out in the advertisement as a requirement that the applicants be registered with the HPCSA only and made no mention of the SANC as an alternative.
- [8] Having regard to the background sketched the arbitrator succinctly ruled that insofar as the advertisement required the incumbent to be registered with the HPCSA, it meant that by appointing a candidate who had not been registered with the HPCSA, the Department of Health deviated from the requirements set out in the advertisement. She was of the view that the department did not justify why the requirement set in the advertisement was changed during the selection process. The arbitrator then concluded that Gxolo and Padayachy had discharged the *onus* to prove that the department committed an unfair labour practice against them. Resultantly, she ordered the Department of Health, Eastern Cape, to re-advertise the position by 15 January 2012.

- [9] In granting the application for the review and setting aside of the arbitrator's award the Court *a quo* reasoned as follows:

'[10]...A reading of the arbitration award reflects that the arbitrator stated the version of both parties before her and concluded that she was satisfied that the respondents had discharged the *onus* of proving that the applicant had committed an unfair labour practice. She did not deal with the evidence before her and gave no reasons for being satisfied that the *onus* of proof had been discharged. She was enjoined by section 138(7) of the Labour Relations Act 66 of 1995 ("the LRA") to give brief reasons for her decision. She gave none thus rendering her award reviewable.'

- [10] The grounds of appeal can be fused into one. In the nutshell, Gxolo and Padayachy contended that the Court *a quo* erred in concluding as it did in the preceding paragraph and in setting aside the award which was not only merely reasonable but correct.

- [11] It is trite that the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.¹ The following lucid remarks by Ngcobo AJP (as he then was) in *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others*² are apposite:

'[28] Given the finality of the awards and the limited power of the Labour Court to interfere with the awards, commissioners must approach their function with caution. They must bear in mind that their awards are final - there is no appeal against their awards...' ³

The learned Acting judge President proceeded as follows at 1715 para 39:

'[39].....Though desirable it may be, **it is not expected of commissioners to write well researched and scholarly awards. Awards must be brief and the proceedings before commissioners must be dealt with expeditiously.** See s 138(1) read with s 138(7)(a) . However, failure to deal

¹ See s138(1) of the Labour Relations Act, 66 of 1995.

² (1999) 20 ILJ 1701 (LAC).

³ At 1712 para 28.

with an important facet may, depending on the circumstances of the case, provide evidence that the commissioner did not apply his or her mind to that particular facet.' (My emphasis)

[12] The facts of this case do not present any difficulty or require any intricate analysis. The issues are largely common cause. The long and short of it is that the department appointed a candidate who was not registered with the HPCSA contrary to the requirements it laid down and could not justify the deviation as found by the arbitrator. Not only did this prejudice Gxolo and Padayachy but disqualified other potential candidates who may have applied but did not do so on the basis of the requirements set. It was not in dispute that had Gxolo or Padayachy been appointed to the advertised position this would have amounted to a promotion for them. The arbitrator correctly found, in my view, that although the SANC and HPCSA were health professional bodies, the department had not justified why the job requirements were changed. Put differently, the department failed to discharge the evidentiary burden that had shifted to it to justify the departure from the requirements set for the position. Although the arbitrator's conclusion to the effect that Gxolo and Padayachy discharged the *onus* to prove their unfair labour practice claim was not comprehensive and appears to be terse, it can hardly be said that she did not provide adequate reasons for her decision as found by the Court *a quo*.

[13] The practice of setting requirements for appointment and departing therefrom when effecting the appointment was condemned as follows in *Khumalo and Another v MEC for Education, Kwazulu-Natal*⁴

[62]Fairness in employment practices and labour relations requires the state to be even-handed and transparent not only to those whom it employs, but so too to those who may wish to apply for employment at a state institution. It would not be fair if the state were to employ persons who do not meet the very requirements that the state itself sets. It is neither fair nor in compliance with the dictates of transparency and accountability for the state

⁴ 2014 (5) SA 579 (CC).

to mislead applicants and the public about the criteria it intends to use to fill a post. The formulation and application of requirements for a particular post are a minimum prerequisite for ensuring the objectivity of the appointment process. Persons who do not meet the requirements for a post in the public sector ought not to be appointed.

[63] But is the public sector permitted no flexibility in its appointment process? If the ideal applicant happens not to meet one of the formal criteria, is a state employer barred from considering that applicant? The reading of the corollary into s 11 of the PSA [The Public Service Act, Proc 103 of 1994], in the context of s 195 of the Constitution, implies that it would generally not be fair or in terms of an objective process for public-sector employers to consider applicants who fall outside of the formal criteria. However, the fairness of the decision will typically be weighted heavily on the process and justification of the decision-makers....⁵

[14] The arbitrator fully comprehended the nature of the enquiry she was required to undertake and dealt with the primary issue. The awards by arbitrators might invariably not be flawless and complete. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others*,⁶ this Court made the following instructive pronouncement:

'[16] In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.

[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

[18] In a review conducted under s 145(2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the

⁵ At 597-598 paras 62-63.

⁶ (2014) 35 ILJ 943 (LAC).

factors amounts to process related irregularity sufficient to set aside the award. **This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make**⁷. (with emphasis)

[15] The ultimate decision reached by the arbitrator that the post of Deputy Director: Clinical Support Services be re-advertised is justifiable on the facts of this case. I am satisfied that the award of the arbitrator falls within the band of reasonable decision-makers. This much, Mr Simoyi, for the MEC, sensibly conceded. On the whole, I am satisfied that the arbitrator did not commit any gross irregularity which justified the reviewing and setting aside of his award. It follows that the review application by the MEC ought to have been and stands to be dismissed.

[16] In a situation where there is an ongoing employment relationship between the parties, such as the present, the Court would be slow to make costs orders against any of them. However, in this case, the department could be said to have acted unreasonably in resisting the appeal and in the end conceding that the opposition was unmeritorious. The appellants should not be out of pocket. I am satisfied that the requirements of law and fairness dictate that the costs should follow the result of this appeal.

Order

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

1. The appeal is upheld with costs as against the first respondent (the MEC for Health), Eastern Cape;
2. Paras 10.4 and 10.5 of the order of the Court *a quo* are set aside;
3. The order of the Court below is substituted with the following:

‘1. *The application for joinder is granted;*

⁷ At 949D-G paras 16-18.

2. *The application to dismiss the review application is dismissed;*
3. *The application for the condonation of the late filing of the review application is granted;*
4. *The application to review and set aside the arbitration award issued by the Public Health and Social Development Sectoral Bargaining Council under case No: PSHS88-10/11 dated 12 December 2011 is dismissed.'*

MV Phatshoane

Acting Judge of the Labour Appeal Court

Landman JA and Coppin JA concur in the judgment of Phatshoane AJA

APPEARANCES:

FOR THE APPELLANT:

A Christison

Instructed by Llewellyn Cain Attorneys

FOR THE FIRST RESPONDENT:

Adv M Simoyi

Instructed by State Attorney