

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

Case No: JR2421/04

Reportable and of interest to other Judges

In the matter between

MATJHABENG MUNICIPALITY

APPLICANT

and

TSHEDISO MOTHUPI N.O.

FIRST RESPONDENT

CCMA – FREE STATE PROVINCE

SECOND RESPONDENT

MOIKETSI BONTIKI MOGOTSI

THIRD RESPONDENT

JUDGMENT

SHAI AJ

INTRODUCTION

- [1] This is an application by the Applicant that seeks to review and set aside of an arbitration award, **“the award”**, issued by First Respondent, the **“commissioner”** under case no FS5533-02 dated 1 September 2004 under the auspices of the Second Respondent, the “CCMA”.
- [2] Further that, the Applicant seeks an order granting condonation for its late filing of the application for review.
- [3] The Third Respondent referred a dispute to the CCMA for conciliation for an alleged Unfair Labour Practice on the basis of discrimination in terms of the Employment Equity Act 55 of 1998, which dispute allegedly arose on the 13th June 2002.
- [4] A Certificate of Outcome was issued by the CCMA on 31 December 2002 in terms of which the dispute remained unresolved and it was certified that the dispute can be referred to arbitration.
- [5] The Third Respondent subsequently requested arbitration. The arbitration was held on 9 October 2003. The said award was issued on the 1st September 2004.
- [6] It appears that at during the course of the arbitration hearing the

Commissioner informed the parties that as the matter pertained to discrimination he lacks the jurisdiction to deal with the matter. The parties there after consented to jurisdiction in terms of section 10(6) (b) of the Employment Equity Act 55 of 1998.

[7] It is the award that is subject to the review application.

[8] The Applicant received the said award on the 2nd September 2004. The application for review should have been lodged on or before 14 October 2004. However, the review application was properly served on the 18 October 2004, two days late. The Third Respondent was however, served on the 15 October 2004.

[9] It is this late filing that the Applicant applies for condonation.

THE FACTS

[10] The Applicant advertised a vacancy for an Executive Manager: Public Safety and Transport and Third Respondent applied for the position. Thirty-one applications were received for the position and five candidates were invited for the interviews. Third Respondent was not short listed. Mr. X E Dasheka was eventually appointed in the position with effect from 1 August 2002.

[11] Applicant contends that because the said executive manager is the manager directly accountable to Municipal Manager, his appointment was done in accordance with Section 56 and 57 of the Local Government: Municipal Systems Act 32 of 2000.

[12] In terms of Section 56 (b) of the said Act, *“such a person appointed as a manager in terms of Section 56(a) must have the relevant skills and expertise to perform the duties associated with the post in question, taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.”*

[13] Subsequent to the short listing and the interviews a report with recommendation was submitted to the Council. The qualifications of the five short listed candidates who were interviewed, were set out in this document and after consideration of the recommendations, resolved that Mr. Dasheka be appointed.

[14] The advertisement of the vacancy set out the responsibilities as well as the qualifications of the said post. The responsibilities of the position were recorded as follows on the advert:

“Reporting to the Municipal Manager, the incumbent will accept responsibility for executive management of the Department Public Safety and Transport which includes: Emergency services; Fire Fighting and

Prevention; Rescue Services; Emergency Training Centre etc. Public Safety and Transport; Law Enforcement and Administration function, educating the public etc. Security; Coordinating the planning, organization, motivation, control of secure programme of Council in order to protect Councilors and personnel in their official capacity, records, interest and property of Council. Civil Defence: Prepare the community for possible disasters and assist during state of emergency."

[15] The qualifications for the post were recorded as follows in the said advert:

"Qualifications: The ideal candidate will have an appropriate B-Degree or equivalent with broad knowledge of the abovementioned spheres of responsibility. At least (4) four years experience in a decision making post will be an advantage."

[16] The Third Respondent's case was that he had the required qualifications for the said position and that he also had at least 4 (four) years experience in a decision making post which according to the advertisement it will be an advantage. The Third Respondent was neither shortlisted nor appointed.

[17] The Third Respondent was of the view that he was better qualified, experienced and knowledgeable and suitable for the position as opposed to Mr. Dasheka who was eventually appointed. Upon enquiry he was told

by the Applicant that he did not meet the requirements stipulated in the advertisement. According to him the Applicant unfairly discriminated against him.

[18] Applicant's evidence was to the effect that Third Respondent was not, as alleged, a better qualified, experienced, knowledgeable and suitable candidate as opposed to Mr. Dasheka. The applicant's evidence was that experience the Third Respondent had, was not relevant to the scope of work stipulated in the advertisement. Applicant's further evidence was that if in case the second respondent find that there was discrimination such discrimination was not unfair as it was based on inherent requirement of the job.

[19] The Commissioner found as follows:

"The conduct of the Respondent (Applicant in this application) amounted to unfair discrimination against the Third Respondent on the basis that the Applicant failed to discharge the onus of proving that the discrimination was as a result of inherent in requirements, which were justified and fair"

GROUND FOR REVIEW

[20] The Applicant raises the following complaints against the Commissioners award:

[20.1] The referral by the Third Respondent referred to unfair labour practice and unfair discrimination during the short listing process and not during the appointment process. Despite this the commissioner ordered compensation as though Third Respondent should have been appointed in the position, without proving that if he was short listed he would have been appointed to the post, hereby exceeding his powers. No evidence was led comparing himself to the short listed candidates in terms of qualifications and experience.

[20.2] The Commissioner ignored the evidence of the other Applicant's witnesses.

[20.3] That it appears that the Commissioner made his finding that Third Respondent was discriminated against merely on the basis of lack of experience on the premise that Section 20(5) of Employment Equity Act is applicable in this instance.

[20.4] That it was evident from the evidence presented on behalf of Applicant that the affirmative action did not play any role in the

decision as to which candidate to appoint.

In fact it is evident from the evidence that Third Respondent actually supported a case to the effect that Applicant wrongfully did not apply affirmative action when making its decision who to appoint, therefore such a finding is not justifiable on the basis of evidence presented during the arbitration hearing.

[20.5] The Commissioner committed gross irregularities in the conduct of arbitration proceedings in that First Respondent committed a material error of law pertaining to onus in the instance. On the basis of the evidence presented to the First Respondent, the Commissioner should have conducted the proceedings on the basis that considering that the discrimination Third Respondent complained of was on an unlisted ground, the commissioner should have borne in mind that the Third Respondent have a more enormous burden than someone who complained for discrimination on an unlisted ground. The Commissioner should have considered the evidence on the basis that neither discrimination nor unfairness were presumed, it was the task of the Third Respondent to prove both. In the instance the arbitration was conducted on the basis that the Applicant was called to justify the discrimination even without Third Respondent having presented evidence to establish the discrimination, on the unfairness of the alleged discrimination.

[20.6] There are no facts upon which the conclusion which First Respondent reached with regard to the issue of an inherent job requirement, can be reasonably justified.

[20.7] The Commissioner exceeded his powers in that the order of compensation he made is not justifiable and no reasons were given as justification that the said order is just and equitable.

THE APPLICATION FOR CONDONATION

[21] As highlighted above the application for review and setting aside the award was filed two days late. It appears that the Respondent instead of opposing the application for condonation then accepted to the late filing of the review application. At the hearing of this matter the third respondent did not pursue this matter further nor opposed the application.

[22] The Applicant's attorney explained the delay on the basis that the Counsel he briefed furnished him with the documents late. As a result of other commitments and the fact that he conducts one man practice he could not file the review application immediately although he managed to do so two days later.

[23] The Counsel who was tasked to draft the said documents indicated in his affidavit that he had planned to furnish the attorney for the applicant with

the necessary documents in time but his schedule became unexpectedly hectic, which included attending full bench appeal in the High Court in Bloemfontein, attending to Pule Ramasimong v Mala Municipality etc.

[24] Applicant is of the view that the Respondents will suffer no irreparable harm if the application is granted.

[25] Applicant further contends that it has good prospects of success on its review application. In the review application the applicant raised a number of irregularities against the commissioner including error of law in respect of onus in discrimination matters, granting of compensation with out giving reason for such an order etc.

[26] The factors that need to be taken into account when determining whether there is sufficient cause to grant condonation were set out in *Melane v Santam Insurance Co Ltd 1962 (4) SA* at 532 and involves weighing together the following factors; which are interrelated : degree of lateness, explanation thereof, the prospects of success and the importance of the case. The court went on and said that although these factors are interrelated, and are not individually decisive, if there are no prospects of success there would be no point in granting condonation.

[27] In the case of *Kritzinger v CCMA and Others (JR 2254/05 (2007) ZALC 85 (November 2007)* Molahlehi J said the following in relation to the test as inunciated in *Melane v Santam Insurance Co. Ltd. 1962 (4) SA A532*:

“These factors are not individually decisive but are interrelated and must

be weighed against each other. In weighing the factors for instance, a good explanation for the delay in lateness may assist the applicant in compensation for weak prospects of success. Similarly strong prospects of success may compensate for the inadequate explanation and the long delays”

[28] In this case the review application was filed two days late which is not excessive. From the explanation I am satisfied that there was no intentional or gross negligence or ineptitude on the part of applicant, its attorneys or the Counsel. I'm of the view that it is properly explained. Taking into account the prospects of success as outlined in the papers it is my conclusion that there is sufficient cause to grant condonation. The application for the condonation is therefore granted.

THE REVIEW APPLICATION

[29] The law is now settled with regards to the test for review as enunciated in the well known case of *Sidumo & Another v Rustenburg Platinum Mines LTD & Others* 2008 (2) SA 24 LC being: “*is the decision reached by the commissioner one that a reasonable decision maker could not reach?*”.

[30] In *Sidumo Ncgobo J* was of the opinion that although the provisions of Section 145 of the LRA have been suffused by the Constitutional standard, that of reasonable decision maker, a litigant who wishes to challenge the arbitration award under Section 145(2) must found his or her cause of action on one or more of these grounds of review and at 186 he

said the following:

“The general powers of review of the Labour Court under Section 158(1) (g) are therefore subject to the provisions of Section 145(2) which prescribe grounds upon which arbitral awards of CCMA Commissioners may be reviewed. These grounds are misconduct by the Commissioner in relation to his or her duties; gross irregularity in the conduct of the proceedings; where Commissioner exceeds his or her powers; or where the award was improperly obtained. These are the only grounds upon which arbitral awards of CCMA Commissioners may be reviewed by the Labour Court under Section 145(2) of the LRA. It follows therefore that a litigant who wishes to challenge an arbitral award under Section 145(2) must found his or her cause of action on one or more of these grounds of review”

[31] On the gross irregularity as a ground of review *Ncgobo J* said the following:

*“[263] The basic principle was laid down in the often quoted passage from *Ellis v Morgan* [*Ellis v Morgan*, *Ellis v Dessan* 1909 TS 576] where the court said:*

“But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as for example, some highhanded or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined”

[32] The Court went further to say that:

“In Goldfields [Goldfield investments LTD and Another v City Council of Johannesburg and Another 1938 TPD 551], Schreinder J distinguished between patent irregularity that is, those irregularities that take place openly as part of the conduct of the proceedings, on the one hand, and ‘latent irregularities’, that is, irregularities that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given on the decision maker. In the case of latent irregularities one looks at the reasons not to determine whether the results is correct but to determine whether a gross irregularity occurred during the proceedings. In both cases, it is not necessary to show intentional arbitrariness of conduct or any conscious denial of justice.....”

[33] The Court went further to indicate that in both *Ellis and Goldfields* cases it is clear that the crucial enquiry is whether the conduct of the decision maker complained of prevented a fair trial of issues.

[34] One of the complaints against the award of the commissioner is that the commissioner committed gross irregularities in the conduct of the arbitration proceedings in that he committed material error of law pertaining to onus. The Third Respondent alleged unfair discrimination on the unlisted ground viz. on the ground of lack of experience.

[35] The commissioner dealt with the matter as follows:

"In this instance the Respondents claim that the discrimination was as a result of inherent job requirements amounts to mere bare statements. The Respondent neither explained what the inherent requirement are nor what makes it necessary that there should be such requirements. If those inherent requirements are not adhered to how will that have an adverse effect. In essence what I am trying to show is that the Respondent failed to discharge its onus by showing that the said requirements are necessary and as such the said discrimination against the applicant is justified and indeed fair."

[36] It was also the contention of the Applicant that the Third Respondent did not possess the required experience.

[37] The test for determining whether an act constitute unfair discrimination was stated in ***Harksen v Lane NO and Others 1998 (1) SA 300 at 324 – 325*** as follows:

- (a) Does the provision differentiate between people or categories of people?.....
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

"(i) Firstly, does the differentiation amount to discrimination? If it is

on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings, or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on specified ground, then unfairness will be presumed. If on an unspecified ground, then unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and other in his or her situation....."

- [38] Prof. Carole Cooper, *Boundaries of Employment Equity*, Industrial Law Journal, commenting on ***Harmse v City of Cape Town 2003 24 ILJ 1130 LC*** said the following:

"An Applicant alleging indirect unfair discrimination would have to show that a failure to appoint solely on the basis of lack of relevant experience would have a disproportionately adverse effect on the members of a group (in this case black people) and would therefore amount to unfair discrimination on the basis of race"

[39] She went further and said: *“A final point in relation to unfair discrimination on the basis of lack of relevance experience relates to the notion of fair/unfairness.....As with the other grounds of discrimination in section 6 of Employment Equity Act of 1998 this suggest that this might be the same if it could be shown that a requirement of relevant experience was an inherent requirement of the job.”*

[40] It is clear from the foregoing paragraphs that a litigant who found a cause of action on unfair discrimination based on an unlisted ground bears the onus to establish the discrimination and to prove that such discrimination is unfair. See also *Matthews Chizunza v MTN and Others (LC)* (JS623/07).

[41] The applicant has the right to raise a defence of inherent requirement of the job in defence of such a claim. The raising of such a defence by the applicant cannot be elevated to the level of an onus to prove that such inherent requirement of the job is not unfair.

[42] The onus lies with the Third Respondent that the said discrimination on the basis of lack of experience is unfair and not the other way around. Consequently the commissioner committed an error of law which in turn has affected the trial of facts.

- [43] It was the Third Respondent's case that he had the relevant experience in that he was a project manager and also a project manager intern. He also testified that he was trained lawyer and that at the time of the application he had passed two courses towards his attorney's board exam. In as far as security issues are concerned he said he had criminology as a course which dealt with security issues.
- [44] It was also the applicant's case that such experience was not relevant and sufficient hence why he was not shortlisted. The applicant needed someone who could start running from the start as it did not have capacity to training someone who needed training.
- [45] Secondly, it is contended that the commissioner exceeded his powers in that the order of compensation he made is not justifiable and no reasons were given in justification that the said order is just and equitable. It was decided in a number of court cases that failure to give reasons is not per se a reviewable irregularity. This is so especially where the reasons can be inferred from the body of evidence before the commissioner. See in this regard *ABSA Brokers (Pty) Ltd v Moshwana NO & Others* (2005) 14 LAC 1.11.11 reported also at [2005] JOL 14644 LAC, at paragraph [44] and [47], *Bezuidenhout v Jonhston No & Others* (2006) 15 (LC) 1.11.11, reported also at [2006] 12 BLR 1131 LC, [2006] JOL 17962 (LC) at paragraphs 57 – 59.

[46] However, in the case of *Mahlakoane v Commissioner, CCMA & Another* (2010) 10 BLLR 1061 (LC) the Commissioner in reference to compensation said simply that an award of two months' compensation would be "just and equitable", nothing more nothing less. There was nothing in the award to indicate how the commissioner arrived at the amount of compensation. The court held that the failure by the commissioner to give reasons therefore constituted a reviewable irregularity.

[47] In the current case evidence was led that the incumbent of the contested post would receive R250 000.00 per annum. The commissioner then decided that R250 000.00 was a just and equitable amount without giving reasons why he came to that conclusion. In my opinion he should have gone further and gave reasons why he accepted that the said amount was just and equitable, and perhaps also taken into account whether the third respondent was working, how much he was paid etc. Even if he came to the same conclusion at least one would know why he came to that conclusion. On that basis it is my conclusion that such failure on the part of the commissioner, to justify the compensation amount to a reviewable irregularity.

[48] Commissioners should be vigilant at all times, especially where they

decide not to grant compensation or they grant one or two months or so compensation, or where the maximum compensation is granted, to make sure that they give reasons therefore. Therefore, commissioners should be careful not to subtle the courts with the task of making inferences from the body of evidence for the reasons of the compensation, although the courts will not fail in their duty in that respect.

[49] Another attack on the award of the commissioner was that he concluded that the third respondent was discriminated against on the ground of lack of experience on the basis that section 20 (3) was applicable even though there is no evidence to support same. The evidence and the argument of the applicant was that it did not discriminate against the third respondent.

[50] The applicant then raised the defence of inherent requirement of the job in the event that the commissioner finds that there was discrimination. The evidence of the applicant was it needed someone who had hands on experience, someone who will start running on the first day of his or her appointment. The third respondent on the other hand felt that he had the necessary experience. How the commissioner came to the conclusion that affirmative action applied is not clear. This is clearly not borne by the evidence led by both parties. To this extend the commissioner has committed a reviewable irregularity.

[51] The other attack on the commissioner's award is that even if it can be accepted that there was unfair discrimination by not short listing the third respondent, the commissioner should have ordered re-advertisement, repeat short listing process, this time including the third respondent.

[52] The third respondent summarized the facts of the dispute he referred as follows under items 3 of the Referral Form, "Discrimination in terms of Employment equity Act 55 of 1998. I applied for the post of Executive Manager Public Safety and Transport and I was not considered for the post i.e. not short listed.

[53] As a remedy he said the following at item 4 of the said Referral: "setting aside of the appointment alternatively compensation for 5 years"

[54] It was the third respondent's complaint that he was not short listed. Third respondent only led evidence to the effect that he had the required qualifications and experience and for that reason he should be short listed. No evidence was led to the effect that if he was short listed he would have been appointed as he was a better candidate *visa versa* the appointed candidate.

[55] However, the nature of the remedy the Third Respondent prayed for indicate that his claim is not restricted to short listing only. The remedy he

prayed for clearly indicate that his claim extends to non-appointment although he may not have said so in many words. I accept that the CCMA processes need not be too formal approach like in a court of law. Even in a court of law accommodation in this regard may be made depending on the sophistication of parties. Also the fact that a party failed to lead particular evidence does not mean that he abandoned his claim, it merely means his case is weakened thereby. I therefore find no fault with the commissioner's finding in this regard.

[56] I have decided in paragraphs 42, 46, 47, and 50 that the commissioner committed reviewable irregularities for reasons outlined therein. I deem it unnecessary to deal with remaining grounds of review.

[57] The applicant in its alternative prayers prays that in case the court finds that the commissioner has committed reviewable irregularities the court should correct the said award and substitute it with its own decision.

[58] In this respect I have noted that the cause of action according to the third respondent arose "On or about 13/06/2002. This is about ten (10) years ago, which is clearly not in line with the theme that runs through the Labour Relations Act 66 of 1995, that of speedy resolution of labour dispute. These are bread and butter issues and should of necessity be speedily resolved. It is possible that the interested parties may have

moved on, and witness no longer available and so on. In the circumstances the court undertakes to resolve the dispute for the parties.

[59] The applicant advertised a post of executive manager as outlined in paragraph 14.

[60] In doing so it complied with the provisions of section 54(1). The said provision required that the appointed candidate must have the following relevant skills and expertise to perform the duties associated with the post in question, taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.

[61] The third respondent applied for the post but was not short listed, and obviously not considered for appointment and the reasons given to him on enquiry was that he did not meet the requirements of the advertisement.

[62] It is common cause that the third respondent lodged his dispute with the CCMA and when the dispute remained unresolved the matter went for arbitration. During the arbitration and almost at the end of the arbitration the commissioner realized that he did not have the necessary jurisdiction to arbitrate the dispute as it pertained to discrimination. At that stage parties conferred jurisdiction on the commissioner as describe elsewhere in the judgment and ratified what happened at the beginning until then.

[63] It is trite that in our law a litigant who found the cause of action on unlisted grounds of discrimination bears the onus to prove such discrimination as well as the unfairness thereof.

[64] The third respondent led evidence about his qualifications which included a law degree, a labour law diploma and a number of courses. He also led evidence of his experience which included, industrial relations clerkship, as a project coordinator and that he was at the time an apprentice manager. He did not indicate how long he was in this position but one can assume by virtue of its title it was not for long. He testified further as a project coordinator he was in decision making position. Looking at his profile clearly he lacked the broad knowledge and experience as determined in the advertisement. In his own words he was in an apprentice manager position, far from the four years required to put him in an advantage position visa verse the other candidates.

[65] Mr Dasheka the appointed candidate had the following qualifications: BML Diploma, Examiner of Drivers Licenses; Diploma in Inspector of Licenses; Diploma Examiner of Vehicles and Diploma and Baccalaureus Legum. Looking at the his qualification Mr. Dasheka appears to have broad experience in transport issues and further that he has acted in that position for example between 21/04/1998 to 31/07/1998. Clearly he has

been involved in this matter for a considerable time.

[66] The third respondent did not lead evidence to the effect that he was a better candidate than the person who was short listed and finally appointed.

[67] However, looking at the qualification and experience it is clear that the third respondent did not have the required experience while Mr. Dasheka had the necessary experience and has acted in that position before, for example from 21/04/1998 to 31/07/1998.

[68] It is clear to me looking at the profile of the two candidates that Mr. Dasheka was a better candidate than the third respondent. Further that, looking at the shortlisted candidates' profiles, it becomes clear that they had experience in either transport or security or safety spheres while the third respondent lacks this experience. It was the applicant's evidence that the appointed person needed to at least have experience in one or of the two spheres.

[69] Given the fact that the third respondent bore the onus to prove discrimination and unfairness thereof I have come to the conclusion that he did not proof any discrimination and unfairness thereof if any. Even if I were to say that he had proved discrimination such discrimination is not

unfair. The applicant in advertising in the manner it did by requiring the stated qualifications and experiences it was doing so in compliance with legislation that governs it in respect of inherent requirements of that post. It was necessary that the incumbent comply with the requirements as stated in that legislation. It is the prerogative of the employer to determine the requirements of any post to ensure delivery on its mandate.

[70] In the premise I make the following order:

1. The commissioner's award issued under case No FS 5533/02 is reviewed and set aside and substituted as follows:

- 1.1 The conduct of the Applicant in this application did not amount to unfair discrimination.

- 1.2 No order as to costs is made.

SHAI AJ

DATE OF HEARING: 09 February 2011

DATE OF JUDGMENT: 12 April 2011

FOR THE APPLICANT: Advocate Hulley

INSTRUCTED BY:

L.P. Grimsel Attorneys

FOR THE RESPONDENT: Mr Golberg

INSTRUCTED BY:

Jansen Labour Court Attorneys