

LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

Case: JR 593-07

In the matter between:

CITY OF TSHWANE METROPOLITAN COUNCIL

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

R VENTER (N.O.)

Second Respondent

IMATU obo RETIEF DE VILLIERS

Third Respondent

JUDGMENT

LAGRANGE, J:

Introduction

- [1] The applicant wishes to review an arbitration award issued on 20 October 2006, in terms of which the arbitrator found that it had committed an unfair labour practice by not promoting the third respondent to the position of Manager: Bulk Services with effect from 1 September 2003. The arbitrator found in favour of the Mr R de Villiers, of the third respondent, and directed the applicant to promote him to the position with retrospective effect to 1 September 2003.

The review application

[2] The applicant's founding affidavit briefly cites four grounds of review, claiming that the arbitrator had exceeded the bounds of his authority in that:

- "1. He imposed a decision to appoint the third respondent retrospectively regardless of the position having been filled;
2. He sought to substitute his finding for the decision of the interview panel;
3. He was biased in relying on the relevant facts in support of the Third Respondents case and excluding relevant facts in support of the Applicant's case;
4. He was biased in privately informing the representative of the third respondent of his decision prior to his official pronouncement of the same."

[3] The applicant did not amend its grounds of review when it filed its notice in terms of rule 7A(8)(b) of the Labour Court Rules. The third ground of review is completely lacking in any factual particularity, making it difficult for the third respondent to answer other than by an equally bald denial. In view of the lack of particularity provided in the third ground of review there is nothing concrete for the court to consider on this point. Accordingly, the applicant must stand or fall on its submissions on the other grounds it relies on.

[4] The applicant's heads of argument are not of much assistance in expanding on the grounds of review. The heads comprise a number of bullet points and make no references to the record of the arbitration in substantiation of the grounds of review, nor did they comply with the requirements of rule 18 of the labour court rules.

Brief chronology

[5] The fourth respondent submitted a grievance on 18 November 2003 concerning his non-promotion to the position of Manager: Bulk Services. The grievance could not be

resolved internally and the matter was referred as an alleged unfair labour practice to the relevant bargaining council ('the SALGBC'). Ultimately, the matter was referred to arbitration which ended on 13 October 2005 and the award was issued on 20 October 2006.

- [6] The new post was advertised on three occasions in 2003. At the time de Villiers held the post of Managing Engineer: Energy Management. The employer led evidence that five criteria were applied in short listing candidates, namely formal qualifications, relevant experience, prior learning or exposure to the working environment, a grace period to acquire suitable qualifications, and employment equity. The applicant complied with all the formal requirements of the post, but he contended that the successful candidate, Mr Sivhada, failed to comply with either the requirements or the recommended criteria.
- [7] It was a requirement of appointment that the successful candidate should have a B Engineering (Electrical) degree and a government certificate of competency (a "GCC"). Sivhada did not have a GCC. The recommendations identified in the advertisement were "relevant experience and professional registration with ECSA in terms of the Engineering Professions Act of South Africa." Sivhada was not registered as a professional engineer. His experience as a qualifying engineer included having been appointed in January 2001 by the City of Tshwane municipality as an engineer concerned with tariffs and metering in the Electricity department.
- [8] In evaluating the qualifications and experience of de Villiers and the successful candidate the arbitrator found that it was obvious that the fourth respondent was better qualified and had at least eight years more relevant experience as an engineer.
- [9] De Villiers contended that the successful candidate should not have been shortlisted because he did not meet one the requirement of having a GCC. The employer defended the shortlisting of Sivhada on the basis that, in terms of the advertisement, candidates had to be suitably qualified "or have the capacity to become suitably qualified within a reasonable period of time", and since Sivhada was an electrical engineer he had the capacity to obtain a GCC. On the question of the comparative

relevant experience of de Villiers and Mr S, the employer's witness confirmed that a person without relevant experience could not be appointed to the post of manager. However, Sivhada was not willing to accept that de Villiers had more relevant experience than he did. He testified that it was the quality of the experience and not the extent of it which mattered. However, the arbitrator found that Mr Sivhada's prior contact with the working environment at best amounted to exposure and did not amount to relevant experience.

- [10] De Villiers had contended that not all the members of the interviewing panel had sufficient knowledge of the technical and strategic aspects of the questions asked in the interview and therefore were not able to fairly assess his answers. He maintained that only one member of the four member panel had the relevant knowledge to enable him to assess his answers in the interview. This was Mr Ehrich' The only other member of the panel with a professional engineering degree, Dr Potgieter, was a civil engineer, not an electrical engineer, and according to de Villiers was therefore not in a position to evaluate his responses.

The arbitrator's findings

- [1] The award is 18 pages in length and is considerably detailed, which will not be repeated here. Only those portions of the award which are relevant to the grounds of review will be considered.
- [2] The arbitrator found the employer had been unable to dispute the qualifications of the panellists. The points allocated by the four members of the interviewing panel for different questions can be illustrated by way of a table set out below:

Panellists	J Ehrich	L J Potgieter	L Nawa	Ratsiane
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Candidate: R de Villiers

Panellists	J Ehrich	L J Potgieter	L Nawa	Ratsiane
Question 1	2	2	3	2
Question 2	4	3	1	2
Question 3	2	2	2	1
Question 4	2	2	3	2
Question 5	4	2	2	3
Question 6	2	3	2	3
Question 7	3	2	1	3
Total	23	16	14	16

Candidate: P Sivhada

Question 1	2	2	4	4
Question 2	3	3	3	4
Question 3	2	2	3	3
Question 4	2	2	3	2
Question 5	3	2	3	3
Question 6	2	3	3	3
Question 7	3	3	4	4
Total	19	17	23	23

- [3] The arbitrator also noted that the scores awarded by the panellists for each question showed that there was more than one instance where the scores awarded by the panellists for a particular question differed by more than one point. The respondent's witness, Mr Ratsiane, attributed this to an element of subjectivity in the scoring by the different panellists. The employer maintained that the basis for the appointment had been merit, measured by the aggregate points scored by each candidate in the interviews.

Employment Equity considerations and requirements of the post

- [4] Nonetheless, the arbitrator records that both Ratsiane and Ehrich conceded that employment equity did play a role in the selection, even though at the time there was no employment equity implementation plan in place. The arbitrator held that the employer had failed to furnish details of precisely how employment equity considerations affected the selection process. The arbitrator also noted that most decided cases "support the view that affirmative action measures can only be easily implemented if it is done in accordance with an affirmative action plan and may not be implemented on an ad hoc basis." He further observed that "(t)he onus rests on the employer to prove it applied affirmative action measures fairly." The arbitrator found that the application of employment equity during the process of selection was procedurally unfair, in the absence of an affirmative action implementation plan. In particular, he held that not only did the advertisement clearly express an intention to promote representivity, but the relaxation of the appointment requirements to allow candidates not having the required qualifications to apply confirmed this intention. In this regard, he noted that the successful candidate did not satisfy the formal requirements for the post and his experience, which did not relate to bulk energy generation, could not be considered relevant to the advertised post. In the circumstances, the arbitrator found it surprising that Sivhada had been shortlisted particularly because Ratsiane had said that a person without relevant experience could not be appointed to the position.

Bias of the panellists

- [5] De Villiers asserted that Ratsiane and Nawa were biased in favour of Mr Sivhada. The arbitrator held that if panel members had either limited or non-existent technical managerial or strategic knowledge of the position, their ability to evaluate candidates would depend on what they learnt during the pre-interview briefing. He accepted that there would be differences in the scoring of candidates' answers to questions because scoring was subjective, but such differences in scoring should not be extreme.
- [6] The arbitrator embarked on a detailed analysis of differences between the panellists' scoring of the candidates. He observed that a one-point difference between panellists when scoring a candidate on each of the seven questions would result in a seven-point difference on the aggregate score of that candidate. He decided that there were substantial divergences between the panellists in their scoring of de Villiers and Sivhada for the first two questions they were asked. The absence of a satisfactory explanation for these differences created a suspicion of favouritism according to the arbitrator. The aggregate scores of the two candidates confirmed this suspicion in the arbitrator's view: the combined score for the fourth respondent was 39 and 30 by Ehrich and Potgieter, and Ratsiane and Nawa, respectively. This amounted to a nine point difference in the evaluation of the two candidates. Similarly the combined score for Sivhada was 36 and 44 by Ehrich and Potgieter and Ratsiane and Nawa, respectively. This is an eight point difference in the evaluation of the successful candidate. Comparing the differences between the evaluations of Ehrich and Potgieter with that of Ratsiane and Nawa, the arbitrator noted that the first two panellists only recorded a three point difference between de Villiers and Sivhada, whereas the last two panellists recorded a fourteen point difference. Consequently, the arbitrator found that it was an irresistible conclusion that Ratsiane and Nawa had deliberately given de Villiers a lower rating and Sivhada a higher one in order to secure the promotion of the second respondent.
- [7] The arbitrator noted also the divergence in the results: Ehrich and Potgieter rated the second respondent the third best candidate with a score of 36 whereas Ratsiane and

Nawa ranked him first with a score of 44, out of a maximum possible score of 56. In effect this means the rating by the last two panellists was a full 15 % higher than that of the first two. Similarly, if one has regard to the combined rating of de Villiers, the first two panellists gave him a rating of 39 and the last two a combined rating of 30, which amounts to a variance of about 16% in the respective combined assessments. The gap between the combined assessments of Sivhada and de Villiers is also noteworthy, with Ehrich and Potgieter rating the former at 36 and the latter at 39, representing a gap of only 5 % between the candidates. By contrast, Ratsiane and Nawa rated Sivhada and de Villiers at 30 and 44 respectively, which equates to a yawning chasm between their combined assessments of the two candidates of about 25 %.

[8] The arbitrator also concluded that there was reason to believe that Potgieter had been biased in his assessment because his score for de Villiers was much closer to the scores of Ratsiane and Nawa and that his score for the successful candidate was closer to that of Ehrich. However, his rating of de Villiers was seven points lower than that of Ehrich. Potgieter did not testify to explain how he arrived at his scores, and in the absence of such an explanation the arbitrator inferred that there was a reasonable suspicion that he too was biased in favour of the successful candidates. The arbitrator then concluded that it was substantively unfair that the "fair scoring by Mr Ehrich could be ousted by the subjective scoring by Mr Ratsiane, councillor Nawa and Dr Potgieter."

[9] The arbitrator found that there was a direct causal connection between the subjective scoring and the failure to appoint de Villiers because the appointment recommendation was based solely on the cumulative scores of the panellists.

The arbitrator's remedy

[10] In determining an appropriate remedy, the arbitrator concluded that the fourth respondent should have been appointed to the post. By not doing so, the employer had prejudiced its ability to render an efficient bulk electricity supply service to taxpayers in the area of service delivery. It was not sufficient merely to remedy de Villiers's

claim by awarding compensation because this would not address the needs of the community as well. The award was handed down on 20 October 2006, approximately three years after the grievance was lodged in November 2003.

Evaluation of the grounds of review

Taking irrelevant considerations into account and ignoring relevant ones

[11] I have already indicated that the applicant did not set out any factual basis for its claim that the arbitrator took irrelevant considerations into account and ignored relevant ones. Accordingly this ground of review cannot be considered. The three remaining grounds of review are discussed below.

Allegation of bias

[12] The applicant alleged in its founding affidavits that the arbitrator had demonstrated bias by privately informing de Villiers's representative of his decision prior to his official pronouncement. Once again, no details are provided to substantiate this in the founding affidavit and the allegation is denied by the third respondent. There was simply no factual basis for me to conclude that such communication took place. Consequently this ground of review also falls away.

The arbitrator substituted his own finding for that of the interviewing panel

[13] A number of decisions by CCMA commissioners and arbitrators of bargaining councils have adopted a deferential approach to the employer's choice of candidates in promotion disputes. Support for such an approach has sometimes been sought in the judgement ***Pharmaceutical Manufacturers Association SA & another: In re Ex parte President of the RSA & others*** 2000 (2) SA 674 (CC) where the following was said:

“The setting of this standard does not mean that courts can and or should substitute their opinions as to what is appropriate for the opinions of those

in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.”¹

[14] However, the correctness of this approach was questioned in the case of ***Minister of Safety & Security v Safety & Security Sectoral Bargaining Council & others*** [2010] 4 BLLR 428 (LC). Francis J pointed out in the judgment that:

*“It is clear from section 193(4) of the Act that an arbitrator must determine the dispute on the terms that the arbitrator deems reasonable. Those terms may include an order for reinstatement, re-employment or compensation. The three examples given in the said section are not the only terms that the arbitrator may use. If, as in the present case the parties agreed that the arbitrator had to decide whether the third respondent was suitable and whether he should be promoted, it cannot be said that the terms used by the arbitrator to determine the dispute was not reasonable. The third respondent had in his opening address stated that the relief that he was seeking was to be promoted to the rank of superintendent. The relief that an arbitrator may grant in an unfair labour practice dispute appears to be wider than what can be granted in an unfair dismissal dispute.”*²

[15] A little further on in the judgment, Francis J rejected the applicant's reliance on the test for intervention set out in the *Pharmaceutical* judgement: *“The applicant's reliance on the Pharmaceutical case appears to be misguided. It finds no application in [an] unfair labour practice dispute since the Act grants the arbitrator certain*

¹ at 709, para [90]

² At 435, para [19]

powers”³

[16] I do not understand the decision in the *Minister of Safety and Security* case to be suggesting that arbitrators should readily interfere in promotion decisions, but they are required to determine whether the promotion decision was unfair to the aggrieved employee and to grant such relief which appropriately remedies that unfairness as far as possible. I agree that the review standard set out in the *Pharmaceutical* case is not apposite, given that the arbitrator is required to make a determination based on fairness which has a procedural and substantive component, rather than make a finding based on administrative review principles. In making such a determination an arbitrator is entitled to enquire into the substance of the promotion decision.

[17] Having said this, it must be recognised that, unlike substantive fairness in dismissals, for which a closed list of legitimate reasons are recognised in terms of section 188(1) of the LRA, there are a myriad of factors which might legitimately be taken into account in the employment decision. These will vary from employer to employer and from post to post. Some employers will use sophisticated rating systems and competency testing to identify appropriate candidates for shortlisting and will strive for selection methods that minimise the effect of subjective factors on the final choice. Others may wish to balance objective criteria with more subjective assessments based, for example, on interviews. Where interview techniques are used it should also be recognised that there will also always be a degree of subjectivity present in such assessments, for which a certain allowance must be made, and an arbitrator considering the fairness of a failure to promote a candidate must be mindful of not having had the benefit of the first hand interaction which takes place between interviewers and candidates.

[18] Which criteria are used will depend on factors such as the employer’s operational needs, organisational values, human resources policy, resources it is willing to devote to recruitment, the number of candidates it might have to consider for each vacancy, and such like considerations, which generally are not prescribed by law.

³ At 436, para [23]

[19] However, if a criterion used is one that unfairly discriminates directly or indirectly between candidates, because it is constitutionally offensive then it will be impermissible to use it under the provisions of section 6(1) of the Employment Equity Act 55 of 1998 ('the EEA'), subject to the exceptions for employment equity measures or inherent job requirements which are provided for in sections 6(2)(a) or (b) of the same Act.

[20] So too, if a candidate ought to have been successful based on legitimate criteria used by an employer, but the employer cannot provide a rational explanation for that person's non-appointment then an arbitrator might be justified in regarding that non-appointment as unfair.

[21] Consequently, in my view, it would still be prudent to follow the two stage approach outlined in Wallis AJ's decision in ***Ndlovu v Commission for Conciliation, Mediation and Arbitration and others (2000) 21 ILJ 1653 (LC)***, to determine if the failure to promote the employee was unfair, namely that:

"[11] ... It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed."

*[12] The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise."*⁴

[22] In this instance, the arbitrator found there was an unacceptable degree of bias on

⁴ At 1655-6, paras [11] – [12]

the part of some of the interviewers. There does appear to be sufficient factual basis for this finding, and in the absence of a satisfactory explanation for the notably wide discrepancies in the panellists' evaluations discussed above, I cannot say the arbitrator's finding was irrational, even if some of his reasoning may be criticised. Further, the arbitrator found that the successful candidate did not meet the formal requirements for the post nor did he have the suitable experience for the position, which the employer's own witness confirmed was a pre-requisite for appointment. These were sound reasons for finding that the employer had not acted fairly towards de Villiers.

[23] Regarding the arbitrator's findings of bias on the basis of the relative scoring of the candidates by the panellists, it cannot be said that his detailed evaluation was irrational. His analysis was a plausible interpretation of the panellists' scoring of the successful candidate and de Villiers. This does not mean that his approach was necessarily correct, or the only way of looking at the results. I have some misgivings about his analysis. For example, in a panel of four interviewers it is not easy to attribute great significance to divergences in scoring. Such divergences might be expected where scores are not calibrated against a guideline score sheet. Having said this, the degree of discrepancy between Nawa and Ratsiane's respective assessments of de Villiers and Sivhada is marked. Nawa and Ratsiane's scoring of the two candidates rated de Villiers 30% and 40% lower than Sivhada respectively, whereas the comparable ratings by the other two panellists differed by only 5% and 17%. Add to this the huge discrepancy in Nawa and Ratsiane's scoring of the two candidates there was a need to explain these large variations in greater detail and not simply to dismiss them as mere subjective differences.

[24] It is possible that the differences could have been explained by employment equity considerations, but then these should have been set out as separate criteria and have been attributed specific points. Taking employment equity into account as an unstated factor in weighting the scoring on other criteria cannot be fair.

[25] It must be mentioned in passing that the arbitrator's designation of the panellist

with the greatest relevant technical expertise as the benchmark against which all the other panellists' scoring should be evaluated, is questionable. It will often happen that the persons interviewing an applicant with specialist expertise will not have such expertise themselves. To assist them making a choice they might rely on person with the appropriate specialist knowledge to advise them on the suitability of candidates based on their training and relevant work experience. However, other values do play a part in making an appointment, apart from a candidate's technical competence. Be that as it may, the arbitrator's basic finding that there was a significant degree of bias, as illustrated by the comparative scores of the panellists, was sufficient to justify his conclusion, even if one ignores his finding on the 'objective' character of Ehrich's judgment, which I have.

The arbitrator imposed a decision to appoint the third respondent retrospectively regardless of the position having been filled

[26] If this criticism was always fatal to awards in promotion disputes, it would render the remedy of instatement in a post non-existent. However, in the context of the timing of the award relative to the lodging of the grievance, I believe the applicant does have a point. Nearly three years had elapsed between the lodging of the grievance by de Villiers and the issuing of the award. During this time Sivhada had occupied the post. While I accept the validity of the arbitrator's reasoning that the interests of service delivery played a part in his decision to appoint de Villiers to the post notwithstanding de Villiers's incumbency, it does not seem he paid any regard to the length of time Sivhada had already held the position by the time the arbitration was finalised. This was a relevant factor which he ought to have considered, and in this respect his decision to appoint de Villiers retrospectively was flawed.

[27] Accordingly, his determination of an appropriate remedy must be set aside. The respondents point out that the fairness Mr Ehrich's assessment was not challenged in the arbitration by the applicant. Given that Sivhada did not have the necessary experience which the applicant conceded was a pre-requisite for appointment and since the other panellists' impartiality in respect of Sivhada was held to be suspect on

the arbitrator's findings, Ehrich's assessment ought to have prevailed. In that case, de Villiers would have been the highest rated candidate and would have been appointed. Because of the elapse of time between the grievance and the award, this is no longer appropriate. Consequently in my view the most appropriate alternative relief would be a form of protective promotion which at least will have the effect of ensuring de Villiers was not financially disadvantaged by being passed over for promotion.

Order

[28] For the reasons set out above, the following order is made:

1. The arbitration award issued by the second respondent on 20 October 2006 is reviewed and set aside only to the extent of the relief awarded by the arbitrator in paragraph 55.2 of the award.
2. The award of relief made by the second respondent in paragraph 55.2 of the award is substituted with the following:

‘55.2 The First Respondent must compensate the Applicant for its failure to promote him to the position of Manager: Bulk Services with effect from 1 September 2003, by paying him the difference between the remuneration he actually received and the remuneration he would have received had he been appointed to that position for the period he remains in the applicant's employment from 1 September 2003, to the extent that the actual remuneration he received from that date is less than what he would have received.’

3. The payment of arrear compensation accrued by the date of this judgment, in terms of the compensation due in terms of paragraph 2 above, must be made by 30 June 2011.
4. No order is made as to costs.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 25 February 2010

Date of judgment: 26 May 2011

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For the respondent: G P Ngoepe of Ngoepe
Attorneys

LABOUR COURT