



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 510/10

In the matter between:

MONWABISI AARON JACOBS

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL (GPSSSBC)

First Respondent

W F BENTZ AND ASSOCIATES

(ARBITRATOR)

Second Respondent

MEMBER OF EXECUTIVE

COUNCIL (MEC): LOCAL GOVERNMENT

AND TRADITIONAL AFFAIRS, EASTERN

CAPE PROVINCE

Third Respondent

Heard: 29 October 2013

Delivered: 5 November 2014

Summary: An applicant needs to prove more than that he was the most suitable candidate for the decision not to appoint him to constitute an unfair labour practice. In the absence of the proof, the award is not susceptible to review.

JUDGMENT

LALLIE J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent ('the arbitrator') dismissing the applicant's claim that the Department of Local Government and Traditional Affairs ('the Department') committed an unfair labour practice relating to promotion by not appointing him to the position of Manager: Labour Relations. It is opposed by the third respondent.
- [2] The applicant joined the Department in 1988 as a Personnel Practitioner. In July 1999 he set up the Department's Labour Relations Unit and became its *de facto* head. In February 2007, the applicant was promoted to the position of Assistant Director. The applicant submitted that between 1 April 2007 and 30 November 2008 he performed the functions of the Manager: Labour Relations pursuant to the resignation of the official who held the position. In May 2007, the post of Manager: Labour Relations ('the impugned post') was advertised. The applicant was not short listed. Ms Mazosiwe was eventually appointed to the impugned position. Had the applicant been appointed he would have been promoted. Aggrieved by the Department's failure to appoint him, the applicant referred an unfair labour practice relating to promotion to the first respondent where the arbitrator made the award, the applicant seeks this Court to review and set aside.

The award

- [3] The arbitrator accepted the Department's version that it appointed Ms Mazosiwe in compliance with its Employment Equity Plan (EEP). Even the applicant's witness conceded that the EEP was utilized in the recruitment of new incumbents. The arbitrator rejected the applicant's claim that he acted in the impugned position as he could not produce any official documents supporting his claim and found that he had no reasonable expectation to be promoted to the position. He concluded that although the applicant might have met the requirements for the impugned position, he was not convinced that Mazosiwe's appointment was made without due regard to the EEP and its targets that were in place at the time.

Grounds for review

- [4] The applicant sought to rely on a number of grounds. He submitted that the explanation the third respondent gave him for overlooking him for promotion was that it had to appoint a female senior manager in terms of its EEP. The explanation was, according to the applicant, false and the arbitrator should therefore have rejected it and accepted his version that the third respondent's failure to appoint him was based on gender and racial discrimination. The arbitrator further prevented him from raising the inconsistent application of the EEP by the Department. The applicant averred that the arbitrator's failure to deal with the critical issue of inconsistency in his award proved that he did not consider the issue thus committing conduct which rendered his award reviewable.
- [5] A further attack on the award is based on the manner in which the arbitrator dealt with the issue of legitimate expectation. Contrary to the applicant's evidence that his expectation was based on the Department's Recruitment Policy, in that he was the most suitable candidate and had the relevant experience on both occasions the position was advertised, the arbitrator incorrectly rejected the applicant's argument on legitimate expectation on the basis that he had acted in the position. Had the arbitrator applied his mind properly he would have concluded that the third respondent had committed an

unfair labour practice by disregarding its own recruitment policy. The applicant submitted that the arbitration award is susceptible to review on the grounds that his analysis of the evidence before him is misleading. He failed to give proper weight to evidence in his favour including the testimony that the equity targets were no longer relevant between April and December 2008.

[6] On 25 January 2012, the applicant filed an amended notice of motion which he withdrew in his replying affidavit filed on 11 March 2013.

[7] The test for review is expressed as follows in *Sidumo and Another v Rustenburg Platinum Mines and others*¹:

‘...The better approach is that section 145 is now suffused by the constitutional standard of reasonable. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.’

[8] The third respondent argued, correctly so, that a substantial part of the applicant’s argument was dedicated to the fairness of the arbitration award rather than to its reasonableness. Contrary to the third respondent’s argument that the applicant contended that the arbitrator did not take into account his submissions but failed to identify them, the applicant in fact identified the arbitrator’s failure to deal with the issue of inconsistency as one of the submissions.

[9] Commissioner’s failure to deal with specific issues was dealt with as follows in *Fidelity Cash Management Services v CCMA and Others*²

‘There is no reason why an arbitration award that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed that could demonstrate the reasonableness of the award. In addition in *Gold Fields*

¹ [2007] 12 BLLR 1097 (CC) at para 110.

² [2008] 3 BLLR 197 (LAC)

*Mining SA (Pty) Ltd v CCMA*³ the Court dealt with the criticism based on arbitrators' failure to deal with some issues thus:

'In a review conducted under section 145 (2) (c)(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 these factors and then determine whether a failure by the arbitrator to deal with one or some of the 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 review 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'.

- [10] In *SAPS v Safety & Security Sectoral Bargaining Council*⁴, a dispute about the employer's unfair failure to promote an applicant, it was held that an applicant needs to show more than that he or she deserved to be promoted.
- [11] The totality of the evidence before the arbitrator proves that the applicant's claim that the third respondent committed an unfair labour practice by not promoting him is based on his averment that he was the most suitable candidate, with relevant qualifications and experience. For the third respondent's conduct to have constituted an unfair labour practice the applicant was required to prove more than being the most suitable candidate. He had to prove that but for the unfair conduct of the third respondent he would have been appointed. He did not succeed in doing so because even his witness conceded that the third respondent applied its EEP when making appointments. Even if his averment that he was the most suitable candidate could be accepted if a female had to be appointed in terms of the EEP, failure to appoint him could not constitute an unfair labour practice.
- [12] Other grounds the applicant sought to rely on are based on the errors the arbitrator made and the weight he attached to evidence. In *Herholdt v Nedbank Ltd*⁵ the court dealt with mistakes of commissioners thus:

³ [2014] 1 BLLR 20 (LAC) at para 18.

⁴ [2010] 8 BLLR 892 (LC)

⁵ [2013] 11 BLLR 1074 (SCA) at para 25.

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145 (2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

[13] In *Gold Fields (supra)*, the Court confirmed that commissioners' gross irregularities will not automatically lead to the setting aside of an award. Notwithstanding the irregularity an award will not be set aside if such irregularity falls in the band of decisions which a reasonable decision-maker could come to on the material presented at the arbitration. The applicant has not shown how the errors the arbitrator made rendered his award unreasonable. In the circumstances his application cannot succeed.

[14] The applicant did not act unreasonably in bringing this application, a costs order will, in the circumstances not be appropriate.

[15] In the premises the following order is made:

15.1 The application for review is dismissed.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant: Advocate Naran

Instructed by: Maci Incorporated

For the Third Respondent: Advocate Gqamana

Instructed by: State Attorney

LABOUR COURT