



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 3306/11

In the matter between:

DIRECTOR GENERAL: DEPARTMENT OF JUSTICE

AND CONSTITUTIONAL DEVELOPMENT

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

COMMISSIONER ZS SIBEKO N.O.

Second Respondent

BN MBONANI N.O.

Third Respondent

L MPHAHLELE

Fourth Respondent

Delivered: 11 September 2015

Review: General principles applied to review of arbitration award, in which a promotion was awarded following a finding of an unfair labour practice. Award reviewed and replaced with an order of compensation

JUDGMENT

FOURIE AJ

Introduction

- [1] The third respondent, Mr Mbonani, was (and still is) employed by the applicant, the Department. He had faithfully acted in the position of Chief Director: Strategy Monitoring and Evaluation (the position) for several years, at the time that he applied for a permanent appointment to the position. He was well regarded by his peers and was suitably qualified and experienced for the position and was duly shortlisted.
- [2] Departmental regulations required that a selection committee conduct interviews with the shortlisted candidates and, thereafter, make recommendations to the Director General on the preferred candidates, whereupon the Director General will make the final decision on who to appoint by either accepting or rejecting the recommendations.
- [3] After the interviews, the majority of the interviewing panel was of the view that Mr Mbonani was the preferred candidate while the fourth respondent, Ms Mphahele, scored in second place.
- [4] The chairperson of the panel, Dr De Wee, advised that he intended seeking guidance from the Director General before firmly committing to a recommendation and it appears that the panel then adjourned without making a final decision.
- [5] Dr De Wee consulted informally with the Director General, who informed him of her preference for a female candidate, as this would further promote the objectives of employment equity within the department.
- [6] Dr De Wee then canvassed the committee members by telephone,

and informed them of the Director General's preference. This resulted in certain members of the committee changing their minds and the recommendation ultimately made by the majority of the committee, was that Ms Mpahlele be recommended for appointment to the position. Unsurprisingly, the Director General acted on the recommendation and made the appointment.

- [7] Mr Mbonani, aggrieved by what he perceived to be unfair treatment, referred an unfair labour practice to the first respondent, the bargaining council, who in turn appointed the second respondent (the commissioner) to arbitrate the dispute.
- [8] After hearing evidence, the commissioner held that the Department had committed an unfair labour practice (on the facts summarised above) and ordered that Mr Mbonani be promoted into the position.
- [9] The Department brought the current review proceedings in which it seeks to set aside the arbitration award. Mr Mbonani opposes the application. The Department launched review proceedings timeously, but has caused lengthy delays in the finalisation of the record and pleadings, which partly explains why this matter comes before court several years after the dispute arose. The remainder of the delay was caused by backlogs in the court process.
- [10] Frustrated by the lack of progress in the matter, Mr Mbonani's attorneys brought two separate applications to dismiss the review proceedings on the grounds of delay. However, at the hearing of this matter, I was informed by counsel for both parties that these applications had become settled and that I was to deal with the matter on its substantive merits, which I propose to do. The lengthy delays that have occurred in this matter will be dealt with where they impact on the appropriate relief to be granted and on costs.

The recruitment and selection policy

[11] The Department has in place a policy, titled 'Recruitment and Selection Policy', that regulates appointments. In relevant part the policy provides as follows:

11.1 Recruitment processes aim to recruit the most suitable candidates to positions, and to promote employment equity in the department.

11.2 The executing authority (in this case the Director General) appoints a selection committee to make recommendations on appointments to vacant posts. The primary function of the selection committee is to compile a shortlist, interview shortlisted candidates, and make recommendations as to appointments to the executing authority. The code provides that recommendations should be made on the suitability of a candidate, having regard to the following criteria:

11.2.1 The qualification, training, skills, and knowledge based on the inherent requirements of the job;

11.2.2 The department's human resources plan;

11.2.3 The department's employment equity plan.

11.3 The code requires that the selection committee retain minutes of interviews and scoring sheets in respect of candidates, in order to justify its decisions.

11.4 The selection committee is then required to make recommendations as to the order of preference for appointment of candidates, so that if the first preferred candidate refuses the appointment, the next candidate in line can be appointed without the need to repeat the process.

11.5 The code states that appointments are only to be regarded as final once the executing authority approves the

recommendation of the selection committee, and a signed offer letter is prepared.

11.6 The code provides further that “Where the Selection Committee makes recommendations that will not enhance representivity, and the candidature included previously disadvantaged persons, the submission with reasons as for such deviation will be forwarded to the executing authority or delegated official for approval/disapproval.”

11.7 Appointments are required to take place in accordance with the Public Service Regulations of 2001.

Non-compliance with the code

[12] Self-evidently, the code does not provide for the executing authority (i.e. the person making the final decision as to whether to approve the recommendation of the selection panel) to comment on or seek to influence the outcome of the panel's deliberations or recommendations. This is hardly surprising – the entire purpose of the selection panel is rendered irrelevant by the interference of the final decision maker in its deliberations – the executing authority may as well conduct the interviews and make appointments directly, without considering the panels' recommendations.

[13] An internal investigation concluded that there were serious irregularities in the selection process, primarily that the Director General interfered with the deliberations of the selection committee, and in doing so caused it to reach a different result.

Unfair labour practice?

[14] The arbitrator held that the conduct described above resulted in an unfair labour practice (relating to promotion) being committed against Mr Mbonani. It is difficult to fault the reasonableness of this conclusion, given the facts as summarised above.

[15] Without doubt, the process that led to the appointment of Ms Mpahlele was procedurally unfair vis-à-vis Mr Mbonani. Given the broad scope of the definition of unfair labour practices, particularly in light of the decision of the Labour Appeal Court in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,¹ this finding is imminently reasonable.

[16] In my view, the arbitrator's finding of an unfair labour practice is correct and is certainly not subject to review.

The relief granted at arbitration

[17] The arbitrator held that were it not for the interference of the Director General in the selection committee process, the committee would most probably have recommended Mr Mbonani to be appointed in the position and the Director General would probably have ultimately appointed him to the position. I agree with the first proposition but not with the second. The Director General had the final say and could have simply rejected the recommendation of the selection committee, for instance on grounds that it did not properly give effect to the employment equity requirements in the department.

[18] This reasoning seems to have been the basis for the relief granted, namely, that Mr Mbonani was to be promoted into the position with effect from the date of Ms Mpahlele's appointment. Is the relief granted reviewable?

[19] The Labour Appeal Court (per Murphy AJA) recently restated the review test, in *Head of the Department of Education v Mofokeng and Others*,² ("Mofokeng"), as follows:

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually

¹ [\(2013\) 34 ILJ 1120 \(LAC\)](#).

² [2015] 1 BLLR 50 (LAC) at paras 30 - 33.

be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* (Footnote omitted) and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (Footnote omitted) have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome. (Footnote omitted)

- [31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA") (Footnote omitted); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. (Footnote omitted) Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues. (Footnote omitted)

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. (Footnote omitted) Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. (Footnote omitted) In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have

regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. (Footnote omitted)

Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.' (Footnote omitted)

(Underlining added)

[20] That a summary of the current state of the review test is so lengthy, is an indication of the complexity inherent in the review of arbitration awards under the LRA. I have emphasised the portions of the test that in my view are most relevant to this application.

[21] It seems to me that the award is *prima facie* unreasonable, in relation to the relief granted, in that the arbitrator based it on a factually incorrect assumption (that were it not for the unfairness, Mr Mbonani would ultimately have been appointed to the position) and failed to take into account material factors, for example:

21.1 The arbitration proceedings took place several months after the appointment and the award was issued more than a year after the impugned appointment.

21.2 The successful candidate would have been firmly entrenched in the position by the time the award was issued, and to order that Mr Mbonani replace her in this position, would cause severe disruption to the functioning of the department.

21.3 The position in question is a senior, strategic role, and this amplifies the disruption factor significantly.

21.4 There is no indication that Ms Mpahlele was not competent for the position. On the contrary, she seems to have been well qualified, with suitable experience.

21.5 While the conduct of Dr De Wee and the Director General was ill-considered, and rendered the selection process unfair, there was no evidence to indicate that it was motivated by ulterior motives, or that it was calculated to undermine the functioning of the selection committee. Rather, it seems that the decision of Dr De Wee to seek guidance from the Director General before concluding the work of the selection committee, was done in good faith and probably to avoid a formal rejection by the Director General. He would have been conscious at the time that the Director General was anxious to appoint a female candidate, if a suitable candidate were available, to promote gender diversity in the department.

21.6 While the conduct was unfair towards Mr Mbonani, it probably had no impact on the ultimate decision not to appoint him, given the Director General's strong views on the need to appoint a female to the position, and the fact that the Director General had the discretion to reject the candidate proposed by the selection committee.

[22] The failure to consider these material and relevant factors had such a distorting effect on the relief granted that, in my view, the arbitrator failed to apply his mind to the inquiry as to equitable relief to be granted. He simply defaulted to the most drastic relief allowed in terms of the LRA, with no consideration as to the effect on the employer (or the incumbent) or any of the factors listed in the paragraph above. In doing so, he deprived the parties of a fair trial in

relation to appropriate relief and failed to strike a balance between their respective interests and the broader interests of fairness and equity.

- [23] It follows that the award stands to be reviewed and set aside on this aspect, as the arbitrator failed to properly consider the question of what appropriate relief for the unfair labour practice would be.

Appropriate relief

- [24] Both parties agreed that given the delays in this matter, it would not be fair to either party to refer the matter back to arbitration. I agree. I will therefore deal with the appropriate relief to be granted for the unfair labour practice.

- [25] In *City of Tshwane Metropolitan Council v South African Local Government Bargaining Council and Others*,³ the Labour Court (per Lagrange J), dealing with a similar review application, grappled with the difficult issue of when it would be appropriate for an arbitrator to order promotion, particularly where substantial delays occurred between the unfair labour practice and the arbitration award. The learned Judge reasoned as follows:

'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

³ [2011] 12 BLLR 1176 (LC) at paras 26 and 27.

in his decision to appoint De Villiers to the post notwithstanding Sivhada'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 of 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 prerequisite for appointment and since the other panellists' impartiality in respect of Sivhada was held to be suspicious 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 lapse 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.'

[26] I agree with the sentiment expressed by the learned Judge, that there needs to be a careful assessment of the disruptive effect to an organisation that is necessarily caused by imposing a promotion and dislodging the successful incumbent from the position. The length of time that has passed between the promotion and the arbitration will always be an important factor in this regard, as the more entrenched the incumbent is, the more disruptive the relief of promotion will be.

[27] It is no easy feat to balance the competing interests of employer, successful incumbent and victim of an unfair labour practice, and to reach a conclusion that is fair to all parties and that gives effect to the

LRA. In the present matter, Mr Mbonani acted with some urgency in referring the dispute to arbitration. The delays in having the matter heard and in issuing the award, seem to be systemic in nature. Similarly, Mr Mbonani has gone to some effort to advance the hearing of this review application, while the department has been culpably lax in its prosecution thereof.

[28] It is, therefore, through no fault of Mr Mbonani that the matter has been so badly delayed and it seems unfair to him that the relief granted is so heavily influenced by the issue of delay. However, fairness requires a careful balancing act between competing interests and, in my view, on balance the interests of justice and fairness require that the incumbent (who by now will have occupied the position for almost five years) not be disturbed – the disruption to the department and to Ms Mpahlele would simply be too great and the wrong that was done to Mr Mbonani, was largely procedural in nature; in that it was not decisive of the ultimate outcome of the appointment.

[29] Aside from the question of delay, a further factor that militates strongly against imposing a promotion on an employer is that an arbitrator or court is not well placed to determine which candidate is most suitable for an employer's operational needs – the employer is self-evidently in a far better position to do so. The remedy of ordering a promotion, while within an arbitrator's statutory powers, should in my view be exercised sparingly and with caution and only on the clearest facts.

[30] In my view, it would be more appropriate in the circumstances of this matter to order compensation rather than compensation in the form of a 'protected promotion' and that compensation should be calculated based on the present value of the remuneration attached to the position for the following reasons. Firstly, given that the unfair labour practice occurred some five years ago, an order that compensation should be calculated in lockstep with the past five years' differences in remuneration (to both positions) would be difficult to calculate and

enforce and is likely to lead to further disputes. Second, to calculate compensation based on remuneration levels in 2010 unfairly penalises Mr Mbonani and does not take into account the time value of money and the effects of inflation. These are best catered for by pegging the compensation order to current pay levels. Thirdly, given that I now don an arbitrator's hat to determine the question of redress for unfair labour practice afresh, it seems more appropriate to do so in the present. This also eliminates the need for cumbersome interest calculations on backdated compensation awards.

Costs

[31] I am inclined to exercise my discretion in favour of awarding costs to Mr Mbonani. He was poorly treated in the selection process, he acted speedily to vindicate his rights and he has been active in ensuring that this review application was prosecuted by the department, who on the other hand was extremely lax in doing so, and is fortunate that the matter was not dismissed out of hand for its failure to prosecute it timeously.

Order

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

1. The arbitration award issued by the second respondent on 21 November 2011 is reviewed and set aside only to the extent of the relief awarded by the arbitrator under the heading 'Award', at the last page of the award.
2. This portion of the award is substituted with the following:

"The employer is ordered to compensate the employee for the unfair labour practice perpetrated by the manner in which it reached the decision not to promote him to the position of Chief Director: Strategy Monitoring and Evaluation, by paying compensation equivalent to six months' remuneration,

calculated with reference to the current remuneration attached to the position of Chief Director: Strategy Monitoring and Evaluation.”

3. The payment of compensation must be made by 30 September 2015.
4. The applicant is ordered to pay the third respondent's costs in the review application.

GA Fourie

Acting Judge of the Labour Court

Appearances:

For the Applicant: Advocate DT Skosana SC and Advocate M Gwala

Instructed by: The State Attorney

For the Respondent: Advocate DM Matlou

Instructed by: Sikitha, Daniels & Associates