



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR372/13

In the matter between:

E N MBATHA

Applicant

And

**SAFETY AND SECURITY
SECTORAL BARGAINING COUNCIL**

First Respondent

I A SIRKHOT NO

Second Respondent

SOUTH AFRICAN POLICE SERVICE

Third Respondent

E NKOSI

Fourth Respondent

Heard: 7 May 2015

Delivered: 30 September 2015

Summary: Review application- commissioner dismissing an unfair labour practice claim relating to promotion even though the employer had failed to give reasons for its decision not to shortlist an employee whose application satisfied all requirements and appointing an employee who did not meet the minimum requirements for the post. The award reviewed and set aside.

JUDGMENT

RALEHOKO AJ

Introduction

- [1] The applicant, Mbatha, seeks an order in terms of section 145 of the Labour Relations Act No 66 of 1995 (LRA) reviewing and setting aside an arbitration award dated 12 November 2012 issued under the auspices of the Safety and Security Sectoral Bargaining Council (SSSBC) in case number 156-12/13. In the award, the second respondent (the commissioner) dismissed an unfair labour practice claim which Mbatha had referred to the SSSBC challenging the third respondent's (SAPS) decision not to promote him and to promote the fourth respondent (Nkosi) instead.
- [2] Mbatha seeks an order substituting the commissioner's award to the effect that SAPS committed an unfair labour practice when it failed to screen and evaluate his application, thereby depriving him of the opportunity to be short listed and sell his candidature for the position.
- [3] In the alternative, the applicant seeks an order directing SAPS to screen and evaluate his application, to be interviewed and if he is found to be suitable, to be offered protected promotion.
- [4] The applicant also seeks an order declaring Nkosi's appointment to be a nullity and for the matter to be remitted back to the SSSBC for a fresh hearing.

The facts

- [5] Mbatha is employed by SAPS as branch commander at Lenasia South Police Station. In 2011 he submitted 7 separate applications for the post of Section Commander: Detective Services at Colonel level (MMS Band) at 7 stations which had advertised.

- [6] Mbatha was not appointed to any of the 7 posts that he had applied for. Had he been successful with any of those applications, Mbatha's appointment to the successful post would have constituted a promotion.
- [7] Although during the arbitration proceedings Mbatha testified that he was aggrieved that he was unsuccessful in 5 of the 7 posts, the dispute he referred to the SSSBC singled out one post, SOW 6/01/2011 Section Commander: Detectives Service for Dobsonville. The arbitration proceedings were conducted on that basis.
- [8] The fourth respondent, Nkosi, was appointed to the post in question and was joined as a party to the arbitration proceedings.
- [9] Prior to referring the matter to the SSSBC, Mbatha lodged an internal grievance in which he requested proof that his application had been considered as well as written reasons why he was not shortlisted.
- [10] Mbatha was furnished with a copy of his application in respect of the Sebokeng post (one of the 7 seven applications) but not his application in respect of the Dobsonville post.
- [11] During the arbitration proceedings, Mbatha once again challenged SAPS to produce proof that his application in respect of the Dobsonville post had been considered and to furnish reasons why he had not been shortlisted. SAPS did not produce the application nor did it give reasons why he was not shortlisted.
- [12] Mbatha also took issue with SAPS's decision to appoint Nkosi, arguing *inter alia* that Nkosi did not meet the requirements for the post in many respects. With reference to Nkosi's curriculum vitae, Mbatha pointed out that Nkosi did not have an NQF 4 qualification or Grade 12 which were minimum requirements for the post as well as the fact that Nkosi was proficient in only one official language whereas it was a minimum requirement of the job to be proficient in at least two official languages.
- [13] It is evident from Nkosi's screening form that he did not meet the minimum requirements for the post.
- [14] During the arbitration proceedings, Nkosi cross examined Mbatha on the alleged poor performance of the branch led by Mbatha. It emerged that

Nkosi was referring to the performance of his section and that of Mbatha after Nkosi had been appointed to the post which was the subject matter of the arbitration proceedings. As the alleged poor performance post dated the filling of the post, it would not have played a part in the decision not to short list Mbatha.

- [15] SAPS's only witness during the arbitration proceedings was Brigadier Pietso Ramatsoele. He was a member of the selection panel. He testified that Mbatha's application had been considered and that a decision was taken not to shortlist him. However since he did not have the documentation before him, he could not recall the exact reason why Mbatha was not shortlisted as they had considered between 200 and 300 applications. He testified that in most cases a candidate is not shortlisted because there are more suitable candidates.
- [16] He could not explain why the relevant documentation had not been brought to the arbitration proceedings and speculated that it could have been due to an administrative error. He also stated that it was not his responsibility to keep these documents.
- [17] Ramatsoele testified that Nkosi was appointed because he had the highest score. He also stated that during the interviews, Nkosi proved to be conversant with the job. However the only recorded reason why Nkosi was recommended is that he had the highest score.

The award

- [18] The commissioner recorded the issue to be decided as whether SAPS had committed an unfair labour practice by failing to promote Mbatha. He found as follows:

18.1 contrary to what was submitted by Mbatha, having occupied the position of Branch Commander was not a requirement for the job.

18.2 a dispute about courses and requirements for the job does not amount to an unfair labour practice.

18.3 It is not the commissioner's function or responsibility to choose the best candidate for promotion for an employer but simply to ensure

that in selecting candidates for promotion, an employer does not act unfairly.

18.4 Section 186(2)(a) is limited to attacks on the procedure followed by SAPS as well as whether the decision was grossly unreasonable.

18.5 All that SAPS was required to illustrate was that it had a rational basis for its decision.

18.6 Mbatha had been considered for the post. There was documentary evidence and Ramatsoele had testified to that effect.

18.7 The failure by SAPS to disclose the reasons why the Applicant was not shortlisted is not sufficiently serious so as to nullify the appointment of Nkosi.

18.8 Mbatha had not placed any evidence before the commissioner that in not promoting him, SAPS was influenced by other considerations.

[19] In conclusion, the commissioner found that the process followed by SAPS which led to the decision not to promote Mbatha does not amount to an unfair labour practice. He dismissed Mbatha's claim.

Grounds for review

[20] Broadly, Mbatha challenges the commissioner's findings that SAPS did not commit an unfair labour practice against him. He argues that no reasonable decision maker could have made that finding given the material before the commissioner. Mbatha also takes issue with the commissioner's findings on SAPS failure to furnish him with reasons for not shortlisting him.

[21] The appointment of Nkosi is challenged on the following grounds:

21.1 Nkosi's overall score is in fact 20 and not 22 as calculated by all panel members.

21.2 The fact that each candidate was allocated the same score by each panel member is an indication that the panel members did not apply their minds. It was submitted that it is highly improbable that all 4 panel members would award each candidate the same score.

21.3 There were two “contradictory” chairpersons for the panel responsible for shortlisting for the Dobsonville post. This submission was not elaborated on and for that reason I was unable to consider it.

21.4 In his CV, Nkosi misrepresented that he had a Diploma from the University of Pretoria (the equivalent of NQF6) whereas in his application he admitted that he did not have a diploma. Without a diploma, Nkosi did not meet the additional requirements for the post.

21.5 One of the panel members, Major General Ndaba was listed in Nkosi's application as a work reference and there is no proof that this interest was declared.

[22] Mbatha also complains that the commissioner allowed him to cross-examine Ramatsoele instead of allowing his representative to conduct the cross examination.

[23] SAPS defends the commissioner's findings and further submits that Mbatha's challenge was limited to procedural fairness and not substantive fairness.

[24] Although Nkosi participated in the arbitration proceedings, he has not filed opposing papers in the review application.

Legal principles

[25] The test in reviews is now well settled. An award is reviewable if the outcome reached by the arbitrator was not one that could be reached on the evidence and other material before the arbitrator. (See *Herholdt v Nedbank Limited and Others*,¹ *Sidumo v Rustenburg Platinum Mines Ltd*²).

[26] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Others*³ the court further clarified the review test in the following terms:

¹(2013) 34 ILJ 2795 (SCA).

² 2008 (2) SA 24 CC.

³ (2014) 35 ILJ 943

[20] ... an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence.

[27] Section 186(2)(a) of the LRA provides as follows:

(2) *Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving:*

(a) unfair conduct by the employer relating to the promotion...of an employee.

[28] It has long been accepted that the decision to promote or not to promote falls within the managerial prerogative of an employer and that the courts will interfere only where such discretion was exercised capriciously, or for insubstantial reasons or based upon a wrong principle or in a biased manner.⁴

[29] In more recent cases the courts have clarified the test to be that of fairness.

⁴ See *Minister of Safety & Security v SSSBC & Others* [2010] 4 BLLR 428 (LC) in which the court rejected the notion that an employer has unfettered discretion when deciding whom to appoint.

[30] In *Apollo Tyres SA (Pty) Ltd v CCMA & Others*⁵, the Labour Appeal Court was dealing with an unfair labour practice relating to a benefit and quoted from *Du Toit et al*⁶ with approval on the meaning of unfairness as follows:

[53] ... unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.

[31] In *Noonan v Safety & Security Sectoral Bargaining Council & Others*⁷ an employee who had been overlooked for a promotion challenged the decision not to promote him on the grounds that the successful candidate had failed to disclose information which affected his suitability for the post. On appeal, the court considered the “fairness of the process”⁸ as a whole and came to the conclusion that the employer had committed an unfair labour practice against the unsuccessful employee in that the successful candidate unfairly participated in the selection process.

[32] In *City of Cape Town v SA Municipal Workers Union obo Sylvester & Others*⁹ the court expressly rejected the notion that the employer has the prerogative to decide who to appoint and that it should not be questioned when it exercises that discretion. The court stated that the proper yardstick was “fairness to both parties”.¹⁰

[33] I will therefore apply the fairness test in determining whether SAPS committed an unfair labour practice against Mbatha.

Evaluation

⁵ (2013) 34 ILJ 1120 (LAC)

⁶ *The Labour Relations Act of 1995* (2 ed) at 443.

⁷ (2012) 33 ILJ 2597 (LAC).

⁸ Paragraphs 17-46

⁹ (2013) 34 ILJ 1156 (LC).

¹⁰ Paragraph 14. See also *South African Police Services v SSSBC & Others* [2010] 8 BLLR 892 (LC) para 15(iv) where the court stated that the role of the commissioner is to oversee that the employer did not act unfairly towards the candidate that was not promoted. See also *City of Tswane Metropolitan Council v SALGBC & Others* (JR 593/07) [2011] ZALCJHB 154 (26 May 2011) at para 16.

- [34] From the analysis of the evidence by the commissioner, he appeared to appreciate that fairness is the test in disputes of this nature and that as long as there is a rational basis for a decision, a commissioner must not easily interfere with the employer's decision.
- [35] However, despite being alive to the correct test, the commissioner failed to apply that test. Instead, the commissioner adopted the approach that the employer had a discretion to choose who to appoint and that it was not his place, as arbitrator, to interrogate that exercise of discretion by the employer. In other words, the commissioner was not prepared to interrogate whether the employer's decision not to promote Mbatha had a rational basis. The effect of the commissioner's approach is that Mbatha was denied a fair trial.
- [36] The arbitrator starts the analysis of the evidence by making much of the fact that Mbatha's case was that he ought to have been appointed because he was a branch commander. But this was contrary to the commissioner's own understanding of Mbatha's case. During the arbitration the commissioner commented that Mbatha's case was that being a branch commander gave him a competitive edge. It is therefore incomprehensible how when writing the award the commissioner could misrepresent Mbatha's case that he had argued that being a branch commander was a requirement of the post.
- [37] Then the commissioner goes on to state that "a dispute regarding the courses and the requirements that are necessary for the position do not amount to an unfair labour practice". Whatever is meant by that statement, the dispute that Mbatha referred to the SSBC was not about courses and requirements for the position. However the requirements for the post remained a relevant factor in determining whether the employer had acted fairly by preferring a candidate who on the face of it failed to meet those requirements. The commissioner ought to have engaged in that inquiry and his failure to do so, coupled with what is discussed below, in my view renders the award reviewable.
- [38] On the question of SAPS reasons for failing to shortlist Mbatha, the commissioner found that Mbatha's application for the Dobsonville post

was considered because there was documentary proof to that effect and also because Ramatsoele testified to that effect.

[39] But that finding is not supported by evidence. There was no documentary proof that Mbatha's application for the Dobsonville post had been considered. The application that was placed before the commissioner was in respect of the Sebokeng post.¹¹

[40] Ramatsoele speculated that Mbatha's Dobsonville application was not available possibly due to an administrative error. He did not elaborate on the possible administrative error, understandably so because he was not responsible for keeping these documents. He also stated that SAPS is a large organisation and that documents get lost. The question that the commissioner ought to have asked is why SAPS did not call the person who was the custodian of the documents to testify about what could have happened to Mbatha's application which could not be located.

[41] In those circumstances the commissioner's decision to accept Ramatsoele's evidence that Mbatha's application was considered, in the absence of proof to that effect, is a finding that no reasonable decision maker could have arrived at. Any reasonable commissioner, faced with those facts, would have arrived at the conclusion that there was no evidence that Mbatha's application for the Dobsonville position had been considered.

[42] Ramatsoele testified that reasons for not short listing a candidate had to be recorded and annexed to an application. In fact this is required in terms of the National Instruction No 2/2008. Ramatsoele further testified that the reason for this was that often unsuccessful candidates challenge such decisions and that SAPS relies on what is recorded in the application forms to defend its decision not to shortlist a candidate.

[43] In this case Mbatha's screening and application form (where the reasons would have been recorded) was not placed before the commissioner. Accordingly it could not be established with reference to documentation why Mbatha had not been shortlisted. Without the application form,

¹¹ Inexplicably the form reflects that Mbatha had declared previous/pending criminal conviction offence when this was not the case.

Ramatsoele could not recall why Mbatha was not shortlisted. He stated that they had considered between 200 and 300 applications and that without Mbatha's application before him, he could not recall the reasons why he was not shortlisted. He testified that normally candidates are not shortlisted when there are more suitable candidates available than them.

[44] Therefore on the facts, Ramatsoele could not shed light on the actual reasons why Mbatha was not shortlisted. On that evidence, a reasonable commissioner would have found that SAPS failed to prove that Mbatha's application had been considered.

[45] The commissioner stated that the failure by SAPS to disclose reasons for not shortlisting Mbatha was not sufficiently serious enough to nullify the appointment of Nkosi. But SAPS failure to furnish the reasons for not shortlisting Mbatha ought to have been given much more weight than that. Without reasons, it was simply impossible to determine whether there were valid reasons for the decision not to shortlist Mbatha.¹² Of course the absence of reasons did not have the effect of automatically nullifying Nkosi's appointment, but without reasons, it could not be said that SAPS had a rational basis for its decision not to shortlist Mbatha. It is precisely for this reason that Mbatha was constrained in challenging substantive fairness. Unless he knew the reasons why he was not promoted, he could not attack those reasons.

[46] In any event, the question whether Nkosi ought to have been preferred over Mbatha or the other candidates for that matter was a different issue to the question whether SAPS had a rational basis for failing to shortlist Mbatha.

[47] Another finding by the commissioner which renders the award susceptible to review is that Mbatha failed to lead evidence that the decision not to promote him was influenced by other considerations. But Mbatha was not required to prove that SAPS had acted in bad faith by failing to appoint

¹² See *SAPS v Gebashe and Others* [2014] ZALCD 68 (24 November 2014) para 16 where the court commented that it is "*not unreasonable to infer that someone who will not explain the reason for their actions probably has none or knows the reasons are ones which cannot justify it, especially if the functionary cannot even advance an explanation why those reasons, if they exist, cannot be made known.*"

him. Bad faith is just but one of the considerations and not the only one. The test is simply that of fairness.

- [48] The next question that must necessarily be asked in disputes about a failure to promote is whether the decision to appoint Nkosi in preference to Mbatha was unfair. In other words, the question is whether but for the unfair or irregular appointment of Nkosi, Mbatha would have been promoted ahead of Nkosi.¹³
- [49] Even though an employer has a prerogative to choose who to promote, its decision will be found to be irrational if it is not able to justify it.
- [50] In this case it is not possible to say with certainty that Mbatha would have been appointed ahead of Nkosi. Mbatha did not even make it to the interviews and without scores, it is simply impossible to do a comparison of the two.
- [51] The other challenge for Mbatha on this issue is that no information about the other shortlisted candidates was placed before the commissioner during the arbitration proceedings. It is therefore not known whether Mbatha was a better candidate than those other candidates.¹⁴
- [52] Even though Mbatha could not show that he ought to have been appointed, in the absence of cogent reasons why Nkosi was the preferred candidate, on paper a comparison of Mbatha and Nkosi revealed that Mbatha was manifestly a better candidate than Nkosi.
- [53] On the one hand, Nkosi did not meet the minimum and additional requirements for the post and on the other hand, Mbatha's application met all the requirements yet he was not shortlisted. In my view SAPS was required to explain why, despite not meeting the requirements for the post, Nkosi was nevertheless shortlisted. No such explanation was forthcoming.
- [54] Furthermore, on paper Mbatha had more qualifications (courses) than Nkosi. Mbatha had a diploma whereas Nkosi was studying towards one.

¹³ *Ndlovu v CCMA & Others* (D544/99) ZALC 153 (1 March 2000) at para 12.

¹⁴ See *South African Police Service v SSSBC & Others* supra para 19 and *National Commissioner of the South African Police Service v SSSBC & Others* (JR11802/2002) [2005] ZALC 67 (21 April 2005) para 12.

- [55] Unlike Mbatha, Nkosi had never been in a post of command whereas Mbatha was a branch commander for a period of 5 years.
- [56] Instead of considering all the information placed before him which pointed to the fact that Mbatha appeared to be a better candidate than Nkosi, the commissioner singled out Mbatha's evidence about being a branch commander and completely ignored all the other evidence which pointed to the fact that SAPS had dismally failed to defend its decision to appoint Nkosi ahead of Mbatha.
- [57] SAPS would have been aware that during the arbitration proceedings it would be required to defend its decision not to short list Mbatha and to appoint Nkosi instead. It made no effort to defend its decision.
- [58] There were some facts which were placed before the commissioner regarding how Nkosi had been appointed which ought to have concerned any reasonable commissioner, viz :
- 58.1 all 5 members of the panel allocated exactly the same score to each candidate in respect of each category that they were assessed on. This was highly improbable.
- 58.2 all 5 panel members failed to do a simple mathematical calculation of Nkosi's total score and allocated him a score of 22 whereas the total of 9+6+5 is in fact 20. Therefore Nkosi did not attain the highest score. Booysse attained the highest score of 70% followed by Nkosi and Kgomo at 66.6%.
- 58.3 Major General Ndaba, one of the panel members was listed as Nkosi's work reference and there is no indication that this interest was disclosed as required in terms of the National Instruction.
- [59] With that evidence, any reasonable arbitrator would have found that the selection process was not above board and was irregular. Instead the arbitrator chose to distance himself from that inquiry. That is a gross irregularity that renders the award unreasonable.¹⁵

¹⁵ *Public Servants Association obo Tlowana v MEC of Agriculture & Others* (2012) 33 ILJ 2675 (LC) at para 15, *City of Tswane Metropolitan Council v SALGBC & Others* supra at para 22 and *Minister of Home Affairs v GPSSBC & Others* (JR 1128/07) [2008] ZALC 35 (26 March 2008)

[60] In conclusion, the commissioner's finding that SAPS did not commit an unfair labour practice against Mbatha is so divorced from the evidence that it cannot be allowed to stand. A reasonable arbitrator presented with those facts would have found that SAPS committed an unfair labour practice against Mbatha.

[61] For completeness I have considered Mbatha's complaint that the commissioner allowed him and not his representative to cross examine Ramatsoele. There is simply no merit to this complaint. It was Mbatha's representative who specifically requested the commissioner if his "client" could conduct the cross examination himself.

Others issues

[62] Mbatha sought condonation for the late filing of the review application and SAPS sought condonation for the late filing of its answering affidavit. Although SAPS had opposed Mbatha's condonation application and the applicant had objected to the late filing of the third respondent's answering affidavit, in argument I was informed that both condonation applications were no longer opposed.

[63] Mbatha's explanation for the delay in launching the review application was rather poor but I have taken into account his prospects of success on review, which are excellent. I therefore grant condonation for the late filing of the review application.

[64] SAPS answering affidavit was filed 3 months after Mbatha filed his supplementary affidavit. The explanation for the delay proffered is that "there was a substantive delay between the period of receiving and processing the matter including the procurement of Counsel to deal with the matter in court". There can be no debate that this explanation amounts to no explanation at all and on that basis alone condonation ought properly to have been refused. Nevertheless I have decided to dispose of the matter on the merits, taking into account SAPS submissions so that there can be finality in this matter. Only for that reason do I reluctantly grant condonation.

Relief

- [65] In my view there is no point in remitting the matter to the SSSBC. All the information has been placed before court which is in as good a position to make a finding on the appropriate relief.
- [66] Mbatha is entitled to compensation for the unfairness that he received at the hands of SAPS. In determining the compensation payable, I have taken into account that although Mbatha was treated unfairly, he could not demonstrate that had he been shortlisted, he would have been appointed.
- [67] But simply awarding Mbatha compensation does not address the fact that the evaluation panel committed serious irregularities in the appointment of Nkosi. Although Nkosi has occupied this position for some time now and interfering with that position is likely to cause disruptions in the running of the branch, Nkosi's appointment was clearly irregular and it cannot be allowed to stand. Selection panels ought to realise that unless they apply their minds during the selection process, a court will not hesitate to interfere with that decision.
- [68] In this case the evaluation panel acted reprehensibly in appointing Nkosi who did not meet the minimum and additional requirements for the post. Paragraph 4(8) of the National Instruction 2/2008 makes provision for the screening of applications to exclude those who do not meet the requirements of a post. The departure from this provision was not explained at all. I have also taken into account that the only reason the panel members recommended Nkosi's appointment is because he attained the highest score. But on a proper calculation of the scores, Booyse attained the highest score of 70% followed by Nkosi and Kgomo who both attained a 66.6% mark. It leaves one baffled that four senior members in SAPS acting independently could not do a simple mathematical calculation.
- [69] For those reasons, the appointment of Nkosi ought to be set aside and a newly constituted evaluation panel must be set up to consider the matter afresh. Obviously Nkosi will be adversely affected by this order but he elected not to oppose the orders sought.

Costs

[70] Both parties submitted that costs must follow the result. I have taken the requirements of law and fairness into account, especially the conduct of the members of the selection panel and SAPS failure to give reasons for its decision not to short list Mbatha. SAPS must bear the cost of this application.

Order

[71] In the premises I make the following order.

71.1 The applicant and the third respondents are granted condonation for the late filing of the review application and the answering affidavit respectively.

71.2 The award is reviewed and set aside and is substituted with an award that the third respondent committed an unfair labour practice against the applicant.

71.3 The third respondent is ordered to pay the applicant compensation equivalent to 6 month's salary, calculated at the applicant's current remuneration rate August 2011, within 60 days of this order.

71.4 The appointment of Nkosi to the post of Section Commander: Detective Services Dobsonville at Colonel level is hereby set aside.

71.5 The third respondent is ordered to pay the applicant's costs.

Ralehoko AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Advocate T Govender

Instructed by: Thapelo Kharametsane Attorneys

For the Third Respondent: Advocates T Mtimunye with Advocate MW Dlamini

Instructed by: State Attorney

LABOUR COURT