



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1513/11

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Applicant

and

THE SOUTH AFRICAN LOCAL

GOVERNMENT BARGAINING COUNCIL

First Respondent

COMMISSIONER QUEENDY GUNGUBELE N.O.

Second Respondent

SAMWU OBO IM PALARE AND 3 OTHERS

Third Respondent

Heard: 6 MARCH 2015

Delivered: 27 October 2015

Summary: The arbitration award reviewed – arbitrator granting protective promotion – such relief incompetent, no evidence led with regard to the losses suffered by employee, further the employee does

not have a right to be shortlisted and as such on the evidence before the commissioner the finding cannot be said to be reasonable within the contemplation of the authorities.

JUDGMENT

AH SHENE, AJ

Introduction

- [1] This applicant in this review is the City of Tshwane Metropolitan Municipality. The third respondent represents an employee, Ingrid Palare, who sought redress in the South African Local Government Bargaining Council ("SALGBC") alleging that she had been a victim of an unfair labour practice.
- [2] The third respondent was successful in the arbitration, and accordingly awarded protective promotion.
- [3] The review was launched 1 day out of time and, accordingly, Mr Naidoo, who appeared for the third respondent, indicated that he was not opposing the late filing of the review.

Grounds for review

- [4] The applicant sought to rely on a number of grounds of review, in that the second respondent committed a gross irregularity in conducting the proceedings; namely, that she made findings that were not justified on the evidence, alternatively, that she gravely misunderstood the evidence before her; further thereto that the second respondent in handing down her arbitration award, she cited and considered the evidence led by the applicant at the arbitration on a very limited and selective basis.

[5] A further attack on the award was the manner in which the second respondent evaluated the evidence which was before her, in that she failed to apply her mind to the facts before her.

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

‘... the better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is 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.’

[7] Other grounds that the applicant sought to rely on are based on errors the arbitrator made and the weight he attached to the evidence.

[8] In *Herholdt v Nedbank*,² the Court dealt with the mistakes of commissioners:

‘In summary, the position regarding the review of the CCMA awards is this: A review of a CCMA award is permissible if the defect in 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 enquiry 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 themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

[9] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*,³ the

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² (2013) 34 ILJ 2795 (SCA) at para 25.

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 within the band of decisions which a reasonable decision maker could come to on the material presented at the arbitration.

[10] Mr Bekker who appeared on behalf of the applicant raised the argument that the award stood to be set aside, *inter alia*, on the grounds that the commissioner committed a gross irregularity in conducting the proceedings, i.e in that she made a finding which cannot be justified on the evidence, alternatively, that she gravely misunderstood the evidence as presented by the parties. The commissioner considered the evidence led by the applicant on a limited basis and failed to consider the following:

- (a) that the applicant failed to meet the minimum requirement of the position;
- (b) the reasons advanced for the required qualification;
- (c) that there was no documentation presented that the applicant met the minimum job requirements;

[11] It was argued that the commissioner incorrectly came to the conclusion that it was common cause that the "applicant, Ms Ingrid Palare, the strategic Executive Director, Ms Mmutle and her Director, Mrs Aline Birkenstock believed that she met the requirements of the advertised post on Management Support Officer." On the facts before the commissioner, she could not have awarded the applicant protective promotion based on the evidence led at the arbitration. The evidence of the applicant's own witness, Ms Birkenstock, who compiled the advertisement and shortlist, requested a waiver of a number of requirements pertaining to the applicant. Ms Birkenstock attempted to reason away the fact that the minimum requirements were a three year

³ (2014) 35 ILJ 943 (LAC) at para 14.

qualification and experience, that it was a mistake and should have read “and/or”. The applicant simply did not meet the requirements as set out by the employer.

[12] Mr Naidoo, who appeared on behalf of the third respondent, argued in support of the allegation that an unfair labour practice had been perpetrated against the third respondent and relied on a collective agreement between the municipality and the unions on staffing policy, which expressly provided that:

- 12.1 principles of fairness must guide the recruitment process;
- 12.2 a person specification should only contain the requirements essential for success in a position;
- 12.3 the object is to invite applications from suitable candidates;
- 12.4 all prospective candidates are allowed fair opportunity to apply and progress through selection process;
- 12.5 an inherent requirement of a position is defined and must be both essential to the position, and objectively justifiable;
- 12.6 selection criteria must be based on key performance areas and inherent requirements of the position and must be applied consistently;
- 12.7 a candidate is considered suitably qualified for appointment based on one or a combination of: formal qualifications, recognition of prior learning, relevant experience, ability to do the job, the capacity to acquire relevant skills and applicable legislation;
- 12.8 all relevant criteria must be taken into account;
- 12.9 person selection criteria must have direct relevance to positions for which candidates are being evaluated.

12.10 the appointment process must be fair.

- [13] It was further argued that it was the evidence of Birkenstock that the applicant had the necessary skills and experience to perform the job and had in effect been acting in the position for many years. It was also the practice of the municipality to waive qualification requirements and Birkenstock had made application to that effect. As a result of the aforementioned, Mr Naidoo argued that the award was reasonable as the commissioner took into account all the evidence and all relevant circumstances. He further contended that it was important to establish the nature of the irregularity that is complained of by the applicant in review proceedings. The review grounds seem to focus on alleged errors that the arbitrator committed, namely, material errors of law and fact when weighing up the evidence and thus the facts pleaded do not give rise to valid reviewable irregularities.

Analysis

- [14] Having heard the submissions from both representatives, it is evident even on the applicant's own version that she did not have the requisite qualifications to occupy the post, hence the application for waiver. The applicant, in its heads of argument, further made this concession.
- [15] Even though this was apparent from the evidence before the commissioner, she attached minimal weight to the evidence and came to the conclusion that a number of provisions in the collective agreement previously alluded to above had been breached. As a result thereof, the commissioner concluded that the employer committed an unfair labour practice and, accordingly, awarded protective promotion.
- [16] The applicant contended that the relief granted by the commissioner exceeded her powers. There have been a number of cases in which the appropriate relief in a dispute over promotion have been considered.

[17] Protective promotion is a concept originating in the Public Service Code, which has been repealed. In *Dunn v the Minister of Defence*,⁴ the court *a quo* was seized with an administrative review of a decision not to promote an officer to a newly created post. The court declined to set aside the appointment of the other candidate but found that the applicant's legitimate expectation to an interview had been thwarted.⁵ It awarded the respondent damages in terms of section (1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 based on the salary that he would have been paid had he been appointed to the position. On appeal, the SCA reversed the decision of the court *a quo*, finding, *inter alia*, that the applicant had suffered no prejudice on account of the way the appointment process had been handled, as court *a quo* itself held that the risk of non-appointment had been handled, that the risk of non-appointment was inherent in the process and, therefore, no prejudice to the applicant could be attributed to the outcome of the process. The SCA found also that:

'Even if there were exceptional circumstances, it is impermissible for a court to substitute its own decision – in this case to give Dunn an effective promotion in the Defence Force – for that of a minister. It is the minister, in terms of the Defence Act, who has the power to make appointments and promotions.'⁶

[18] The applicant, also referred to the *Kwadukuza Municipality v SALGBC and Others*,⁷ wherein, Pillemer, AJ held that

'I am satisfied that it is wholly inappropriate and unreasonable to as a remedy or as a measure of compensation for reasons advanced by Mrs Nel. In fact the arbitrator properly applied her mind to the question of compensation, she would have found that there was insufficient material before her to enable her to hold that actual damages had been suffered. She had to determine the amount of compensation, if any that would be appropriately compensate the third respondent for

⁴ 2007 (6) SA 52 (SCA).

⁵ *Ibid* at para 28.

⁶ *Ibid* at para 39.

⁷ *Kwadukuza* (2009) 30 ILJ 356 (LC) at 11.

unfairness in denying to him the opportunity to compete for a post for which he seems to have the requisite qualification and in which he may have succeeded had he competed and been considered.'

[19] The above case is distinguishable in that the applicant in *Kwadukuza* had the requisite qualifications, in the application before me, the applicant does not have the qualifications as conceded by the applicant's own witness, Birkenstock and contained in the applicant's heads of argument.⁸ In any event, there was no evidence of damages suffered or that the applicant would have been the best suited candidate for the position and, therefore, awarding protective promotion in the circumstances cannot be said to be reasonable given all the evidence and material before the commissioner.

[20] I am satisfied that the irregularities set out as grounds of review are not self-standing but when viewed as a whole and having applied the standard as set out in *Sidumo*, the award cannot be said to be reasonable and as a result the award stands to be reviewed and set aside.

[21] It follows from my decision that the review succeeds that the prospects on review are such that condonation should be granted.

Costs

[22] In considering the issue of costs, I have to consider both law and fairness in accordance with section 162 of the Act. Given the circumstances and the fact that the applicant was of the view that she had been treated unfairly, it cannot be said that the applicant acted frivolously and, therefore, she should not be liable for the applicant's costs.

Order

13. In the premises, I make the following order:

⁸ Applicant's Heads of Argument at page 2 -3, para 6.

13.1. Condonation for the late filing of the review is granted.

13.2. The application for review is dismissed.

13.3. In the interest of law and fairness, I make no order as to costs

AH Shene, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate Bekker

Instructed by: Gildenhuys Malatji Inc

For the respondents: Mr Naidoo of Cheadle Thompson & Haysom