



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: JR2287/11

In the matter between:

MATUKU MPHAHLELE

First Applicant

NATIONAL UNION OF MINEWORKERS

Second Applicant

and

ANGLO PLATINUM MINES (UNION SECTION)

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

SAM ALIDZULWI MUVHANGO N.O.

Third Respondent

Date heard : 09 September 2015

Date delivered : 15 December 2015

Summary: Decision to promote falls within prerogative of the employer. Facts not placed before arbitrator cannot be relied upon in the review application. Unfair Labour Practice not established. Review application dismissed.

JUDGMENT

BALOYI AJ

1. The First Applicant Matuku Mphahlele, represented by the trade union, National Union Mineworkers approached this court seeking review and set aside of the Third Respondent's arbitration award. Mphahlele is cited as First Applicant while the trade union is cited as Second Applicant. The arbitration award was issued consequent to his unfair labour practice dispute referred to the Second Respondent. In his award, the Third Respondent made a finding that the First Respondent did not commit unfair labour practice towards the First Applicant and went on to dismiss his claim. The Applicants relied on grounds of review as set out in the founding and supplementary affidavits. Specific points were during arguments brought to the court's attention in support of Applicants' case, details of which appear herein below. The review application together with condonation application for late filing of the review application are opposed by the First Respondent.

Background to the dispute

2. On or about 31 July 2007 the Applicant and First Respondent entered into employment relationship wherein the First Applicant was appointed as Community Engagement Development Officer (CED Officer). In 2009 the First Applicant's position became redundant due to restructuring exercise embarked upon by the First Respondent. A position of Community Engagement Development Co-ordinator (CED Co-ordinator) was created and advertised. The First Applicant was invited to apply for appointment in the said new position. The position was at a level higher than that of CED Officer. If the First Applicant

was appointed to the position, promotion would have resulted. The First Applicant responded by applying as invited and was duly interviewed. At the end of the recruitment process he was informed that his application was unsuccessful. A certain Mr Tshepo Maphutse was appointed to the position in question. Aggrieved by the developments he referred unfair labour practice dispute to the CCMA. The instant review application is the aftermath of the arbitration proceedings which resulted into an award currently under scrutiny.

Condonation application

3. The filing of the review application was out of time by two weeks counting from the date of the award. The explanation given for the delay deserves no comprehensive detailing as it hits straight to the point. What appears indisputable in the application and surely crucial is that the First Applicant received the award from the First Respondent. It is not known as to when did the First Respondent receive the award from CCMA. It is also not in dispute that the Applicant and his trade union did not receive the award from CCMA. Mr Makinta for the First Applicant submitted that since there was no service of the award as set out in section 145(1)(a) of the LRA, there was therefore no need to apply for condonation. This submission was not countered. The First Respondent's only contention is that the averments made in the founding affidavit lack evidentiary value in the absence of confirmatory affidavits of persons mentioned therein. It is under the circumstances undeniable that the Applicants made a valid point in this regard. I have taken guidance from *Queenstown Fuel Distributors CC v Labuschagne NO & Others*¹ and the only conclusion to arrive at is that there was indeed no condonation application required. What follows is that there is no need to look further into the merits of the condonation application.

¹ 2000 (1) BLLR 45 LAC

Merits of Review

4. The Applicant's contentions in their grounds are heavily rested on:
 - First Respondent's having obtained the award in an improper manner by misleading the Third Respondent on facts of the dispute;
 - The Third Respondent's misconception of the law on issues before him,
 - misconduct in relation to Third Respondent's failure to investigate interview matrix and whether he conceded to having contractual right to promotion,
 - Third Respondent's misunderstanding of the issue whether the First Applicant had fair opportunity to compete.
5. What can be drawn from the lengthy propositions made by the Applicant is that he was a best candidate. The First Respondent should have appointed him instead of Maphutse. Unfairness came as a result of First Respondent's failure to compare his qualifications to those of Maphutse who had an irrelevant degree for the position. The Third Respondent followed suit by not investigating the subject. The scoring on interview matrix was unfairly applied and the Third Respondent failed to come to First Applicant's rescue. Mr Makinta argued further that the Third Respondent failed to take into account that no scores of individual panelists were presented by the First Respondent and no comparison was made between the First Applicant's answers and those of Maphutse.
6. Ms Norton for the First Respondent pointed that Maphutse's Masters degree was higher than the First Applicant's B degree. The argument that the First Applicant was better qualified cannot be sustainable.

The issue of comparing interview questions and answers was never placed before the Third Respondent. The First Respondent's evidence was that First Applicant's performance during interview was less as he scored 11.75 while Maphutse scored 16.08. The First Applicant conceded to having been given fair opportunity to compete.

Evaluation

7. It deserves to be stressed that reasonableness is the beginning and the end in determining whether the arbitration award is reviewable or not. The cumulative effect of the test laid down in *Sidumo* case² is that the decision made in the award should not be merely unreasonable but unreasonable to a degree that no decision maker could have made. It is therefore not an absolute consideration that the reviewing court would have arrived at different finding had it been an arbitrator. The difference between appeal and review is easily drawn in situations of this nature.
8. The Supreme Court of Appeal restated the reasonableness test in *Hertholdt v Nedbank Ltd*³ wherein the following was said in paragraph 25;

"[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 effect is to render the outcome unreasonable"

² *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC)

³ 2013 11 BLLR 1074 (SCA).

9. In this instant case the Applicants in expansion of their grounds made it clear in the supplementary affidavit by extracting the cream of his case for the court's attention, specifically in paragraph 18 where he had this to say:

"It was my case that I was entitled to be fairly considered for the position, as I applied for it, and a fair consideration would have led to my appointment, as I was the best candidate on the information properly before the arbitrator." (sic)

10. It was not in dispute that the First Applicant's application was given consideration *inter alia* on the basis of his qualifications and experience hence he was shortlisted. Secondly he was invited for interview together with other shortlisted candidates for the position. It further became common cause that the interview process resembled a competition between the shortlisted candidates. In other words it was acceptable that the best candidate was the one to walk away with glory of being appointed to the position in question. The Third Respondent recorded in his award that First Applicant conceded to have been given a fair opportunity to compete. On the other hand the First Applicant himself in paragraph 28.1 of supplementary affidavit contends he did not concede that he was given fair and equal opportunity to compete for the position.

11. While the First Applicant denied having been afforded a fair opportunity to compete, the record interestingly states otherwise. To be precise the record is consistent with what the Third Respondent recorded in the award. The First Applicant attempted to create a different meaning to this point by accusing the Third Respondent of having misunderstood issues and evidence before him. In a twisted fashion the gist of the dispute was according to the First Applicant that he had been unfairly and unequally disadvantageously treated. This is certainly raised in this review application and it has been thrown now

and labelled Third Respondent's misunderstanding. No attempt was made to explain the concession while the matter was still before the Third Respondent. Since the concession is, disingenuously so denied, further dealing with the attempt to justify same will result in futility.

12. Turning to the second point of the cream of the First Applicant's case, namely, that he was the best candidate. The Applicants' contention is in two legs, that he was the best candidate and that the score card had discrepancies. On both complaints he compared himself to the successful candidate, Maphutse. Third Respondent is attacked for not considering that the First Applicant's qualifications were more relevant to the position than those of Maphutse. This argument stands to fail because it was not put to any of the First Respondent's witnesses. Furthermore the First Applicant himself never dealt with the issue in his evidence.
13. Similarly the allegation of discrepancy on score card is bound to fail. The First Applicant never tendered evidence in demonstration as to why the score card should be found to have had discrepancies. The First Respondent's conceded to the possibilities of the score card having discrepancies, however such discrepancies were of such nature that if corrected the result would not turn around the tables to favour the First Applicant. It deserves to be said that this argument of discrepancy is not founded on evidence because the First Applicant's evidence before the Third Respondent contains not even single averment to the effect. In the absence of such evidence it is difficult to see how the Third Respondent could have made a finding against the First Respondent.
14. As I am dealing with unfair labour practice dispute, I keep on reminding myself as to who of the parties bore the onus of proof under the circumstances. The answer is within the finger tips, that is the employee. In this regard it is undoubtedly the Applicants. At the same

time it must be borne in mind that appointment of a candidate to a position is entirely within the employer's prerogative. The court will only interfere when *mala fides* is proved. (See *Goliath v Medscheme (Pty) Ltd*⁴). It has not been brought to the attention of this Court as to why the First Respondent had to begin in leading evidence during arbitration. It would seem that the Applicants lost focus in the light of this sequence events and handled the matter on the belief that the party who bore the onus is the First Respondent. This approach had sadly filtered through to the level of this review application. Generally, (which is definitely the case in this matter) employers shortlist candidates on the basis that they are all sufficiently qualified for the position. The mere allegation that the First Applicant was sufficiently qualified cannot give rise to unfair labour practice. To this end the Third Respondent's decision cannot be held to be the one that a reasonable decision maker could not reach.

15. In essence there is no reason for interference with the Third Respondent's arbitration award. Both parties moved for an order that costs should follow the result. I see no reason for deviation from the submissions.

Order

16. In the premises the following order is made:

- 16.1 The review application is dismissed with costs.

BALOYI AJ
Acting Judge of the
Labour Court of South Africa

⁴ 1996 5 BLLR 603 IC

Appearances:

For the Applicant: Mr ES Makinta
Instructed by: ES Makinta Attorneys

For the Respondent: Ms D Norton
Instructed by: Mkhabele Huntley Adekeye Inc.

LABOUR COURT