



REPUBLIC OF SOUTH AFRICA

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA, HELD AT PORT
ELIZABETH**

Case no: P 372/12

In the matter between:

**BUFFALO CITY PUBLIC FET
COLLEGE**

First Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Applicant

**COMMISSIONER BONGANI MBALI
N.O**

First Respondent

KHAYA LURWENGU

Second Respondent

Heard: 2 November 2016

Delivered: 4 November 2016

Summary: (Review application – inordinate delay in prosecuting review not condoned)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an application to review an arbitration award in an unfair labour practice dispute. The finalisation of the review application has taken considerable time because of various interlocutory proceedings, but also because of significant delays on the part of the applicant Buffalo City Public FET College ('the college') to prosecute the review expeditiously.
- [2] The third respondent, Mr K Lurwengu ('Lurwengu') had claimed that the failure to appoint him to the post of registrar student support services in 2011 was discriminatory in that the successful candidate had a "biological connection" with one of the senior managers. Prior to his appointment, the applicant had been the HOD of student support services since 2009 and his conduct had been faultless. Before that he had worked as a student support officer.
- [3] Despite having two years managerial experience in the post which was essentially the same as the post he occupied, the successful appointee, Madliki, was given the post without any prior experience. The successful candidate also happened to be the brother of a senior manager, but she was not part of the selection panel and did not work in the Academic Affairs division of the college.
- [4] The college maintained that the applicant did not score as well as the successful candidate in the interview process. Furthermore because the interview process was weighted more heavily than the assessment process Madliki was appointed. However, even on the 70:30 interview-assessment weighting ratio, the total scores of Madliki and Lurwengu were the same at 63 out of a potential 100 points.
- [5] The arbitrator concluded that despite Madliki's sister holding a senior position at the school she had no influence in the recruitment process and that it was the governing body which made the appointment. The crux of the arbitrator's reasoning is contained in paragraphs 28 to 33 his award. In summary, he reasoned that:

- 5.1 The evidence did not support a conclusion that the successful candidate had more managerial experience than the applicant and his managerial experience met the requirements of the post as advertised.
 - 5.2 There was no justification for preferring the successful candidate based on his supposed managerial 'potential' rather than actual managerial experience in a similar environment to the post advertised. Moreover managerial 'potential' was not one of the criteria mentioned in the advertisement.
 - 5.3 The college's only witness Ms C Tyldesley ('Tyldesley') had no direct knowledge of the reasons why the panel did not recommend the applicant as she was not part of it. Further, the panel's reasons were not stated in the recommendations to the governing body.
 - 5.4 The college could not explain why the successful candidate was invited to a meeting with JET education personnel before the interviews were held, which the applicant should have attended as the HOD of Student Services.
 - 5.5 There was no reason to believe that the applicant lacked managerial potential because of the supervisory post he held, nor was there any reason to believe he was not a suitable candidate who did not meet the requirements of the job.
- [6] The arbitrator concluded that the college had acted unfairly in not appointing him and ordered that the college must remunerate him at the same post as the post he unsuccessfully applied for.

Grounds of review

- [7] The college argued that the arbitrator reached conclusions which no reasonable arbitrator could reach for the following reasons:
- 7.1 The college contends that the arbitrator misconstrued the evidence of the successful candidate's managerial experience because he had acted in the post of registrar at the time of the previous registrar's absence on maternity leave and thereafter. Accordingly he had

relevant managerial experience. The third respondent denies that evidence of Madliki working as a registrar had ever been tendered during the arbitration, but it is apparent from Tydesley's evidence that she did say that he had temporarily acted in the place of Mrs Jagus, the previous Registrar of Student Support Services from April until November. Nevertheless, this was never put to Lurwengu during his testimony.

- 7.2 The arbitrator failed to take account of the fact that candidates were excluded due to their lack of managerial experience.
- 7.3 The arbitrator failed to consider that the applicant's witness was the chief personnel officer who was knowledgeable on matters relating to employees when dismissing her evidence on the basis that did not know the reasons for not appointing third respondent.
- 7.4 The arbitrator misconstrued the evidence about the reason for Lurwengu not attending the JET meeting. Only staff were working at the administration centre were invited to attend and this had nothing to do with the distance between the administration area and the area where Lurwengu worked as the arbitrator appeared to think.
- 7.5 The arbitrator incorrectly stated that no evidence was presented that Lurwengu was not the suitable candidate whereas clear evidence was presented that the applicant did not regard his experience as suitable.
- 7.6 The arbitrator could not conclude that Lurwengu was the best candidate based on the evidence presented as the assessment of showed that Lurwengu had a lowest score of either of the successful appointees.
- 7.7 The arbitrator had exceeded his powers in appointing Lurwengu to a post level 5, whereas he could only award him 12 months compensation at most. It was conceded in argument that this ground of review was invalid.

[8] In the applicant's supplementary affidavit it submitted that:

- 8.1 The arbitrator had applied the incorrect test in finding that there was no evidence to convince him that Lurwengu was not a suitable candidate did not meet the requirements of the job, whereas the correct test was that he was required to prove that he is the best candidate for the post.
- 8.2 In similar vein, the arbitrator had incorrectly placed the onus on the applicant to prove why Lurwengu was not successful, whereas that the applicant had committed an unfair labour practice by not appointing him.
- 8.3 Lurwengu had not applied for the Academic Registrar's post but only for the registrar of Student Support Services. Madliki had initially been appointed for the post of Academic Registrar and Ms Warrenberg for Students Service Registrar. They swapped portfolios after the appointments had been made. Lurwengu incorrectly contends that this is evidence that never served before the arbitrator. He also argued that the letter of recommendation recommended Madliki be appointed as Registrar of Student Support Services.

Timeline

- [9] The third respondent contends that the review application should be dismissed as it is deemed to have been withdrawn in terms of the provisions of the Labour Court practice manual owing to the excessive delays in the college's prosecution of the review application. In this regard the timeline of the review application needs to be considered.
- [10] The applicant's review application was launched timeously on 7 September 2012. The third respondent filed a notice of opposition and, somewhat prematurely, an answering affidavit on 23 October 2012. At that stage, the matter was handled by an organisation called Joblaw (Pty Ltd) on behalf of the College, which I can only presume was a labour consultancy of some sort.
- [11] On 31 January 2013, a directive was issued to the applicant to take the necessary steps to compel the CCMA to lodge the record of proceedings.

Despite this directive no steps were taken by the applicant to finalise the record in the ensuing two years.

- [12] On 26th of May 2014 Lurwengu launched an application to have the arbitration award made an order of court. On 7 August 2014 a directive was issued to the effect that the application to make the award an order of court did not comply with clause 14.1.5 of the Labour Court practice manual which came into effect on 2 April 2013, which relates to proof of service of an application.
- [13] On 30 August 2014 a notice of withdrawal as representatives of the applicant was filed by Joblaw. It was claimed in the notice that Joblaw had informed the applicant of the withdrawal “some time ago”.
- [14] The applicant claims that it received ‘the order’ to make the award an order of court on 5 November 2014, though presumably this is a reference to the application as the order was only made on 20 November 2014. The college does not properly explain the circumstances in which Joblaw withdrew as its representative. It claims it withdrew Joblaw’s mandate but given the date of Joblaw’s notice of withdrawal it is unclear why the college was prompted to withdraw its mandate in August but took no steps to oppose the application to make the award an order of court in November.
- [15] In any event, on 20 November 2014 in the absence of any opposition by the college the award was made an order of court.
- [16] On 29 May 2015 the default order in terms of section 158(1)(c) was rescinded. In terms of the judgment it was also noted that the application to make the award an order of court was served and accepted by the applicant on that date.
- [17] It was only on 10 June 2015 that the record was filed and the applicant filed its supplementary affidavits on 21 August 2015 in the review application. No answering affidavit was ever filed by the applicant in opposition to the s 158(1)(c) application to make the award and order of court. On 23 August 2016 the matter was postponed to 2 November 2016.

- [18] The third respondent has filed a further affidavit raising the point that the review application is deemed to have been withdrawn in light of the failure of the applicant to file the record within 60 days of being advised to by the registrar.
- [19] While denying that any such advice had been received from the registrar, the applicant asks condonation for its non-compliance with the practice manual. By way of a somewhat backhanded request for the condonation of its conduct, the applicant says that it terminated the services of Joblaw when it became apparent “they were not properly protecting the interests of the applicant”. It further states that it could do nothing further in the review application until it rescinded the court order on 29 May 2015. This is the sum total of its explanation for the delay in finalizing the review application.
- [20] In terms of clause 11.2.3 of the Labour Court practice manual if a record is not filed within the 60 day period it is deemed to have been withdrawn unless during that time the respondent has consented to an extension of time, or failing which a judge in chambers has flouted such an extension. Clause 11.2.7 of the same manual emphasises urgent nature of review applications and that if an applicant has not finalise the application within 12 months of launching it the application is regarded as lapsed and will be archived unless good cause is shown why it should be removed from the archives. Clause 16.3 makes it clear that the consequence of archiving file is that the matter is treated as dismissed, though in terms of clause 16.2 an application may be made to revive the file.
- [21] In this case, the applicant has not brought an application to revive the review, but in so far as it seeks condonation for its non-compliance this is provided in the slender explanation alluded to above.
- [22] Even if the practice manual was not applicable, the applicant ought to provide an explanation for its inordinate delay. See ***Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others***¹

¹ (2016) 37 ILJ 313 (CC) at 323-330

- [23] I accept that once the court had made the arbitration award an order of court, the applicant could take no further steps to prosecute the review application until it had rescinded that order. However, the award was only made an order of court on 20 November 2014, well over two years after the review application had been launched. Other than to vaguely allude to the supposed inadequacy of Joblaw, the applicant provides absolutely no explanation for its abject failure to do anything further to prosecute the review application. It also provides no explanation why it did not comply with the directive to finalise the record. It is simply insufficient for it to provide a one line explanation for two years of inactivity if it wishes the review application to proceed.
- [24] *Mr Simoyi* , for the applicant, nonetheless urged me to consider the merits of the review application before dismissing it solely on account of the undue delay and the poor explanation therefor. In doing so I will focus on the college's stronger grounds of review.
- [25] Firstly, I accept that it is correct that the arbitrator misconstrued the evidence of Madliki's managerial experience because he did not take account that he had acted in the post of registrar student support services for some months after the previous incumbent left. Accordingly he had relevant managerial experience.
- [26] The arbitrator had also applied the incorrect test in finding that there was no evidence to convince him that Lurwengu was not a suitable candidate did not meet the requirements of the job, whereas the correct test was that he was required to prove that he was the better candidate for the post. I agree that the arbitrator reversed the onus which lay on Lurwengu and replaced it with an onus on the college to prove that he was not a suitable candidate. It is also important to mention that it was not sufficient for Lurwengu to establish merely that he was a suitable candidate for appointment but also that he was better than the others.²

² See *Ndlovu v Commission for Conciliation, Mediation & Arbitration & others* (2000) 21 ILJ 1653 (LC) at 1655-1656:

[11] ... It can never suffice in relation to any such question [in an unfair labour practice dispute over non-appointment to a post] for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle.

- [27] Would it have been irrational of the arbitrator to conclude that Lurwengu was the best candidate based on the evidence presented, if the onus was correctly applied ? *Mr Simoyi* argued that I had to have regard to the supplementary affidavit of the college in which it had stated that the arbitrator had failed to consider that Lurwengu had applied for the post of Registrar: Student Support Services and another candidate, Mrs Warrenberg , was rated as the best candidate for that post . He argued that since Lurwengu did not take issue with this in his answering affidavit, this contention was undisputed.
- [28] However, a review application can only deal with evidence that was before the arbitrator not with evidence presented after the fact on review. The question therefore is whether it was clear from the evidence of the arbitration that Lurwengu would not have been appointed on account of Warrenberg 's assessment. Scrutinising the record shows that it was put to Lurwengu that Warrenberg's total score of 70 was higher than his own of 63 and that they had both applied for the position of registrar student Support Services. The third respondent did not dispute this but questioned whether the assessment could be objective given that Warrenberg came from an academic background and had no experience of managing budgets as he had.
- [29] *Mr Simoyi* contended that since Warrenberg was the better candidate for Registrar: Student Support Services, Lurwengu's case that he should have been appointed was untenable. Shortly after the appointment of Madliki to registrar: academic and Warrenberg to Registrar: Student Support Services, it was decided for operational reasons that they should swap positions. The operational issue concerned the fact that it was considered more appropriate for a male person to be dealing with students in

Obviously a person who is not so qualified cannot complain if they are not appointed.

[12] The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise." (emphasis added)

residences, which the Student Support Services post entailed. What this meant though, was that Madliki was ultimately appointed to the post which Lurwengu had applied for in circumstances where they obtained the same overall score as a result of the assessment and interview process. It is clear from the arbitrator's own queries about this issue during the arbitration that he was concerned about the anomaly that Madliki could end up being appointed to a post on the basis of being the successful candidate for a different post but then appointed to another, whereas his overall rating was the same as Lurwengu who had also applied for that very post. What this plainly raised in the arbitrator's mind was whether it could be fair that Madliki could be appointed to the post which Lurwengu had also applied for by being moved sideways from the academic registrar's post.

- [30] As far as the evidence of Madliki's managerial experience in the post of acting registrar is concerned, this was only raised when Tydesley gave evidence and was never put to Lurwengu during his cross-examination. The arbitrator had also clearly been reluctant to accept the rationalisation of Tydesley as to why Madliki was the better candidate of the two, especially given that she was not even a participant in the assessment process. At the arbitration there was also no minute presented of the panel discussion to validate Tydesley's hearsay testimony as to the value attached by the panel to Madliki's managerial experience.
- [31] Having considered the above, I am not persuaded that the review application would have necessarily have been successful because Warrenberg, who was initially appointed, had a better score than Lurwengu. The issue confronting the arbitrator was that the person who was ultimately appointed to the position of Registrar: Student Support Services very shortly after the conclusion of the selection process was not demonstrably better equipped for the position that he was. The fact that Madliki's appointment to that post occurred on account of 'operational reasons' and not as a result of the interview and assessment process, did not prevent Lurwengu from contending that the failure to appoint him to the post was unfair. On the evidence before the arbitrator, it could not be said that the evidence showed that Madliki was obviously a better

candidate for that post than Lurwengu even if Warrenberg, the initial appointee might have been.

In short, I am not persuaded that the merits on review are compelling enough to make me disregard the college's neglect in prosecuting the review application timeously. It also has failed to even file a full record even at this late stage. In this regard it must be mentioned that despite the elapse in time, the transcript is still incomplete as it completely omitted the evidence of Madliki which is dealt with in the arbitrator's award and was clearly an important factor in reaching his decision. Furthermore, the college failed to file the bundle of documents used in the arbitration.

- [32] In the circumstances, I am satisfied that the applicant has failed to provide good cause why it should be allowed to pursue its review application despite its inordinate delay, its non-compliance with the directive of the court of 13 January 2013, the inadequate explanation for its delay and its failure to file the full record nearly four years after the review was launched.

Order

- [33] The review application is dismissed.
- [34] The arbitration award dated 24 July 2012 issued under case number ECEL 94-12 by the second respondent is made an order of court.
- [35] The applicant must pay the third respondent's costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

Madliki Simoyi instructed by
the State Attorney

THIRD RESPONDENT:

Z Madliki Maseti instructed
by S N Jiba Attorneys