



**IN THE LABOUR COURT OF SOUTH AFRICA,
JOHANNESBURG**

Not Reportable
Case no: JR 2449/16

In the matter between:

TSHEPO GABRIEL MAPONYA

Applicant

and

**NELSON MATSOBANE LEDWABA (cited in his capacity as
Commissioner of the South African Local Government
bargaining Council)**

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Second Respondent

POLOKWANE LOCAL MUNICIPALITY

Third Respondent

Heard: 30 May 2017

Delivered: 25 July 2017

**Summary: Review application-Arbitration records must be made available if
the claim is that a commissioner made an error of facts-
Application dismissed.**

JUDGMENT

MABASO AJ

Introduction and the parties

- [1] An applicant who approaches a court, alleging that a Commissioner committed reviewable irregularity by failing to take into account information properly placed before him, such applicant is expected to provide that court with such information for the determination of the impact of such irregularity. Failure to do so may lead to that court being unable to decide if the alleged defect resulted to an unreasonable outcome, taking into account that the totality of material presented at the arbitration are crucial in such inquiry.
- [2] In preparation for the hearing herein, I noticed that in paragraph 1 of the arbitration award the Commissioner states that the arbitration proceedings proceeded for 6 days. However, there are no transcribed records in the court file¹, only the handwritten notes of the Commissioner were made available. Unfortunately, the notes were illegible.² I then directed the registrar to issue a directive to the parties advising them that they should file typed notes at least three days before the set down date, if they intended to rely on the Commissioner's notes. However, the applicant's legal representative indicated that they did not intend relying on the Commissioner's notes, hence, they were not typed.
- [3] This is an application to review and set aside the arbitration award issued by the first respondent under the second respondent's case number LPD 121303 dated 3 November 2016, and be replaced with an order that the Municipality committed an unfair labour practice in terms of section 186(2)(b) of the Labour Relations Act³, in that the applicant "*is entitled to maximum compensation*",

¹ Paginated index: page 69.

² Records: page 11-50.

³ 66 of 1995, as amended. (the Act)

alternatively that the applicant “*be appointed as if he was in the position of Deputy Chief Financial Officer (the Deputy CFO) in terms of section 158 (1) (a) (iii)*”;⁴ alternatively, refer the matter back to the second respondent for hearing *de novo* before a different Commissioner, and order costs against any party opposing this application.

- [4] The Applicant is Tshepiso Gabriel Maponya (the Applicant), the first respondent is Commissioner Nelson Matsobane Ledwaba (the Commissioner), the second respondent is South African Local Government Bargaining Council (SALGBC), and the third respondent is the Polokwane Local Municipality (the Municipality). The Commissioner and SALGBC took no part in this review application; only the Municipality did oppose it.

Relevant background

- [5] In 2011 the Applicant joined the Municipality as its Manager within Financial Services, Business Unit (the first position), later that year, due to operational requirements, this position was made obsolete. He was then appointed as a Manager in Expenditure (the second position) without changes to his remuneration. Precipitating this change, he was consulted by the Municipality, and was given three choices of positions to choose from; he opted for the second position.
- [6] In terms of the letter that was issued to the Applicant on or about September 2011, he was advised, *inter alia*, that “*You are requested to indicate in writing whether you accept the placement or no, and submit or fax the letter to the attention of HR manager...*”⁵ and the effective date of this amendment to his contract of employment was 1 September 2012 - almost a year later. The Applicant acknowledged receipt of this letter. In the papers, before me, there is no indication that the Applicant presented evidence before the Commissioner to reject this change. Instead, the Applicant asserts that this change took place in September 2012 but, the status, function, and the

⁴ This prayer is wrong in law and taking into account what I have said in paragraph 11.

⁵ Paginated index: page 55.

responsibilities were substandard to those of the first position. The Municipality asserts that both the first and the second positions were similar, and were managerial positions. The Applicant in his replying affidavit states that he *“was forced to choose from the available positions having his position [the first position] being abolished with no other alternative.”*

- [7] In 2013 the Applicant was appointed as an Acting Chief Financial Officer (the Acting CFO) of the Municipality. During his stint, another review of the organizational structure of the Municipality took place, and the Applicant was part of it, and recommendations were made, Whereinto the Applicant recommended to the Municipality that a position of Deputy Chief Financial Officer (Deputy CFO) be created. In the replying affidavit, the Applicant confirms this and in giving reasons behind his recommendation, he says *“The review in 2013 was not considered to be another review but rather an attempt to rectify the mistakes made in 2011. [He] made certain recommendations to assist in the rectification of the errors”*. Without the arbitration records, as this assertion is made in the replying affidavit, I am unable to verify if this was properly placed before the Commissioner. By implications, the Applicant acknowledged that the Municipality declared the first position redundant in 2011, which was his original position, and when he was given an opportunity of being an Acting CFO, he recreated the first position and gave it a different name.
- [8] Subsequent to the recommendations by the Applicant, the Municipality created and advertised the Deputy CFO position. The Applicant was one of the people who applied and interviewed for this post. However, in terms of the scoring sheet of the interview panel, one Ms T Muelelwa, and one Mr Makgata scored 138 and 128 respectively, whereas the Applicant scored 106, meaning the Applicant was not the preferred candidate.
- [9] As Ms Muelelwa was the first preferred candidate, she was offered the post, however, for whatever reason she did not accept it. Then, the second preferred candidate, Mr Makgata, was approached, and he accepted the offer.

- [10] According to the referral submitted to SALGBC, dated 11 December 2013, the dispute arose on 5 November 2013 - more than two years after the Applicant was issued with a letter amending his employment contract with the Municipality, under summary of the facts of the dispute, the Applicant stated that the issue was about being “*demoted from position unfairly and not promoted to applied position*” and under the desired outcome it is written “*reinstatement to original position/promotion to deputy CFO*”.⁶ Clearly this points that the Applicant wanted to be placed in the reinvented position. The Applicant was now challenging his appointment to the second position from the first position, and further saying Mr Makgata should not have been appointed, and that he is the one who should have been appointed to the position that he recreated when he was the Acting CFO.⁷

The arbitration award

- [11] In the arbitration award, which is the subject of this application, the Commissioner under common cause facts recorded, *inter alia*, that the Applicant was no longer an employee of the Municipality as he was dismissed on 30 April 2015 and the dispute of dismissal was declared and subsequently dismissed, meaning the recourse of reinstatement was now not apposite.
- [12] The Commissioner further records that the Municipality had said the issue of the alleged demotion, which took place in 2011, was not properly before him as there was no condonation application thereof. The Commissioner dismissed this *point in limine*. As there is no counter review in that respect, I cannot decide as to whether he was right or wrong.

None appointment issue

- [13] It is clear that the Commissioner was presented with the ratings of the interviews which recorded that Mr Makgatla scored more than the Applicant during the interview, and was the second preferred candidate for the position

⁶ Paginated index: pages 52 and 53.

of Deputy CFO. According to the Commissioner, the Applicant had no chance of being appointed to this position, as he did not impress the interview panel, in reaching this conclusion the Commissioner states that,

*“The applicant did not dispute the fact that such position was newly created hence it was openly contested after it was advertised. The applicant further did not dispute the respondent’s submission that on his erstwhile position there were no managers reporting directly to him. He further did not challenge the fact that the current of organogram has about four managers reporting directly to the deputy CFO.”*⁸

Demotion issue

- [14] The Commissioner under issues in dispute stated, *inter alia*, that the Applicant’s concern was about the reduction of his duties and responsibilities and alleged that this negatively affected his dignity. In conclusion, he made, *inter alia*, the following findings:

“...There wasn’t any kind of evidence tendered in respect of this aspect neither did the applicant refute the fact that both position were at Level 01...”

The Commissioner further concluded that the Applicant voluntarily accepted the second position.

Grounds for review

- [15] The Applicant submitted that the following was correctly placed before the Commissioner: that the first position was declared redundant and the “heads of argument” were presented during the arbitration, dealing with differences regarding the duties and responsibilities of the first position confirms that the Deputy CFO position was created and advertised following his recommendation when he was the Acting CFO. This position was indeed

⁸ Paginated index: Page 19.

created and advertised. Thereafter, he applied, was shortlisted and interviewed. The recommendations by the interview panel opted to recommend to the Municipality, based on their respective performance, for the appointment of Ms Maulelwa and/or Mr Makgata into the position of Deputy CFO. There were several similarities between these positions.

[16] After setting out the above, the Applicant proceeds to submit that “*the arbitration award is wrong in fact and in law, and irregularly arrived at and cannot be justifiable, on an objective basis and that in fact and law.*” Further that, is one that a reasonable decision maker could not have arrived at based on the circumstances,⁹ in that,

16.1 he failed to take into account several differences between the first and the second positions, that the position of Deputy CFO was created and it has similarities with the first position. In all of this, the Applicant refers to the “heads of argument” that were submitted to the Commissioner.¹⁰

16.2 that he failed to take into consideration the report from the director-cooperate and shared services to the creation of the Deputy CFO position.

16.3 that he failed to apply his mind to the facts in that demotion properly does not only require the financial loss of benefit, et cetera.

16.4 that he was suitably qualified for the Deputy CFO position as he acted to this position before without “compensation”.

Applicable principles and application thereof

[17] Do I have a benefit of “all the material evidence” that was before the Commissioner? If the answer to this is ‘no’, the next question would be how will I decide the reasonableness of the award. It is trite that an applicant in a

⁹ Paginated index (supporting affidavit): page 10, at para 6.4.

¹⁰ Paginated index(supporting affidavit): page 10, at para 7.2, page 11, at paras 7.6, 7.7.

review application, motion proceedings, has to make out his case in the papers. The rules of this Court allow a party to deliver a founding affidavit and a supplementary affidavit after receiving the records if he wishes to do so. That is when an applicant may make out his *prima facie* case.

- [18] In a review application, an applicant has to present a case which would show that there is an irregularity on the part of the Commissioner and such irregularity has prevented him from having a fair trial of issues. Not all irregularities will amount to the setting aside of an award.¹¹ The Supreme Court of Appeal in the matter of *Heroldt v Nedbank Ltd*¹² held that,

*“A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(a)(ii), ...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 their effect is to render the outcome unreasonable.”*¹³(Own emphasis)

¹¹ Mckenzie v Basha 1951 (3) SA 783 (N), at 786H: Such a total want of judicial capacity would surely amount to misconduct. It is true that this Court in *Young's Estate v. Estate Young*, 1917 N.P.D. 244 at p. 254, applied to the report of a referee appointed by the Court under Part III of Act 24 of 1898 **the test of whether the conclusions were such as a reasonable man could not properly arrive at, and the same test was applied** in *Chaffer and Tassie v. Richards*, 26 N.L.R. 207. But sec. 25 of the Act provides that the report of a special referee or arbitrator appointed by the Court shall be equivalent to the verdict of a jury, and there is no such provision in regard to ordinary submissions by agreement such as the submission in this case. The tests applicable to the verdict of a jury thus apply only to the reports of referees and arbitrators appointed by the Court under Part III of the Act and not to awards coming under Part II. **A party attacking an award of the latter sort, such as the award in the present case, will have to prove, not only that there is no evidence to support it and that no reasonable man could properly have made it, but also that the lack of evidence is so glaring that misconduct on the part of the arbitrator ought properly to be inferred therefrom.** (Own emphasis)

¹² [2013] 11 BLLR 1074 (SCA) at para 25.

¹³ Id, para 12, See also *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC), at para 103 where it was held that “...Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to **all the evidence** that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.(Own emphasis)

- [19] The reviewing court has to remind itself to look at what was before the Commissioner to determine as to whether an alleged irregularity has led to the award to be one that a reasonable decision-maker could not have made. Even if the reviewing court does not agree with the Commissioner's conclusion, it cannot willy-nilly set it aside. I am aware that the test for review is unlike an appeal, that sometimes an award may be reviewed if the conclusion is either entirely disconnected with the evidence that was properly presented before the Commissioner or is unsupported by evidence properly presented before the Commissioner and/or is based on speculations.¹⁴ However, I can only be in a position to know about this if all the evidence presented before the Commissioner is before me.
- [20] In this matter the Applicant neither delivered a supplementary affidavit nor records showing how the evidence was tendered in support of the documents that have been submitted herein. The reason for the latter is stated in paragraph 3 above. Under the circumstances only limited to the founding affidavit, the award and the "heads of argument" which the Applicant asserts that they were not taken into account by the Commissioner. Therefore, any dispute of fact herein has to be resolved based on the facts relied upon by the Municipality, together with any facts relied upon by the Applicant which is admitted by the Applicant.¹⁵
- [21] Based on the above, it will not be achievable for me to precisely determine what transpired during the arbitration, and further taking into account the principle in *Heroldt* and *Fidelity Cash Management Services*, which requires that a reviewing court has to take into account the totality of evidence that was presented before the arbitrator, clearly, the applicant should have at least submitted written submissions by the Municipality and when I invited him as to why he did not deliver them his answer was that the Municipality should have submitted same.

¹⁴ *Herhodt* supra, at para 13.

¹⁵ See . *Plascon-Evans Paints Limited v Van Riebeeck Paints (Proprietary Limited)* [1984] ZASCA 51.

- [22] I proceed to look at the limited information that is before me. In the respect of the ground that the Commissioner failed to apply his mind to the facts and the law relating to unfair labour practice in that there were several differences between the positions, the first and second ones , it is evident from there that the positions were similar, and they were all at post level 1 as per Annexure NKR 12 and NKR13 of the founding affidavit. The Municipality and the award dictate so. Therefore without having the benefit of the records to detect how was the evidence presented, if any, or complete argument by both parties presented if the arbitration was dealt with on papers. Under these circumstances, I am inclined to accept the averments of the Municipality which are on par with the Commissioner's findings.
- [23] In respect of the submission by the Applicant that he was demoted, referring to 2011, and that this was done without his consent, I am inclined to accept what the Municipality averred to in that he was requested to choose a position which he would prefer among the three that were offered to him, which he chose the second position. I have also taken into account that the recommendation which the Applicant was part of, confirms that back in 2011 there was a need for restructuring as it says "*the review was done taking into account operational requirements and affordability of the institution.*"
- [24] Therefore, under those circumstances, it is clear that there was a need back in 2011 to move the Applicant to a different position. As I have indicated that there are no records in this matter, I take note that the Commissioner did deal with this aspect, as stated in paragraph 14 above. The Commissioner concluded in this way, after he had indicated the concern of the Applicant relating to the duties and responsibilities. Based on that, I am of the view that the Commissioner did apply his mind to the facts before him. This ground of review fails.

[26] The ground that the Commissioner committed an error of law in respect of the understanding of the definition of “unfair demotion,” it is evident in the award that the Commissioner understood this definition. Firstly before it could be said that an act is unfair therein, the first question had to be determined was whether any act of demotion took place. If the answer to the latter was ‘no’, therefore the determination of unfairness was to be absurd. The Commissioner ruled that there was no demotion, by this it ended the inquiry. This ground of review also fails.

[27] As to whether the Commissioner failed to take into account the job descriptions of the first position and Deputy CFO, and that the Applicant was suitably qualified, as he had acted previously in that position. The Commissioner ruled that such position was newly created, advertised and the applicant had his opportunity to impress the interview panel and was interviewed, but he failed to impress them, therefore, under these circumstances, the referral was justifiably dismissed. Again, this ground has no merits.

[28] Therefore, I conclude that the Applicant’s review application should be dismissed. I see no reason why costs should not follow the results, as both parties during argument emphatically asked for it.

[29] Under the circumstances, the following order is made:

Order

1. The review application is dismissed.
2. The application in terms of section 158(a)(iii) of the Labour Relations Act 66 of 1995 is dismissed.
3. The applicant to pay the costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Higgs

Instructed by: Higgs attorneys.

For the Respondents: Advocate Mushet

Instructed by: Lebea & Associates

LABOUR COURT