



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 86/15

In the matter between:

MOGALE CITY LOCAL MUNICIPALITY

First Applicant

and

IMATU OBO HENIE VISAGIE

First Respondent

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

COMMISSIONER M.N.S. DAWSON N.O.

Third Respondent

EDWARD KHOLISILE MOYIKWA

Fourth Respondent

Heard: 13 September 2017

Delivered: 20 November 2017

JUDGMENT

MAHOSI J

Introduction

[1] This is an application in terms of section 158(1)(g) of the Labour Relations Act (LRA)¹ for an order that the arbitration award dated 25th of November 2015, handed down by the second respondent acting under the auspices of the third respondent, under case number GPD 041413 be reviewed set aside and/or substituted by this Honourable Court, and/or referred back to another commissioner of the second respondent other than the third respondent. In his award, the commissioner found as follows:

- '1. The respondent is found to have committed an unfair practice by not short-listing and subjecting the applicants to an interview.
2. The 1st respondent is hereby ordered to subject the applicant to protective promotion with effect from 1st April 2014.
3. The first respondent be and is hereby ordered to pay the costs of this arbitration.'

[2] Before this Court is also the application for an order to stay the enforcement of the arbitration award.

Background

[3] The material facts giving rise to the application are summarised thus. In January 2014 the applicant advertised the position of Superintendent: Waste Water Treatment for the appointee to be deployed at Percy Steward and Magalisberg Plant. The first respondent's member (Mr. Visagie") allegedly applied for the position, but did not make it to the shortlist. The applicant shortlisted, interviewed and appointed the fourth respondent to the position. Mr. Visagie had been successfully interviewed for the same position in 2012. However, the SAMWU objected to his appointment and as a result he never occupied that position.

¹ Act 66 of 1995.

- [4] Dissatisfied with the applicant's decision not to shortlist and appoint him, the first respondent ("IMATU"), acting on behalf of Mr Visagie, referred an unfair labour practice dispute to the second respondent. The dispute was conciliated unsuccessfully and the matter proceeded to arbitration. In the arbitration IMATU submitted that the Mar. Visagie applied for the advertised position and that the applicant's decision not to shortlist and interview him amounted to unfair labour practice. IMATU argued that Mr. Visagie had applied for the same position in 2012 and that he should have been appointed to the position, as he was qualified for it. The applicant disputed that Mr. Visagie applied for the advertised position and submitted that he was therefore not entitled to be interviewed, let alone to be appointed.
- [5] The commissioner arbitrated the matter and found that the applicant had committed an unfair labour practice by not short-listing and subjecting the employee to an interview. The applicant was ordered to grant the employee protective promotion with effect from 1st April 2014. The costs of arbitration were ordered against the applicant. Dissatisfied with the award the applicant launched a review application based on the grounds stated hereunder.
- [6] The review application was launched on the 28th January 2015, about 3 days out of the prescribed period. An application for condonation of late filing of the review application was considered and granted by this Court on the 21st February 2017.

The test for review and evaluation

- [7] The decision on the merits of an unfair labour practice disputes stand to be reviewed in the light of whether they were decisions that no reasonable arbitrator could reach and the grounds listed in section 145(2). The test for review which has been authoritatively stated in *Sidumo and Another v*

*Rustenburg Platinum Mines Ltd and Others (Sidumo)*² was reiterated in *Herholdt v Nedbank Limited*(*Herholdt*) as follows:

'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 in one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity as contemplated by s 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 fact, 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.'³

- [8] The test for review is therefore whether the decision reached by the commissioner is one that a reasonable decision-maker could reach. Section 186(2)(a) defines unfair labour practice as any act or omission that arises between an employer and an employee involving an unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee. It is trite that a promotion for the purposes of section 186(2)(a) involves a move by an existing employee to a higher rank or position which carries greater status, responsibility and authority.⁴
- [9] An employee may challenge his/her failure to be promoted with reference to the procedure adopted in appointing the successful candidate and the reasons for failing to promote him/her. In this case, at arbitration IMATU challenged the applicant's decision not to promote Mr. Visagie on the basis that he was not shortlisted and interviewed for the position he had applied for and further that he previously was recommended to be appointed for the same position in 2012. It is common cause that Mr. Visagie was not appointed in that position in 2012 because of an objection from a union. As aforesaid, the commissioner found that the applicant's failure to shortlist and

² (2007) 28 ILJ 2405 (CC).

³ At para 25.

⁴ *Department of Justice v CCMA & Others* [2004] BLLR 297 (LAC) 315

interview the employee amounted to unfair labour practice. It is this finding that the applicant is challenging.

Arbitration

- [10] Mr. Visagie attended the arbitration hearing in which he was represented by Mr. Vuyo Mkhwibisi, an IMATU official. The applicant was represented by its legal advisor, Mr. Enos Phidezulina. After correctly classifying the dispute as an unfair labour practice, the commissioner found that the onus to prove that the conduct was not unfair rests on the applicant.
- [11] The arbitration award records that the parties called several witnesses and further that a hard cover exercise book was handed in by the applicant as an exhibit of the names of all the candidates who applied for the position. The commissioner heard the evidence and ruled against the applicant.

Grounds of Review

- [12] The applicant seeks to review the commissioner's arbitration award on a number of grounds. I will start with the ground that the commissioner did not properly apply his mind in his consideration of the question of onus to prove the unfair labour practice. In this regard, the applicant argued that the commissioner misconceived the nature of the enquiry and the issues to be decided. The basis for the commissioner's ruling is encapsulated in the following passage of his award:

'I ruled that in view of the fact that the reason why the applicant was neither shortlisted nor interviewed was in the personal knowledge of the respondent (in) that the respondent was in possession of the reasons why the applicant was not shortlisted or interviewed. The onus rests with the respondent and the duty to begin was on the respondent.'

- [13] IMATU submitted that the commissioner's decision that the applicant had the duty to begin was justifiable because: (a) during the initial deliberations at the

arbitration, it became clear that the dispute related to unfairness in the applicant's failure to shortlist, interview and promote the employee and further that all the documents relating to the dispute were in the applicant's possession; (b) the applicant failed to readily make the requested documents available to IMATU; and (c) the applicant's representative did not object to it. IMATU further submitted that despite the commissioner's ruling, the burden to prove unfair labour practice was discharged by IMATU.

- [14] It is trite that the onus to establish existence of a decision that constitutes an unfair labour practice as provided in section 186(2) rests on the applicant.⁵ In *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others*⁶ the Court stated that:

'.... An employee who complains that the employer's decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. This is not one of those cases such as disputes relating to unfair discrimination and disputes relating to freedom of association where if the employee proves the conduct complained of, the legislation then requires the employer to prove that such conduct was fair or lawful and, if he cannot prove that, unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of item 2(1)(b) matters, the Act does not say so because it was not intended to be so.'

- [15] In this case, IMATU had to show that the conduct or decision is one that falls within the definition of unfair labour practice. Firstly, IMATU had to prove that Mr. Visagie applied for the position advertised in 2014, that he has been overlooked for promotion although he possesses qualifications or experience which the successful candidate does not, and that the applicant cannot explain why he was overlooked. If the said conduct or decision is proved, the

⁵ See *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others* (2013) 34 ILJ 1156 (LC) at para 19

⁶ (2004) 25 ILJ 248 (LAC) at para 73

enquiry whether the conduct was unfair can then follow. It is apparent that, in finding that the applicant had the duty to establish that the employee was not subjected to an unfair labour practice, the commissioner committed an error of law. In so doing, he committed a gross irregularity. The question is whether the error is material to an extent of having an effect to render the outcome unreasonable. In *Head of the Department of Education v Mofokeng and Others*⁷ the LAC stated as follows:

'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

- [16] The issue before the commissioner related to whether the applicant's failure to shortlist and subject the employee to an interview amounted to unfair labour practice. The law requires the employee to show the existence of the conduct

⁷ [2015] 1 BLLR 50 (LAC) at para 33

or decision complained of and not the other way round. It follows that Mr. Visagie had to prove that he was not shortlisted for a position that he not only applied for but he also qualified for and further that the applicant's conduct or decision was unfair. If that decision or conduct is not established, that is the end of the matter.

[17] Therefore, the commissioner's ruling that the applicant has a burden of prove is an indication of his failure to understand the provisions of section 186 of the LRA. It is apparent that, by committing such a material error in law, the commissioner misconstrued the nature of the enquiry which led to an unfair arbitration of the issues before him. In so doing, the commissioner committed a reviewable irregularity and the award stands to be set-aside on this ground alone. I will consider the other grounds of review for the sake of completeness.

[18] The other ground of review was that the commissioner's conclusion that the employee applied, and/or qualified for the post in question was not supported by the evidence placed before him. Regarding Mr. Visagie's qualification for the position, the applicant submitted that Mr. Visagie did not satisfy the qualification requirements for the position in question. However, IMATU submitted that this ground is without merit as there was unchallenged evidence that Mr. Visagie had acted in the position in question for a significant period of time, he had been shortlisted and scored the highest at the interview when the position was advertised in 2012. This was, according to the IMATU, evidence to prove that Mr. Visagie qualified for the position. It was not IMATU's submission that a legitimate expectation was created when Mr. Visagie was allowed to act in the same position for a considerable period. Instead, IMATU submitted that Mr. Visagie's performance during the 2012 interview is enough to prove that he qualified for the position in question. IMATU contended that had Mr. Visagie been shortlisted, he would have scored the highest as he had done in 2012. It is common cause that the advertisement stated the following as requirements:⁸

⁸ page 116 of the documentary record

'Grade12. Bachelors Degree/NQF level 6 in Chemistry/ Civil Engineering. 4 years working experience in Wastewater Treatment.'

- [19] The record shows that the fourth respondent's was an African make and that his qualifications were Grade 12, BSC Chemistry and Botany and ND Chemical Engineering.⁹ Mr. Visagie testified on his qualifications and stated as follows¹⁰:

'MR MASHOSHO: What were the requirements?

COMMISSIONER: You see it is a simple thing, do you remember what the individual requirements were or you do not remember?

MR VISAGIE: NQF4, 5, you must know electrical, mechanical, experience, more than six years experience, must know electrical and mechanical, must at least have the NQF qualification.

MR MASHOSHO: Do you have one of those qualifications?

MR VISAGIE: I have got...(indistinct) years experience on the sewage farm, I have got NQF level 2 in that line, I do electrical and mechanical.'

- [20] It is apparent from the above that, although Mr. Visagie had experience did not have the required qualifications for the position. Therefore, IMATU's contention that Mr. Visagie would have scored the highest, had he been shortlisted is baseless. In addition, Mr. Visagie confirmed that SAMWU raised an objection to the recruitment process which led to his non-appointment in 2012.¹¹ Nevertheless, the commissioner seem to have taken into consideration the testimony of Mr. Makhaya, a recruitment officer, that in 2008 the Municipal Manager had given a direction that all people who had acted in a position for more than one year should be confirmed as permanent in that position. The commissioner further considered that Mr. Visagie had been recommended for the same post in 2012 and that he had previously acted in the position in question for 10 years. It was for these reasons that the commissioner concluded that the employee qualified for the position.

⁹ page 126 of the documentary record

¹⁰ page 382 to 383 of the transcribed record

¹¹ line 14 of page 288 of the transcribed record

- [21] The commissioner's focus was on what transpired in 2012 as opposed to the qualifications specified in the 2014 advertisement. In doing so, he clearly disregarded the evidence on the qualification requirements as advertised in 2014; Mr. Visagie's academic qualifications and SAMWU's objection leading to his non-appointment in 2012. In *Transnet Rail Engineering v Mienies and Others*¹² the Labour Appeal Court restated the principles of review as outlined in *Herholdt* and said the following:

‘It is important to bear in mind that the conclusion reached must account for all the evidence adduced. No evidence may simply be ignored. ...’

- [22] The commissioner's failure to take into consideration all the evidence that was adduced before him is a gross irregularity, which renders his outcome unreasonable. As such, the commissioner's outcome is not one that a reasonable arbitrator could reach on all the material that was before the him/her.
- [23] On the evidence to prove that Mr. Visagie applied for the position in question, the applicant's submission was that Mr. Visagie's name did not appear in the exercise books that were used by the applicant as registers for the job applications (“the registers”). In this regard, the commissioner rejected the applicant's evidence and stated as follows:

‘The applicant had asked for all the books where the names of applicants were recorded for interviews and several books were brought to the arbitration, neither of the witnesses (were) able to testify to exactly how many books were kept, in fact the way these books were written up leaves a lot to be desired.

The books were in disarray, some of them had pages torn out, approximately 3 books had entries of 2014 some of the books had entries for different years e.g. one book had entries of 2011, 2012, 2013 and 2014 and these were in no particular order.’

- [24] He then found as follows:

¹² [2015] 11 BLLR 1144 (LAC)

'In considering all the evidence before me I am amazed that the security guards who were the people who were to receive the CVs were not called to testify. It was blatantly clear that the respondent did not conduct any investigations relating to these events and from the testimony before me the applicant was a suitable person for this position and it was proven by what happened in 2012 when he had scored the highest and he was recommended for that position.'¹³

[25] The commissioner further found that none of the applicant's witnesses were able to state that they never received the employee's curriculum vitae. It was on the basis of the above considerations that the commissioner concluded that Mr. Visagie had applied for the position in 2014. In reasoning in this manner, the commissioner committed an error of law, which was fundamental to the conclusion he arrived at. He drew an adverse inference against the applicant for not calling the security guards to testify on the receipt of Mr. Visagie's curriculum vitae. In doing so, he placed the onus of disproving an unfair labour practice on the applicant and thereby misconstruing the enquiry before him.

[26] Mr. Visagie testified that he submitted his curriculum vitae and that his name was written in an exercise book similar to the one brought to the arbitration by the applicant. He further testified that he was with his supervisor, Ms. Elize Mare, when he submitted his application to the security guard at the entrance of the applicant's Human Resource section. Ms. Elize Mare testified and corroborated Mr. Visagie's evidence. The commissioner accepted Mr. Visagie's evidence on the basis that it was corroborated. The commissioner was faced with two diametrically opposite versions. The technique generally employed by courts in resolving factual disputes was summarized in *Stellenbosch Farmers' Winery Group Ltd and another v Martel et Cie and others*.¹⁴ In this case, the commissioner made no express credibility findings. However, the reading of the award reveals that the commissioner found Mr. Visagie's version that he applied for the position more probable than that of

¹³ page 6 of the arbitration award

¹⁴ 2003 (1) SA 11 (SCA) at para 5. Also see *NUM v Rustenburg Platinum Mine [2015] 1 BLLR 77 (LAC)* at para 43

the applicant. The question is whether this makes the commissioners' decision reasonable.

- [27] The applicant further challenged the commissioner's award on the ground that the commissioner exceeded his powers in so far as the prerogative to appoint employees rests with the employer and must be preceded by a proper selection procedure, including an interview where it is compulsory. In *Ncane v R Lyster NO*¹⁵ the court outlined an approach to be taken by the arbitrator when arbitrating disputes concerning unfair labour practice as defined in section 186(2)(a) and stated as follows:

‘[25] When it comes to evaluating the suitability of a candidate for promotion, good labour relations expect an employer to act fairly but it also acknowledges that this is not a mechanical process and that there is a justifiable element of subjectivity or discretion involved. It is for this reason that the discretion of an arbitrator to interfere with an employer's substantive decision to promote a certain person is limited and an arbitrator may only interfere where the decision is irrational, grossly unreasonable or *mala fides*. See on this *Goliath v Medscheme* (supra).

- [26] But where an employer provides that certain rules apply as regards the decision to promote or to recommend a candidate for promotion, e.g. as in this case, the candidate who scores the most points must be recommended by the panel, good labour relations requires an employer to be held to this. A failure to comply with the rules may result in substantive unfairness.

- [27] In the case where another person has been promoted to the post then the unsuccessful candidate must show that this is unfair. And as Wallis AJ (as he then was) said in *Ndlovu v Commissioner for Conciliation, Mediation and Arbitration and Others*:

¹⁵ [2017] 4 BLLR 350 (LAC) para 25 and 26

“That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer is rational it seems to me that no question of unfairness arises...” [Footnotes omitted]

[28] In this case, there was no evidence before the commissioner that the applicant's decision was irrational, grossly irregular or *mala fides*. Therefore, it cannot be said that Mr. Visagie should have been promoted against the fourth respondent. As such, the protective promotion is not warranted.

[29] Further ground of review is that the commissioner had no factual or legal basis upon which the ruling ordering the applicant to pay the costs of the arbitration was based. The commissioner issued an order against the applicant on the basis of the reasons that appear from the award as follows:

‘If the 1st respondent had indeed investigated this matter and not just called witnesses as a matter proceeded this matter should not have proceeded to arbitration and consequently the 1st respondent proceeded with reckless disregard of the relationship that should be between the employer and the employee consequently a cost order against them would cause them to always consider that employees should be treated with respect.’

[30] The commissioner's discretion to award of cost orders in arbitration proceedings is regulated by section 138(10) of the LRA, which requires the commissioner to make an order for the payment of costs according to the requirements of law and fairness in accordance with CCMA rules. In ordering the costs, the commissioner should, in terms of Rule 39(1) of the Rules of the CCMA have regard to the following factors:

- (a) The measure of success that the parties achieved;
- (b) Considerations of fairness that weigh in favour of or against granting a cost order;
- (c) any prejudice offers that were made with a view to settling the dispute;
- (d) Whether a party or the person who represented that party in the arbitration proceedings acted in a frivolous and vexatious

manner by proceeding with or defending the dispute in the arbitration proceedings, or in its conduct during the arbitration proceedings;

- (e) The effect that a cost order may have on a continued employment relationship;
- (f) Any agreement concluded between the parties to the arbitration concerning the basis on which costs should be awarded;
- (g) The importance of the issues raised during the arbitration to the parties as well as to the labour community at large;
- h) Any other relevant factor.

[31] The cost orders where parties are represented in the arbitration by a person contemplated by rule 25(1)(a), that is persons other than legal representatives, is regulated by Rule 39(2). These persons may be awarded reasonable disbursements actually incurred in the conduct of its case. A commissioner who makes an award in terms of this provision is required to specify clearly the items and amounts in respect of which costs are ordered. A commissioner may, in terms of Rule 39(3), make an award of costs in respect of the legal fees of a party that is represented in arbitration by a legal practitioner, only if the other parties to the arbitration were represented by a legal practitioner. An award for costs in terms of sub-rule (3) is limited to an amount of R6 000.00 in respect of the first day of an arbitration (including any arbitration concluded in a single hearing) and R4 000.00 in respect of each additional day of arbitration. These amounts are inclusive of VAT.

[32] In this case, there is no indication that the commissioner had regard to the considerations mentioned in Rule 39(1). Instead, the commissioner took into consideration that the applicant failed to investigate the matter without specifying what exactly the applicant was required to investigate and how the applicant recklessly disregarded the existing working relationship. In addition, the commissioner failed to clearly specify the items and amounts in respect of which costs are ordered as required in terms of Rule 39(2). As such, it cannot be said that the commissioner applied the requirement of law and fairness in arriving at a finding that the applicant must pay the costs of the arbitration.

- [33] The applicant's further ground of review was that the commissioner was biased in that he unnecessarily argued with, criticised and intimidated the applicant's witnesses and their representative and further refused to grant postponement on the ground that the applicant's representative was hospitalized. IMATU submitted that the commissioner's participation during the arbitration demonstrated that he was alert to the evidence that was presented before him. Further that there were no complaints from the applicant's representative regarding intimidation of witnesses and that the witnesses themselves were more than willing to engage with the commissioner.
- [34] There is nothing in the transcript of the arbitration to show that there was any undue interference by the commissioner in the arbitration proceedings and with the testimony of witnesses. Moreover, the applicant's supplementary affidavit does not provide specific examples of this contention as contemplated by Rule 7A(8). Therefore, there is nothing that becomes apparent from the transcript of the proceedings which could remotely convince me that the first respondent conducted himself in a manner that could be seen to be biased. On the question of the commissioner's refusal to grant postponement, it is trite that granting of postponement is an indulgence which involves the exercise of a discretion on the part of the commissioner. Its refusal is reviewable if the discretion was not judicially exercised. I can therefore find no irregularity that exists insofar as it relates to this ground of review .
- [35] In light of the above, I am of the view that the employer succeeded in making out a case that the commissioner's decision was unreasonable and that he committed a gross irregularity in misconstruing the nature of the enquiry before him, disregarding material evidence and committing material error in law. I do not deem it wise to remit the dispute to the CCMA for fresh arbitration. I will determine the dispute in terms of section 145(4)(a) of the LRA. It is apparent that Mr. Visagie failed to establish existence of a decision that constitutes an unfair labour practice. In light of the decision in *Department*

of Justice v Commission for Conciliation, Mediation and Arbitration and Others, the enquiry into whether the conduct was unfair does not follow.

[36] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

Order

[37] In the premise, I make the following order

- a) The arbitration award is reviewed and set aside and substituted with the following order.
 - (i) The second respondent's claim for unfair labour practice is dismissed.
- b) No order as to cost.

Mahosi J
Judge of the Labour Court

Appearances:

For the Applicant: Adv. H.W Sibuyi

Instructed by Phungo Inc

For the Respondent: Mr V.G Mkwibiso (Union Official)

IMATU

LABOUR COURT