



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: JR 1115/15

In the matter between:

TEDDY KOMMAL

First Applicant

POPCRU

Second Applicant

and

SOUTH AFRICAN POLICE SERVICE

First Respondent

BRIGADIER C M KOTZE

Second Respondent

ADV E MAREE (NO)

Third Respondent

SAFETY AND SECURITY

Fourth Respondent

BARGAINING COUNCIL

Heard: 12 July 2016

Delivered: 05 December 2017

Summary: (Review – unfair labour practice – promotion – internal candidate successful – findings not unreasonable)

JUDGMENT

LAGRANGE J

Background

- [1] The applicant in this matter has applied to review an arbitration award which found that the failure to appoint him to the post of Commander: SAPS Academy Paarl: Division: Human Resource Development at the level of Brigadier was not an unfair labour practice. At the time he applied for the position during May 2011 he was a Colonel in the Human Resource Development Division. He was shortlisted for the post and obtained a score of 68.7% which placed him second out of seven shortlisted candidates. The successful candidate is the second respondent, Brigadier Kotze ('Kotze') a white female, who scored 75.1 % in the interview. The applicant is an Indian male.
- [2] The late filing of this application was previously condoned.

The arbitration award

- [3] The arbitrator wrote a very lengthy award in which he comprehensively summarised the essential evidence of the parties.
- [4] In essence, the thrust of the evidence led by the applicant at the arbitration was that:
- 4.1 The second respondent's academic qualifications did not include a qualification in a management course and accordingly she did not qualify for the post.
 - 4.2 A member of the selection panel, General V A Nyalunga ('Nyalunga'), convened a meeting to which the second respondent was invited because "she needed to know what was happening at head office". Nyalunga invited her to the meeting despite the fact that he knew she had applied for the promotion and that he was a member of the selection panel.
 - 4.3 The short list of eight candidates was compiled out of 51 applications and was reduced to the final number in the meeting which lasted less than an hour, which the applicant claims could never have been a rational selection in that time.
 - 4.4 The selection panel was not impartial.

- 4.5 In terms of the National Instruction governing the appointment to levels 13 and 14, the procedure is supposed to be based on the principles of open competition, competency, objectivity and fairness and aimed at creating a broadly representative workforce taking into account the race gender and disability composition of the South African population. In this regard there were no Indian males at the level of Brig in the HRD division, whereas the panel misleadingly represented to the national Commissioner that there were two Indian Brigadiers in the section and white males were overrepresented. In addition after the second respondent was appointed there were two white females at that level but no Indian males where there should at least have been one.
- 4.6 There was no motivation submitted by the HRD for the appointment as required.
- 4.7 The letter of motivation submitted by the chairperson of the selection panel requesting deviation from the employment equity targets of the division was misleading in a number of respects.
- 4.8 Nyalunga, as Kotze's line commander had a vested interest in the matter and was named as a referee by Kotze in her application, but he did not declare the interest or recuse himself from the selection panel.
- 4.9 The panel favoured Kotze because she lived in Paarl and the questions of the panel were specifically about the Academy which favoured her because of her inside knowledge.
- 4.10 On the basis of equity considerations the applicant should have received more favourable consideration than Kotze.

[5] The thrust of the evidence led by the SAPS was to the effect that:

- 5.1 Nyalunga's membership of the selection panel was by appointment of the National Commissioner and it was not unusual for a member of the selection panel to consider applications by subordinates. Moreover it was important that members of the panel had a

knowledge of the duties the post would entail and the environment of the post.

5.2 The three-person selection panel scored the applicants against three different sets of criteria namely:

5.2.1 Part A – qualifications, prior learning and relevant experience.

5.2.2 Part B- After writing a draft test, a written appreciation and psychometric tests on day one of the selection process, candidates were required to make a presentation on a scenario with their solution and also participate in a role-play involving crisis management.

5.2.3 Part C -the last part of the assessment consisted on overall performance of a candid during the exercises taking into account how they demonstrated in the practical exercise their ability to apply their skills, experience and qualifications. The two candidates were assessed in this part with reference to two criteria, namely knowledge and skills and managerial ability.

5.3 The respective overall scores of the panellists of the applicant and Nyalunga, were 68,7 % and 75.1 % respectively. They can be broken down further thus :

Respective scores by each selection panellist of the applicant and Nyalunga						
Part A: 1. Relevant Qualifications; 2. Prior learning and development; 3. Relevant Experience						
Item	Applicant			Kotze		
	Nyalunga	Nomoyi	Mbekela	Nyalunga	Nomoyi	Mbekela

1.	9	9	9	7	7	7
2.	8	8	8	8	8	8
3.	8	8	8	8	8	8
Subtotal	25	25	25	23	23	23
Part B: 4. Draft test; 5 Written appreciation; 6. Presentation; 7. Role play; 8. Crisis Management						
4.	6	6	6	8	8	8
5.	5	5	5	7	7	7
6.	6	6	6	7	8	8
7.	6	6	6	8	8	8
8.	4	6	6	6	8	8
Subtotal	27	29	29	36	39	39
Part C: 9. Knowledge and Skills; 10. Managerial ability.						
9.	6	6	6	7	7	8
10.	6	6	7	7	7	7
Subtotal	12	12	13	14	14	15
Total	202	206	210	220	226	230

5.4 The panel sought to get all races represented in the interviews and the composition of the shortlist reflected that most shortlisted candidates were either black males or females followed by coloured, white and Indian members.

5.5 Apart from the equity considerations, SAPS wanted to transform the academy into a university and were looking for candidates with a strategy to do this by the following year which made performance a consideration. Although Kotze is white, she did satisfy the equity gender criterion. Further she was able to immediately run with the

project and knew people at the academy. Had they followed considerations of equity alone, the panel would have chosen the lowest scoring candidate.

- 5.6 Regarding the applicant's purported Executive Development Learning Programme ('EDLP') qualification, the applicant had not completed the third phase of that qualification which required him to finalise his report.

The arbitrator's reasoning

[6] After noting the principle that a degree of subjectivity can enter the selection process and that a candidate who appears to be better qualified on paper does not necessarily mean that the promotion of another candidate is unfair, the arbitrator identified the central complaint of the applicant as being that he was better qualified and had more experience than the successful candidate and accordingly contended that in the absence of the employer providing satisfactory reason for promoting Kotze, it was reasonable to assume it had acted in bad faith. The arbitrator identified the procedural and substantive complaints of the applicant under the following summary headings:

- 6.1 Procedural Unfairness: (a) the department did not comply with National Instructions; (b) questions asked favoured Kotze; (c) he was unfairly marked down; (d) records were not properly kept; (e) one of the panel members, General Nyalunga ('Nyalunga') was a referee of Kotze and failed to sign a declaration of interest; (f) the letter motivating the appointment of Kotze contained incorrect or false information; (g) the interviewing panel was not impartial and did not reflect the correct equity figures when making its report, and (h) the shortlisting of candidates was capricious.
- 6.2 Substantive fairness: (a) his qualifications were better than Kotze; (b) equity considerations favoured him as an Indian male compared to Kotze as a white female given the racial and gender composition of the department, and (c) he had more experience particularly in management.

- [7] The arbitrator noted that the applicant had conceded that equity was a factor that the panel was entitled to weigh up against service delivery. Further, there had been a motivation submitted because Kotze's promotion would not facilitate obtaining equity objectives. Consequently, the arbitrator concluded that the panel had not ignored equity considerations.
- [8] The arbitrator accepted that because the applicant had a Master's degree he had been given a score of 9/10 by the panel compared to 7/10 for Kotze. The fact that the panel acknowledged his higher qualification demonstrated that the panel had not ignored this factor. As far as the additional training qualification is concerned, the arbitrator accepted that at the time of the advertisement neither he nor Kotze had an EDLP qualification, but that Nyalunga had completed hers by the time of the interviews whereas the applicant still had the last phase of the qualification to complete but he did not advise the panel of this. He also conceded that Kotze had done particularly well in all three phases of the EDLP achieving the accolade of "Overall Best Achiever" and that he had not amended his third phase research proposal despite being asked to. An issue which arose in relation to the EDLP qualification was that the applicant had stated in his CV that he had completed it which led to him being credited with points for that.
- [9] The applicant's training experience was at the Bishop Lavis Academy, which Nyalunga testified was at a primary level providing basic training and entry level programmes compared to Kotze's experience as Commander at the Paarl Academy, which was at a tertiary level. When it came to the practical tests, the arbitrator accepted that the second respondent performed better in the various exercises such as the draft test, written appreciation, presentation, role-play and crisis management.
- [10] The arbitrator further found that the applicant had conceded that it was not improper of a referee such as Nyalunga to be part of the interview panel. Nyalunga had also not been tested on those issues during cross-examination. The arbitrator accepted that the evidence showed that Nyalunga was suitably qualified to assess the written appreciation

exercise done by the shortlisted candidates. Nyalunga had also testified that it was necessary for panel members to have knowledge of the requirements of the Academy post and he and the chairperson had that knowledge.

- [11] As far as the attendance of Kotze at a meeting, at the request of the Nyalunga, on the same day the psychometric tests were conducted, the arbitrator was satisfied that her attendance at that meeting in no way could have been said to have advantaged her in some way in the selection process.
- [12] On the question of whether the applicant was marked down on the written appreciation, the arbitrator was of the view that the applicant had dealt with the issues in vague and general terms, whereas Kotze had been practical and to the point.
- [13] In support of his contention that the selection of shortlisted candidates had been capricious, the applicant claimed that the number of candidates had been whittled down from 51 to 8 in a meeting that lasted less than an hour, which he contended was impossible. However, the arbitrator noted this was not canvassed with Nyalunga and no other evidence was adduced in support of the argument that the process must have been capricious or impossible.
- [14] In relation to the contention that the motivation letter by the panel in support of Nyalunga's promotion because it required a deviation from equity objectives, the applicant maintained that it was inaccurate because it incorrectly stated equity figures and failed to mention a prior disciplinary infraction of Kotze. However, he had earlier conceded in his evidence that the disciplinary action dated back to 1993 and concerned Kotze's pregnancy, which at the time was not permitted in terms of existing policies and he conceded that it was of no consequence or relevance to the position they had applied for.
- [15] In conclusion, the arbitrator found that the applicant could not show that he had objective qualities such as experience and qualifications which Kotze did not possess and therefore there was no further explanation SAPS had to provide as to why he was unsuccessful. The motivation to promote

Kotze was an acceptable one, despite the fact that it required a deviation from the equity policy, and the applicant was unable to show that the employer had acted in bad faith. Accordingly, the arbitrator concluded that the applicant had failed to show that his non-promotion amounted to an unfair labour practice.

Grounds of review

[16] The applicant's grounds of review in many respects are little different from grounds of appeal. It is important in this regard to stress what is now a well-established test a court must apply when evaluating an arbitrator's award. In ***National Union of Metalworkers of SA on behalf of Motloba v Johnson Controls Automotive SA (Pty) Ltd & others***¹ the LAC reaffirmed the current approach :

"[38] Following the decision of the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* on the review test this court provided further guidance on the test in a number of its decisions. In *Head of Department of Education v Mofokeng & others*, this court provided the following useful exposition on the test which needs to be quoted in extenso:

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* [(2013) 34 ILJ 2795 (SCA)] and this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* [(2014) 35 ILJ 943 (LAC)], have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on

¹ (2017) 38 ILJ 1626 (LAC)

grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. *Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in Herholdt, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.*

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to “defects” as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] *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 enquiry. 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 enquiry, 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 I 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.' (Emphasis added.)"*²

In what follows below only those grounds of review which were pursued when the matter was argued have been considered.

First Ground

- [17] Firstly, the applicants' complains that the arbitrator did not apply her mind to the most fundamental shortcoming in the process of appointing Kotze, namely that Kotze did not have the minimum qualifications for the advertised post. The applicant contends that as Kotze did not have a degree in Management science, she did not meet the "additional requirements" in the advertisement namely "NQF6 in Police Science/Law/Commercial or Management Sciences plus at least 5 years' experience in related Human Resource Development or Training Field". He ridiculed the attempt of Nyalunga to equate Kotze's teaching degree

² At 1638-9.

with a management science degree on the basis that teaching required the management of people.

[18] SAPS argued that the so-called additional requirements were ones that were over and above the generic minimum requirements and that in terms of national instruction for of 2010, members of the selection panel

“... must consider all applications on the basis of-

- a. *The inherent requirements and core functions of the advertised post;*
- b. The ability and potential of the applicant to function in the post;
- c. The status of every applicant has provided for in the Class that Act, 1998 (act no. 55 of 1998), and
- d. The representativity of the relevant division or province that the salary level that is applicable to the post.

Factors that may be considered to inform evaluation of the application according to the above include –

- a. The experience gained in the field of the post and whether the applicant meets the requirements for the post as set out in the advertisement of the post;
- b. *Any relevant qualifications over and above qualifications that of the minimum basic requirements as stated in the advertisement;* and
- c. The health of the applicant, if good health is an inherent requirement for the post.”

(Emphasis added)

SAPS interprets the emphasised portions to mean that in considering applications, the selection panel did not necessarily have to consider qualifications over and above the core functional requirements of the job. In describing the “Minimum requirements” for the post, the following was stated, *inter alia*:

“Applicants must: display competency in the post-specific core functions of the advertised posts; have a minimum period of three (3) years proven appropriate managerial experience; have an Executive Development Learning Program (EDLP) or an applicable NQF 6 qualification or higher qualification, unless otherwise specified....”

It may be debatable whether or not the 'additional requirements' for specific posts were peremptory or not. If they were peremptory, then I tend to agree with the applicant that it seems to be untenable stretch of the ordinary meaning of 'management' to equate a degree in 'management' science with a teaching degree.

- [19] However, even if a degree in Management Science as an 'additional requirement' was a peremptory one, the applicant also has a fundamental difficulty with being considered for appointment because it transpired during the arbitration that he did not have the EDLP qualification at the time he was interviewed. The EDLP qualification undoubtedly was a minimum requirement. Not only had he not obtained it at the time of the interview but he had misleadingly said he had 'successfully completed' it in his CV, whereas Kotze had said she was busy finalising her report and had qualified at a high level by the time she was interviewed. Consequently, assuming the requirement of a Management Science was also peremptory, it would not assist the applicant in obtaining the post because he also did not satisfy a minimum requirement for consideration for the post. As such, even if this ground of review was a sound one, it would not assist him in his quest for relief on account of his own disqualification for consideration.

- [20] Despite this, I will briefly consider the other main grounds of review.

Second ground

- [21] Secondly, the applicant complains that the arbitrator did not deal with SAPS's alleged failure to apply the criteria set out in National Instructions 3 of 2005 and 4 of 2010 and completely ignored this in her award. The real basis for this ground of review is that, SAPS could not provide the record of the assessment done on the candidates and he contended that the failure of the chairperson to maintain the written record of all the proceedings of the selection process contrary to Clause 7(2) (d), constituted an irregularity which undermined the fairness of the process.
- [22] Clearly, the absence of the complete record might be crucial in some instances, but there was sufficient evidence of the scoring of the applicant

and Kotze in the assessment process and other evidence of Nyalunga for the arbitrator to consider the possible procedural irregularity and whether it gave rise to any unfairness. As things stood, Kotze did far much better than Nyalunga in the assessment phase and arguably that would have been one of the most important issues in determining the most suitable candidate. Be that as it may, in absence of a reason to believe the results of the assessment were manipulated, the mere absence of the entire record of the selection process, does not necessarily raise an inference of procedural unfairness.

Third ground

[23] Thirdly, the applicant contends that SAPS was obliged to apply equity and representivity and had it done so he would have been appointed. The arbitrator failed to deal with this issue properly.

[24] I am satisfied that there was enough evidence before the arbitrator to the effect that if equity targets had been applied rigidly, the applicant would not necessarily have benefitted from that. Moreover, I agree that this type of attack can only have a prospect of succeeding if the applicant had based his claim on unfair discrimination in the first place. In this regard, see ***Dudley v City of Cape Town***³, where the LAC decided that the enforcement of employment equity policies had to first be dealt with under the provisions of chapter V of the Employment Equity Act, 55 of 1998. In this instance, if the applicant wanted to argue in addition that his non-appointment was unfair discrimination he did not seek to challenge it on that basis and neither the arbitrator could deal with that under his unfair labour practice claim, nor can it be introduced indirectly as an issue on review.

Fourth ground

[25] The arbitrator failed to consider any of the evidence indicating that Kotze appear to be the favoured candidate and that the panel was going to

³ (2008) 29 ILJ 2685 (LAC) at 2708A-B

appoint her irrespective of her shortcomings in her qualifications and despite the existence of more suitable candidates.

[26] It is not correct that the arbitrator did not consider the evidence the applicant wished to rely on to support his contention that the process was pre-determined. Thus the arbitrator carefully evaluate the evidence of Colonel Ramlall and the fact that Kotze had been working at the Paarl Academy already as well as the allegation that it was improper of Nyalunga to sit on the panel.

[27] It is understandable the applicant may have felt that Kotze was favoured for the position, but that is often the case where a person has been working in the institution where the appointment will be made and is well known to those who are best placed to consider the suitability of candidates for appointment. This will be even more so where the person in question already acted in the post. That fact alone also gives rise in many instances to an expectation that they ought to get it and when they do not they are the ones claiming they were unfairly overlooked. It is also not insignificant that the post under consideration was a very unique one, being an appointment to manage an academy serving the training needs of senior members of SAPS. It is not unreasonable to think that the candidate with working knowledge of that academy would unavoidably have a natural advantage over candidates applying from outside the institution. Similarly, questions dictated by the requirements of the post, may understandably be more easily addressed by someone with inside knowledge of the institution than a candidate without that advantage. However, it would be wrong to deem any such advantages unfair, without demonstrable evidence of specific assistance being given to an 'insider to try and ensure they succeed.

Conclusion

[28] In light of the reasoning above, I am not satisfied that the conclusion the arbitrator came to was one no reasonable arbitrator could have reached on the evidence before her, and accordingly the review application must fail

Order

- [1] The review application is dismissed.
- [2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

B Edwards instructed by
Makgahlela Mashaba
Attorneys

RESPONDENT:

S B Nhlapho instructed by
the State Attorney,
Johannesburg.