THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2423/15

In the matter between**:**

TELKOM SOUTH AFRICA LIMITED **First Applicant**

GARTH STRACHAN **Second applicant**

and

COMMISSIONER LAURENCE NOWOSENETZ *N.O.* **First Respondent**

TSHEPISO DARRYL MOLEFE **Second Respondent**

JOSIAH ZIMPI MAPHANGA **Third Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Fourth Respondent**

Heard: **14 November 2017**

Delivered: **25 January 2018**

Summary: **Review application – unfair labour practice – the commissioner pegged his findings on an irrelevant issue.**

JUDGMENT

NKUTHA- NKONTWANA. J

Introduction

[1] This is a unique case pertaining to unfair labour practice in terms of section 186(2)(a) of the Labour Relations Act (the LRA).[1] The second and third respondents (Messrs Molefe and Maphanga) successfully challenged the appointment of the first applicant (Mr Strachan) by the first applicant (Telkom) at the arbitration hearing under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA). The first respondent (the commissioner) issued the award dated 17 November 2015 under case number 14736-11 wherein he found as follows:

1.1. Telkom had committed an unfair labour practice against Messrs Molefe and Maphanga by promoting the first applicant (Mr Strachan) to the position of Executive Enterprise Risk Management.

1.2. Telkom was directed to set aside the appointment of Mr Strachan within 30 days from the date it received the award and re-open the procedure for the filling of the position of Executive Enterprise Risk Management within 60 days from the date it received that award.

1.3. Ordering Telkom to pay compensation to Messrs Molefe and Maphanga equivalent to six months' remuneration respectively within 14 days from the date it received the award.

[2] In these proceedings, Telkom seeks an order reviewing and setting aside the award and to substitute it with one dismissing the unfair labour practice claim, alternatively remitting the matter back to the CCMA for a hearing *de novo* before a different commissioner.

[3] The application is opposed by both Messrs Molefe and Maphanga.

Pertinent facts

[4] The facts in this matter are to a large extent common cause. The post of the Executive Enterprise Risk Management (the position) was created in July 2010. The requirements for the position were a four-year degree with a

[1] Act 66 of 1995 as amended.

minimum experience of eight years in the enterprise risk management field, of which three years must be in a management capacity. The post was to be advertised internally and externally.

[5] The post was advertised internally on 22 July 2010. Amongst the shortlisted and interviewed candidates were Messrs Molefe, Maphanga and Strachan. They were all interviewed on 26 August 2010 but no appointment was made. Mr Mvelase, the person who had requested the establishment of the position, was not satisfied with the candidates who, in his view, were too theoretical. Mr Maphanga was the best candidate, scoring 39 points; Mr Strachan was the second best, scoring 38.5 points; and Mr Molefe scored 30 points.

[6] On 25 August 2010, Telkom and KPMG concluded a consultancy agreement (KPMG agreement). Telkom was duly represented by Mr Mvelase who accordingly signed the KPMG agreement and with Mr Strachan signing as a witness. In terms of clause 27 thereof, 'both parties agreed not to make any offer of employment or employ any member of the party's employees during the duration of the agreement'.

[7] On 3 September 2010, Mr Strachan resigned from Telkom to join KPMG. Mr Mvelase testified that he waived the terms of clause 27 of the KPMG agreement. Mr Strachan testified that he did not seek any consent to take up employment with KPMG because he had been informed that clause 27 of KPMG agreement had been waived by both parties.

[8] On 16 September 2010, the position was advertised externally with a closing date of 30 September 2010. Mr Strachan decided otherwise and wanted to return back to Telkom. He enquired from Mr Mvelase whether it would be possible that he be reconsidered for the position since he had withdrawn his internal application and he was late for submitting an external application. A permission had to be sought from the HR department in terms of the Telkom Staffing Policy. Mr Mvelase testified that the approval was sought and granted.

[9] Mr Strachan was accordingly part of the candidates, external and internal, that had been interviewed between November 2010 and 11 January 2011.

Mr Strachan was found to be the best candidate, scoring 59.5; the second best was Mr Leon Govender (Mr Govender), an external candidate, scoring 54; Mr Maphanga came third, scoring 45.5; and Mr Molefe was the lowest, scoring 39.5.

Arbitration Proceedings

[10] The case of Messrs Molefe and Maphanga was two pronged. Firstly, they challenged the fairness of the process that led to the appointment of Mr Strachan. They argued that the open and competitive process was a smokescreen used to hide Mr Mvelase's predetermined motive to appoint Mr Strachan. Secondly, they challenged Mr Strachan's candidacy and argued that he was not eligible for appointment in terms of the KPMG agreement.

[11] In relation to the first challenge, the commissioner found as follows:

11.1. Nothing turned on the external advertisement of the position. Even though Mr Strachan had achieved the second highest score in the internal advertisement, Mr Mvelase could have exercised his discretion at that stage and appointed him but he did not because he found the candidates to be theoretical in their approach.

11.2. No adverse inference could be drawn from the replacement of Mr Naidoo by Mr Moola as a panellist during the second interviews.

11.3. It was not unusual that the questionnaire that was used during the interviews was based on the strategy document that had been prepared by Mr Strachan who was a Senior Manager for the Enterprise Risk Management. The advantage he enjoined consequently was not undue or unfair.

11.4. The delay in finalising the process and notifying unsuccessful candidates was not unfair.

11.5. The lowering of the requirements was within the discretion of management and hence not irregular.

[12] The commissioner, however, was of the view that the process was seriously derailed by Mr Strachan's resignation, recruitment by KPMG, late

submission of his application for the position as an external candidate and his re-employment by Telkom. He stated that:

> 'The purview of this dispute necessarily requires scrutinizing the rationality of the selectin of Mr Strachan and the scope of the enquiry of rationality is not limited to his score but to all the objective factors having bearing on his suitability for appointment. Such factors legitimately include his business integrity and adherence to Telkom's business ethics and legal compliance. In short the equity is whether the appointment of Mr Strachan complied with sound corporate governance.'[2]

[13] Having undertaken the above enquiry, the commissioner concluded that 'there was serious irregularity in the appointment of Mr Strachan solely on the KPMG issue' and that had the issue been dealt with in a 'lawful, ethical and transparent way' the outcome of the award would have been different.[3]

Grounds of review

[14] The main ground of review is that the commissioner failed to discharge his duties as an arbitrator.

[15] In addition, Telkom argued that the commissioner misconceived the nature of the inquiry and rendered an award that is grossly unreasonable.

Review test

[16] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others,*[4] the Labour Appeal Court (the LAC) as per Waglay JP contextualised the review test as postulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[5] and stated that:

> '[14] *Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional

[2] Award page 38 paras 45 and 46.
[3] Award page 37 para 42.
[4] [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 14.
[5] (2007) 28 ILJ 2405 (CC).

standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.'

[17] In *Head of the Department of Education v Mofokeng*,[6] the LAC found as follows:

'[30] The failure by an arbitrator to apply his or her mind to issue which are material to the determination of a case will usually be an irregularity. However, the [SCA] in *Herholdt* … and this court in *Gold Fields* … 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 the setting aside of the award. It must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…

[31] … 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 inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.'

[18] Concisely, as deftly put by Ngcobo J, as he then was, in *Sidumo*:[7]

'[268] Where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing …

[6] [2015] 1 BLLR 50 (LAC); Subsequent to *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA) and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

[7] *Supra* n 5 at para 268, see also *First National Bank – A division of First Bank Ltd v Language and others* (2013) 34 ILJ 3103 (LAC) at para 17.

> the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity … And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity….'

Analysis and findings

[19] It is now a well-established verity that correct approach arbitrators should adopt when dealing with promotion disputes in terms of section186(2)(a) was set out in *Ndlovu v Commission for Conciliation, Mediation and Arbitration and Others,*[8]where it was state that:

> '[11] In my view, the questions which the commissioner asked in the first paragraph of that quotation were wholly justifiable questions in relation to a dispute over a matter of promotion. It can never suffice in relation to any such question 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. 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.'

[20] The correct approach when dealing with the issue of onus in promotion disputes is the one in *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others*,[9] where the LAC stated that:

> '[73] … 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

[8] 2000) 21 ILJ 1653 (LC) at 1655-6.
[9] (2004) 25 ILJ 248 (LAC) at para 73.

> 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.'

[21] In essence, Messrs Melefe and Maphanga had an onus to not only to prove that they are qualified for the position and that, 'but for' the appointment of Mr Strachan, they would have been appointed; but also the prejudice they had suffered.[10]

[22] It will be recalled that the commissioner clearly endorsed the recruitment process and found no irregularity in relation to the re-advertisement of the position and the shortlisting of the candidates other than Mr Strachan. Put differently, according to the commissioner, the process would have been fair if it was not for the candidacy and appointment of Mr Strachan. It must also be highlighted that Mr Strachan met all the inherent requirements of the position. He was only found to be unsuitable not because he was not the best candidate, as found by the interviewing panel, but because his appointment is unlawful, as found by the commissioner.

<u>Was the appointment of Strachan unlawful?</u>

[23] Telkom argued that Mr Strachan's departure to join KPMG was irrelevant to the question that arose regarding his subsequent appointment and the commissioner misdirected himself in finding that it was proof that he lacked integrity, a quality crucial to cooperate governance. The KPMG agreement did not, per se, prohibit Mr Strachan from taking up employment with KPMG, so it was further argued.

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[10] *Ndlovu v Commission for Conciliation, Mediation and Arbitration and Others, supra; unreported* judgment in *Sun International Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (Case No. JR939/2014) 18 November 2016 at para 9.;

[24] Since the KPMG agreement did not create any rights to the third parties and, correspondingly, obligations to the third parties, the commissioner misdirected himself in his finding that the alleged breach thereof offended the right of Messrs Melefe and Maphanga to fair labour practice. It is only the parties to the KPMG agreement who can enforce its terms in the event of a breach. In this instance, both Telkom and KPMG had no qualms with Mr Strachan's movement between the two companies. In fact, it was Mr Mvelase's evidence that he had waived the application of clause 27 of the KPMG agreement. The commissioner rejected this evidence on wrong legal basis. Even if there was no expressed waiver, it could be inferred from the conduct of Telkom and KPMG as they did nothing to enforce the terms of the KPMG agreement. The correct test for waiver or inferred waiver is well articulated in *Atlantic Beach Home Owners Association NPC v City of Cape Town and Another,*[11] the court referred with approval to *Road Accident Fund v Mothupi,*[12]where the test for inferred waiver is stated as follows:

> '[15] Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it… "It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory term…"
>
> [16] The test to determine intention to waive has been said to be objective…That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations…; secondly, that mental reservations, not communicated, are of no legal consequence…; and thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes.

[11] [2016] ZAWCHC 149; [2017] 1 All SA 99 (WCC) at para 62.
[12] [1] 2000 (4) SA 30 (SCA); 2000 [3] All SA 181 (A) at paras 15 to 19.

[17] …

[18] The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to act or speak exists…[19] Because no-one is presumed to waive his rights…the onus is on the party alleging it and, two, clear proof is required of an intention to do so. The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis.'

[25] Frankly, the evidence on record does not disclose any wrongdoing by Mr Strachan. Even if his appointment was, however, unlawful, it would be absurd to hold him responsible for it. Mr Strachan was not a party to the KPMG agreement and could not have been bound by it solely because he had witnessed its conclusion. The KPMG agreement was not in any way a restraint of trade against Mr Strachan.

[26] Another issue that the commissioner failed to deal with is the causal connection between the unfairness complained of and the prejudice allegedly suffered. Telkom correctly argued that Messrs Molefe and Maphanga failed to demonstrate that there was a causal connection between the unfairness complained of and the prejudice allegedly suffered. In *International Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[13] the Court stated that:

'[9] It is important to note that in these type of cases, it is also incumbent on an applicant to show a causal connection between the unfairness complained of and the prejudice suffered. Consequently, it is not sufficient just to show that there was a breach of protocol or procedures in the recruitment process. It is necessary also for the complainant to show that the breach of the procedure unfairly prejudiced him. Accordingly, the question is whether but for the alleged failure to consider internal candidates first, Mogoro would have been appointed.'

[13] Unreported judgment of this Court under Case No. JR939/2014) delivered on 18 November 2016 at para 9.

[27] During the oral submissions, the counsel for Messrs Molefe and Maphanga was constrained to concede that 'but for' the alleged illegal appointment of Mr Strachan it is Mr Govender that would have been appointed as he was the second best candidate. The scoring of each candidate was not in dispute and the commissioner had, in any event, endorsed the re-advertisement of the position and inclusion of extremal candidates.

[28] Also, this case presents a peculiar situation where two candidates sought promotion in relation to a single vacant position with success and were awarded a compensation equivalent six months' remuneration respectively, notwithstanding the fact that both did not qualify for appointment. The commissioner clearly misdirected himself as the second best candidate was Mr Govender. If this approach were to stand, it would mean that all unsuccessful candidates would qualify for compensation even if they are not promotable solely because the appointed candidate is ineligible. This is untenable. Nonetheless, there is no need to delve much on this issue in the light of the findings I have made above.

[29] In short, I agree with Telkom that the KPMG agreement was irrelevant in the enquiry of the alleged unfair labour practice. The commissioner clearly misconstrued that nature of the enquiry and, consequently, the decision that he arrived at is definitely not one that falls within a cluster of reasonable decisions.

<u>Conclusion</u>

[30] In all the circumstances, the commissioner committed an irregularity and the award stands to be set aside.

[31] In the interest of justice and in line with the tenets of this Court one is hesitant to remit this matter back to the CCMA. Having had the benefit of reading the record, pleadings and hearing oral submissions; I am in a position to decide the matter to finality. For all the reasons alluded to above, I am persuaded that Messrs Molefe and Maphanga failed to prove that, by appointing Mr Strachan, Telkom deprived them promotion and accordingly committed an unfair labour practice against them.

<u>Costs</u>

[32] In my view, it is equitable not to award costs against Messrs Molefe and Maphanga, who are individual litigants.

[33] In the premises, I make the following order:

<u>Order</u>

1. The arbitration award under case number GATW14736-11 is reviewed and set aside and replaced with the following order:

   ‘1.1 The applicants failed to prove that the first respondent committed an unfair labour practice in appointing the second respondent to the position of Executive Enterprise Risk Management.

   1.2 The unfair labour practice dispute is dismissed.

   1.3 There is no order as to costs of arbitration proceedings.’

2. There is no order as to costs of suit.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the applicants:	Advocate GI Hulley, SC and Advocate T Manchu
Instructed by:	Mamabolo Phajane Inc.
For the second respondent:	Mr R Makoele from De Beer Makoele Inc
For the third respondent:	Advocate PH Kirsten
Instructed by:	Gideon Van Der Berg Inc.