



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 993/09

In the matter between:

MINISTER OF CORRECTIONAL SERVICES Applicant

and

POPCRU obo K M MATHIBEDI
AND 4 OTHERS First Respondent

P M NGAKO NO Second Respondent

GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL Third Respondent

Heard: 26 July 2011

Delivered: 20 February 2018

JUDGMENT

SELLO, AJ

Introduction

- [1] There are two applications for consideration in this matter. One brought by the applicant for the review and setting aside of the second respondents award in respect of an allegation of unfair labour practice lodged by the first respondent and concerning the applicant's failure to promote five employees represented by the first respondent.
- [2] The second application is brought by the first respondent in terms of section 158 (1)(c) of the Labour Relations Act¹ (LRA).
- [3] This is a matter concerning promotions effected by the applicant which excluded the employees represented by the first respondent who had applied for the respective posts (for convenience I shall refer to them simply as the employees). The promotions were effective from 1 April 2008.
- [4] At the outset, it must be mentioned that the record is in a woeful state and replete with indications that certain words were 'inaudible'. This makes the record impossible to follow and difficult to understand.
- [5] The actual award of the second respondent is not part of the record. His findings are however common cause between the parties

Background Facts

- [6] The background to this matter is as follows.
- [7] During November 2007, the applicant issued a national advertisement for the promotion of employees to level 6 (correctional officer grade II) and salary level 7 (correctional officer grade I). The opportunity was open to correctional officer grade III (level 5) and correctional officer grade II (level 6).
- [8] The advertisement prescribed the minimum requirements for applicants applying to the respective positions. In regard to Grade II, the minimum criteria were a grade 12 qualification; at least 4 years applicable experience; at least three years actual service in the rank of

¹ Act 66 of 1995 as amended.

correctional officer grade III and a performance rating of at least an average of 65% in the year 2006/2007.

- [9] Applicants for Grade I were required to meet the following criteria - a grade 12 qualification, at least 7 years applicable experience; at least three years actual service in the rank of correctional officer grade II and a performance rating of at least an average of 65% in the year 2006/2007.
- [10] Officials who were not in possession of a Standard 10 (grade12) qualification but whose relevant experience exceeded the minimum requirement per grade were also encouraged to apply. Following the publication of the advertisement, guidelines were issued advising of the level of experience applicants are required to have relative to the highest academic qualification obtained in order to qualify. Paragraphs 9.1.1 and 9.1.2 listed the key competencies required for levels 6 and 7 respectively.
- [11] The guidelines addressed other relevant issues relevant to the invitation to apply for the advertised posts. On the question of selection process, paragraph 7.3 provided selection criteria, additional to those listed in paragraph 3.1 of the advertisement, that would apply in the event there were more qualifying officials than available posts. officials were to be considered in terms of the criteria listed in paragraph 3.1. These included area of locality, seniority (number of years on current salary level), performance rating in respect of the year 2006/2007 and passing the prescribed promotional exams/further studies². A total of 19 posts were advertised. It is not clear whether 112 or 119 employees applied for the posts. The record appears to suggest a total of 112, whereas the respondents' answering affidavit states that 119 applications were received by the applicant. This discrepancy is however of no moment, as in either instance the applications far exceeded the available posts.

² NB No order of preference or ranking.

Condonation

- [12] The applicant states that the arbitration award made on 16 February 2010 was received on 25 February 2010. The applicant launched the review application on 4 June 2010.
- [13] Section 145 of the LRA prescribes that a review of an arbitration award must be instituted within six weeks of the date the award was served on the applicant.
- [14] The applicant therefore initiated these proceedings well outside the time limits imposed by section 145.
- [15] No cogent explanation for the delay however was advanced by the applicant. On the applicant's own version, consultation with counsel, which was necessary for the preparation of the application, was held on 12 April 2010. No explanation is put forward as to why the consultation could only be secured eight weeks after receipt of the award. Equally, no explanation was tendered for why it took a further five weeks to draw the papers and file.
- [16] The founding affidavit is not a substantive one. Neither does it raise complex issues to justify a delay of five weeks in its preparation.
- [17] The first respondent however does not challenge the explanation adduced by the applicant for the delay, confining himself only to the question of the applicant's prospects of success.
- [18] The Court has a discretion to condone the late filing on good cause shown. The correct approach to the question of condonation for the late filing was set out in *National Union of Metalworkers of South Africa v Jumbo Products CC*³ wherein the court stated that:

“[I]n adjudicating such applications the Court normally has regard not only to the facts and circumstances relating to the failure to comply with the procedural rules in question and the applicant's explanation therefor,

³ 1996 (4) SA 735 (A).

but also to other relevant factors, such as the degree of non-compliance, the importance of the case, the respondent's interest in the finality of the judgment, the convenience of the Court, the avoidance of unnecessary delay in the administration of justice and the applicant's prospects of success in the main proceedings (see *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362G). In a particular case the Court may be inclined to weigh the degree of non-compliance and the explanation therefor against the prospects of success....)".

[19] Notwithstanding the applicant's lack of cogent reasoning for its failure to comply with the filing provisions of section 145 of the LRA, I have decided to exercise my discretion and condone the late filing of the application. In its affidavit, the applicant had claimed that the delay does not prejudice the first respondents, although no basis was given for this contention. The first respondent did not plead prejudice. Instead as I said, it stated that it does not challenge the reasons advanced for the delay by the applicant.

[20] I am of the view that it is in the interests of both parties that the matter be determined on the merits. In light thereof, I hereby grant the condonation for the late filing of the applicant's review application of the third respondent's award.

The review application

[21] The applicant raises the following grounds of review:

21.1. The conclusion reached by the second respondent is not reasonable given the evidence presented to him. Notwithstanding the selection process set out in paragraph 7.3, the regional office amended those recommendations and utilised the criteria in paragraph 3.1.

21.2. The second respondent misdirected himself in finding that the applicant had to apply the selection criteria set out in paragraph 7.3 in circumstances where the paragraph states that it shall be

applicable where there are more qualifying officials than available posts.

21.3. The employees were outclassed by other candidates on performance criteria. If the employees were rated higher than the successful candidates, paragraph 7.3 would have been of application.

21.4. The second respondent committed a gross irregularity in his finding that the regional office was unfair to interfere with the decision of the selection panel to shortlist candidates in terms of paragraph 7.3. There was no need to apply criteria set out in paragraph 7.3 as all the preferred candidates had been promoted by applying paragraph 3.1 criteria.

[22] The grounds of review advanced by the applicant are without merit. The original advertisement stipulated the criteria applicants must meet in order to qualify. Paragraph 12 of the advertisement specifically stated that further guidelines would be communicated in due course.

[23] The guidelines were subsequently issued. Paragraph 3.1 of these guidelines provides additional criteria and states as follows:

“in addition to the job competency requirements as stipulated in the advertisement, the criteria to be considered for posts advertised in terms of the interim promotion Arrangement Final Phase”.

[24] The only rational interpretation that can be attached to paragraph 3.1 is that it expands the original selection criteria set out in the advertisement. Paragraphs 3.1 and 3.2 of the advertisement prescribed that grade 12 was the minimum educational requirement. Absence of a grade 12 qualification was however not a bar to consideration for the advertised posts. Paragraph 3.3 specifically directed that officials not in possession of a grade 12 qualification but with more relevant experience than the experience specified in paragraphs 3.1 and 3.2 would be considered for appointment.

- [25] The guidelines address specifically the relevant experience required depending on the highest academic qualification achieved. The recognition of level of experience afforded those officials not in possession of a grade 12 qualification to compete on an equal basis with those in possession of such qualification. This created an entitlement for all those who applied and qualified for the relevant position to be considered together with those who possessed a grade 12 qualification.
- [26] Paragraph 7.3 of the guidelines sets out the selection criteria which would be applicable in the event that more qualifying officials than available posts applied for the advertised posts. As it is, at least 112 applications were received.
- [27] The advertisement clearly elicited a significantly higher number of hopefuls than there were available posts. This would have required a two-stage assessment process. Firstly, all the applicants would have to be assessed on the basis of the specified criteria to determine whether they qualified for promotion. If more officials than there were available posts qualified, it would then have become necessary to implement a further process to select those officials to be appointed. In the second stage the selection process set out in paragraph 7.3 of the guidelines would have to be followed.
- [28] There was no other means of objectively and fairly selecting 19 officials to appoint out of 112 without implementing the above process. There is no record of the appointment process on record. It remains unknown how many officials qualified following assessment. It is improbable though that only exactly 19 people qualified for the posts, this obviating a need to resort to the further selection process in terms of paragraph 7.3.
- [29] I am willing to accept that the employees may not have qualified for any of the posts. But that is not the important issue. What is at issue here is

whether the selection process implemented by the applicant accords with the criteria set out in the advertisement and guidelines.

[30] Once the selection criteria have been determined and published, the applicant is bound to effect the promotions strictly in terms thereof, unless it can advance a legally recognized basis for deviation therefrom.

[31] The applicant contends that the Regional Commissioner amended the recommendations of the selection panel on the basis that there was no need to apply the criteria in paragraph 7.3.

[32] The decision of the Regional Commissioner must be adjudged against the selection criteria for promotion prescribed by the advertisement and the guidelines⁴. Absent a full documentary record of the appointment process and results, there is insufficient information to determine whether or not the conduct of the Regional Commissioner accorded with the prescripts of the advertisement and guidelines.

[33] It was not open for the Regional Commissioner to deviate from the prescribed selection process. Such deviation would render invalid the result of the selection process.

[34] The applicant's reliance therefor on the conduct of Regional Commissioner, which conduct constituted a clear deviation from the prescribed selection criteria, is misplaced.

[35] Taking all these factors into account, I am of the view that the basis on which the applicant seeks to review the award of the second respondent is not legally sustainable.

[36] In the circumstances, the following order is made:

Order

1. The application is dismissed with costs.

⁴ See *South Africa Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para 61.

2. The first respondent's application in terms of section 158(1)(c) of the LRA under case number JR1297/10 is granted with costs.

M Sello

Acting Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

For the applicant

Advocate B Matlejoane

Instructed by

The State Attorney

For the first respondent

P W Coetzer

Instructed by

Grosskopf Attorneys

LABOUR COURT