



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2339/15

In the matter between:

THE MINISTER OF POLICE

Applicant

and

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

First Respondent

L C SHANDU N. O

Second Respondent

POPCRU obo K A MAKOLA

Third Respondent

N PILLAY

Fourth Respondent

Heard: 20 March 2018

Delivered: 29 March 2018

Summary: An opposed review application. The applicant contends that the second respondent's findings that it committed an unfair labour practice is not one that a reasonable commissioner can arrive at in the light of the evidence presented. Alternatively, the only prejudice is that of being deprived of an opportunity to compete and the remedy of protected promotion was inappropriate. Held (1) the award is reviewed and set

aside. Held (2) the applicant did not commit an unfair labour practice. Held (3) there is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an opposed application to review and set aside an arbitration award issued by the second respondent on 10 September 2015 in terms of which it was found that the failure to promote the third respondent (Makola) amounted to an unfair labour practice. The applicant was ordered to promote Makola with effect from 1 December 2012. Further, the applicant was ordered to pay the salary difference within 30 days of the award being issued. The applicant was aggrieved and launched the present application.

Background facts

- [2] The onset of the dispute arose when on 20 May 2011, the Divisional Commissioner: Personnel Management, advertised various posts at National level. One of the posts so advertised was that of Section Head: Program Management Office: Division: Technology Management Services (At the level of Brigadier). Makola, who at the time of the advert was a Colonel in the South African Police Services took interest and applied for the post. The closing date for the applications was 06 June 2011.
- [3] It is unclear from the evidence when Makola applied for the post. It is however apparent that Makola applied for two posts. Her interest was on the one mentioned above. On 02 June 2011, the Divisional Commissioner: Personnel Management issued another circular withdrawing some of the positions so advertised and effected some amendments on the additional requirements for the post that Makola and about 83 others applied for. The original additional requirements were

NQF 6 in Police Sciences/Law/Political Sciences/Humanity or Management Sciences plus at least 5 years' experience in related field.

- [4] The amendments to about 11 posts were to the following effect: National Diploma or B.Sc. Degree or B. Tech/Honors in the core functions of the posts and 3 years work and 2 year's managerial experience in IS/ICT related field. The Divisional Head requested all Divisional Commissioners, Components Heads and Deputy National Commissioners to bring the amendment to the attention of all personnel. It is apparent from the evidence that Makola only became aware of the amendments in September 2011 after she approached her immediate Commander, who was to chair the selection panel. She approached the General, when she observed that she was not being invited to an interview. She subsequently lodged a grievance needing to be provided with the reasons why she was not shortlisted. She was not provided those reasons. Upon her investigations, she discovered that her application did not go through the screening process as required by clause 8.5 (a)¹ of the National Instruction 4/2010.
- [5] Aggrieved by her non-shortlisting, Makola referred a dispute alleging an unfair labour practice related to promotion. After unsuccessful conciliation, the dispute was referred for arbitration. The second respondent issued an award favourable to Makola. The applicant in turn was aggrieved and approached this Court for an appropriate relief.

Grounds of Review

- [6] The applicant raised about five grounds for review. In summary, they are (a) excess of power, (b) wrong factual findings effectively tantamount to failure to apply mind, (c) meeting the core functions of the post-excess of power, (d) appointment to the post-relief-excess of power and (e) ignorance of evidence. Above all, the applicant contends that the award is not one that a reasonable commissioner may arrive at.

¹ Indicate on the covering sheet of each application whether or not the candidate has been shortlisted. Yes, or No?

Evaluation

[7] The test for review does not require repetition at every turn. It is trite that only decisions that a reasonable commissioner cannot make are reviewable. In this regard reference is made to *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*².

[8] In terms of section 186 (2) of the Labour Relations Act³ (LRA), an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-(a) unfair conduct by the employer relating to promotion. The dispute before me relates to an alleged unfair conduct by the applicant relating to a promotion. From the record, it is apparent that Makola's complaint was about not being shortlisted. Her complaint was not about the additional requirements brought about by the amendment. At arbitration, she testified thus:

"Then I saw that the withdrawal and the amendment was still giving me more chance to be competent as it was looking for the National Diploma...So a National Diploma and a Degree to me, they are equivalent because it is NQF level 6⁴

[9] The above evidence suggests that Makola did not view the amendment as an unfair act. She was of the view that the amendment does not prejudice her. Her real gripe-alleged unfair act was articulated thus, by her at arbitration:

"So if we have to look into the issue about my background and the findings about how the process was done, then I was sure that I can lodge a grievance because then I see I was unfairly treated, and being unfairly treated, it means I need to be provided with the reasons why I could not make it to the shortlist..."⁵

² [2007] BLLR 1097 (CC)

³ Act 66 of 1995 as amended.

⁴ Page 21 at lines 1-10 Transcript. My own underlining and emphasis.

⁵ Page 21-22 at lines 23-25 and 1-2 of the Transcript.

- [10] It is patently clear that according to Makola, she was supposed to have been shortlisted as she felt she met the requirements for the post. She was never provided with the reasons and she later discovered that in fact her application was not screened. Therefore, the conduct to have been considered on arbitration was the failure to shortlist-depriving her of an opportunity to compete. The central question would then be, whether the applicant acted unfairly by failing to shortlist Makola? It is common cause that she was not shortlisted.
- [11] General Mavundla testified at length at the arbitration as to the reasons why Makola was not shortlisted. Effectively, the reason is that Makola did not meet the minimum requirements. She did not have Information Technology qualifications. She disputed her evidence that she functioned in the space of Information Technology. She had not completed the relevant qualification that would complement the core functions of the post.
- [12] The third respondent's representative conceded, rightly so, that in the SAPS, promotional posts are filled through a recruitment process envisaged in the National Instructions. Therefore, to the extent that when Makola was not shortlisted, the panel was guided by the National Instructions, then the conduct cannot be found to be unfair. In *South African Police Service v Solidarity obo Barnard*⁶, the Constitutional Court had the following to say about the National Instructions:
- “The Instructions sets out the parameters within which a selection panel must work...”⁷
- [13] One of the issues regulated by the Instructions is the issue of minimum requirements. On the unchallenged evidence of Mavundla, Makola did not meet the requirements set out in the amended advert. Her further unchallenged evidence was that the core functions requires higher level

⁶ 2014 (6) SA 123 (CC).

⁷ At para 47.

ICT qualifications, which Makola did not have. The LAC in *Monyakeni v SSSBC and Others*⁸, had the following to say:

“[47] The substantive issue as regards the appellant’s dispute with his employer relates to the issue of his core experience in the field of disability management. The determination of whether the appellant ‘s experience including the recognised experience was such as to make him suitable for promotion is primarily a matter for the employer and the arbitrator was required to defer to this decision when it is taken following a fair and proper process.”⁹

- [14] In the light of the above, the third respondent was in error and actually exceeded her powers when he reasoned thus:

“[55] The employer is yet to explain to this arbitration the relevance of IT in ensuring efficient operation of the section PMO, managing programme and providing program support, managing business plan and budget plan processes, managing promulgation and compliance with policy for Information Technology Management...It is quiet plain that what is required here in the main is the ability to manage processes and ensure compliance with policies as testified by the employee. One can say outright that these functions have nothing to do with an IT qualification and the most relevant qualification will be the one of management as testified to by the employee.”¹⁰

- [15] It is clear from the above that the second respondent wrongly deferred to Makola as opposed to the employer. It is not within the powers of an arbitrator to determine what relevant qualification is and what is not. Such is the task of an employer. It is plain that the second respondent thus ignored or failed to apply mind to the evidence of Mavundla. Amongst others, she testified thus:

“MS MAVUNDLA: The qualifications that these core functions of the post is looking at, it is looking at the SAPS qualification, which is the

⁸ Case JA64/13 delivered on 19 May 2015.

⁹ My own underlining and emphasis

¹⁰ Own emphasis and underlining.

policing, because the policing is the SAPS, the mandate of the SAPS is policing and what the SAPS needs to, what division Technology needs to support the SAPS in is the IT, which is IS/ICT qualification, any of those. If you hear me correctly, I am saying that the core functions of the post are demanded to be performed within the SAPS, is IS/ICT functions within the SAPS, of which the SAPS mandate or the business need..."

- [16] She further testified that Makola did not have the relevant and required qualifications. In addition, she testified thus:

"MS MAVUNDLA: Okay, within the subjects you mentioned, of which Computer Literacy, End-user Operating System, that is basic computing that any other degree will have to do because in any study, they mostly include those, but as I said, the qualification, we looked at the completion of the qualification up to level 3, so if you have gone up to level 3 on your subjects that are related to IT, then yes..."

- [17] It is clear from the evidence of Mavundla that what was required was not a simple management of processes. Failure to apply mind entails ignoring the relevant considerations and considering the irrelevant ones. Clearly, the second respondent was on that path. He placed premium on the amendment of the advert, whilst the alleged unfair conduct related to the failure to shortlist. Makola, on her own version was not prejudiced by the amendment. The fact that the employer shortlisted candidates who did not have NQF level 6 is neither here nor there. It is a red herring. Makola's case was not one of inconsistent application of the entry requirements. Her case properly considered, was that she ought to have been shortlisted because in her mind she met the minimum qualifications.

- [18] Seeking to find the applicable interpretation of clause 4 of the National Instructions was an irrelevant consideration. Makola was simply not prejudiced by the amendment. Being critical of the applicant was not helpful. A simple fact is that the post requirements were IT related qualifications, which, it was common cause that Makola did not possess. It must then follow that a reasonable commissioner faced with the same

evidence could not have come to a conclusion that failure to shortlist Makola constituted an unfair conduct.

[19] The other error, which evinces excess of power and failure to apply mind is the order to promote Makola. It is common cause that Makola was not interviewed and or assessed by the panel. Qualifications and experience only accounted 30% in the assessment for promotion. Makola was not assessed on the remainder of 70%. That being the case, how could it be found that she was promotable nonetheless? It is not the duty of an arbitrator to assess an employee for promotion. The duty of an arbitrator is to assess the fairness or unfairness of the failure to promote and not to assess promotability. Makola's case falls under the leg of being deprived of an opportunity to compete. The appropriate relief, had there been evidence to support unfair conduct in relation to shortlisting, would have been compensation.¹¹

[20] In summary, the second respondent did commit a reviewable irregularity. Also the award does not fall within the bounds of reasonableness. Accordingly, the review application is bound to succeed.

[21] In the results, I make the following order:

Order

1. The award issued by the second respondent is hereby reviewed and set aside. It is replaced with an order that:
 - 1.1 The applicant did not commit an unfair labour practice.
2. There is no order as to costs.

¹¹ See *Ncane v Lyster N.O and Others* [2017] 38 ILJ 907 (LAC) and *South African Police Service v Gebashe and Others* [2015] 36 ILJ 1620 (LC).

GN Moshwana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate FMM Snyman with her Advocate B
Hlangwane

Instructed by: State Attorney, Pretoria

For the third Respondent: Attorney Mohale Magoshi

Instructed by: Majang Inc, Johannesburg.