



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR1197/15

In the matter between:

SAMWU obo W MANAKA

Applicant

and

T.L. MABUSELA N.O.

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second

Respondent

CITY OF TSHWANE METROPOLITAN

MUNICIPALITY

Third

Respondent

Application heard: 21 June 2018

Judgment delivered: 26 June 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the first respondent, to whom I shall refer as 'the arbitrator'. In his award, the arbitrator found that the third respondent had not committed any unfair labour practice relating to promotion. The applicant had referred a dispute to the bargaining council, the second respondent, after he was not shortlisted for the position of director: communication and information services, for which he had applied.
- [2] The factual background is not in dispute. The facts are set out in the award under review, and I do not intend to repeat them here. In essence the applicant testified that he had been employed by the third respondent since 1995. In 2002, he established the communication and information services section. In February 2012, he was asked to lead the communication section which he did for the purposes of completing a specific project, after which he was stationed in Mamelodi. The advertisement concerned appeared in July 2013. The applicant stated that he was not shortlisted despite the fact that he considered himself the most experienced person in the Metro Police in relation to communications.
- [3] The third respondent's witness, the deputy chief of police, testified that one of the requirements for appointment to the advertised position was a minimum of 8 years' experience in policing at a senior management level. The applicant did not meet this criterion and that was the sole reason for him not being shortlisted. The applicant had been appointed in 2012 as a superintendent, which is not a senior management position. While the applicant had 8 years' experience in communications, he did not have 8 years' experience in senior management. Six candidates were shortlisted; the successful candidate met all of the requirements. The witness disputed that the applicant had been acting as a

superintendent from 2002 to 2012, and that he had established the communication and information services section.

- [4] In his award, the arbitrator summarized the law relating to fairness in promotions and recoded that it was for the applicant to establish that the third respondent had acted substantively or procedurally unfairly in relation to the applicant's application for appointment. The arbitrator recorded that the staffing policy applied to the appointment and promotion of staff. He accepted that the applicant had been present at the inception of the communications section, whether it had been started by him or someone else. The issue for determination was whether the respondent had failed to afford the applicant the opportunity to be promoted. In this regard, the arbitrator found that the applicant had responded to an advertisement that stipulated that the applicant should have 8 years senior management experience. The applicant had testified that he had been acting in the post of superintendent for more than 8 years, and thus fulfilled the requirement. The third respondent had denied this, asserting that the applicant had become a superintendent only in 2012, and thus lacked the required experience. The arbitrator concluded as follows:

After analyzing the parties' submissions, I realized that indeed the advertisement needed someone who had *inter alia*, the eight years senior managerial experience. According to my analyses, it cannot be argued that indeed the applicant is the one who established the section or who was the founder member of the section that on itself does not guarantee him an automatic right to be promoted to the position if the advertised requirements are not met. It was held to be unfair for an employer to advertise a position, sitting prescribed minimum qualification, and then appoint a person who did not possess that qualification...

I also went through the successful candidate's profile to enquire as to whether there was any irregularity by the respondent and I'm satisfied that indeed he is someone whose profile is very pleasing and his resume satisfied all of the requirements by the employer. I could not find any element of the respondent's non-compliance with its own policy.

Even though the respondent initially advertised the position and later readvertised to allow the outside candidates to apply, I still could not find any irregularity from the respondent side as clause 9.1 of the staffing policy states that the employer can readvertise if the candidate does not meet the inherent requirements.

I therefore could not find any irregularity in the respondent's action of appointing the person it has appointed

- [5] The arbitrator's finding might have been more clearly expressed, but he appears to accept that the applicant had not established that he had met the requirement of eight years' experience at a senior managerial level. As I have indicated, the arbitrator went on to find that the third respondent had not committed any unfair labour practice in making the appointment it did.
- [6] The applicant contends that the arbitrator's decision that the failure to shortlist him did not constitute an unfair labour practice is not one to which a reasonable commissioner could come in considering the evidence presented before him. The applicant avers that the arbitrator ignored and/or did not apply his mind to the fact that none of the candidates who had applied were shortlisted for the position possessed the appropriate tertiary career related qualifications, and that had the arbitrator taken account of the fact that the applicant possessed such a qualification, he would have come to the finding that the applicant was the most qualified and suitable candidate for the position. Further, the applicant contends that the arbitrator failed to take into account the fact that he (the applicant) had more than eight years' experience in policing at a senior management level which he gained from 2002 until 2012, when he was acting as a senior superintendent. The applicant avers that evidence was presented that he had indeed performed duties at a senior management level for more than eight years and that if the arbitrator applied his mind to this evidence, he would have come to the finding that the third respondent had committed an unfair labour practice in failing to appoint him. In the circumstances, the applicant contends that the arbitrator's award ought to be reviewed and set aside.

- [7] The third respondent, in its terse answering affidavit, disputes that the applicant's experience constituted experience at a senior managerial level and thus that the applicant met the requirements for the advertised position. The third respondent admits that the applicant was appointed as an acting senior superintendent until 2008, when it avers the department stopped all acting positions. During that year, the applicant reported to a senior superintendent. In 2012, the applicant was appointed to the position of superintendent, a junior management position.
- [8] The applicable legal principles are well-established. This court is entitled to interfere with an award made by a commissioner if and only if the commissioner misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)). In other words, the test is two-staged. First, the applicant must establish a misconception of the nature of the enquiry or some misconduct or misdirection on the part of the arbitrator. If that is established, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and on the available evidence.
- [9] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC)), The Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgement). Specifically, the questions for a review court to

ask are whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he was she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with a substantial merits of the dispute and whether the decision is one that another decision maker could reasonably have arrived at based on the evidence (see paragraph 20). In short, when an arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

[10] The simple factual issue that the arbitrator was called on decide was whether the applicant met the advertised requirements for appointment, and in particular, whether he had eight years' experience at a senior managerial level. The applicant was appointed in 2012 as a superintendent, which is not a senior management position. The evidence by Dhlamini is clear – the applicant did not meet the requirement, and that was the sole reason for his exclusion from the short list. To the extent that the applicant relied on what he asserted to be his appointment as an acting senior superintendent between 2002 and 2012, Dhlamini disputed this and testified that the applicant had failed to establish that he had indeed acted in that capacity.

[11] Given the clear issue in dispute, it is remarkable that the applicant did not testify, in his evidence-in-chief, that he had acted as a senior superintended between 2002 and 2012 and that this was experience accrued at a senior managerial level. Before the applicant testified, the issue of proof of meeting the experience requirement was specifically raised with the applicant's representative. The record reveals the following exchange:

ARBITRATOR: from what I understand from the submissions that both made, both of you made, you are maintaining that the main reason why he did not make it, the main one is that he did not have the eight- year relevant experience?

MR BALOYI: as a senior.

ARBITRATOR: as a senior?

Mr BALOYI: Yes, senior management, yes.

ARBITRATOR: is that the main issue?

Mr BALOYI: yes, it is the main issue.

ARBITRATOR: And from your side as far as I understand, Mr Moerane, is that he has those, that particular experience?

MR MOERANE: Ja, he has the 10 years, 10 years' experience

MR BALOYI: As senior, senior management? You can look at the advert of the position, it states clearly that one should have a minimum of eight years applicable experience in policing at senior management level. Eight years applicable experience in policing at a senior management level.

ARBITRATOR: Mr Moerane, did you unpack this element of the minimum eight years at senior level management and make sure that indeed you have evidence to prove that it qualifies or it goes along with every element that is on that particular, on that particular point?

MR MOERANE: Ja. Chairperson, it has, it was taken up, that particular point, that my member established this particular department, it was not there before, so to date he is still working in that section, communication and information services, he established that. He is 10 years in that particular...

ARBITRATOR: Section.

MR MOERANE: Section and he is a senior, he is there one who is helping at the whole council. So the question of him being a police person outside in cameo with seniority, that was not what is required in terms of him. He says the appointment as a Metro police make seem to qualify, a police officer, a traffic officer and those are the issues that were concentrated on and the question of him being a senior somewhere and come to the council, that that was not an issue to be canvassed because we did not want, our union does not represent the police people outside this.

ARBITRATOR: I'm looking at this, I have underlined the policing at senior management level. I need to understand, before we go in deeper, I would need to know exactly what it is that now the evidence that is going to be needed.

Mr MOERANE: My member qualifies to be at the senior management level.

ARBITRATOR: Management, okay.

MR MOERANE Because he established the Department, one. Two, he is the only one to date who has put every mechanism in place.

ARBITRATOR: Okay.

MR MOERANE: That makes him to be a senior.

ARBITRATOR:... I need to understand that, as to whether does he... Remember now, if we say he has eight years senior management experience, then that I think would be easier to say what exactly does the employer mean by senior management level. You will simply just have to prove to say, 'Listen, he has been appointed since 2006 or 2005 in senior management. This is the proof, therefore that element is satisfied'. But if we do not have that, possibly, maybe for me to understand is that he does not have that specific document that says he is at the senior management level, but based on his seniority and his experience in establishing that particular one, two, three, he was supposed to have taken, they were supposed to have taken him into consideration at the time of the appointment. I, that is what I'm trying to establish.

- [12] What is clear from this exchange is that the applicant and his representatives had their own definition of what constituted senior managerial experience – this did not relate to the formal managerial level at which the applicant had been appointed, but rather to his experience and his perception of the level of management at which that experience was related. The arbitrator made it clear that he required some formal form of proof, beyond the applicant's mere assertion, that he met the requirement of experience for a period of at least eight years at a senior management level. That proof was not forthcoming, despite the arbitrator's direction. In contrast, the evidence of Dhlamini was clear – in his

view, the applicant did not have the required experience at the required level, and that his appointment as a superintendent in 2012 was to a junior managerial position. That evidence was not the subject of any serious challenge, certainly not to the point where the only reasonable conclusion to be drawn was that it should be disregarded.

[13] To the extent that the applicant contends in these proceedings that in terms of a collective agreement known as the staffing policy the agreed procedure is to the effect that a candidate must be considered to be suitably qualified for appointment and shortlisting if he or she meets any one or more of certain defined qualifications relating to education, recognition of prior learning, relevant experience and the like, it was never the applicant's case in the arbitration hearing that the third respondent was in breach of this procedure or that the terms of the agreement were the basis on which he sought to assert the right to be shortlisted. It is not open to the applicant at this late stage to contend that that basis for his right to be shortlisted is the terms of the agreement, and any breach of it by the third respondent.

[14] In my view, having regard to the record of proceedings, the applicant failed to establish that he was unfairly excluded from the short list. Further, on the evidence before him, the arbitrator's award is not so unreasonable that no reasonable decision-maker could come to it. The application thus stands to be dismissed.

I make the following order:

1. The application is dismissed.

André van Niekerk

REPRESENTATION

For the applicant: Adv. T Malatji, instructed by Maenetja Attorneys

For the respondent: Not in attendance

Labour Court