



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: PR 206/14

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF EDUCATION, EC PROVINCE

First Applicant

THE HEAD OF THE DEPARTMENT

DEPARTMENT OF EDUCATION, EC PROVINCE

Second Applicant

MINISTER OF BASIC EDUCATION

Third Applicant

and

THE EDUCATION LABOUR RELATIONS

COUNCIL

First Respondent

JOHN CHEERE ROBERTSON N.O.

Second Respondent

SAOU obo MARIUS CRONJE

Third Respondent

ERIKA ESTERHUIZEN

Fourth Respondent

Heard: 23 November 2016

Delivered: 19 January 2018

Summary: The commissioner's decision that the applicant's conduct of changing post requirements during interviews without notice constituted an unfair labour practice against the third respondent who qualified for the post in terms of the advertised requirements falls within bound of reasonableness. It is therefore not reviewable.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent who will be referred to as the arbitrator in this judgment. It is opposed by the third respondent. The application was filed out of time and the applicants sought condonation for the delay. Having considered the condonation application, I am satisfied that the applicants have shown good cause and the delay should therefore be condoned. The third respondent sought condonation for the late filing of the answering affidavit. He showed good cause and his application stands to be granted.

Background

- [2] The factual background to this matter is that the applicants advertised a number of vacancies in 2012. The individual third respondent who will be referred to as the third respondent in this judgment, as well as the fourth respondent applied and were shortlisted for the post of the Head of Department post level 2 for grades 4-7 at Hoër Skool PJ Olivier (the impugned position). They were both interviewed to determine their suitability for the position. The fourth respondent obtained the highest points, the panel recommended her appointment and she was appointed to the impugned position. An appointment to the impugned position would have constituted a promotion to the third respondent. Aggrieved by being overlooked for

promotion, the third respondent referred an unfair labour practice dispute to the first respondent where the arbitrator issued the award under review.

The award

- [3] The arbitrator analysed the evidence before him and found that the composition of the interview panel did not comply with the requirements of the Personnel Administrative Measures (the PAM), it was highly irregular and procedurally defective because the principal of the school played two roles instead of one during the interviews. He represented the Department of Education (the Department) as an observer/resource person and actively participated in the interviews and allocated points to candidates. The arbitrator found that the third respondent was more suited for the post on the basis of the advertised criteria. He further found that the principal added the requirement of Information Technology (IT) as he wanted the school to be a leader in the field of computer-based/assisted learning. It is the added requirement which did not appear in the advertisement that earned the fourth respondent the highest points. The arbitrator found the change of requirements unfair and concluded that the fourth respondent should not have been appointed over the third respondent because she lacked the teaching experience in the required subjects and in coaching rugby but was qualified and proficient in IT. The arbitrator rejected the applicant's argument that the fourth respondent's appointment was influenced by equity on the basis that equity cannot be used to justify a change in the advertised criteria without notice. He found that the applicant's conduct of not appointing the third respondent to the impugned position constituted an unfair labour practice relating to promotion as envisaged in section 186 (2) (a) of the Labour Relations Act¹ (the LRA), both procedurally and substantively. The arbitrator ordered that the third respondent be promoted to the impugned position with effect from 1 January 2013.

¹ Act 66 of 1995.

Grounds for review

- [4] The test for review of arbitration awards issued in terms of the LRA is whether the arbitration award is reasonable. An award becomes unreasonable when the arbitrator misconceives the nature of the enquiry that he/she has to conduct or when the arbitrator reaches a decision which a reasonable decision-maker could not reach on the evidence tendered at arbitration. A determination of the reasonableness of the award is based on the totality of the evidentiary material before the arbitrator. The grounds for review will be assessed against the above-mentioned test. The applicants submitted that the arbitrator committed a gross irregularity by usurping the power of appointing employees. As the fourth respondent had obtained the highest points, the arbitrator had no sound operational or employment equity reasons for deviating from the common practice of appointing the candidate with the highest points. The applicants also submitted that the arbitrator further rendered the award unreasonable by not applying his mind to all the material placed before him and taking into account irrelevant factors.
- [5] In the supplementary affidavit, the applicants substantiated the grounds for review they sought to rely on in the founding affidavit and added some. They submitted that the arbitrator denied them of the opportunity of leading vital evidence of Mr Snyders, the principal of Hoër Skool PJ Olivier (the school). The evidence included reasons for the points that Snyders allocated to the third respondent and the fourth respondent during the interviews. The arbitrator proceeded with the arbitration although he had been informed of the unavailability of Snyders owing to ill health. The third respondent's basis of opposing the application was that the arbitrator dealt with the issue before him, considered evidence and gave reasons for his correct and reasonable decision.
- [6] The applicants' case was mainly that the arbitrator made errors in the conduct of the arbitration which resulted in him reaching an unreasonable decision. It is common cause that the procedure followed by the applicants in appointing the fourth respondent was flawed in that Snyders should not have been an active participant during the interviews. He should therefore not have

allocated points to the candidates. The arbitrator's finding that the procedure followed by the applicants in overlooking the third respondent for promotion was irregular and unfair, was not vitiated. The applicants did not establish that the arbitrator erred in finding that the applicants committed an unfair labour practice by not promoting the third respondent. His finding that the third respondent was the most suited candidate based on the requirements in the advertisement for the post is supported by evidence. The arbitrator's finding that it was unfair to change requirements for the post without prior notice cannot be faulted. The reasons for the rejection of the applicant's reliance on equity are sound as it is impermissible to use employment equity principles to justify unfair conduct. On the evidence before the arbitrator the applicants, through their representative, Snyders, deliberately flouted rules to advantage the fourth respondent at the expense of the third respondent who qualified for the impugned position. The record does not provide a justification for the fourth respondent's appointment. The applicants' conduct was *mala fide*. The arbitrator's decision that such conduct constituted an unfair labour practice is reasonable

- [7] The applicants submitted that the arbitrator exceeded his powers in ordering them to promote the third respondent as the order constituted protective promotion. They relied on the case of *Minister of Defence and Others v Dunn*² where it was held that protective promotion is not provided for in the LRA. It was part of the public service staff code which was repealed before 2002. The applicants further relied on section 193 of the LRA. The third respondent relied on the record as well as the arbitration award in his insistence that the relief granted by the arbitrator is reasonable. Section 193 (4) of the LRA empowers an arbitrator considering an unfair labour practice dispute to determine it on terms the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation. While arbitrators have been given very wide powers when granting relief for unfair labour practices, the LRA has not expressly granted them the power to order promotion. I am of the view, based on principles of interpretation of statutes,

² (2008) 2 All SA 14 (SCA).

that the omission is deliberate. The arbitrator's decision ordering the applicants to promote the third respondent is unreasonable.

[8] An order correcting the arbitration award is one of the orders sought by the applicant^s. For the reasons given above, compensation is the appropriate relief for the unfair labour practice committed by the applicants against the third respondent. The third respondent sought compensation equivalent to 12 months remuneration on the basis that had the applicants not committed to the unfair labour practice, he would have been promoted and enjoyed the benefits which would have come with the promotion for a substantial period as his contract of employment is not of limited duration. The applicant argued that a quarter of what the third respondent sought would constitute appropriate relief. The third respondent's argument is valid. The third respondent suffered the prejudice of being overlooked for promotion unfairly and the applicants must accept that committing an unfair labour practice has consequences. As the applicants provided no cogent reasons for the amount of compensation sought by the third respondent not to be granted, the third respondent's argument has to be accepted.

[9] The applicant sought a costs order against the third respondent for the costs they incurred as a result of the late service of the answering affidavit. The delay was caused by the third respondent's attorney who served the answering affidavit via ordinary mail and not by registered mail. Having considered the submissions on behalf of both parties before me on the question of costs, I am of the view that both the law and fairness require that a costs order not be granted as both parties have been partially successful.

[10] In the premises, the following order is made:

Order:

1. The late filing of the application for review is condoned.
2. The late filing of the answering affidavit is condoned.
3. Paragraphs 36.1, 36.2, and 37 of the arbitration award issued by the second respondent under case number PSES 291-13/13 EC dated 19 March 2014 are reviewed and set aside and substituted with the following:

3.1 The applicants are ordered to pay the third respondent compensation in an amount equivalent to 12 months' remuneration calculated at the third respondent's rate of remuneration on the date of the commission of the unfair labour practice.

4. No order is made as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicants: Advocate Rawjee with Advocate Thys

Instructed by: The State Attorney

For the Third Respondent: Advocate Dyke SC

Instructed by: Leon Keyter Attorneys

LABOUR COURT