

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 369-15

Not Reportable

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY

First Applicant

SAMWU OBO LR MABOSHEGO

Second Applicant

And

SALGBC

First Respondent

M M LEGODI N.O.

Second Respondent

IMATU OBO PIETERSE

Third Respondent

Heard: 22 August 2018

Delivered: 10 May 2019

JUDGMENT

WHITCHER J

- [1] The applicants seek to have reviewed and set aside the arbitration award granted in favour of Mr Pieterse on 12 January 2015 under case number GPD 071311. The arbitrator found that the applicant municipality committed an unfair labour practice when it did not shortlist Mr Pieterse for the post of Operations Officer, and awarded Mr Pieterse protected promotion against that post from the date of the second applicant's appointment to the position.
- [2] The grounds of review are limited to questions of jurisdiction and exceeding powers, namely that Mr Pieterse's matter constituted an unfair discrimination dispute, which the bargaining council lacked jurisdiction to entertain and the arbitrator exceeded her powers in granting him protected promotion.

The facts before the arbitrator

- [3] Mr Pieterse commenced employment with the municipality in 1997. In 1999 he qualified and was appointed as an artisan plumber with an N3 and Trade Test: Plumbing. Over the years, he also secured certificate *courses* with the municipality: a National Certificate: Supervision of Water Reticulation, NQF Level 4 and a National Certificate: Sanitation Project Co-ordination, NQF5.
- [4] Fifteen years later and after repeated acting stints in the post of Operations Officer, he was still in his substantive post, having failed twice to reach the short-list for the post of Operations Officer purely on the basis of demographics.
- [5] In 2013, when he was again not shortlisted for the post, he referred an unfair labour practice dispute to the bargaining council, and his matter came before the second respondent.
- [6] The advertisement for the post stated that the minimum requirements were: N3/Trade Test Plumbing and relevance experience. The advertised core functions included planning and assigning tasks, *quality control* of all works and managerial functions.

- [7] Mr Pieterse's case at the arbitration was simple and a classic unfair labour practice dispute. He led evidence which demonstrated that he more than qualified for the post in terms of its minimum requirements and, at the time of the arbitration, he was still acting in the post, the successful candidate (LR Maboshego), having been sent to another depot for some undisclosed reason. More significantly, the successful candidate did not possess the minimum requirements of the post. According to the successful candidate's job application and the supporting documents, he had neither an N3 or Trade Test: Plumbing. He had only certificates courses, a National Certificate: Supervision of Water Reticulation, NQF Level 4 and a National Certificate: Sanitation Project Co-ordination, NQF5. Mr Pieterse explained that an N3 is a three-year technical college qualification and a pre-requisite for a Trade Test: Plumbing. He further explained that the core functions of the post, as advertised, required plumbing experience. The successful candidates' job application disclosed no plumbing experience.
- [8] In these circumstances, Mr Pieterse submitted, the municipality's failure to short-list him was grossly unfair. More significantly, the municipality's decision to appoint the successful candidate further contravened its own policy in that it failed to adhere to the minimum requirements for the post.
- [9] The municipality, instead of answering Mr Pieterse's allegations (which established a strong prima facie case of an unfair labour practice), sidestepped this issue and sought refuge in a defence based solely on demographics. The municipality's witnesses spent the entire arbitration leading long evidence about its purported equity plan and disproportionate demographics. When pushed during cross-examination to deal with the real dispute, the witnesses took a mendacious approach. Clearly, as an afterthought and in a garbled evasive fashion, they tried to claim that the minimum requirements of N3/Trade Test: Plumbing did not actually mean N3/Trade Test: Plumbing, and that the core functions of the post did not really require plumbing experience, despite the core functions interpreted in light of the minimum requirements clearly contemplated plumbing experience.

- [10] The upshot of their evidence was that they never applied their minds to the minimum requirements and core functions of the post at all. They *only* looked at demographics, and, in the process, failed to appreciate that affirmative action measures are defined as measures designed to ensure that *suitably qualified people* from designated groups are equitably represented in all occupational categories and levels in the workforce of a designated employer.
- [11] The fact that the municipality chose to respond to a real unfair labour practice dispute with a mendacious equity defence did not transform Mr Pieterse's dispute into an unfair discrimination dispute.
- [12] It must follow from all the above that the *outcome* of the award, namely a finding that the applicant committed an unfair labour practice is not liable to be set aside on review. The fact that the arbitrator incorrectly and unnecessarily in the process of reaching such a conclusion forayed into questions about the validity of the equity plan does not detract from reasonableness of such a finding.
- [13] The only ground of review which has merit lies against the arbitrator's decision to award protective promotion. In *KwaDukuza Municipality v SALGBC & Others* (2009) 30 ILJ 356 (LC) the court ruled that so-called protected promotion is merely a disguised form of compensation, which may not be granted in the absence of proof that the employee has suffered an actual loss, and is unlawful if it exceeds the one-year limit on compensation prescribed by the LRA. The award of protected promotion was substituted by an award of compensation equal to 5 months' salary.
- [14] In the present case, while I accept that Mr Pieterse is highly qualified and experienced, and was not granted a fair chance to compete for the post, there is insufficient evidence on record to hold that, but for the municipality's unfair conduct, he would have been promoted. There is no evidence on record about the merits or otherwise of the other candidates who applied for the post. Moreover, in the end, the prerogative to appoint lies with employers, as long as they comply with the basic tenets of fairness, which is, adhere to the

minimum requirements of the post, and, where appropriate, grant suitable candidates a fair opportunity to compete for the post.

- [15] The appropriate remedy at the time of the arbitration was an order directing the applicant to re-do the appointment process from the shortlisting stage, and this still appears to be the most sensible and practical approach considering Mr Pieterse was still acting in the post at the time of the arbitration.

Order

1. The arbitration award that the applicant committed an unfair labour practice against the third respondent (Mr Pieterse) is confirmed on review.
2. The award granting Mr Pieterse protected promotion is reviewed and set aside, and substituted by an award that the applicant must re-do the appointment process from the shortlisting stage.
3. There is no order as to costs.

B Whitcher

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

NA Cassim SC, instructed by Werkmans Attorneys

For the Third Respondent:

Lynette Burns-Coetzee, IMATU