

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 654/17

In the matter between:

TSHEPO ANDREW MALATJI

Applicant

and

CITY OF TSHWANE METROPOLITAN

MUNICIPALITY

First Respondent

SIPHO SEBASTIAN NKOMO

Second Respondent

TSHIKANE OWEN MTSETWENI

Third Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Fourth Respondent

MABHOKO MATHOLE N.O

Fifth Respondent

Heard: 27 August 2019

Delivered: 7 November 2019

JUDGMENT

MAHOSI. J

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award issued by the fifth respondent (the arbitrator) under the auspices of the fourth respondent (SALGBC), under case number PMD 081505, dated 10 January 2017 in terms of which the arbitrator dismissed the applicant's referral.
- [2] The applicant seeks an order substituting the award with a finding that he was unfairly denied a promotion and/or appointment and that the first respondent be ordered to promote him to a position equivalent to Director: Road Policing from 1 May 2013 with all financial benefits. In the alternative, the applicant seeks an order remitting this matter back to the SALGBC to be heard *de novo* by an arbitrator other than the fifth respondent.
- [3] The key question is whether the arbitrator's decision is one that a reasonable decision-maker could not reach.

Background

- [4] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.
- [5] On 8 February 2013, the Municipality advertised various positions within its Metropolitan Police Department thereby inviting interested parties to apply for such positions. The applicant applied for 8 Director positions and one of the positions that he applied for was that of Director: Road Policing (Operational Position). However, the Municipality did not shortlist him.
- [6] Aggrieved by the decision not to shortlist him, the applicant referred an unfair labour practice dispute to the SALGBC for conciliation which was held on 29

¹ Act 66 of 1995 as amended.

November 2013. However, the dispute could not be resolved through conciliation and as a result, the certificate of non-resolution was issued. The matter was then referred for arbitration that was heard from 18 August 2015 and finalized on 25 November 2016.

- [7] The issue that the arbitrator had to decide was whether the Municipality acted unfairly by not promoting the applicant and the third respondent (Mr Mtsetweni), who was the second applicant in the arbitration proceedings. In his award, the arbitrator found that the applicant failed to show that he was entitled to be shortlisted by the Municipality and that such failure amounted to unfair labour practice. The arbitrator further found that the Municipality committed an unfair labour practice against Mr Mtsetweni.
- [8] On the basis of his finding, the arbitrator dismissed the applicant's claim and ordered the Municipality to appoint the third respondent to a position equivalent of a Director: Road Policing from 1 May 2013 with all financial benefits. It is this award that is the subject matter of this application.

Grounds for review

- [9] The applicant contends that the arbitrator committed a number of gross irregularities in the conduct of the proceedings, which resulted in him arriving at the award that a reasonable decision maker would not have arrived. The basis for the applicant's contention is that the arbitrator:
- 9.1 Misconstrued the nature of the dispute and the evidence before him.
 - 9.2 Failed to consider the severity of the non-compliance with the Municipality's own policies and procedures, which rendered the whole recruitment process null and void.
 - 9.3 Exceeded his powers as an arbitrator in appointing Mr Mtseweni in the position in question.
 - 9.4 Made a finding to allow introduction of documentary evidence during cross-examination without giving reasons.

- 9.5 Failed to direct the process properly in respect of cross-examination and re-examination.

The Municipality' submissions

- [10] The Municipality contends that when regard is had to the applicant's founding papers and the record of the attrition proceedings which is sought to be reviewed and set aside, there is no factual and legal basis to conclude that the arbitrator's conclusion is unreasonable and that the arbitrator committed irregularities in the arbitration proceedings to justify the reviewing and setting aside of the award.
- [11] It is the Municipality's further contention that the reason why the applicant was not successful in his application for the position was that he did not satisfy the requirements to be appointed to the position.

The test for review and evaluation

- [12] The test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² is a test for the substantive reasonableness of the outcome or result of an arbitration award, which is an outcome based enquiry³, entailing a stringent test aimed at ensuring that arbitration awards are not lightly interfered with.⁴
- [13] In *Bestel v Astral Operations Ltd and Others*⁵ the Court stated as follows:

'It is important to emphasise, as is exemplified from *Carephone*, and in *Schwartz, supra*, that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'⁶

² [2007] 12 BLLR 1097 (CC).

³ *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2899 (LAC) at 2906H-I.

⁴ *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 100; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at para 13.

⁵ [2011] 2 BLLR 129 (LAC)

⁶ *Id* fn 5 at para 18.

- [14] In the current matter, the applicant is challenging the arbitrator's decision that he failed to show that he was entitled to be shortlisted and that the failure to shortlist him amounted to unfair labour practice. For the applicant to succeed with the review application, it must be established that the arbitrator's decision fell outside the bounds of reasonableness on all the material that was before the arbitrator, including for the reasons not considered by the arbitrator.⁷
- [15] The unfair labour practice is defined in section 186(2)(a) of the LRA as any act or omission that arises between an employer and an employee involving an unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee. It is trite that a promotion for the purposes of section 186(2)(a) involves a move by an existing employee to a higher rank or position that carries greater status, responsibility and authority.⁸
- [16] The *onus* to establish the existence of a decision that constitutes an unfair labour practice as provided in section 186(2) rests on the employee.⁹ An employee may challenge his/her failure to be promoted with reference to the procedure adopted in appointing the successful candidate and the reasons for failing to promote him/her. In the current matter, the applicant challenged the Municipality's decision not to promote him on the basis that he was not shortlisted and interviewed for the position that he had applied for. In *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others*¹⁰ (*Department of Justice*), the Labour Appeal Court (LAC) stated that:
- ... An employee who complains that the employer's decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. This is not one of those cases such as disputes relating to unfair discrimination and disputes

⁷ *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 103.

⁸ *Department of Justice v CCMA and Others* [2004] 4 BLLR 297 (LAC); (2004) 25 ILJ 248 (LAC) at 315.

⁹ See *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others* (2013) 34 ILJ 1156 (LC) at para 19.

¹⁰ (2004) 25 ILJ 248 (LAC) at para 73.

relating to freedom of association where if the employee proves the conduct complained of, the legislation then requires the employer to prove that such conduct was fair or lawful and, if he cannot prove that, unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of item 2(1)(b) matters, the Act does not say so because it was not intended to be so.' [Footnote omitted]

[17] In *Monyakeni v SSSBC and Others*,¹¹ the LAC stated as follows:

'There are two components to a complaint regarding a failure to promote an employee as an unfair labour practice. The one relates to the procedure followed by the employer. The other relates to the substantive merits and it concerns the suitability of the candidate for promotion to the post in question.'

[18] To succeed, the applicant has to establish the existence of a conduct or decision on the part of the Municipality. It is common cause that the applicant applied for the position that was advertised. The question is whether the Municipality's conduct or decision not to shortlist and appoint him is one that falls within the definition of unfair labour practice.

[19] The applicant has to show that he has been overlooked for promotion although he possesses qualifications or experience that the successful candidate does not have and that the Municipality cannot explain why he was overlooked. If the said conduct or decision is proven, the enquiry whether the conduct was unfair can then follow. If it is found that the conduct was fair, that is the end of the matter.

[20] The advertisement required that the applicants satisfy the following requirements (a) possess an appropriate tertiary-related qualification in the relevant field or discipline or equivalent qualification; (b) be appointed as Metro police officer, police officer or traffic officer; (c) have a minimum of eight (8) years applicable experience in policing at senior management level; (d) not have previous criminal convictions (excluding previous convictions relating to political activities in the previous dispensation) and such a person shall allow his/her fingerprints to be

¹¹ ZALAC 17 (19 May 2015) at para 20.

taken, or has been waived by the relevant authority; (e) have advanced computer skills and (f) a valid Code B driver's license.

- [21] The applicant's contention is that the arbitrator misconstrued the nature of the dispute and the evidence before him in that his finding that "*the applicant failed to show that he was entitled to be shortlisted*" was in direct contradiction with paragraph 5.3 of the award, which reads:

'The first applicant argued that he applied for the position, met the requirements but was not shortlisted. The first respondent appointed the second respondent who did not meet the requirements. There was no evidence brought by the respondents to oppose the evidence of the first applicant meaning that it stands to be accepted'

- [22] In opposing, the Municipality contents that the applicant does not have a tertiary-related qualification in policing or any equivalent qualification. The Municipality further contents that, although it employed the applicant in a senior position from May 2005, he still did not have a minimum of eight (8) years applicable experience in policing as required.

- [23] The applicant took issue with the Municipality's submission that he did not meet the minimum requirements on the basis that it was not an argument before the arbitrator. According to the applicant, the Municipality's argument was simply that he did not have a right to be selected for an interview from the pool of candidates who all qualified for the position.

- [24] As aforesaid, the question is whether the arbitrator's decision fell outside the bounds of reasonableness on all the material that was before him, including for the reasons not considered by the arbitrator.¹² It is common cause that the applicant was not shortlisted and interviewed. The next question is whether the Municipality's conduct was unfair.

- [25] In his award, the arbitrator recorded that the applicant "*passed matric, primary teachers diploma, BA degree, traffic diploma and a registered traffic officer.*" To an extent that the applicant does not dispute that which is recorded by the

¹² *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 103.

arbitrator to be his qualifications, this application must be determined on the basis that these are the qualifications that the arbitrator considered before arriving at the conclusion that he reached.

- [26] Considering the requirements outlined in the advertisement for the position and the applicant's qualifications, it is apparent that the applicant did not establish that he was entitled to be shortlisted and to be appointed for the position as he failed to show that he possessed a tertiary-related qualification in policing and had the minimum of eight (8) years applicable experience in policing at senior management level. It follows that the Municipality's conduct was not unfair. There is therefore, no merit to the applicant's contention that the arbitrator misconstrued the nature of the dispute and the evidence before him.
- [27] Without the applicant having produced evidence that he satisfied the requirement to be shortlisted and appointed for the position at the arbitration, his remaining grounds of review are of no consequence. It is my view that the arbitrator's decision is one that a reasonable decision-maker could reach. Considering the test for review and case law cited herein above, the applicant has failed to pass the threshold to have the award reviewed and set aside and his application falls to be dismissed.

Costs

- [28] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.
- [29] In the circumstances, the following order is made:

Order

1. The application for an order to review and set aside the arbitration award issued by the by the fifth respondent under the auspices of the fourth respondent under case number PMD 081505, dated 10 January 2017 is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate Ernest Richter

Instructed by: Oliver, Cronje, Stighlingh Attorneys

For the respondent: Advocate Kennedy Tsatsawane

Instructed by: Gildenhuys Malatji Incorporated Attorneys