

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C 181/2017

In the matter between:

THE SOUTH AFRICAN TEACHERS UNION

obo GEORGE ROSE

Applicant

and

THE WESTERN CAPE EDUCATION DEPARTMENT

First Respondent

**THE GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

Second Respondent

COMMISSIONER J.P HANEKOM N.O

Third Respondent

Heard: 2 August 2018

Delivered: 9 May 2019

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] The Applicants seek an order reviewing and setting aside the arbitration award issued by the Third Respondent (Commissioner) dated 6 February 2017. In the arbitration award, the Commissioner dismissed a claim that the failure by the First Respondent (Department) to promote the

employee (Mr George Rose), constituted an unfair labour practice. The Department has opposed the review application.

- [2] Rose is employed as a Human Resources Clerk in the Department. In November 2015, the Department had advertised a post of Human Resources Practitioner (Salary level 8). Rose's application was successful and he had received a letter of appointment dated 18 December 2016. The appointment was to take effect from 1 January 2016 on a 12 months' probation.
- [3] Rose commenced employment in his new position. The Department's case is that it was discovered that Rose's appointment was in error because he did not meet the requirements of the post, hence the appointment was not loaded onto the Persal System. Through the Union SAOU, Rose then lodged a formal grievance in February 2016.
- [4] The common cause facts are that the Department's Director of Recruitment & Selection, Mr Meyer, had recommended the appointment of Rose capture onto Persal, whilst Mr Carolus, the Department's Chief Director, Human Resources, had not accepted the recommendation. Instead, Carolus had directed that the appointment be retracted with immediate effect, and that Rose be paid an acting allowance for the period 1 January 2016 to 31 March 2016, which was further extended to 30 June 2016. On 30 June 2016, a letter was sent to Rose confirming the rescission of the decision to appoint him. He was to revert to his previous position.
- [5] Following requests for the reasons that Rose's appointment was not confirmed, the Department advised that Rose did not have the necessary qualifications for appointment to the post, as he did not possess a three-year degree with 360 credits. It was contended that he only possessed an advanced diploma with 120 credits. Rose however maintained that he had acquired his qualifications in Advanced Diploma in Management (ADM) through the Recognition of Prior Learning (RPL through the University of Western Cape (UWC)), a qualification that met the requirements for the post.
- [6] Rose with the assistance of SAOU then referred a dispute to the General Public Service Sector Bargaining Council (GPSSBC) on 19 September 2016.

When attempts at conciliation failed on 20 September 2016, the dispute came before the Commissioner for arbitration.

The arbitration proceedings and the award:

- [7] Evidence on behalf of Rose in support of his case of an unfair labour practice was led by Mr Vincent Morta, who is employed by the University of Western Cape as Director: Quality Assurance & Business Intelligence. His main role is to advise the Faculties and Senate of University on programme accreditation and evaluation, as well as on RPL at Post Graduate Level.
- [8] Morta's testimony was essentially that Rose had obtained his ADM with 120 credits through RPL, and that the ADM had the same exit level 7 as a Bachelor's Degree. According to Morta, this meant that Rose as a middle manager could perform with the same competencies in the field of management as a person with a Bachelor's Degree. According to Morta, the requirements of a three-year degree/diploma were comparable with the ADM, and Rose therefore met the requirements of the post.
- [9] Evidence on behalf of the Department was led by its Personnel Officer: Evaluation and Qualifications, Mr Rodney Floris, whose testimony was merely meant to restate the difference between the ADM and a three-year degree insofar as the credits for the qualifications were different.
- [10] The Commissioner having heard the evidence of Messrs Morta and Floris, and further having taken into account the submissions made on behalf of the parties concluded that;
- 10.1 On the evidence of Morta, an ADM qualification was comparable and of similar status as a Bachelor's Degree, but that status did not award credits. It was not however for UWC or Morta to dictate to the Department as to how to advertise posts and what the requirements of those posts should be. It was the prerogative of the employer to decide on how to advertise its posts.

- 10.2 On the evidence of Floris, Rose's ADM qualifications were not similar to a three-year Bachelor's Degree or a National Diploma that required 360 credits. Thus the issue was whether Rose met the necessary requirements of the post or not, and to the extent that the employer enjoyed a prerogative, Carolus had made a decision not to appoint.
- 10.3 Rose, upon a consideration of the evidence as a whole, had not discharged the onus placed on him to prove his allegations of an unfair labour practice, as his ADM qualification was not equivalent or the same to a three-year bachelor's degree even if comparable, and he therefore did not meet the requirements for the appointment to the post.

The review test and evaluation:

- [11] The test on review remains whether the decision reached by the commissioner is one that a reasonable decision maker could not reach¹. In *Herholdt v Nedbank Ltd and Another*², the Court held that:

'... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

- [12] Ultimately, the question to be answered by this Court is whether the Commissioner considered the principal issue before him; evaluated the facts presented at the hearing and came to a decision that falls within a band of decisions a reasonable decision maker could come to on the available material³.

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.

² (2013) 34 ILJ 2795 (SCA) at para 25.

³ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14

[13] As it was also recently reiterated in *Duncanmec (Pty) Limited v Gaylard NO and Others*⁴, the enquiry into the reasonableness of a decision invariably involves consideration of the merits. Furthermore, unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker. The review test therefore means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. Whether the court disagrees with the reasons of the arbitrator is immaterial, as the correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it⁵.

[14] In assessing whether the award of the Commissioner is vitiated by unreasonableness, the starting point is the examination of the requirements of the post as stipulated in the advertisement. This is so in that the onus to establish that conduct complained of constitutes an unfair labour practice within the meaning of section 186(2) of the LRA rests on the employee⁶. This implies that the onus is upon Rose in this case, to lay the evidentiary foundation for his claim of an unfair labour practice, and *inter alia*, demonstrate that he met the requirements of the post. Ultimately, if Rose was unable to discharge that onus by demonstrating that he met the requirements of the post, that would be the end of the matter⁷.

⁴ [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC)

⁵ *Duncanmec (Pty) Limited v Gaylard NO and Others supra* at para 41 - 43

⁶ See *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 248 (LAC) at para 73, where it was held 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 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.’

⁷ See *Ndlovu v Commission for Conciliation, Mediation & Arbitration & Others* (2000) 21 ILJ 1653 (LC) at 1655-6, where it was held that;

“[11] In my view, the questions which the commissioner asked in the first paragraph of that quotation were wholly justifiable questions in relation to a dispute over a matter of promotion. It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical

[15] The advertisement is to be found in Annexure 'AB1' to the answering affidavit. Under the requirements for the post, it is stated that;

'A relevant three-year degree/diploma in Human Resource Management/Public Management or similar one year traceable experience'

[16] Rose however contends that the Commissioner's award was reviewable on a variety of grounds, including that he misconceived the nature of the enquiry, failed to consider material evidence placed before him, made material errors of law resulting in unfairness, and committed misconduct and gross abrogation of his duties. In this regard, it was submitted that;

- i. The Commissioner failed to carefully consider documentary and oral evidence before him that demonstrated that he met the requirements of the post as advertised;
- ii. Failed to take into account the purpose of the National Framework Policy⁸ to which he had relied on, and the importance of RPL;
- iii. Failed to take into account that the post as advertised did not make reference to 'credits' and how these had a bearing on the recognition of his qualifications
- iv. Failed to take into account that the post as advertised made reference to *'relevant three-year degree or diploma in Human Resources management/Public Management or similar one year traceable experience'*.

[17] I did not understand Rose's case to be that he possessed the qualification of a relevant three year degree/diploma in Human Resources Management/Public Management, other than his contention that his ADM was similar to a bachelor's degree. Furthermore, to the extent that he sought an interpretation of what *'similar one-year traceable experience'* meant, any interpretation in that regard had to be within the context of evidence in regards

qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed."

⁸ Published in Government gazette No 38116 dated 17 October 2013

to his traceable experience. It was common cause that he did not lead any evidence in regards to his experience, and in my view, any opinion expressed by Morta in regards to what that concept meant without supporting evidence in respect of Rose's experience was irrelevant. Without Rose's evidence, it is difficult to appreciate how the Commissioner could have arrived at a decision that by virtue of Rose's ADM he qualified for the post by reason of traceable experience.

- [18] In the answering affidavit, Rose's qualifications were said to be limited to ADM, which is a one-year course (if completed on a full-time basis), and which only carried 120 credits. In the replying affidavit, Rose chose not to respond specifically to the averments made in relation to his qualifications, and instead contended that arguments would be tendered at the hearing to 'flesh out the responses'. It is trite that a case is made out in the pleadings and not in the heads of argument. It is either there is a response to allegations made in the answering affidavit or not.
- [19] Mr MacRobert for the applicants had on 1 August 2018, and a day before the hearing of the matter, submitted a 'Supplementary Note'. In the Supplementary Note, it was contended that upon a perusal of the transcript and the record, it came to MacRobert's attention that Floris in his evidence had relied on certain provisions of the 2000 Regulations, which had since been replaced by the 2014 Regulations as contained in the Government Gazette No 38116 of 17 October 2014. It was argued that the substance of Floris' testimony was entirely misplaced, misleading and based on an incorrect set of Regulations and premise, and that the Commissioner, even though he had regard to the correct Regulations, had selectively focussed on Regulation 41, and entirely misconstrued and misinterpreted the meaning, intent and purport of those Regulations.
- [20] Counsel for the Department, Mr Nyman had strenuously objected to the Note, contending that new issues and grounds of review were being raised therein, which was impermissible at that late stage of the proceedings.

- [21] It is trite that in application proceedings the affidavits constitute not only the pleadings but also the evidence. An applicant must make out his case and set out sufficient facts in his founding affidavit, and must stand or fall by the allegations contained therein⁹.
- [22] In the arbitration proceedings, Floris in his evidence had referred to the 2000 Regulations¹⁰, and had further made reference the Council on Higher Education's policy contained in the Higher Education Qualifications Sub-Framework, in support of his contentions that there was a difference in credits in relation to qualifications, which the Department had always taken cognisance of.
- [23] In the supplementary affidavit, and in specifically dealing with Floris' evidence, no mention is made that Floris had referred to incorrect Regulations, despite reference being made to his evidence¹¹. No such similar allegations were raised in the replying affidavit, let alone the heads of argument. In any event, it is trite that a case cannot be made out in the replying affidavit or the heads of argument.
- [24] When the Note was sought to be placed before the Court, the applicants were warned that should it turn out that indeed the facts raised in the it were new and not pleaded, a costs order might follow in that regard. It is correct as pointed out by Mr Nyman that the supplementary note merely seeks to introduce new issues and constitutes a new ground of review, and these are matters that were not pleaded. In the absence of leave from the Court to introduce those new issues, the supplementary note constitutes an irregular step which ought to be met with a costs order.
- [25] In the heads of argument, it was further submitted on behalf of Rose that he had acquired ADM through RPL, which is a process through which non-formal and informal learning are measured, mediated for recognition across different texts, and certified against the requirements for credit, access, inclusion or

⁹ See *Molusi v Voges N.O.* 2016 (3) SA 370 (CC) at paras 27-8; *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 150.

¹⁰ Transcript at lines 19 – 25 at page 105

¹¹ Paragraphs 8 – 17 of the Supplementary Affidavit

advancement in the formal education and training system or workplace. He contended that since he had acquired his ADM through the UWC, which had an NQF exit level 7, thus making his qualification 'similar' to that of someone with a bachelor's degree, which has the same NQF exit level.

- [26] The Department in opposing the review application contends that the grounds relied upon by Rose were legally and factually not sustainable as the Commissioner had correctly reasoned that whilst an ADM was comparable with a Bachelor's Degree and at the same exit level 7, they were not similar given that the ADM only required one-year full time study that carried 120 credits, whilst a Bachelor's Degree was a three year degree that carried 360 credits.
- [27] As already indicated, and further as per the understanding of the Commissioner in regards to what he was required to determine, the only issue was whether Rose had the necessary/relevant qualifications for the post or not. To the extent that the Commissioner had considered this issue within the context of the evidence led, and came to a conclusion that a qualification of ADM was not equivalent to a Bachelor's Degree, I fail to appreciate how it can be said that the he had misconstrued the nature of the enquiry.
- [28] It needs to be added that the nature of the enquiry obviously had to be dictated to by what the requirements of the post were as per the advertisement, and the reason that Rose's appointment was retracted. The appointment was retracted because Rose did not have a Bachelor's Degree which carried 360 credits. The requirement of the 360 credits was not invented or imposed by the Commissioner or added as an extra requirement or change by the Department for that matter. It was a requirement stipulated in the National Qualifications Act¹² and the 2014 Regulations as referred to by Floris. The Act makes provision for RPL under paragraph 66, whilst a Bachelor' Degree is described as a qualification at NQF Exit level 7, with a minimum total credits of 360.

¹² Act No 67 of 2008

- [29] At most, Morta conceded that an ADM does not qualify as a bachelor's degree due to differences in credits, even if the two qualifications were comparable. As further pointed out, nothing turned on Morta's interpretation of the word '*similar*' as contained in the advertisement. That was purely his opinion in regards to comparisons between an ADM, which was essentially a one year certificate, which could not clearly be similar to a three-year degree or diploma. Morta could not attest to Rose's experience or ability to perform the tasks at the managerial level he had contended, and as already indicated, in the absence of evidence by Rose, his abilities at any level were not ventilated.
- [30] Had the Department specifically mentioned in the advertisement that qualifications obtained through the RPL would be a consideration, that would have been a different matter, and Rose would have had cause to complain of unfairness. Furthermore, any comparisons of an ADM with a National Diploma did not appear to be a matter pursued by Rose.
- [31] In the light of the above factors, any suggestion that the Commissioner ignored material facts and the evidence pertaining to extraneous factors he was not required to consider is without merit. There is no basis to conclude that the Commissioner ignored the evidence of Morta or the material presented in that regard. The Commissioner clearly dealt with that evidence in the award, and within the context of Morta's expertise and confines of the university.
- [32] Equally so, any suggestion that the Commissioner committed gross misconduct or abrogation of his duties is without merit, as the Commissioner was only required to deal with the substance of the merits of the matter and the facts placed before him.
- [33] It was further alleged that the Commissioner committed misconduct or acted in an unprofessional manner when he mentioned to the parties the amount he earned when writing award. It was of course unnecessary for the Commissioner to mention that issue as it was irrelevant to the proceedings. The issue however remains what distorting effect this had on the final

outcome arrived at or the manner with which the proceedings were conducted. If it did not have any effect as I believe to be the case, then it should be accepted that ultimately, the Commissioner afforded both parties an opportunity to state their respective cases.

[34] The issue of whether there was a need to consult with Rose when the appointment was retracted is neither here nor there. When the appointment was retracted, Rose was placed in an acting position until 30 June 2016. At most, the Department owed him a courtesy by explaining the circumstances of the retraction, which it did. The Department had made an error in appointing him as it had acted contrary to applicable statutes and regulations, as his qualifications did not meet the statutory requirements to qualify as a bachelor's degree. It was not for the Department at the time of the appointment or selection to look at other extraneous factors such as whether his ADM was equivalent or comparable to a bachelor's degree. Any appointment was to be made strictly in accordance with the advertisement, which was whether a candidate had a relevant three-year degree/diploma in Human Resource Management/Public Management or not.

[35] In the end, I am satisfied that there is no basis to interfere with the award, and that application for review ought to fail. It is apparent from the Commissioner's award that he considered the principal issue before him, gave the parties an opportunity to state their respective case, evaluated the facts presented at the hearing and came to a decision that falls within a band of decisions a reasonable decision maker could come to on the available material.

[36] I have further had regard to the considerations of law and fairness in regards to the issue of costs. I have already determined that the applicants are liable for the costs in regard to the filing of the 'Supplementary Note'. I am however of the view that any costs in regards to the review application itself are not warranted.

[37] Accordingly, the following order is made;

Order:

1. The Applicants' application for a review of the Third Respondent's arbitration award issued on 6 February 2017 is dismissed.
2. The Applicants are ordered to pay the First Respondent's costs in respect of the 'Supplementary Note' that was filed and served on 1 August 2018.
3. There is no costs order made in respect of the review application.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the applicants: J MacRobert of John MacRobert Attorneys

For the Respondent: R Nyman, instructed by the Office of the State Attorney, Cape Town