



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Not reportable

Case no: **C385/2022**

In the matter between:

THE GEORGE MUNICIPALITY

Applicant

And

IMATU obo AVRIL BENNET

First Respondent

SAMWU obo NOZUKO WILLIAMS

Second Respondent

**THE SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Third Respondent

COMMISSIONER ELVISO ADAMS N.O

Fourth Respondent

JENNY KIEWIT

Fifth Respondent

Date of Hearing: 28 June 2024

Date of Judgment: 24 April 2025

JUDGMENT

CASELLS AJ

Introduction

- [1] The Applicant seeks an order that the arbitration award that is the subject matter of this application be reviewed and set aside, more specifically, that the award that the Applicant committed an unfair labour practice in shortlisting and appointing the Fifth Respondent (hereinafter referred to as “Kiewit”) into the position of Human Resources Manager (OHS and EAP) when she did not meet the minimum NQF Level 7 qualification, and in the process deprived First Respondent’s member Avril Bennet (“Bennet”) from promotion, be substituted with an order that the appointment of Fifth Respondent during or about August 2015 in the position of Manager: Human Resources be upheld as a lawful appointment in terms of section 66 of the Municipal Systems Act, 2 of 2000, alternatively, that the matter be remitted to the Third Respondent for the arbitration between the Applicant, the First and Second Respondents and the Fifth Respondent be heard *de novo* before a commissioner other than the Fourth Respondent.
- [2] The review application was initially opposed by both the First Respondent, IMATU on behalf of its member Bennet and the Second Respondent, SAMWU on behalf of its member Nozuko Williams (“Williams”).
- [3] At the time the matter was argued, Kiewit had retired from the Applicant’s employ

and consequently the relief setting aside Fifth Respondent's appointment had become moot and Second Respondent withdrew its opposition to the review application due to this fact.

Background

- [4] The Applicant advertised the post Manager Human Resources (OHS and EAP), which stipulated, amongst other requirements, that a NQF level 7 qualification in occupational health and safety management and relevant wellness related qualifications, and five years relevant experience, was required for appointment into the post in 2015. Bennet, Williams and Kiewit applied and were shortlisted with two other candidates. Kiewit scored the highest in the interview process and was appointed into the post. Bennet met all the requirements and achieved the second highest score in the interview process. Williams met the minimum qualification requirements, although it was disputed whether she had five years relevant experience, and she ranked fourth amongst the shortlisted candidates.
- [5] In 2019, during an audit of the Applicant's Human Resources Department, Bennet and Williams became aware that Kiewit did not have an NQF level 7 qualification when she was appointed as she was short of one subject for her NQF level 7 qualification. Neither the long list nor the short list that was compiled at the time of the recruitment process recorded the fact that Kiewit did not have a NQF level 7 qualification, and no condition was stipulated in her appointment letter that she was required to obtain the qualification within a reasonable time.¹
- [6] Armed with this information, Bennett and Williams contended that Kiewit should not have made the long list, should not have been shortlisted and should not have been appointed in circumstances where she did not meet the minimum requirements for the post. Through their respective trade unions, Bennet and

Williams independently referred alleged unfair labour practice disputes against the Applicant relating to promotion, contending that Kiewit did not meet the minimum qualifications in terms of the advertisement and that her appointment be set aside. They both claimed that they should be appointed retrospectively to the post.

- [7] The separate disputes referred by IMATU and SAMWU were consolidated prior to the arbitration of the matter.
- [8] The arbitration process was conducted over several days and Bennet and Williams presented evidence in support of their unfair labour practice claims. Second Respondent also called another employee of the Applicant, Mfundo Mtamo ("Mtamo") as a witness in support of Williams's claim. The Applicant presented the evidence of its Human Resource Manager, Michael Eksteen ("Eksteen") in respect of the recruitment process and the appointment of Kiewit.

The Arbitration Award

- [9] The arbitration award records that the Applicant initially claimed that Kiewit was in possession of the minimum NFQ level 7 qualification in terms of the advertisement but that this approach changed as the case progressed and that the Applicant adopted the position that clause 8.4.2 of its Recruitment and Selection Policy ("the Policy") allowed for Kiewit to be shortlisted and appointed, in that it provides that "*only candidates, who meet the minimum requirements or can be expected to meet the requirements within a reasonable time, can be shortlisted, unless the law prohibits such an appointment*". The arbitration award also records that the arbitrator was not convinced that the Applicant's reliance on clause 8.4.2 or the further provisions of the Policy could be used to include Kiewit in the process as reliance on clause 8.4.2 was not captured in documentation

¹ Although Kiewit's letter of appointment was not produced in the arbitration proceedings, it was undisputed that her appointment letter did not contain any reference to her not having the required

relating to the shortlist meeting and/or the Municipal Manager's memorandum and no endorsement to that effect was made on Kiewit's appointment letter. Further, the Applicant's witness Eksteen failed to confidently submit the underlying criteria used to include Kiewit under the apparent clause 8.4.2 process, other than relying on the incorrect reflection on the long list and shortlist. The arbitration award also notes that Kiewit had not completed the NFQ level 7 qualification six years after her appointment.

- [10] The arbitrator concluded that Kiewit did not meet the minimum requirements and that this was based on someone's omission, whether deliberately or not, to record that she did not have the NFQ level 7 qualification, which meant that she should not have made the shortlist and could not have been appointed in the position.
- [11] The arbitration award records that there are limited grounds on which a commissioner, or a court, may interfere with a discretion which has been exercised by a party competent to exercise that discretion, as the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion or managerial prerogative of an employer, should only be interfered with, to the extent that it can be demonstrated that it was not properly exercised, if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner. It further records that the Applicant, as a local authority, is expected to comply with the requirements stated in the advertisement and that if the provisions of the Policy are relied upon to accommodate a candidate who otherwise did not meet the minimum requirements of the advertisement, this should be recorded in all relevant documentation. The arbitration award notes that Kiewit had a national diploma in library and information services and that her highest incomplete qualification related to post school education, and that accordingly it would have been reasonable to frown upon choosing her, as the

qualification stipulated in the advertisement was relevant to the position and deviating from it to accommodate a qualification not close to the position was problematic. The arbitrator concluded that the shortlisting committee and the Municipal Manager would have acted differently if they knew that Kiewit did not possess the minimum qualification, and in the absence of any recorded information that the long list or shortlist committee had relied on clause 8.4.2 of the Policy. In the circumstances, Kiewit should not have been shortlisted and accordingly not appointed into the advertised position, and by allowing her to be part of the process and to be appointed under the circumstances amounted to an unfair labour practice as it was based upon a wrong principle and the discretion to appoint her was not exercised properly. For these reasons, the appointment of Kiewit must be set aside notwithstanding that she was in the position for a substantially long period and the arbitration award concludes that it would be just and equitable that Bennet, who was the next best candidate should be compensated with an amount equivalent to the difference in her salary and the salary at which Kiewit was appointed from the date of her appointment for twelve months.².

- [12] The arbitration award further ordered that the Applicant must readvertise the position and that Bennet and Williams may reapply for that post. That relief is no longer specifically required as an outcome of the arbitration process as Kiewit has subsequently retired from the Applicant's employ.

The Grounds of Review

- [13] The Applicant contends that the arbitrator committed a gross irregularity and misconducted himself in a manner that is unreasonable and culminated in the arbitration award being defective. In its essence, the Applicant contends that the arbitrator did not properly consider the evidence presented in the arbitration

² Bennet had declined to be appointed and had asked for a protected promotion, which could not be granted as no such position existed in the Applicant's structures to award such a remedy.

proceedings and the law applicable to the facts and he made an award that no reasonable decision maker could have made.

- [14] In its supplementary affidavit, the Applicant relied upon the contention that there was no requirement in terms of the Policy that compliance with the minimum requirements as referred to in clause 8.4.2 should be reflected in the appointee's letter of appointment or employment contract. The Applicant further contended that, in terms of clause 8.4.2 of the Policy, the Applicant had shortlisted and subsequently appointed other employees who did not meet the minimum requirements.

The Merits of the Review Application

- [15] The Applicant's averment that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings and/or misconducting himself must be assessed with reference to the overarching ground of review that the Applicant relies upon, namely that the decision of the arbitrator is one that a reasonable decision maker could not make based on the facts presented at the arbitration and the application of the law to those facts. The legal principles are the following:

1. A gross irregularity requires that the result is that the arbitrator misconceived the nature of the enquiry or arrived at an unreasonable result;
2. 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;
3. Material errors of fact (and also of law) 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;

4. An outcome will be reasonable if the decision that the arbitrator arrived at is one that falls in a band of decisions which a reasonable decision maker could make on the available material;
5. The Labour Court on review must ascertain whether the arbitrator considered the principal issue, evaluated the facts presented at the hearing and came to a reasonable and justifiable conclusion;
6. The Labour Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make;
7. The questions to be asked in assessing whether there are grounds of review are:
 - a. In terms of the arbitrator's duty to deal with the matter with the minimum of legal formalities, did the process that arbitrator employed give the parties a full opportunity to have their say in respect of the dispute;
 - b. Did the arbitrator identify the dispute that was to be arbitrated;
 - c. Did the arbitrator understand the nature of the dispute to be arbitrated;
 - d. Did the arbitrator deal with the substantial merits of the dispute;
 - e. Is the arbitrator's decision one that another decision maker could

reasonably have arrived at based on the evidence.³

[16] In *Head of the Department of Education v Mofokeng and others*⁴ the Labour Appeal Court found that:

“Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.”

[17] The Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*⁵, found that an applicant in review proceedings must establish three things to succeed:

1. Demonstrate that both the commissioner’s reasons and the result of the award are unreasonable;

³ *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC)

⁴ [2015] 1 BLLR 50 (LAC)

⁵ [2007] 12 BLLR 1097 (CC)

2. Where some error or misdirection on the part of the commissioner is identified, the error or misdirection caused the result of the award to be unreasonable;
3. On the totality of the evidence before the commissioner and examining the merits “in the round”, the award is incapable of reasonable justification, including on the basis of good reasons not considered by the commissioner.

[18] The reasonable decision maker test is an outcomes-based test. Therefore, even if an arbitrator is wrong in his assessment of certain facts presented at the arbitration, this would not of itself result in the arbitration award being reviewable unless the consequence of the incorrect recording and consideration of those facts results in a distortion in the outcome of the arbitration.

[19] In respect of an unfair labour practice dispute relating to the promotion of an employee, the jurisdiction of an arbitrator is limited and the employer’s decision may only be interfered with in circumstances where it is established that, in exercising its discretion, the employer acted arbitrarily, capriciously, irrationally or unreasonably, or was otherwise motivated by bad faith or the decision was made in a biased manner or it was discriminatory. Ultimately, it is an evaluation of the fairness of the manner in which the employer has acted towards its employee, notwithstanding that there is an element of subjectivity or discretion involved.⁶

[20] Applying these principles to the facts, the transcript of the arbitration proceedings does not support the arbitrator’s conclusion that the Applicant only decided to rely upon clause 8.4.2 of the Policy after the commencement of the arbitration proceedings as, already during the cross examination of the first witness Bennet, the Applicant placed reliance upon that clause. To this extent, the arbitration award does not correspond with the evidence presented in the arbitration proceedings. The arbitration award furthermore addresses an issue that was not

⁶ Myburgh & Bosch, *Reviews in the Labour Courts*, LexisNexis, 2016, pages 380 - 383

placed in dispute by the parties in the arbitration proceedings, namely that, even if Kiewit were to complete the outstanding subject to obtain the NQF Level 7 qualification, her qualifications did not comply with the requirements of the advertisement as they were not in occupational health and safety management. However, this was not a matter specifically raised by either IMATU or SAMWU in challenging Kiewit's appointment, and it was not addressed in the evidence. As stated above, the primary dispute raised in the arbitration process was that Kiewit should not have been appointed as she did not have the NQF Level 7 qualification, and no condition was attached to her appointment that she obtain the qualification within a reasonable time.⁷

- [21] The fact that the arbitration award refers to an inaccurate assessment of the evidence and/or an issue that was not relied upon by the parties in the arbitration proceedings does not of itself, either individually or collectively, render the arbitration award reviewable, unless their consideration has distorted the outcome of the arbitration award. This may only be determined upon considering the reasons relied upon in making the arbitration award.
- [22] The essence of the arbitrator's finding that the Applicant had committed an unfair labour practice in shortlisting and appointing Kiewit into the position of Human Resources Manager (OHS and EAP) is that she did not meet the minimum NQF level 7 qualification, that this was not recorded on the long list, the short list or the Municipal Manager's memorandum, that no endorsement was made on the letter of appointment and that Eksteen had failed to explain the Applicant's reliance on clause 8.4.2 of the Policy in those circumstances. The latter conclusion is borne out by the transcript of Eksteen's evidence. Contrary hereto, it was Bennet and Williams' contention that it was general practice that if reliance was placed on clause 8.4.2 of the Policy, this was stipulated as a condition in the appointee's

⁷ The further challenges against Kiewit's appointment were whether she had the relevant experience required in terms of the advertisement, but this was not seriously disputed. Williams disputed whether the post was recognised in Applicant's organigram at the time that the advertisement was placed, and this

letter of appointment and this was not challenged under cross examination. It was also Mtamo's uncontroverted evidence that when he was appointed into a post for which he did not have the required qualification, his letter of appointment recorded the condition that he obtain the qualification within a reasonable time thereafter.

- [23] As no reference was made in any of the documentation relevant to the appointment of Kiewit that she did not have the qualification required in terms of the advertisement and that the Applicant was relying on clause 8.4.2 of the Policy in appointing her, the arbitrator's decision that the Applicant committed an unfair labour practice in appointing Kiewit despite her not having the NFQ level 7 qualification and thereby deprived Bennet from promotion, is a decision that a reasonable decision maker could have made on the facts and the application of the law, and does not reflect either a gross irregularity in the conduct of the arbitration proceedings or that the arbitrator misconducted himself.
- [24] Although the Applicant referred in its review application to alleged financial, administrative and other implications of the arbitration award, this was not expanded upon in the founding affidavit or the supplementary affidavit and no compelling submissions were made to interfere with the compensation awarded to Bennet in terms of the arbitration award.
- [24] In the circumstances, the review application fails. The Constitutional Court has held that the ordinary rule that costs follow the result does not apply in labour matters.⁸ There are no reasons in this matter to justify a departure from the position that a losing party should not be mulcted in costs in labour disputes.
- [25] The following order is made:

was found to be unsubstantiated. In any event, in circumstances where SAMWU abandoned its opposition to Applicant's review application, it is not a matter that requires further consideration.

⁸ Zungu v Premier of the Province of KwaZulu-Natal & others (2018) 39 ILJ 523 (CC); Long v SA Breweries (Pty) Ltd & others (2019) 40 ILJ 965 (CC)

Order:

1. The review application is dismissed
2. There is no order as to costs.



G Cassells

Acting Judge of the Labour Court of South Africa

For the Applicant: Adv N Ristic
Instructed by: Schröter Attorneys

For the First Respondent: E Geldenhuys
Instructed by: Macgregor Erasmus Attorneys Inc.