



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

Of interest to other judges

Case no: C335/2022

In the matter between:

CYNTHIA BUYELWA MBOYA

Applicant

And

**THE PREMIER OF THE WESTERN
CAPE**

First respondent

MELVIN ARENDSE

Second Respondent

**THE GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL
(GPSSBC)**

Third Respondent

JACQUES BUITENDAG (N.O.)

Fourth Respondent

Heard: 7 November 2024

Delivered: 29 September 2025

Summary: (Review- Unfair labour practice relating to promotion – central dispute concerned whether the process leading up to the shortlisting and interviews was fair, and if not whether the applicant would have been appointed – Despite not giving applicant an opportunity to act pending advertisement of vacant post and despite evidence that advertisement was delayed until acting

candidate had the necessary qualification , arbitrator finding no evidence that the selection and interview process was flawed – Contention that delay in advertising the post denied applicant being appointed reliant on too many other imponderable factors to justify such a claim – Arbitrator's decision, while not the only possible outcome, was not so untenable that no reasonable arbitrator could have reached it - review application dismissed)

JUDGMENT

LAGRANGE, J

Nature of the application

- [1] This is an application to review and set aside an arbitration award of the fourth respondent ('the arbitrator') in which he found that the applicant, Ms B Mboya ('Mboya') a deputy director in the directorate of Land Safety and Transportation of the office of the fourth respondent ('the Premier') had been given a fair opportunity to compete for the post of the director of the same directorate. Accordingly, he dismissed her unfair labour practice claim relating to the premier's failure to appoint her to the position. The second respondent, Mr M Arendse (Arendse'), was the successful candidate.
- [2] The premier's answering affidavit was filed on 21 July 2023, some four and a half months late. Mboya filed an objection to the failure to file the answering affidavit in terms of rules 11.4.2 of the Labour Court Practice Manual¹. The condonation application was filed on 28 August 2023. Given the delay between Mboya's request for the enrollment of the application on 30 March 2023 and the enrollment state of 7 November 2024, Mboya no longer opposed the late filing of the answering affidavit. An issue of costs

¹ Clause 11.4.2 has now been superseded by Rule 36(2) of the Labour Court Rules.

had been raised by Mboya, but the parties had resolved this issue too by the time argument commenced.

- [3] A number of other preliminary objections had been raised by the Premier, but at the commencement of the hearing the court was advised that none of these would be pursued either.

Brief factual background of the dispute

- [4] In November 2009, Mboya was appointed as a deputy director.
- [5] In October and November 2014, Mboya acted in the Director's post when the Director was on leave and received an exceptional performance assessment.
- [6] The existing director in the directorate resigned on one December 2014 and the director's post became vacant. Ms Ribbonaar ('R1') was appointed to act in the post May 2015. In April 2015, Ribbonaar called a meeting to inform middle management that she had appointed the second respondent, Mr. M Arendse ('Arendse') from the License Directorate as the acting Director in the vacant post with effect from 1 May 2015.
- [7] During a meeting in April 2015, when R1 announced that a new person would be joining the team acting in the post, Mboya raised objections during the meeting as to why she and the other deputy director were not appointed to act in the vacant post. Ribbonaar admonished her in a private meeting for challenging her authority and informed Mboya that she needed a male person to manage the directorate.
- [8] At the time, Mboya held a Bachelor's degree and an Honours and have five years' experience in middle management
- [9] Arendse continued to act uninterruptedly for three years until September 2018, which Mboya argues was contrary to the Public Service Regulations which provide that a person may not act in a director's post for an uninterrupted period of more than 12 months. In addition, the Western Cape government Recruitment and Selection policy ('the RSP') dated 1 August 2018 stated that a vacant funded post had to be advertised within six months of becoming vacant and filled within 12 months.

- [10] At the time of his acting appointment, Arendse did not have a Bachelor's degree. He only acquired this in November 2017. The same month, R 1 sought authority to advertise the post for a permanent appointment. The post was advertised in early February 2018.
- [11] By 30 April 2018, three candidates including Mboya and Arendse were selected for shortlisting and interviews were held by the end of May 2018. Each candidate had to complete a practical exercise and answer a set of structured questions during the interview after completion of the practical exercise.
- [12] The respective scores obtained by the three candidates were 64.5% for Mboya, 87% for Arendse and the third candidate obtained a score of 43.5%. The interview panellists had determined the interview scores on a consensus basis, which meant that they agreed on a common score for each issue they evaluated. As a result, their respective ratings were identical.
- [13] On 28 August 2018, Arendse's appointment as the new director was approved with effect from 2 September 2018. Mboya was informed that she was not the successful candidate on 10 October 2018. She referred her unfair labour practice dispute to the bargaining Council on 12 November 2018.
- [14] Prior to the commencement of the arbitration, the parties agreed on a pre-arbitration minute. Among other things, the parties agreed that the *"issue to be decided was whether the process leading up to the shortlisting and interviews were fair"* and, if not, whether Mboya should have been the successful candidate for the post.

The award

- [15] The arbitrator incorrectly captured the essence of Mboya's complaint, which had three primary components. Firstly, she was overlooked as an acting appointment, whereas Arendse, who did not have the necessary qualifications or relevant experience for the post was about to acting the position for about three years. Secondly, the employer did not comply with public service regulations which prohibited a person occupying a funded

vacant post in an acting capacity for more than twelve months and failed to comply with its own recruitment and selection policy that required such a post to be advertised within six months of becoming vacant. Thirdly, Mboya had challenged the scoring during the interview process on the basis of consensus and expressed concerns about the composition of the interviewing panel.

- [16] He noted that the employer had claimed it was not feasible for Mboya² act in the position because of staff shortages and her own operational duties. The arbitrator appear to accept at face value the employer's evidence that restructuring measures and a budget freeze the reason why the post was only advertised in 2018. He noted the employer's evidence that the questions had been drafted in a way that would not give an advantage to a candidate acting in the position. Also appears to have accepted the evidence that the panel awarded points on a consensus basis.
- [17] The arbitrator referred to case authority to the effect that an employee does not have a right to be promoted, barring any statutory provisions to the contrary, but only a right to be given a fair opportunity to compete for a post. Provided that such an opportunity was afforded to the employee, the selection process itself is only assailable if the appointment was arbitrary or motivated by an improper reason. He also considered the case of Department of Justice, which held that an unfair labour practice relating to promotion concerns conduct relating to the actual promotion or non-promotion and conduct related thereto. Further, he cited authority that having the necessary qualifications and experience for a post is simply the first hurdle that a complainant must overcome. Thereafter, as long as the employer's decision to appoint another qualifying candidate is rational, the issue of unfairness cannot arise. Moreover, to establish a claim to be appointed to the post or to be given protected promotion, the claimant had to establish that if it had not been for the unfair conduct they would necessarily have been appointed to the post.

- [18] He found that:

- 18.1 The delay in advertising the post did not amount to unfair labor practice because Mboya applied for the post wound was advertised and was interviewed.
- 18.2 The fact that the interview panel consisted of three coloured persons and one black female was not irregular even though the last mentioned member of the panel was on the same salary level as the post advertised.
- 18.3 There was no evidence to support Mboya's claim that the black member of the panel was unduly influenced by the more senior panel members.
- 18.4 He accepted that Mboya had not been given an opportunity to act owing to various operational reasons, the employer's failure to give her that opportunity did not constitute and unfair labour practice concerning promotion, even though it may have been unfair not to offer her an opportunity to act, because the appointment of Arendse to the post was not automatic but the result of a competitive selection process. Even though it might have been unfair to allow Mboya to have the same opportunity to act as Arendse, that did not justify appointing Mboya in his place.
- 18.5 The arbitrator rejected the contention that the post had been reserved for Arendse. He accepted that the interview panel comprised four and there was no evidence of collusion between them. The eight questions put to each candidate consisted of four technical questions and for managerial skills questions. He accepted the unchallenged testimony that the questions did not favour a candidate who had acted in the post. The panel had deliberated and reached consensus on the evaluation of each applicant's response to each question. In the upshot, he concluded that Mboya was not appointed to the position simply because she did not do as well as Arendse did.
- 18.6 Lastly, he dismissed suggestions the qualification which Arendse had eventually obtained because this was not part of the issues in

dispute recorded in the pre-arbitration minutes, nor was it raised in the opening statement made by Mboya's representative. In any event no evidence was presented that there were any irregularities discovered during the third-party qualification vetting process.

[19] The arbitrator concluded that, on the evidence presented, he could not find that Mboya was a better candidate than Arendse, or that he delegated authority unfairly exercised its discretion to appoint Arendse.

Grounds of review

[20] Mboya raises a number of grounds of review, which may be summarised as follows: The arbitrator:

20.1 ignored the requirement to advertise the post within 6 months and fill it within 12 months;

20.2 Overlooked the impact of the irregular acting appointment on Mboya's promotional prospects;

20.3 committed errors of law in failing to apply Regulation 63 of the Public Service Regulations, 2016, which limits acting appointments to 12 months and requires competency, and section 11 of the Public Service Act: Requires fair, objective, and transparent appointment processes.

20.4 committed an error of law in failing to take account of the Recruitment and Selection Policy, which mandates advertising and filling of posts within specific timeframes.

20.5 made untenable findings in concluding that the delay in advertising the post did not constitute unfairness, and accepting that Arendse's acting appointment was based on operational requirements, despite evidence that nineteen other management posts were filled during the same period;

20.6 in relation to the latter issue, the arbitrator ignored the fact that the evidence of operational and budgetary reasons for denying Mboya the opportunity to act, and for delaying advertising the post were not

put to Mboya during cross-examination, and as such should have been disregarded;

20.7 failing to consider that Mboya would have been promoted but for Arendse's irregular appointment.

20.8 finding that Mboya had equal opportunity to compete, despite being denied the chance to act in the post and despite the post only being advertised once Arendse had obtained his degree, and

20.9 focussing only on the selection process after the post was advertised.

Evaluation

[21] A fundamental question in the review is how far back the inquiry into the fairness of the promotion process could go. Mboya argued that the appointment process kicked off essentially when the post became vacant. In this regard, she relied on the RSP which required a vacant post to be advertised within six months and filled in twelve months. Accordingly, she argued, any unjustified conduct during that period which prejudiced to her ability to compete for the post once it was advertised ought to have been considered in deciding whether the employer had acted unfairly. The employer argued that the unfair promotion dispute could not refer to events occurring prior to the date on which she claimed the dispute arose in her referral form to the bargaining council, namely 12 November 2018.

[22] The significance of drawing a line between events before and after the date is that it determines whether the arbitrator ought to have taken account of the evidence that the post was not advertised for nearly four years on account of the employer having apparently earmarked the job for someone who did not yet qualify to occupy the post and then advertising it as soon as they had obtained that qualification. It also would determine if the evidence that Mboya had been denied an opportunity during that entire period of acting in a position, despite having prior experience in that directorate, which Arendse lacked, could be considered.

- [23] The employer sought to minimise the negative inference that might be drawn against it from this evidence, by contending that various restructuring measures, budgetary constraints and the difficulty of Mboya not performing her existing operational role if she was appointed to act in a position as a director were the real reason that the post was not advertised earlier. Mboya argued that there was ample evidence of numerous senior management posts being permanently filled over the same period. It is a striking feature of the evidence led that, when Mboya was cross-examined, there was little more than a vague allusion to the possibility of restructuring being an explanation for the delay.
- [24] The arbitrator plainly erred in taking the evidence which was not put to Mboya into account. Although he did acknowledge that it had been unfair to her not to give her an opportunity to act, he accepted there were legitimate reasons for delaying the advertisement of the post and consequently concluded that the employer had not attempted to reserve the post for Arendse.
- [25] In the absence of a substantive justification for delaying advertisement of the post for so long, and given the timing of Arendse finishing his degree and the advertisement of the post in the same month it is very difficult to see how, if the arbitrator had not erred in this respect, that he could have avoided the inference that the advertisement of the post was being deliberately delayed until Arendse had obtained the necessary qualification which made him eligible to apply for the job.
- [26] The question which arises from this is, if the arbitrator had not made this error, could he nonetheless have plausibly found that the failure to promote Mboya was not unfair, even if was evident that the employer wanted to make sure Arendse would be eligible for appointment before it advertised the post?
- [27] Although Mboya belatedly expressed some doubts about the validity of Arendse's qualification, it was not seriously challenged. There was no argument that he was eligible to apply for the post by the time it was advertised. There was also evidence that, in the process of winnowing out candidates for the shortlist of those to be interviewed, Mboya had actually

been rated above Arendse during that stage. However, in the crucial interview phase Mboya could not demonstrate that the eight questions asked of each candidate were clearly easier for someone with more experience in the post to answer. She could only express her suspicion that the single black member of the panel had succumbed to the weight of opinion expressed by her seniors on the panel to during the process of agreeing on the score to be awarded for each of the candidates' answers to the eight questions. There was no other evidence she could adduce of collusion between members of the panel to shift the weight of opinion in favour of Arendse. It may be so that by the panellists agreeing to score answers to each question by consensus this method could have been used to discourage dissent, but absent any evidence from anyone present at the panellists' deliberations to support this, Mboya could only advance her suspicions in that regard. All be it that those suspicions were not wholly unreasonable considering the delay in the filling the vacancy until Arendse was also eligible for appointment, those suspicions are not enough to show that the panel must be presumed to have acted in bad faith to deny her the appointment.

[28] Mboya implied that if the post had been advertised within six months of it falling vacant, as it should have been, she would have been appointed. It is true that Arendse would not have been in contention if the post had been advertised within six months of it falling vacant because he would not have met basic eligibility requirements. However, it cannot be said that, without Arendse in the mix, there would have been no other suitable candidates for the post and that Mboya would have been successful. To reach that conclusion entails speculation about unknown variables which could have affected a selection process at that time.

[29] It must be emphasised that the thrust of Mboya's attack on the appointment process was on the perceived disadvantage she suffered from the delay in making the appointment which benefitted Arendse by giving him time to become eligible for appointment and acquiring more acting experience than she had. Although aspects of the actual interview process were criticised, even during the arbitration it was made clear that

the interviews where not the chief focus of her complaints about the process.

[30] It must also be mentioned that during the arbitration, from time to time, Mboya expressed in passing a belief that race and or gender might have played an illegitimate role in the process, but the arbitrator was not seized with an unfair discrimination case, and could not entertain those considerations, even if they might have had some validity.

[31] In conclusion, I am not persuaded that the arbitrator's conclusion that the applicant had a fair opportunity to compete for the post was plainly an untenable one, given that there was no evidence that the interview process itself was contaminated by any improper motive to prefer Arendse, even if the delay in advertising the post might have suggested that. It is possible the applicant might have benefitted if the panel had each submitted their own scores for each question the candidates answered in their interviews, but it cannot be said with any confidence that would necessarily have been so.

[32] It is important to stress that the court is not tasked with deciding if the arbitrator's decision is the only finding a reasonable arbitrator could have reached, but simply whether it is one that a reasonable arbitrator might have reached. Even though another arbitrator might reasonably have concluded that the actions of the employer prior to the advertisement of the post irredeemably tainted the post-advertisement process, on the evidence it cannot be said no reasonable arbitrator could have reached the same conclusion as the arbitrator.

Order

1. The late filing of the First Respondent's answering affidavit is condoned.
2. The review application is dismissed.
3. No order is made as to costs.



R Lagrange
Judge of the Labour Court of South Africa

Appearances

For the Applicant:

J A Nortje instructed by
Halday Attorneys

For the Respondents:

C Daniels instructed by
the State Attorney