



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR1854/22

In the matter between:

KHULISO HILLARY MBULALENI

Applicant

and

**SASOL CHEMICAL OPERATIONS (PTY) LTD
SECUNDA**

First Respondent

KENEILWE MOLWELANG

Second Respondent

**NATIONAL BARGAINING COUNCIL FOR THE
CHEMICAL INDUSTRY**

Third Respondent

Heard: 26 June 2025

Delivered: 20 October 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for handing down judgment is deemed to be 20 October 2025.

JUDGMENT

RAMALATSO, AJIntroduction

- [1] This is an application in terms of section 158(1) (g) of the Labour Relations Act¹ (LRA) to review and set aside an arbitration award. The test applicable in this review application is that of correctness – whether the commissioner's ruling is right or wrong, and therefore the ruling is reviewable on objectively justifiable grounds.²
- [2] The First Respondent raised the issue of an incomplete record; however, it insisted that the matter proceed as the missing record does not prevent the court from making a proper determination. In his argument, it was also raised that the evidence of Mr Johan DJ van Rooyen (Vlam) was missing. The evidence of Mr van Rooyen is captured by the Second Respondent, although it is handwritten notes, which are easy to read and follow. I, therefore, was satisfied that the Court was presented with a full record to decide and finalise the review application before me.

Background

- [3] The facts leading to the arbitration award are common cause.
- [4] The Applicant previously declared a dispute and referred it to the National Bargaining Council for the Chemical industry (NBCC). That dispute was in terms of section 186(2) (a) of the LRA, and was referred to the NBCC on 16 September 2022.
- [5] Subsequent to an unsuccessful conciliation, the Applicant referred the dispute for arbitration at the NBCC under the case number CHEM6-20/21. In terms of the

¹ Act 66 of 1995, as amended.

² See: *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC) at paras 39 – 41; *Zeuna-Stärker BOP (Pty) Ltd v National Union of Metalworkers of SA* (1999) 20 ILJ 108 (LAC) at para 6; *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 ILJ 1427 (LAC) at para 2; *South African Municipal Workers Union obo Manentza v Ngwathe Local Municipality and Others* [2015] 9 BLLR 894 (LAC) at para 20; *Ukweza Holdings (Pty) Ltd v Nyondo NO & others* (2020) 41 ILJ 1354 (LAC) at para 12.

referral to the NBCC, the Applicant challenged the withdrawal of his job offer. His challenge was whether there was an appointment; if there was no appointment, then whether the decision not to appoint was unfair.

- [6] The Second Respondent, on 15 July 2022, issued an award, ruling that the Applicant failed to establish an unfair Labour practice and dismissed the application.
- [7] The Applicant then referred the matter to the above court under case number JR1845/22, for the review and setting aside of the arbitration award issued by the Second Respondent, and for the remitting of the matter to the Third Respondent for arbitration afresh before a commissioner other than the Second Respondent. Alternatively, the Applicant pleaded for the review and setting aside of the arbitration award of the Second Respondent and for the substitution of the award with an order that there was indeed an unfair labour practice and ordering the First Respondent to appoint the Applicant to the position. Finally, the Applicant pleaded for the grant of any such further and alternative relief as the above Honourable Court deems appropriate.

Applicant's evidence at arbitration

- [8] At the proceedings before the NBCC, the Applicant contended that he was employed by the First Respondent since 1 June 2013 and is currently in a position as a Process Controller Grade 01 (PC-G01) at Sasol Synfuels Operations. That the First Respondent advertised a promotional post of Process Artisan Grade Two at SCO (Secunda Chemical Operations) Logistics. The advert was in June 2019, and he filed his application on 16 June 2019. He could not remember if the advert was for both internal and external applicants, but he applied internally.
- [9] On 4 November 2019, he was called to attend the interview on 7 November 2019, which he did. The panellists were Ms Thobekile Chonco (HRC), Mr Jaco

Venter (Manager of the vacant position), another manager whose name he could recall, and a union official.

- [10] On 13 November 2019, Ms Chonco called him to confirm that he was successful in his application, and he was asked if he was going to accept the offer at the proposed salary for the post.
- [11] Further, the Applicant was asked to submit his NQF qualifications, which he did, and Ms Chonco then informed him that she would let him know as soon as the manager comes back from leave. The Applicant then responded that he is ready to move.
- [12] On 15 November 2019, the Applicant was told by Ms Charlotte Nell that he could not move anymore because there were issues with his movement, but she would find out the reason. Later, he received a call from Ms Melinda Beelder, the Human Resource Business Partner, who informed him that SCO was wrong in appointing him. She then called a meeting to address the issue.
- [13] Present at this meeting was himself, Ms Melinda Beelders from Synfuels, who is a senior to Charlotte Nell, Nkosi Chonco (HRBP) from Secunda Chemical Operations, who is the senior to Thobekile from HRC. The meeting, however, did not yield his desired results.
- [14] Further, during his testimony, the Applicant referred the arbitrator to the Third Respondent's recruitment policy, which reads *'Once the vetting process is completed successfully, a salary offer is prepared according to the remuneration policy, by the remuneration specialist. The vacancy manager approves the offer and the salary offer may then be extended to the candidate'*. It is important to note that although the Applicant referred to the above subparagraph of the policy, the entire paragraph which deals with appointment, together with the other subparagraph/s of the relevant part of the policy, will be referred to later.
- [15] It was the Applicant's evidence that his offer was made via email, and that he does not know if, in other cases, offers were made via email and that it was the

first time that he was given an offer via email. The Applicant further referred to the requirements of the advertisement for the post, and his testimony read as follows:

‘There are questions there that I am of the view are in line with the requirements of the job advertised. That was the online application, my first online application for the job. Number one then says, do you have Grade 12 or 13 with Math’s , Science and English?, those are the questions for the application online. Job requirements, qualifications and expertise required, two to five years’ experience, Grade 12 or N3 with Math’s and Science, NQF level 4 Chemical Operations, Process Artisan, which is equal to NQF level four Chemical Operations. Further that only candidates that are already process Controller Grade ones will be considered, and then, specific experience required. It says, experience in a production environment, experience in the ability as a Process Controller on Top and bottom road loading, preferably road tanker loading facility experience, in working on the plant panel control room will be an advantage. And then on page 10 of the applicant bundle, I would read the question, the first question for that application was, Do you have Grade 12 or N3 with Math’s and Science and English? Of which my response to that, to that question was, yes. The next question on the advert was, do you have NQF level four Chemical Operations Occupational CHIETA , the answer to that was yes, the third question was are you a Process Artisan or NQF level 4 Chemical Operations, the answer was no, the next question was do you have any experience and ability as a Process Controller on both and bottom road loading operations, preferably road tanker loading facility, the answer to that was no, the next question was do you have experience in the production environment, the answer was yes, the last question was are you an unpleased GT employee, the answer was no.’

- [16] The Applicant, in his testimony, also referred to subparagraph 8.4.1 of the Human Resources Policy: Recruitment of the bundle, which reads: *‘the Talent Acquisition consultant and/ or human resource consultant representative screens applications by reviewing the candidate profile or CV against minimum requirements stipulated in the advertisement’*. Further to para 8.5.1, which reads, *‘Candidates will only be invited for an interview if they meet the inherent*

minimum requirements in terms of qualifications and experience will not be placed'.

- [17] The Applicant referred the commissioner to para 8-C1 of a document entitled '*Sasol Procedure: Career development of artisans 23/08/2011*' as contained in the bundle, which reads:

'Sasol Level 8-C1, Job Title(Chemical operations Artisan-Grade 2), Min Qualifications and Experience (NQF 4, (Mandatory), High Level Competency indicators (Single Chemical operations understanding and Operation, Asset mgt: understand Chemical operations failure modest and defect identification, Conduct Proactive(advanced) fault finding, Operate within designed parameters. Assessment Criteria (Plant reliability, Chemical operations incidents, and Chemical operations performance targets. Shift Handover Chemical operations (Feedback from foreman/PA/SPA). Preparations of equipment/system for maintenance. Number of repeat incidents (Feedback from foreman/PA/SPA-Shift Handover Chemical operations.) Number of alarms, trips on plant. Product quality and quality (Feedback from foreman/Alarm Management system.).'

- [18] The Applicant, during cross-examination, said the following: that he is not a process artisan Grade 2 at his current post; that he does qualify for promotion, but because of the plant-specific, he is not; and that in his current position, he could not, in the eight years at work, progress to Grade 2, which he conceded. The Applicant was further made to read from a document entitled '*Process Artisan appointment process, standard and practices (SA Region preliminary investigation-2nd round integration slide pack)*', dated 05th April 2017, which reads:

'Process Artisan- operates process equipment, systems and processes for a specific plant/unit within the Sasol environment to achieve production requirements in a safe manner. This position is required to operate the plant processes from a control panel (e.g. operate a single process-multiple systems and operate within design parameters using DCS).'

- [19] That, in his eight years' experience, he could not progress to Grade 2. The response from the First Respondent was that *'the cognition ability of the individual also plays a vital role to become a progress artisan grade two. In many cases, individuals only reach the PC one position and don't progress further in the career path'*.
- [20] The applicant was further told on cross-examination that he does not have the necessary experience for the post he applied for, and he agreed with the question. He further agreed on cross-examination that his appointment was rejected because of his lack of plant-specific experience. It was his argument that the First Respondent was wrong in not appointing him.
- [21] He was then made to read his email sent to Tumi Matsheka, which reads as follows;

'I would seek your intervention on the below matter as an HR Ethics officer

I am currently appointed as Process Controller Grade 1 in the Synfuels Gas Circuit(Turnaround) environment. A position was advertised for a Process Artisan grade 2 position by Secunda Chemical Operations (SCO), specifically for Road Loading site and Logistics. I applied for the position on the 16th June 2019. I received an invitation for the interview scheduled for the 07th November 2019, of which I then informed my line manager. On the 13th November 2019 I received a call from SCO to notify me that I was successful. A offer was communicated to me as per my request after the phone call (Please see attached). My HRC and Area Manager were informed and asked when permission could be granted for me to make the move. They resolved that I could not move vertically for a promotion on another plant, but only laterally for the same position. I then requested a meeting with my Area Manager, he advised he can let me move, but only for the same position, but not for a promotion. I then did further liason with my HRC and only received the same outcome. I apparently according to the MSP procedure not allowed to move to another plant on the basis of a promotion(vertical), but can only do a transfer(lateral move)according to HR. I have to this point explored different avenues including talking to both HRBP'S

that are senior to the HRC's, but no solution. A meeting was scheduled between me and both HRBP's including my Area Manager and Union, but still no resolution. I have to this point requested a procedure from my HRC that stipulates I am not allowed to make a vertical move, still that has also reached a brick wall. The SCO HHRBP retaliated on the offer stating HR Recruitment procedural irregularities which I am unaware of, and have no influence whatsoever.

The above matter has resulted in Occupational depression for me as no one has thus far validated the procedure that I am not allowed to move, but rather a word of mouth. I feel my growth is being hindered.

I am of the view that the movement is good for my personal career growth and for the company as a whole.

Please see attached process Artisan position advertisement and offer from SCO.

Your intervention in the matter will be highly appreciated.

Kind Regards'

[22] The Applicant was the only witness on his application.

First Respondent's evidence at arbitration

[23] The First Respondent then called Ms. Thobekile Chonco, who is the HR consultant at Sasol Chemical Operations.

[24] Per the First Respondent's evidence: the Applicant is working at Synfuels, and he applied for the post at SCO; that the Applicant, when he applied for the post, he manipulated the system to qualify for the interview, he said he had relevant experience, yet he did not have. The First Respondent stated as follows: *'when an employee applies and answers all the screening questions correctly, then the system filters them out. Those that don't qualify, it does say disqualified and turns orange on the system. So those that meet the minimum requirements, then they are blue. That's what we look at to shortlist, and in this instance with Khuliso that*

was the case, he was blue'. After the salary negotiations, there is still another step that needs to be followed for approval, which is called SAP (System Application Program), which involves loading the information, which also needs to be approved.

[25] The witness further indicated that, *"the HR colleagues in Synfuels drew our attention to a career progression of Artisan, which requires that an Artisan need to be subjected to an assessment before she or he is progressed to the next level. In the case of the Applicant, "only the interview process was used to determine competencies. It was during this process when we learned that site logistics advertises Artisan position. Le-okay 1.7 says, learning was drawn in to give advice on the matter. The recommendation was that we appoint the candidate at a Process Controller Grade one, which would have been a lateral move and groom him for progression to a Senior Artisan"*. That she then emailed her colleague Charlotte, who then said, *'the Applicant doesn't meet the competencies according to his line manager to move across and to be promoted to SCO'*.

[26] Further, the witness submitted that the Applicant could not be appointed because:

'I think from a safety perspective, up in the experience that I, in there, we've had a lot of safety cases of employees that are working there. So, it would've been a risk, in my view, from a safety perspective to the other employees. That's just number one, number two, it also would've been unfair for the employees that were within the area that also wanted to be promoted for that position that had been there and had applied for the position as well.'

[27] The other witness for the First Respondent was Mr. Johan Vlam van Rooyen, whose testimony, in short, was that he holds the position of HR Vice President at SCO; that the position of Process Artisan was advertised, which prompted the applicant to apply; in his application, he completed a certain questionnaire; the post required NQF4 and plant-specific experience; the application system

excluded people who did not comply with the job advert based on answers provided; the applicant could not have been promoted to the post of Process Artisan Grade 02, due to the following reasons: he does not have relevant plant specific related experience and that the promotion can never be vertical.

- [28] Van Rooyen also indicated that the promotion could have been a safety risk, as the Process Artisan Grade 02 has more knowledge of the process and process flow of the plant, as opposed to the process controller, who is associated with the physical inspection of the plant. As a Process Artisan Grade-02, one will be both in and out of the plant, further that the flow of the two plants is different insofar as operations such as pressure, temperature and flows. That lack of understanding of the flow may lead to fatalities.
- [29] The appointment of the Applicant would have created a safety risk, due to the fact that he does not have experience; further, it could have created grievance to those who underwent training and were not afforded the opportunity to be promoted to the position. For one to qualify for such a post, one has to undergo training for a period of 12 to 24 months, some even longer. The Applicant must be signed off in order to be declared competent to do the tasks through competency judgment. NQF 4 qualifications alone are not enough; one still needs the practical experience obtained and signed off at a specific plant in order to qualify for the post. Further, the post required experience related to the post and nothing else; if the Applicant's response to the application was 'no', he would not have been called for an interview.
- [30] On cross-examination, Mr Van Rooyen indicated that he was not part of the interviewing panel. The interview does not raise technical questions as it is more of a behavioural interview, and an evaluation to determine whether the individual will fit in the team. He further testified that the salary offered to the Applicant was not an offer, but a potential salary for negotiation purposes. The post was put on hold upon a verification process, which revealed that the applicant did not possess the necessary relevant experience.

[31] The next witness for the First Respondent was Mr. Jacque Cloete, who is a Senior Learning Practitioner at Sasol ROAS Site Services. He has NQF 4, as his qualifications, with 12 years of experience under the Solvents area, where he started off as a learner and worked up to Senior Process Artisan. For one to be promoted to the post of Senior Process Artisan, *'one must do Theoretical assessment and you need to pass it, then you do Task observation, then once you've completed all your training on that one leg, you must write a final theoretical assessment and practical task observation. So we have to do a final assessment'*. The final assessment will be about the whole plant and *'you need to get progressed or that you'll have to be progressed. You need to complete your technical training, that's one of the requirements for you to become, from PC Grade 2 PC Grade1. You can't do NQF 3, and 2- years' experience and I expect now I'm on PC, it doesn't work like that. You still need to declare competent in that area. So that's why you've competencies that needs to be measured against you in that area or environment'*.

[32] On cross-examination, Mr Cloete responded that:

'You don't appoint a person on senior post, you first appoint on lower level and then you start grooming and up skilling that individual to learn that plant, it will make no business sense to appoint an individual as Senior Process Artisan if he doesn't have one bit of knowledge of the plant... the recommendation said he does not have the necessary requirements, we will up skill him rather give him training.'

[33] The next witness for the First Respondent was Nkosi Chonco, who indicated that the Applicant applied for Process artisan Grade Two within the business unit Secunda Chemical Operation. She is an HR Consultant; before, she was an HR Business Partner. She was responsible for the advert. It came to her attention that the company was in the process of recommending a candidate who was coming from the Secunda Operation, that has no knowledge of the site logistics environment. It was at that time that she instructed Thobekile to stop the process. This was actually engaged with the senior manager in the business to say, 'we

are stopping this process'. The manager was Mr. Godfrey Hlatshwayo. The candidate does not have the relevant experience required specifically for the site logistics plant. Then, when she did that, she made her way to the Secunda operation. She had a meeting with the management team in Secunda operations, together with the employee, who is the Applicant in this case. It was Ms Chonco's understanding that, in terms of the post advertised, as far as this position is concerned, if the answer is yes, it will mean that the Applicant has worked in the site logistics for two to five years. The main reason for the withdrawal of the position was *'the fact that the employee has never worked in the site logistics environment, and it was not in the best interest of the business to make that appointment'*. Furthermore, having somebody who has no knowledge of the plant, firstly, doesn't serve the business in terms of the work that needs to be done, and secondly, it was also a safety reason.

[34] On cross-examination, she was asked if *'there were four panelist who interviewed the Applicant. It was Thobekile Chonco, Jaco Venter, the other person he could not remember. But out of those four people, why were they not able to pick it up, that the applicant does not have this experience'* and Mr Chonco's response was that, *'the fact that I went and said, guys, we need to stop this process. It sort of like tells you that there was something wrong with the process, otherwise, I wouldn't stop the process if they've done it to the team'*.

[35] The Applicant, in his argument, submitted that the Second Respondent, in her award, failed to appreciate the totality of the evidence with regard to the probability of witnesses. That the Applicant was shortlisted, interviewed and recommended to be appointed for the position of Process Artisan Grade -02. He was interviewed by HR Consultant, Ms. Thobekile Chonco, who offered him the position of Process Artisan Grade-02, which he accepted. Later, he was informed by his own HR Consultant that he did not qualify for the post, and the post was then withdrawn. The Applicant then referred the matter to the Third Respondent for adjudication. The Second Respondent, on behalf of the Third Respondent, ruled that the Applicant failed to discharge the onus to prove the claim of unfair

labour practice against the First Respondent pertaining to demotion/incorrect grading. Further, the Second Respondent further determined that the evidence suggested that the Applicant does not qualify for promotion to the position of Process Artisan Grade- 02, nor was he appointed to the position. And found that the First Respondent did not commit an unfair labour practice.

In this Court

[36] The Applicant then referred the matter to this Court, raising the following grounds to review the decision of the Second Respondent;

36.1 That the decision of the Second Respondent is entirely disconnected from the evidence or is unsupported by evidence.

36.2 Failure to properly consider, analyse and evaluate the facts of the dispute against evidence brought before the commissioner (the advert merely stated that the Applicant must have 2 to 5 years' experience). The Applicant, in pursuing the argument, referred to *SA Metal (Pty) Ltd v Holroyd & Others*³, that for a relationship between an employer and employee to exist, a written contract of employment is not a requirement. The relationship commences the moment an offer is accepted. A letter of employment is just a recordal of the terms already agreed upon.

36.3 Failure to appreciate the totality of evidence presented in deciding the probabilities of issues and evidence before her, in determining the credibility of witnesses (it is submitted that it is improbable that the interviewing panel, which also consisted of HR practitioners, were not aware at the shortlisting and interviewing stages of candidates that the Applicant was not qualified for the position. No explanation was provided

³ (J2274/17) [2020] ZALCJHB 32 (5 February 2020) at para12.

by the First Respondent as to why, in the interview, the lack of qualification was not canvassed with the Applicant).

36.4 Failure by the commissioner to apply her mind to material facts or evidence before her. (it is submitted that the First Respondent conceded that a reasonable expectation was created that the Applicant would be appointed. However, the commissioner did not apply her mind to that material fact).

36.5 Failure by the commissioner to take into account factors she is bound to take into consideration (it is submitted that the commissioner failed to take into account that there was a panel constituted to interview and recommend a suitable candidate, and such a recommendation cannot be disregarded by the First Respondent). The Applicant, in his argument, referred to *Shukla v Ethekewini Municipality Revenue Management and Others*⁴, in which it is said that it is illegal and unlawful to interfere with the work of an interview panel that made a recommendation of a candidate.

[37] The Applicant, in his argument, argued that the decision of the Second Respondent is unreasonable as it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the arbitrator.⁵ Further that the First Respondent's decision not to promote or to withdraw the appointment of the Applicant was motivated by bad faith, as it occurred after someone in his then or current employer (Sasol Synfuels Operations or SSO) mentioned that the Applicant lacks relevant competencies. The Applicant further referred to *Woolworths (Pty) Ltd v Whitehead (Women's Legal Centre Trust Intervening)*⁶.

[38] The First Respondent, in its opening argument, raised the fact that the record was incomplete in that the evidence of Mr van Rooyen was not captured, but argued that the review must, however, continue. I must say upfront that the

⁴ (D1833/2018) [2015] ZALCD 51 para 66

⁵ See: *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* 2013 (6) SA 224 (SCA).

⁶ 2000 (3) SA 529 (LAC) at para 22.

evidence of Mr van Rooyen is actually part of the record as per the Second Respondent's handwritten notes. The Applicant applied online with the Respondent but did not disclose that he did not have plant-specific experience in the functions and site Logistics SCO Plant. The Applicant did not possess any plant-specific experience, therefore was not declared competent to work on the Site Logistics Plant and as a consequence did not meet the minimum job requirements for the position.

- [39] That, in terms of the First Respondent's procedure⁷, applicants for promotion must be on the same plant and must supply the following information: a request form, minutes of three personal development discussions, results of trade-specific, plant and plant-specific competency assessments and a CV for the applicant. Further, in terms of the policies of the First Respondent⁸, a person to be appointed/promoted must go through seven steps, which are advised to be followed, and which include vacancy identification, sourcing, advertising, screening and shortlisting, interview and selection, candidate verification and appointment. Further, it was during the candidate verification process (vetting of qualifications and minimum job requirements) that it came to light that the Applicant did not qualify for the position, in that he does not have relevant plant-specific qualifications, experience and competencies and that the Policy does not support diagonal promotion from one plant to another.
- [40] That only once the vetting has been completed successfully, the Applicant was not supplied with a written letter of appointment, and therefore, the process was not completed. The evidence of the witnesses confirmed that on 13 November 2019, Thobekile Chonco called the Applicant to inform him that he is the preferred candidate for the new position and informed him that she would send his salary information (remuneration information received from the Remuneration (so-called Rem Department) to the Applicant for him to consider, discuss with her and respond to it. She requested him to send his qualifications to her for

⁷ Sasol Career Development of Artisan (SGI HRS-000002)

⁸ Human Resources Regional Policy; Recruitment (HR RP POE SA 109)

confirmation and verification thereof by the First Respondent's Learning and Development. On the same date, at 08:31 AM, the Applicant transmitted an email to Thobekile (subject: NQF Certificates) to which he attached his 'NQF Certificate' and wherein he stated, *'please find copies of certificates as discussed'*. On 15 November, the Applicant responded by saying, *'you will let me know the progress, I am ready to move'*. However, on the same date, Thobekile responded and informed the applicant that the Area Manager still had to confirm and verify his qualification.

[41] The First Respondent further argued that in dealing with reasonableness of not appointing the Applicant into the position, the focus was the absence of plant specific/relevant experience and reasonable expectation; that it is trite that the Applicant does not have a right to be promoted, unless specifically agreed to or provided by law, further that a reasonable expectation although denied to have been created, is not a right, but an expectation, which the employer creates to be treated fairly, when deciding what constitutes unfair conduct in the context of promotions, the management prerogative of the employer remains of critical importance.⁹

[42] The First Respondent further argued that the Labour Appeal Court held that the appointment and promotion of employees fall squarely within the domain of the employer, who must select the most suitable candidate in accordance with the requirements of the post. The commissioner may only interfere when the decision or reasoning of the employer is assailable because there is evidence that:

- a) The employer acted on the basis of an unreasonable, irrelevant or individual consideration;
- b) The employer's decision was arbitrary, capricious, or unfair;

⁹ See: *Department of Rural Development and Agrarian Reform v General Public Service Sectoral Bargaining Council and Others* [2020] 4 BLLR 353 (LAC) (*Department of Rural Development*) at para 23, *Department of Justice v CCMA & Others* [2004] 4 BLLR 297 (LAC) at para 35, *De Nysschen v General Public Service Sectoral Bargaining Council & Others* [2007] 5 BLLR 461 (LC).

- c) The employer failed to apply its mind to the promotion;
- d) The employer acted in bad faith; or
- e) There is no rational relationship between the decision not to promote, the purpose of the promotion, and the information upon which the impugned decision is based.¹⁰

[43] The First Respondent argued further that the Supreme Court of Appeal held as follows¹¹:

‘Reliance on the doctrine of legitimate expectation for any purpose presupposes that the expectation qualifies as legitimate. The requirements for the legitimacy of such expectation have been formulated thus:

- (a) The representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications;
- (b) The expectation must have been induced by the decision-maker;
- (c) The expectation must be reasonable
- (d) The representation must be one which is competent and lawful for the decision-maker to make...’

[44] The First Respondent, with regard to question four of the application, asked the Applicant whether he had 2 to 5 years relevant experience, to which he replied, ‘Yes’. Mr. van Rooyen specifically testified that the word ‘relevant’, within the relevant experience, means plant-specific experience, which testimony was corroborated by witnesses Mr. Jacques and Ms. Chonco. The Applicant is not

¹⁰ *Mashaba v University of Johannesburg and Others* (2023) 44 ILJ 156 (LAC). *Public Servant Association obo Thorne v Department of Community Safety (Western Cape) and Others* [2018] 12 BLLR 1173 (LAC) at para 16. *Department of Rural Development supra* at para 23, *South African Police Service v Safety and Security Sectoral Bargaining Council and Others* [2016] JOL 35883 (LAC) (SAPS) at para 41.3.

¹¹ *Duncan v Minister of Environmental Affairs and Tourism and another* [2010] 2 All SA 462 (SCA) at para 15.

competent in terms of Section 8 of the Occupational Health and Safety Act¹², and appointing him to the new position would have resulted in a violation of health and safety. Further, Ms. Thobekile Chonco did not have the legal authority to offer the position; in her testimony, she denied having offered him the appointment.

- [45] In *Sidumo*¹³, the test for reviewing arbitration awards issued by the CCMA or Bargaining Councils. The test asks whether the outcome of the arbitration is one that no reasonable commissioner could have reached based on the evidence presented. The record before me clearly indicates that the Applicant was shortlisted, interviewed and recommended for the post. The argument of the Applicant is that the Second Respondent failed to consider the crucial evidence before her, that the Applicant was interviewed, recommended and offered a post, which he accepted. The Applicant, in terms of offering the post, refers to the conversation he had with Ms. Chonco and the subsequent email exchange. The record further indicate that upon the discussion of the salary with Ms. Chonco, the Applicant was asked to submit copies of his certificates, which he did as per email, which was received and acknowledged by Ms. Chonco on 14 November 2019, the Applicant then on 15 November 2019, wrote an email to Ms. Chonco, which read '*pleasure, You will let me know the progress. I am ready to move*'. The referral to the Second and Third Respondents was an unfair labour practice dispute (refusal for MSP promotion vertical movement), which was what the Second Respondent was to adjudicate on and nothing else. The applicant, during his argument in this Court, raised the issue of contract, that he was offered a contract which he accepted. The First Respondent objected to the new issue only being brought up during argument. In dealing with this aspect, as the reviewing court, this Court only focuses on what was before the Second Respondent, which is the unfair labour dispute (promotion), as the contention was about the failure to promote and nothing else.

¹² Act 85 of 1993.

¹³ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC).

[46] In terms of section 186(2)(a) of the Labour Relations Act¹⁴, any unfair act or omission by an employer relating to promotion is an unfair labour practice. While employees don't have an automatic right to promotion, the law requires employers to conduct the promotion process fairly, considering factors like qualifications and experience. The argument of the First Respondent is that the Applicant, although shortlisted, interviewed and chosen as the preferred candidate, it was simply because when he applied for the post, in his answers to question 4 relating to relevant experience, he indicated that he had relevant experience, which he did not have. Further, his communication with Ms. Chonco was not an offer of appointment, because other processes were still to be followed before the final decision, and it was during that period that it was discovered that he does not have relevant experience and that the policies of the employer do not allow diagonal promotion.

[47] In *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others*¹⁵, the court said, '*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 follow*'. It is common cause that the Applicant was shortlisted, interviewed and chosen as the preferred candidate. Further, a salary discussion was held with him; it is because of this conduct that he felt that the First Respondent committed an unfair labour practice, by refusing to promote him.

[48] In *George v Liberty Life Association of Africa Ltd*¹⁶, the court held that:

'An employer has ... a prerogative or wide discretion as to whom he or she will promote or transfer to another position. ...

¹⁴ Act 66 of 1995, as amended.

¹⁵ (2004) 25 ILJ 248 (LAC) at para 73.

¹⁶ (1996) 17 ILJ 571 (IC) at 583H-I and 595A-B. See also

While it is submitted that the court should be careful not to intervene too readily in disputes regarding promotion, especially to senior management positions, and should regard this as an area where managerial prerogatives should be respected unless bad faith or improper motive such as discrimination are present.'

[49] In *Department of Rural Development and Agrarian Reform v General Public Service Sectoral Bargaining Council and Others*¹⁷ the Labour Appeal Court confirmed that an employer's discretion in a promotion decision is not absolute and can be challenged if the decision or reasoning is unreasonable, arbitrary, capricious or made in mala fide.

[50] The First Respondent referred the Second Respondent to their Human Resources/ Regional Policy Recruitment (HR RP POE SA 109), which reads as follows '*internal candidates to be vetted in relation to additional qualifications that were not vetted upon their entry to the organisation, should the qualification be a minimum requirement of the role applied for*'. Further argued that the offering of a salary was not the final stage, the Applicant was still to be vetted, and that it was at that stage that it was picked up that the wrong candidate was selected as the preferred candidate.

[51] The terms of the Sasol Procedure: Career development of artisans, reads as follows:

'Procedure for career progression of an artisan

- The artisan compiles a portfolio of evidence, according to the Sasol career ladder requirements, with assistance from the Department Learning Practitioner and/or First Line Manager.
- The artisan completes the request for career development form, SAS-450(appendix A)

¹⁷ [2020] 4 BLLR 353 (LC)

- The first line manager and Departmental Learning Practitioner acknowledge the artisan's request form and the BU LM send a copy to the GL Skills Academy.
- The artisan completes the area specific competency assessment for the relevant area and the trade generic competency assessment at the Global Learning (GL) Academy.
- The verification panel verifies that the correct process has been followed.
- The verification panel signs off on the process.
- The HRC communicates the artisan career progression requirements to the relevant stakeholders.
- The First Line Manager communicates the outcome to the artisan.'

[52] The First Respondent argued that the Applicant had zero experience in the field of Artisan, as his current post is Process Controller Grade 01 at Sasol Synfuels Operation, which is a different plant from the one for which he applied. The Applicant conceded that he does not have experience with the plant, but was hoping to be trained. It was also the evidence that cross-promotion is not allowed at Sasol; one can be moved from one plant to the other, but on the same post and not as promotion.

[53] In the email exchange between the Applicant and Ms. Chonco, which appears to be what is termed 'acceptance of offer', the email sent by the Applicant reads '*I am ready to move, I will hear from you*'. This was to be based on the other event still to take place, being the vetting and the final decision from the relevant manager. The Applicant, in terms of the email communication, was well aware. Further, the policies of the First Respondent are very clear in terms of procedure to be followed on promotion; this aspect was not challenged by the Applicant, and these remain the policies of the First Respondent, which remain applicable in their workplace.

- [54] The Applicant conceded that he never worked in the plant he applied for, and that the post itself is a higher post which requires managerial skill. In *Department of Higher Education and Training v Commissioner Bheki Smiza General Public Service Sectoral and Others*¹⁸, the court held as follows ‘employers are obliged to follow their own established policies and procedures for recruitment and promotion applying them consistently, and any additional shortlisting criteria fairly’. It was further said in *Noonan v Safety and Security Sectoral Bargaining Council and Others*¹⁹ that, while employees deserve a fair chance to compete, there is no automatic right to promotion.
- [55] In my view, the First Respondent was able to demonstrate that it has policies relating to promotion and that those policies are a yardstick to promote fairness; the courts are not allowed to interfere with the policies of the employer on promotion. The reliance of the Applicant on the issue of his being told of the salary and the fact that he was chosen as the preferred candidate does not automatically qualify him to be promoted. An employer, before appointment, must follow the processes contained in their policies, in this case, the vetting was still to be done and it was at this stage that it was picked up that the Applicant does not have any experience relating to the post he applied for, the fact that he was the preferred candidate, does not take away the right of the employer to still follow his own policies on promotion.
- [56] The decision of the First Respondent relating to this post was definitely fair, and I am of the view that the Applicant failed to demonstrate the unfairness of the conduct of the First Respondent.
- [57] The evidence before the Second Respondent did not demonstrate any unfair conduct by the First Respondent; therefore, the Applicant failed to demonstrate unfairness on the part of the First Respondent.
- [58] In the premises, the following order is made:

¹⁸ (JA53) (2022) [2024] ZALAC 5; [2024] 5 BLLR 447 (LAC) 45 IJL 1981 (LAC).

¹⁹ (2012) 33 ILJ 2597(LAC)

Order

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

M. Ramalatso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Tshisevhe

Instructed by: Mangatshe Attorneys

For the First Respondent: Adv P.H. Kinstein

Instructed by: JR Attorneys

LABOUR COURT