



- (1) Reportable: Yes/NO
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: C329/2024

In the matter between:

SOLIDARITY obo UPTON, M.R.

Applicant

and

**THE SAFETY AND SECURITY SECTORAL BARGAINING
COUNCIL**

First Respondent

LILIAN GORODEMA

Second Respondent

SOUTH AFRICAN POLICE SERVICES

Third Respondent

Heard: 15 October 2025

Delivered: 16 January 2026

Summary: Review application - unfair labour practice - use of incorrect application form.

JUDGMENT

MKHATSHWA, AJ

Introduction

- [1] This is an opposed review application in terms of section 145(2) of the Labour Relations Act¹. The Applicant seeks the following order:
- 1.1. Reviewing and setting aside and/or correcting the arbitration award issued by the Second Respondent under case number PSSS 8-21/22 dated 30 June 2024.
- [2] The Applicant also seeks to review and correct the award with an award that determines the Third Respondent committed an unfair labour practice against Ms Upton and that:
- 2.1. Just and equitable compensation be awarded and/or
- 2.2. The advertisement shortlisting, screening, interview and appointment process for post number 22: Director Admin Assistant at the rank of Lt. Colonel be declared invalid and to start afresh.
- [3] Alternatively, ordering that the matter should be remitted back to the First Respondent for an arbitration hearing *de novo* before a commissioner other than the Second Respondent.

Background Facts

- [4] At the time the dispute arose Ms Upton, who is represented in these proceedings by the Trade Union, Solidarity, was employed by the Third Respondent as Head of Finance and State Accountant. She responded to an advertisement on 7 February 2020, for a post promotion by using an application form that she downloaded from the Intranet of the Third Respondent.
- [5] After the closing date of submitting applications, she realised that she had not been shortlisted and requested access to the record and saw that her application form had been noted as 'on a wrong form'.

¹ Act 66 of 1995 as amended.

- [6] She alleged at the arbitration that the Third Respondent treated her unfairly by not considering her application form, as she had downloaded it from the Intranet, and she sought compensation.
- [7] The Third Respondent disputed the unfairness and stated that Ms Upton had failed to comply with the application requirements of the post.
- [8] The Second Respondent dismissed the application and found that the decision not to consider Ms Upton's promotion by the Third Respondent was fair.

Grounds of review

- [9] The Applicant seeks to review the award on the following grounds:
- 9.1. The Second Respondent committed a gross irregularity in that she misconceived the nature of the issue to decide. That she was not only required to decide whether the correct application form was used, but also to decide in light of other applicants who used the same application form being shortlisted and recommended for their applied posts.
 - 9.2. She committed a gross irregularity in that she failed to consider and properly apply her mind to the undisputed testimony that Ms Ramohlabi did not fully complete her application form (in respect of her career history periods), yet she was shortlisted and interviewed.
 - 9.3. The Second Respondent committed a gross irregularity in that she failed to consider and properly apply her mind to the fact, alternatively did not put enough weight on the testimony of Mr Fortuin, when it was his undisputed testimony that he received his application form from HRM, which was allowed as per the advertisement.
 - 9.4. She failed to apply her mind when she stated that if an application does not comply with the requirements, it must be rejected, however no weight was placed on the undisputed testimony that a candidate whose application form was not completed fully was shortlisted.

- 9.5. The Second Respondent committed a gross irregularity when the undisputed testimony of Ms Upton was not considered when she testified that, in the subsequent promotion phase, applicants who used the same application form as her for a different position were shortlisted and promoted.
- 9.6. The Second Respondent erred in finding that Ms Upton was not able to prove that the decision was arbitrary, even though the Third Respondent's only witness was not able to articulate whether the decision was fair.
- 9.7. That she did not reach a conclusion that a reasonable decision maker could have based on the totality of the evidence before her, specifically the undisputed evidence of the Applicant and her witness in comparison to the testimony of the Third Respondent's witness.
- 9.8. Further, the Second Respondent committed a gross irregularity in that she failed to consider and properly apply her mind to the fact, alternatively did not put enough weight on the testimony that the column, which was not present on the application form had no use.
- 9.9. That the Second Respondent, throughout the cross-examination of the Third Respondent's witness, the Second Respondent interfered with the cross-examiner, indicating that the witness would not be able to answer the questions as she was not privy to the testimony of those witnesses.

Award

- [10] The Second Respondent found that Ms Upton admitted that her application form had four columns instead of five, and she rejected Ms Upton's argument that such was insignificant. According to the Second Respondent, her duty was not to stand in the shoes of the selection committee and decide whether their finding that the application form was wrong was insignificant or not. According to her, her duty was to decide whether the rejection of the form was fair.

- [11] She made reference to the evidence of Colonel Berger (it is clear from the record that the Third Respondent's only witness was Lieutenant Colonel Annalese Liebenberg), who testified that in compliance with Instruction 3/2015, Ms Upton should have submitted an application form which was attached to the post advertised. She accepted the evidence of Lieutenant Colonel Liebenberg that she had no idea which post the other form related to. There must have been a reason for the prescription of the relevant form. Ms Upton and Lt. Col. Desmond Fortuin submitted the wrong forms, with the result that both were disqualified.
- [12] The Second Respondent agreed with Lieutenant Colonel Liebenberg's evidence that the rejection of the forms was peremptory in terms of paragraph 6(d) of the National Instruction 3/2025, as it states that if an application does not comply with the requirements, it must be rejected.
- [13] She also found that the comparison of Ms Upton's application and other applications by Sergeants Dean Thomas and VC Daniels were meritless, as their applications related to different posts.
- [14] She also rejected Ms Upton's argument that she was better qualified compared to the successful incumbent, according to the Second Respondent this argument was erroneous, as Ms Upton's application was not evaluated due to the fact that she submitted an incorrect form.
- [15] With reference to the judgment in *Arries v Commission for Conciliation, Mediation & Arbitration & others*² (*Arries*), that was relied upon on behalf of Ms Upton's representative, the Second Respondent found that it was not applicable as Ms Upton did not submit evidence that the Third Respondent's decision was arbitrary or capricious and motivated by bad faith or discrimination. The decision of the Third Respondent was based on the prescriptions in the National Instruction 3/2015.

² (2006) 27 ILJ 2324 (LC).

Analysis of the facts

[16] The question of the fairness of the decision not to consider Ms Upton's appointment/promotion by the Third Respondent because she submitted the 'wrong form', turns firstly on the contents of the National Instruction 3/2015³. Paragraph 3(1)(a) [Grade Progression] provides as follows:

'(1) Submission of documents for grade progression

- (a) A member who qualifies for grade progression must:
 - (i) Complete any form prescribed by the National Commissioner.
 - (iv) submit the prescribed form and PEP evaluation to his or her Commander within the time frame specified by the National Commissioner. Failure by the member to submit the prescribed form and PEP evaluation to his or her Commander within the specified time frame may result in the member not being considered for grade progression during the specific process.'
- [Own emphasis]

[17] Paragraph 4(4) [Applications for advertised posts], in particular sub-paragraph 4(4)(b) states that:

- '(b) An application for an advertised post must -**
- (i) be made on the form determined by the National Commissioner,' [Own emphasis]

[18] Paragraph 4(6)(d) [Generic functions of evaluation panels for promotion, whether interviews are conducted or not] states the following:

- '(d) A panel must be satisfied that an application complies with the requirements of referred to in paragraph 4(4)(b), before the application is considered, if an application does not comply with the said requirements, the application must be rejected.'**

³ National Instruction No 3 of 2015: Promotion and Grade Progression Of Employees Of the Service From Post Level 1 to Level 12 And From Constable Up To Colonel.

- [19] The next document that is relevant is the actual advertisement. Paragraph 3 of the advertisement states as follows:

‘Employees who apply for advertised posts must use the attached application for Annexure A...’ [Own emphasis]

- [20] The relevant part of the form can be gleaned from that of Fourth Respondent on Page 3 of 6 under ‘Qualifications’. The form contains five columns, which the Fourth Respondent completed, namely:

First Column - Tertiary Qualification(s) Successfully Completed

Second Column Name of Institution

Third Column- Indicate Field of Study Completed Qualification

Fourth Column- Duration Of Qualification (Study Period)

Fifth Column- Year Completed

- [21] The next document that is of relevance is the application form submitted by Ms Upton. Page 3 of 8 under Qualifications, it contains four columns only, which she completed, namely:

First Column- Tertiary Qualification(s) Successfully Completed

Second Column- Name of Institution

Third Column- Indicate Field of Study Completed Qualification

Fourth Column- Year Completed

- [22] Considering the above analysis thus far, what becomes clear is that paragraphs 3(1)(a)(i) and (iv) together with 4(4)(b) and 4(6)(d), of the National Instruction No 3 of 2015 are peremptory. They are not optional or discretionary. Either the candidate complies with them, or the application must be rejected (paragraph 4(6)(d). They ‘must’ be complied with. Period.

- [23] The Fourth Respondent complied with the above requirements, among other requirements in terms of the National Instruction 3/2015. On the other hand, it

is common cause that Ms Upton did not, as she downloaded a form that was not prescribed for the particular position that she applied for. It is the Fifth Column (Duration of Qualification Study Period) of the form that was completed by the Fourth Respondent that Ms Upton did not have and did not complete on the form that she downloaded from the Intranet.

[24] The argument that Mr Fortuin used a similar form that was given to him by HRM is not sustainable. The advertisement is clear, it requires (in paragraph 3) that the candidate applying for the post 'must' use the attached application form, Annexure A. Once more, this is a mandatory requirement, which Ms Upton did not comply with. Both Ms Upton and Mr Fortuin were disqualified for the same reason.

[25] During the hearing of this application, Ms van Wyk, for the Applicant, argued that paragraph 4(4)(b)(v) of the National Instruction 3/2015 merely asks that an applicant for an advertised post must:

'(v) contain sufficient information showing that the applicant meets the requirements of the post(s);'

[26] The problem with that argument is that an applicant can only provide sufficient information when he or she gives at the very least the information sought to show that he or she meets the requirements of the post(s), not when the applicant gives less than the information required as a minimum. In this case, Ms Upton cannot be said to have provided sufficient information, when the form that she used excluded the required information [in respect of the duration of qualification (Study Period)].

[27] There is no doubt that any employer would be interested in knowing the duration of the qualification or the study period that a candidate immersed himself or herself in the chosen qualification. It therefore ill behoves Ms Upton to argue that the information required was 'insignificant'. Otherwise, it would render the prescribed form nugatory, as a candidate can simply submit any form and select whichever information he or she prefers to supply without any regard to the requirements of the advertisement and the post.

- [28] The conclusion of the Second Respondent in the final paragraph of the Award, by referencing the fairness of the decision of the Third Respondent not to consider Ms Upton's promotion, is a clear indication that she understood the nature of the enquiry that she had to grapple with, and she made a specific determination based on the enquiry.
- [29] Regarding the argument that the Second Respondent was, in addition, required to decide further on the issue of other applicants who used the same form as Ms Upton in different posts (who were shortlisted), the Second Respondent answers the query in the Award. She clarifies that the applications by Sergeants Dean Thomas and VC Daniels are meritless as their applications related to different posts. In short, had the two mentioned candidates applied for the same post as Ms Upton, used the same 'wrong form' and had been shortlisted, Ms Upton's argument would most likely have been sustained.
- [30] The reference to Ms Ramohlabi, that she did not fully complete her application form, yet she was shortlisted and interviewed, is also not of assistance to Ms Upton. It is common cause that Ms Ramohlabi was not appointed. It has not been argued on behalf of Ms Upton, and correctly so, that Ms Ramohlabi used a 'wrong form'. She used the correct form, and she completed all five columns. That should deal with the query on this ground.
- [31] In respect of the argument that Ms Upton was better qualified than the Fourth Respondent, the Second Respondent found that the argument was erroneous as Ms Upton's application was not evaluated due to the fact that she submitted an incorrect form. It follows, therefore, that for Ms Upton's qualifications to have been considered, she needed to go through the first gate, namely, compliance with the requirements for the submission of her application by using the correct form. She did not do so.
- [32] On the argument that the Second Respondent found that Ms Upton did not prove that the decision was arbitrary. The answer lies in the requirements of the National Instruction No 3 of 2015, the advertisement for the post and the prescribed form. All of them specifically mandated the use of the prescribed form. It can hardly be argued that when a candidate is held to those

requirements, such a decision could be classified as being arbitrary, capricious or motivated by bad faith or discrimination as envisaged in the *Arries* judgement (*supra*).

- [33] Finally, regarding the argument that the Second Respondent interfered with the questioning of a witness (Lieutenant Colonel Leibenberg). There is a reference to the witness having been evasive and that the Second Respondent decided against Ms Upton based on that witness's testimony. The Second Respondent sits as a referee, and she is entitled to exercise her judicious discretion in the manner in which the arbitration is conducted. In the first instance, she ruled on a question put to the witness regarding the testimony of Mr Fortuin. The witness had made clear that she could not comment on other applicants' forms. It was a perfectly fair answer, and the Second Respondent emphasised that point. In the second instance, the witness was cross-examined about certain applicants whose forms Ms Upton alleged were incorrect, the witness stated that she could not testify on other forms that she did not have insight into. Once more, that was a fair answer by the witnesses. These examples, as cited on behalf of Ms Upton, do not lend themselves to interference, overreach or the suggestion that the Second Respondent exceeded the bounds of ensuring a proper hearing.

Legal analysis

- [34] The general principle is that an employer has the right to appoint or to promote employees whom it considers the best or most suitable. Thus, arbitrators are reluctant to interfere with the employer's choice in the absence of unfairness.
- [35] In *SA Municipal Workers Union on behalf of Damon v Cape Metropolitan Council*⁴, it was held that unless the appointing authority was shown to have not applied its mind in the selection of the successful candidate, the CCMA may not interfere with the prerogative of the employer to appoint whom it considers the best candidate.

⁴ (1999) 20 ILJ 714 (CCMA).

[36] The Labour Appeal Court has held that an arbitrator must show deference to the employer's decision and may interfere only if the employer acted irrationally, capriciously, arbitrarily, or in bad faith.

[37] It has also been held that while it may not be easy to justify the preference of one candidate over another⁵, the employer at the very least should be able to provide reasons for its decision⁶.

Conclusion

[38] Considering the totality of the above analysis, the Second Respondent made an award that a reasonable arbitrator presented with the same set of facts and the same legal framework would have made.

Order

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

M. Mkhathshwa

Acting Judge of the Labour Court of South Africa

⁵ *PSA obo Dalton v Department of Public Works* [1998] 9 BALR 1177 (CCMA).

⁶ *Mashegoane v University of the North* [1998] 1 BLLR 73 (LC).

Appearances:

For the Applicant: Ms K. Van Wyk

Instructed by: Solidarity

For the Third Respondent: Adv C. Tsegarie

Instructed by: State Attorney

LABOUR COURT