



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

Signature

01 September 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. JR2196/20

In the matter between:

TSHEPISO GABRIEL MAPONYA

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

MAAKE, JOSIAS SELLO N.O.

Second Respondent

GREATER TZANEEN MUNICIPALITY

Third Respondent

ARNOLD MATHEBULA

Fourth Respondent

Heard: 25 August 2026

Delivered: 1 September 2026 (By uploading on *CaseLines* and/or circulation to the parties' legal representatives by email)

JUDGMENT

MAKHURA, J

- [1] The applicant referred a claim in terms of section 10(2) read with section 6(1) of the Employment Equity Act¹ (EEA) to the Commission for Conciliation, Mediation and Arbitration (CCMA), alleging that the third respondent Municipality discriminated against him on an arbitrary ground, after he had unsuccessfully applied for the position of Manager: Financial Services and Reporting.
- [2] The proceedings before the CCMA culminated in an award in terms of which the second respondent commissioner dismissed the applicant's claim that his non-appointment was based on unfair discrimination. The applicant now seeks to review and set aside the award and substitute it with an order setting aside the appointment of the successful candidate, Arnold Mathebula, and to appoint him to the advertised position.
- [3] In 2018, the Municipality advertised the position of Manager: Financial Services and Reporting, with 28 June 2019 as the closing date. The applicant was invited to the interview on 8 August 2019, together with five other candidates. The interview panel recommended Mathebula, who scored 64 points compared to the applicant's second best 51 points, for appointment.
- [4] On 30 August 2019, the applicant requested, in terms of section 18 of the Promotion of Access to Information Act², the following information:
- 'Scoring sheets with details of panel members, Interviews report and CV of successful / recommended candidate...'
- [5] On 16 September 2019, the Municipality refused the applicant's request on the basis of alleged privacy and confidentiality of the information and a possible breach thereof. The applicant then declared and referred an unfair discrimination dispute to the CCMA.

¹ Act 55 of 1998.

² Act 2 of 2000.

[6] The interview panel comprised of three members, CW Molokomme, Walter Shibamba and MP Makhubela who also served as the panel chairperson. In terms of the interview questionnaire completed by Molokomme, he noted that the applicant had a disciplinary record from his previous employer, that he was the best “*so far in terms of conflict resolution mechanism*”, scored him 17 out of 25 points and recommended him with reservations due to the “*outstanding disciplinary case at Labour Court*”. Shibamba scored the applicant 16 points and did not indicate whether he recommended or did not recommend the applicant or recommended him with reservations. Makhubela scored the applicant 18 points and recommended him with reservations because of the disciplinary record and dismissal from Polokwane Municipality.

[7] Molokomme and Makhubela scored Mathebula 19 and 23 points respectively and both recommended him for appointment without any reservation. Molokomme noted that Mathebula was at that time acting in the position, had practical experience of the division and that he had performed well during the interview. Shibamba scored Mathebula 22 points and again did not indicate whether he was recommended for the position or not.

[8] In his referral form, the applicant sought to be appointed to the position or to be compensated. In his request for arbitration, the applicant summarised the issues in dispute as:

‘I am dissatisfied with interviews outcome for Manager: Financial Services and Reporting. Internal candidate was appointed despite poor performance in the interviews and I was unfairly discriminated.’

[9] His complaint was further articulated in his founding affidavit in support of the applications for condonation for conciliation and request for arbitration as follows:

‘He was unfairly discriminated because he was not an internal candidate / political opinion. He was not appointed because of one or both reasons above despite performing well in the interviews, better than the appointed internal candidate.’

- [10] At the arbitration proceedings, it was common cause that the applicant's employment history started with the Municipality through an internship programme in 2002. In 2005, he left the Municipality and joined the Thaba Choeu Municipality as an accountant with effect from 1 December 2005. He was later appointed as Deputy Director: Income by Thaba Choeu. In 2008, he resigned from Thaba Choeu and joined Lesedi Municipality as Deputy Chief Financial Officer. On 1 June 2011, he joined the Polokwane Municipality as the Deputy CFO, a position which he held until his dismissal on 20 April 2015. After his dismissal, he established a private business providing training facilitation and consulting services.
- [11] The applicant's case was that he possessed substantially more experience than the successful candidate, Mathebula, particularly at management level. Although he claimed to be more experienced than Mathebula, he acknowledged that he did not know Mathebula's detailed qualifications or have access to his CV. Mathebula, according to the applicant, was preferred over him despite his poor performance during the interview and lack of experience because he was an internal candidate.
- [12] However, the applicant conceded that he did not possess the required BCom Accounting degree specified for the position, which Mathebula possessed. Instead, he held a Diploma in Cost Management and Accounting and a BTech in Management and Accounting (NQF Level 7), which he regarded as equivalent.
- [13] The applicant then claimed that he performed better than Mathebula during the interview process. He said that Mathebula's interview was brief and described it as "*quick in and out*" and that Mathebula himself indicated that the interview was difficult. From these facts, he inferred that Mathebula must have performed poorly. By contrast, he described his interview as reasonably easy, the interview questions as relatively easy, and believed that he performed better than Mathebula.

- [14] It is common cause that Mathebula scored 64 points while the applicant scored 51 points. The applicant complained about the scores. He alleged that the scores were “irrational”, “skewed” and “swayed”. He contended that the scores were manipulated and not a true reflection of his and Mathebula’s performances because Mathebula received consistently high scores from all panel members, suggesting that the panel members could have engaged in discussions beforehand, leaked interview questions, or otherwise favoured Mathebula. These allegations were disputed by Shibamba and, also challenged as speculative.
- [15] The applicant also took issue with the recommendation with reservation because of his disciplinary record. He argued that the panellist’s reference to or reliance on his disciplinary record was improper because he had challenged the dismissal and the matter was still pending before the Labour Court. He argued further that his disciplinary record, which he disclosed voluntarily, should not have influenced the appointment decision.
- [16] The applicant further sought to challenge his non-appointment on the basis that the chairperson of the panel interview, Makhubela, had no integrity. The commissioner rejected the admission of the evidence on the basis that Makhubela was not found guilty. The applicant had also not produced the report to draw a link between the report and the allegation of unfair discrimination.
- [17] The commissioner observed that an applicant who relies on an arbitrary ground as a ground of discrimination must clearly identify and prove the alleged arbitrary ground. Relying on the LAC judgment in *Naidoo and Others v Parliament of the Republic of South Africa*, the commissioner found that:
- ‘The applicant merely avers no less or more than that he was more suitable for appointment to the vacancy than the second respondent was. He therefore failed to identify a clear, distinct and discernible arbitrary ground of discrimination. His averments are no different from those commonly alleged and relied upon in an unfair labour practice dispute and certainly fall far short of sustaining a claim of unfair discrimination on an arbitrary ground. Consequently, I am of the firm view

that by referring this type of a dispute, rather than an unfair labour practice dispute, he made a fatal wrong choice of cause of action, but since I am not at liberty to express a view in the merits of latter dispute, I therefore do not express any such view on the merits of the unfair labour practice dispute.

As a parting shot, I express the view that it is difficult, if not almost impossible, to identify / prove an arbitrary ground and where possible and appropriate, litigants should seriously consider referring an unfair labour practice dispute, which is relatively easy to prove.'

- [18] In these proceedings, the applicant contends that the commissioner committed gross irregularity and misconduct and exceeded his powers for various reasons. He argues that the commissioner failed to apply his mind to the material facts and evidence, did not understand or appreciate the true nature of the dispute, selectively dealt with the evidence to unduly favour the Municipality, conducted the proceedings partially and in violation of the *"legal provisions applicable to the proceedings before him"*. He submits that the commissioner arrived at an irrational decision that was not based on the evidence, which *"clearly indicated that [he was] the most suitable candidate for the position"*, was not sound in law, and was unreasonable. Further, the applicant contends that the commissioner considered evidence relating to issues that formed part of a different dispute and ignored evidence relating to the applicable issues.
- [19] The applicant contends that the commissioner erred in finding that he failed to identify a clear, distinct, and discernible arbitrary ground of discrimination, and criticised the commissioner's remarks about the challenges of proving an unfair discrimination claim on an arbitrary ground compared with an unfair labour practice. He criticised the commissioner for allegedly ignoring the uncontested evidence that he was the best candidate. He maintains he was unfairly discriminated against on an arbitrary ground in that the Municipality appointed an *"internal candidate"* and therefore discriminated against him because he was an external candidate.

[20] The applicant further contends that the commissioner failed to have regard to the credibility of the witnesses and the inherent probabilities of the competing and conflicting versions in that the chairperson of the panel had questionable credibility because she was implicated in the VBS Mutual Bank report and she did not challenge the report. Further, he complains that the commissioner failed to have regard to the fact that the successful candidate did not testify, and that the Municipality presented inconsistent evidence and lied under oath regarding the recording of the interview process. He contends that the Municipality did not dispute that it committed discrimination, but its case was that the discrimination was fair.

[21] The applicant also complained that the commissioner led the witnesses and answered questions on their behalf. Finally, he complained that the commissioner's insistence to finalise the matter "*intimidated*" him and did not allow the proceedings to follow its natural course.

[22] Section 6(1) of the EEA, which this claim is based on, provides that:

'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

[23] In *Association of Mineworkers & Construction Union on behalf of Members v Aberdare Cables (Pty) Ltd & others*³, the Labour Appeal Court revisited the test for unfair discrimination where an employee relies on an arbitrary ground. Referring to its earlier decision in *Naidoo & others v Parliament of the Republic of SA*⁴ (*Naidoo*), the LAC held that:

'[18] In *Naidoo*, this Court (per Sutherland JA) concluded that the narrow interpretation of an 'arbitrary ground' is correct, and that a claimant seeking to

³ [2025] ZALAC 26; [2025] 7 BLLR 698 (LAC).

⁴ [2020] 10 BLLR 1009 (LAC); (2020) 41 ILJ 1931 (LAC).

establish discrimination on that basis must necessarily identify an arbitrary ground of discrimination, as opposed to making a general allegation of mere arbitrariness or capriciousness. The Court said the following about section 6(1):

‘The injunction in s 6(1) is to outlaw, not “arbitrariness”, but rather to outlaw unfair discrimination that is rooted in “another” arbitrary ground (the syntax of “any other...” cannot be understood as otherwise than looking back at what has been stipulated in the text that precedes it). Capriciousness, by definition, is bereft of a rationale, but unfair discrimination on a “ground” must have a rationale, albeit one that is proscribed. The glue that holds the listed grounds together is the *grundnorm* of Human Dignity...’.

[19] In *Minister of Justice and Correctional Services v Ramaila and Others*⁵ (*Ramaila*), this Court confirmed that the phrase ‘any other arbitrary ground’ is not meant to establish a self-standing ground, but rather one that refers back to the specified grounds, so that a ground of a similar kind would fall within the scope of section 6.’

[24] The legal position is abundantly clear. A claim of unfair discrimination founded on an arbitrary ground cannot succeed merely because the impugned conduct is alleged to be arbitrary. The claimant must establish that the ground relied upon is analogous to a listed ground under section 6 of the EEA and that it is based on characteristics or attributes that have the potential to impair human dignity or to adversely affect him in a comparably serious manner.⁶

[25] The applicant’s case was fundamentally misconceived from its inception. He had not identified any ground that falls within any of the scope of section 6. His claim was merely that he was unfairly discriminated against because he was an external candidate. The applicant’s failure to establish that the alleged arbitrary ground was analogous to any of the listed grounds was dispositive of the matter and rendered any further inquiry unnecessary. Accordingly, the proceedings

⁵ (2021) 42 ILJ 339 (LAC).

⁶ See also: *Naidoo & others v Parliament of the Republic of SA* [2020] 10 BLLR 1009 (LAC); (2020) 41 ILJ 1931 (LAC); *Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd* (2024) 45 ILJ 1554 (LAC); *Ndudula & others v Metrorail - Prasa (Western Cape)* [2017] 7 BLLR 706 (LC); (2017) 38 ILJ 2565 (LC).

were foredoomed to a spectacular collapse owing to this fundamental defect, as they eventually have. The review application must suffer the same fate, as the applicant is not entitled to advance on review a case different from that presented at arbitration.

[26] In any event, even if the review application were to survive the foregoing difficulties, it would nonetheless fail on the merits and fall to be dismissed on that basis, for the reasons that follow.

[27] First, during the arbitration hearing, Ms Schroeder, appearing for the applicant, contended that the applicant had been denied a fair hearing as a result of the commissioner's interference with the presentation of evidence. Although this ground was not expressly pleaded in those terms, she submitted that it is discernible from the applicant's allegations that the commissioner conducted the proceedings in a partial manner and contrary to the legal principles governing arbitration proceedings. In support of this contention, she pointed to the applicant's complaints that he felt intimidated by the commissioner, that the commissioner effectively asked and answered questions on behalf of a witness, and that the commissioner prevented the arbitration from proceeding to its proper and natural conclusion.

[28] I accept that a proper reading of the review grounds encompasses this complaint. However, I am not persuaded that the commissioner's alleged interference deprived the applicant of a fair hearing. During examination in chief, the applicant was afforded a full opportunity to present his case. The commissioner merely directed him to confine his testimony to relevant matters and excluded irrelevant evidence. Before cross-examination commenced, the commissioner expressly allowed the applicant to reflect on whether he had said everything he wished to place before the arbitrator.

[29] In my view, no valid criticism can be levelled at the commissioner's conduct up to the point at which the applicant closed his case. Although the commissioner intervened on several occasions during the applicant's cross-examination of

Shibamba, ostensibly to obtain clarity, prevent excursions into irrelevant issues, and ensure that the proceedings were finalised on the allocated day, such interventions do not, without more, establish that the proceedings were unfair. The commissioner was entitled, and at times obliged, to intervene to ensure that proceedings remain focused, relevant and efficient.

[30] More importantly, by the time these interventions occurred, the applicant had already presented and closed his case. As I have found, the applicant's case was fundamentally deficient from inception. His evidence in chief failed to disclose even a *prima facie* case of discrimination. Indeed, at the conclusion of his own evidence, the applicant had not established the factual foundation necessary to sustain his claim. In those circumstances, the case had effectively failed before the Municipality was required to present any evidence. Consequently, no amount of cross-examination of Shibamba, nor any evidence that might have been led by the Municipality, could have remedied the deficiencies inherent in the applicant's case. It follows that the commissioner's interventions did not occasion any prejudice capable of rendering the proceedings unfair.

[31] Second, the applicant sought to compare himself to Mathebula, despite being unaware that Mathebula possessed the prescribed qualification of a BCom in Accounting. Although the applicant was invited to attend an interview, the position did not provide for the appointment of a candidate with qualifications equivalent to those required. The applicant accordingly failed to adduce any objective evidence demonstrating that he was better qualified or more suitably experienced than Mathebula. On the contrary, the evidence established that Mathebula held the requisite qualification, had approximately ten years' experience as a senior accountant, and had already been acting in the position within the Municipality. These factors provided a clear and rational basis for his appointment.

[32] The applicant confirmed that much of his belief that Mathebula performed poorly during the interview was based on assumptions arising from Mathebula's

comments about the difficulty of the interview. There was no objective evidence to suggest that the scores were manipulated. Even if the applicant was able to establish the above, his cause of action was that he was discriminated against on an arbitrary ground because he was an external candidate. The applicant not only failed to identify the arbitrary ground as required, but he also failed to lead evidence of different treatment, let alone discrimination.

[33] Third, the applicant conceded that his belief that Mathebula had performed poorly during the interview was founded largely on assumptions drawn from comments allegedly made by Mathebula regarding the difficulty of the interview. There was no objective evidence before the commissioner to suggest that the interview scores had been manipulated or that the selection process had been improperly influenced. Even if the applicant had succeeded in establishing those allegations, his pleaded case remained that he had been subjected to unfair discrimination on the basis of an arbitrary ground, namely that he was an external candidate. Yet he failed to identify and establish the alleged arbitrary ground as required, and more fundamentally, failed to adduce evidence showing differential treatment amounting to discrimination.

[34] Accordingly, the applicant's evidence concerning Mathebula's qualifications, experience, interview performance and the alleged irregularities in the selection process consisted largely of assumptions, speculation, inference and subjective opinion rather than admissible direct or indirect evidence. From the outset, his case was characterised by conjecture and a misplaced sense of entitlement on the part of the applicant rather than by cogent evidence capable of establishing unfair discrimination. He presented no credible evidence demonstrating that he had been treated differently from other candidates, nor any objective basis upon which the integrity of the recruitment process could reasonably be called into question. The review application is accordingly without merit and falls to be dismissed.

[35] In the premises, the following order is made:

Order

1. The review application is dismissed.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms N. Schroeder
c/o Higgs Attorneys

For the 3rd Respondent: Mr T. Chavalala

Instructed by: Raphela Attorneys