

SOUTH AFRICA / JUDGMENT

Lecogo v General Public Service Sectoral Bargaining Council and Others (JR699/21) [2022] ZALCJHB 360 (20 October 2022)

[2022] ZALCJHB 360

COURT

Labour Court Johannesburg

BEFORE

Snider

CASE / FILE NUMBER

JR699/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR699/21

In

the matter between:

JOSEPH

KEKGALEMILE LECOGO

Applicant

and

GENERAL

PUBLIC SERVICE SECTORAL

BARGAINING

COUNCIL

First

Respondent

P

J GREYLING N.O.

Second

Respondent

DEPARTMENT

OF LOCAL

GOVERNMENT

AND HUMAN

SETTLEMENTS:

NORTHWEST Third

Respondent

D

MOKEKE

Fourth

Respondent

Heard: 28

June 2022

Delivered: 20

October 2022

Summary: Application

for the review of an award relating to an application in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995, as

amended, (“the LRA”) concerning promotion. The

Applicant alleges that he was passed over for promotion in

circumstances where he met the criteria which were required in terms of the advertisement for the position in which he was acting,

whereas

the person who was awarded the position, being the Fourth Respondent, fulfil the criteria which were set out in the advert.

The

Second Respondent, in his award, emanating from the arbitration of the matter, found against the Applicant, and concluded that

the

appointment of the Fourth Respondent in the position of Deputy

Director: Housing Subsidy Administrator on 1 June 2018

did not

constitute an unfair labour practice as envisaged in section

186(2)(a) of the LRA. The application to the CCMA was

accordingly dismissed.

JUDGMENT

SNIDER, AJ

- [1] This is a review application brought in terms of section 145 of the Labour Relations Act[1] (LRA) which the Applicant seeks to set aside an arbitration award made by the Second Respondent (the Arbitrator) under the auspices of the First Respondent (the Bargaining Council) in an arbitration between the Applicant on the one hand and the Third Respondent (the Department) on the other. The Fourth Respondent (Ms Mokeke) was also cited in the arbitration.

Background

- [2] The Applicant was employed by the Department in the capacity of Assistant Director: Subsidy Administration. The Applicant acted as Deputy Director: Subsidy Administration for three years from 1 April 2014 to 31 May 2017, when the Deputy Director position became vacant. The Deputy Director position was a level above the one to which the Applicant had been appointed full time. The Deputy Director position was advertised, for a full-time appointment, on or about 15 November 2016.
- [3] It is important to have regard to the actual wording of the advertisement for the full time Deputy Directorship position. The requirements are:
- 3.1. a matric (grade 12) or equivalent;
 - 3.2. a three-year diploma / degree in research / policy development / human settlements / public administration / public management or any other relevant qualifications;
 - 3.3. a minimum of three years relevant experience at junior management level; and
 - 3.4. a valid drivers licence.
- [4] There were 114 applications for the post including the Applicant and Ms Mokeke.
- [5] The Applicant had the requisite minimum three years' experience at a junior management level by virtue of his acting in the advertised position. He also had a National Diploma in Management obtained from the Southern Business College. There does not appear to be any challenge to the Applicant meeting the criteria in the advertisement. It is common cause that he has a diploma in Management obtained from the Southern Business College, and this is stated in the founding affidavit in the review application compliance with the criteria set out in the affidavit. [2]
- [6] Ms Mokeke, on the other hand, has a Bachelors, Honours and master's degree in Bio-Chemistry, she did not have the required minimum 3 years' experience at the time she applied for the post, yet she was nevertheless recommended for appointment by the Department's Selection Committee and appointed to the Deputy Director position by the Department on 1 June 2017. Again, these facts seem to be common cause.
- [7] The Applicant placed second in the selection process. On 4 October 2017, the Applicant lodged a complaint with the Public Service Commission (the PSC) in respect of his non-appointment.
- [8] I must point out, at this stage, that the PSC's report is not determinative nor is it in fact particularly helpful for the purposes of adjudicating this matter. It deals with essentially procedural

issues

and the failure of the Department to comply with relevant procedures. However, notwithstanding that the Applicant's complaints were substantiated in the course of the PSC investigation, and various recommendations, including a recommendation to the department that it apply to court to withdraw its appointment decision, what the PSC did not do was to place the Applicant in the Deputy Director position. There can be no doubt that the PSC's attitude in respect of this decision was severely critical, however, it appears that this was largely a critique of procedure not substance. The substance, regardless of the procedure concerns, seems to have been left in the hands of the Department.

[9] It is common cause between the parties that Ms Mokeke's qualification were in the science arena and that she did not have the minimum three year requisite experience in a junior management position. The allegation is made on behalf of Ms Mokeke that when the short listing of the prospective candidates was done, Ms Mokeke qualified inter alia in as far as her required periods of service was concerned.

[10] It is also common cause that the main issues before the Arbitrator were narrowed down to the following:

10.1. whether Ms Mokeke was the best suitable candidate to be appointed in the position in question, or

10.2. whether the Applicant was the best suitable candidate to be appointed in the post.

Condonation application

[11] This Court is required to decide an application for condonation brought by the Applicant in respect of the late delivery of this review application. I am of the view that the condonation application should be granted as the applicant has shown good cause for the delay. The Applicant has good prospects of success, and this is the determinative criteria in this particular matter. The Applicant has proffered an explanation for the delay and any shortcomings in the application are cured by the good prospects of success in the main matter.

The evidence

[12] Ms Mokeke's evidence related to her qualifications and that she had worked as a Researcher for the Department and that she did research during her honours and master's degrees. It was by virtue of this that she was of the view that she qualified to apply for the post.

[13] It was also evidence before the Arbitrator that the internal and departmental courses were relevant in qualifying Ms Mokeke to function within the specific department. What is set out above was the essence of the evidence before the Arbitrator.

[14] The first ground of review dealt with by the Applicant is that the Arbitrator failed to apply his mind to the PSC report which made it clear that Ms Mokeke should not have been shortlisted from the outset as she did not, have a minimum of three years relevant experience in Junior management level/ Assistant Director by the closing date of 18 November 2016, as advertised. The PSC concluded that the shortlisting of Ms Mokeke was not in line with the advertisement and the inherent

requirements of the post, as advertised.[3] It is some significance that Ms Mokeke scored 93% in the interviews whereas the Applicant obtained 78%.

[15] The PSC report does not go so far as to make a determination of who the better candidate was for the position and, the furthest it goes is to state that [4]

“The PSC therefore directs that the MEC approaches the court of law in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 (as amended), to correct the irregularities relating to the appointment and promotion of Ms Mokeke to the position of the Deputy Director: Housing Subsidy Administration.”

[16] It is implicit in this direction given by the PSC that the appointment can be rectified, and, in fact, the PSC’s report certainly does not go to the extent of determining that the Applicant should have been placed in the Deputy Director position ahead of Ms Mokeke. The PSC report is very strongly critical of the conduct of the Department.

[17] In addition, a legal opinion was obtained by the Department in respect of whether the PSC report is binding on the Department, and what the Department should do in this situation. In short, the opinion obtained was that the Department is not bound by the PSC’s report and the remedy available to the Applicant is to refer the matter as an unfair labour practice to the Bargaining Council, as he did. It appears that the Department acted in accordance with the advice that it was given relative to the PSC’s report / investigation outcome.

[18] In respect of the ground of review, that the Arbitrator failed to apply his mind to the PSC report which made it clear that Ms Mokeke should not have been shortlisted from the outset, as she did not meet the minimum requirements pertaining to experience, the Applicant is correct, the Arbitrator did fail to apply his mind to this issue and how it should be treated in relation to the overall assessment of fairness.

[19] There can be no serious doubt the PSC report ought to have informed the Arbitrators’ assessment of the overall fairness of the Department’s actions, and whether their conduct constituted an unfair labour practice.

[20] The Arbitrator’s failure to appreciate that the academic requirement was not simply of a general nature, as stated by him in paragraph 25 of his award, but was in fact confined, at least to the requirement of relevancy, in respect of the job content itself; being to manage subsidy administration for all human settlement programs, is also reviewable.

- [21] It was common cause before the Arbitrator that Ms Mokeke did not have the requisite three years of experience as a junior manager. This common cause fact should also have weighed in the Arbitrator's consideration as to the fairness or unfairness of the failure to promote the Applicant. The Arbitrator correctly articulates the dispute before him when he says, at paragraph 18 of the award –

“the second respondent was the successful candidate and was appointed as from 1 June 2017. It is this appointment that is the subject matter of these arbitration proceedings. It is to be decided whether the decision of the first respondent to appoint the second respondent constitutes an unfair labour practice with regard to promotion.”

- [22] The academic requirements are specific that a three year diploma degree in research / policy development / human settlement / public administration / public management or any other relevant qualifications are required. There is no evidence that Ms Mokeke's qualifications fall into any of those categories, although she does claim to have attended relevant courses within the department.
- [23] Although the Arbitrator refers to the advert requiring certain minimum standards of Applicants, and not being determinative of the best candidate, this does not answer the question. A candidate must meet the minimum threshold to advance to an enquiry into who the best candidate is. If the criteria are not met, then it is difficult to perceive on what basis the candidate could advance to the next step.
- [24] In terms of his notice of motion the Applicant asks for condonation for the late launching of the review application which, as set out above, I believe should be granted; and the reviewing and setting aside of the award.
- [25] On its own, and under the circumstances of this matter, it seems that reviewing and setting aside the award would, without more, lead to a highly unsatisfactory situation. It would not be clear to the parties as to how to conduct themselves. A rehearing of the matter by another arbitrator would seem pointless where I am in the same position as the Arbitrator, being in possession of all the relevant evidence, to determine the matter.
- [26] Clearly, the Department deviated from the terms of its advertisement in allowing Ms Mokeke to be shortlisted, and to persist in her application, notwithstanding the requirements of experience and relevant academic qualifications in the advertisement, neither of which she had. This is manifestly unfair, although not arbitrary or capricious.
- [27] In the circumstances, it is my intention to set aside the award and to determine the matter in terms of section 145(4)(a) of the LRA.
- [28] I find the conduct of the Department to have been unfair and constituting an unfair labour practice relating to promotion as described in section 186(2)(a) of the LRA.

[29] In the circumstances I believe that it is fair that the Applicant be compensated in an amount of eight months remuneration at the rate of his remuneration at the end of the month proceeding the handing down of this judgment.

Costs

[30] There is no reason that the Applicant should be mulcted with the costs of this application. I must, in terms of section 162(1) of the LRA, and the decision in *Zungu v Premier of the Province of KwaZulu-Natal and others*[5] have regard to the requirements of law and fairness in deciding the issue of costs. The Department should not have conducted itself as it did in the appointment process, nor should it have opposed this review application.

[31] It is a large governmental organisation which I do not believe will be prevented in any way from approaching the Labour Courts or defending matters in the Labour Courts as a result of a costs order against it in this matter.

[32] Accordingly, the following order is made:

Order

1. Condonation is granted for the late delivery of the review application.
2. The award is reviewed and set aside.
3. The Third Respondent is ordered to pay the Applicant, within 14 days of the date of this judgment, an amount equal to eight months remuneration calculated at the rate of his remuneration at the end of the month before the handing down of this judgment.
4. The Department is ordered to pay the Applicant's costs in respect of this review application.

Snider, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Vincent Mabuza

Instructed by: Mothusi Marumo Attorneys

For the Respondent: Advocate Hendrik Jacobs Schollz

Instructed by: State Attorney Mahikeng

[1] No. 66 of 1995, as amended.

[2] Page 10, paragraph 16 of the founding affidavit in the pleadings bundle.

[3] PSC Report, page 43 of the pleadings bundle.

[4] At paragraph 7.3 of the award

[5]

(2018) 39 ILJ 523 (CC).

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Prepared on 11 October 2026 · Esheria