

SOUTH AFRICA / JUDGMENT

Mokoena v General Public Service Sectoral Bargaining Council and Others (JR 1121/18) [2021] ZALCJHB 239 (17 August 2021)

[2021] ZALCJHB 239**COURT**

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

JR 1121/18

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Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case****no: JR 1121/18****In****the matter between:**

FUSI
MOSES
MOKOENA Applicant
and
GENERAL
PUBLIC SERVICE SECTORAL
BARGAINING
COUNCIL First
Respondent
CHRISTOPHER
MANNDE Second
Respondent
DEPARTMENT OF WATER
AND SANITATION Third
Respondent
Heard: 11
August 2021 (Virtual hearing)
Delivered: This
judgment is handed electronically by circulation to the parties'
legal representatives by email, and released to the court's
library and SAFLII. The date for hand-down is deemed to be 17

August 2021.

JUDGMENT

MAHOSI, J

Introduction

[1] This is an application brought by the applicant in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award issued by the second respondent (the arbitrator) under the auspices of the first

respondent, the General Public Service Sectoral Bargaining Council (the GPSSBC) under case number GPBC 918/2017, dated 02 May 2018.

Background

- [2] The facts leading to the current dispute are either common cause or not in dispute and may be summarised as follows: The applicant is the third respondent's employee who was employed on 01 November 2011 after having applied for the post of Information Technology (IT) Technician.
- [3] Subsequent to his appointment and prior to reporting to duty, the applicant was invited to sign the contract of employment, conditions of which were explained to him by the third respondent's HR practitioner. In particular, the applicant was informed that he was the first IT Technician to have ever been appointed by the third respondent and as such his post was not included in the Rank Designation Requirements (RDR), the document which is third respondent's policy on promotion. It was further explained that he would be assessed after which his results would be used to determine whether he qualifies for merit bonus or promotion.
- [4] During 2014, the applicant was assessed. However the Moderation Committee declined the recommendation for him to be appointed to a position of Chief Industrial Technician (salary level 10). Dissatisfied with the decision of the Moderation Committee, the applicant launched a grievance, which was raised to the Moderation Committee in a form of an appeal. The Moderation Committee considered the appeal and eventually approved the promotion of the applicant. In its letter of approval dated, the Moderation Committee stated as follows:

'APPEAL: PROMOTION TO LEVEL 10 – CHIEF INDUSTRIAL TECHNICIAN

Your letter dated 31 July 2014 has the reference.

A thorough consideration was given to your appeal to be promoted to level 10. The following is brought to your attention:

The RDR makes no provision for IT positions and in order to appoint IT personnel a decision was taken to appoint IT personnel as Industrial Technicians with different requirements from those of Industrial Technicians. The RDR is currently under review. Should the requirements change and the prerequisite be that of a Nation Diploma/Degree for promotion to level 11, the rule will be strictly

applied.

In view of the above management decided to promote you to level 10 with effect from 1 July 2014. However, it is brought to your attention that the Department is committed to continuous training and development of staff and the same is expected from all personnel. You are therefore advised to commit to the same principle and are further encouraged to obtain your relevant national diploma/degree.

It is hoped that you accept the management principle regarding your appeal.’

[5] In 2016, the applicant was again subjected to a merit assessment by his superior who recommended that he be promoted to the position of Control Industrial Technician (salary level 11). However, the merit committee declined to endorse the applicant’s promotion.

[6] Aggrieved by the third respondent’s decision not to promote him, the applicant lodged a grievance that was unsuccessful. Dissatisfied with the outcome of the grievance procedure, the applicant referred a dispute to the GPSSBC. The dispute was conciliated unsuccessfully after which the applicant referred a dispute to arbitration.

Arbitration

[7] The arbitration was set down for 12 January 2018 before the arbitrator. It is not clear what transpired during these proceedings, as the arbitrator did not keep any record. Nevertheless, it is common cause that the parties agreed to submit closing submissions.

[8] Subsequently, the arbitrator issued an undated ruling in terms of which he stated the following:

‘REPORT FOR CASES: GPBC415-2017, GPBC918-2017,GPBC1-31-2017

[1] The awards for the above mentioned cases are pending. The recent developments influenced by the decision by the Labour Appeal Court (LAC) made me not render the awards as expected. The parties of the above mentioned cases agreed to dispense of the arbitration by way of written heads of argument. In the case of PSA obo 522 Members vs Minister of correctional service and others case No. JA52/2014. Judge CJ Musi JA in paragraph 16 gave a good practice to follow when parties appearing before an arbitrator wanted to finalize the arbitration without leading oral evidence.

[2] After a lengthy discussion in the case law monitor in the CCMA it became apparent that the path we were following when dealing with submitted heads of agreement was susceptible for review. I Maromoto (sic) decided not to conclude awards in the circumstance rather to

revisit the parties in the above cases to follow the route (good practice) as suggested by Judge Musi in the supra paragraph. I take responsibility after learning for (sic) such a good practice after the case were scheduled and finalized. I however recommend to the council to reschedule the above mentioned cases to be done accordingly.'

- [9] On 07 March 2018, the GPSSBC issued another notice of set down to the parties for a hearing that was scheduled for 09 April 2018. It is also not clear from the pleadings what transpired during these proceedings as no record was kept. In his award, the arbitrator

stated that the parties agreed to proceed by means of written heads of arguments.

- [10] On 02 May 2018, the arbitrator issued an award in terms of which he found that the third respondent did not commit an unfair labour

practice. It is this award that is the subject of this application.

Applicable law and analysis

- [11] The test to review a decision on the merits of an unfair labour practice dispute is whether the decision is one that no reasonable arbitrator could reach and the grounds listed in section 145 (2) of the LRA. The test for review which has been stated in *Sidumo and Another v Rustenburg Platinum Mines and others*[2] was reiterated in *Herholdt v Nedbank Limited*[3] as follows:

"In summary, the position regarding the review of CCMA awards is this. A review of a CCMA award is permissible if the defect in the

proceedings falls in one of the grounds of section 145(2)(a) of the Labour Relations Act. For a defect in the conduct of the proceedings

to amount to gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance attached to a particular fact are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if the effect is to render the outcome unreasonable."

- [12] The test is therefore whether the decision reached by the arbitrator is one that a reasonable decision-maker could reach. Section 186(2)(a) defines an unfair labour practice as any act or omission that arises between an employer and an employee, involving unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provisions of benefits to an employee. It is trite that a promotion for the purpose of section 186 (2)(a) involved a move by the existing employee to a higher rank or position which carries a greater status and responsibility.

- [13] An employee may challenge his or her failure to be promoted with reference to the procedure adopted in making a determination on

whether to promote or not and the reasons for failing to promote him or her. It is trite that the onus in establishing the existence of an unfair labour practice for the purpose of section 186(2) rests on the applicant. In *Department of Justice v CCMA and Others*[4] the Court held that.

“An employee who complains that the employer’s decision or conduct in not appointing him constitutes an unfair labour practise must first establish the existence of such a decision or conduct. If the 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 then can follow. This is not one of those cases such as disputes relating to unfair discrimination and disputes relating to freedom of association where if employee proves conduct complained of, the legislation then requires the employer to prove that such conduct was fair or lawful; or if he cannot prove that, then unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of paragraph 2(1)(b), the Act does not say so because it was not intended to be so.”

[14] In the current matter, the applicant alleges that he met the requirement for promotion and that the third respondent’s decision not to promote him was arbitrary.[5] It is common cause that the third respondent took a decision not to promote the applicant. The enquiry whether the conduct was unfair should then follow. Therefore, the applicant bears the onus to prove that although he possessed the qualification and experience required, he was overlooked for the promotion and further that the third respondent cannot explain why he was overlooked.

[15] During arbitration, the parties submitted a joint document titled “common cause issues and issues to be decided”, which reads:

‘Issues in common cause

1. Mr Mokoena was appointed by the Department as per the recruitment and selection policy.
2. He was a suitable candidate after the interviews.
3. The promotion within Chief Directorate: Construction Management are done through rank designation requirement (RDR).
4. The employees are eligible for promotion after serving two years in the rank and meeting the requirements of RDR.
5. In 2014, Mr Mokoena was promoted from salary level 9 to salary level 10 after he had lodged a grievance.
6. The MODCOM promoted Mr Mokoena after writing a letter to him outlining their reasons for promotion and their expectations.
7. In 2016, the promotion of Mr Mokoena was declined by the Unit Merit Committee.

Issues

to be decided

1. The commissioner must decide if the employer committed unfair labour practice by declining the promotion of Mr Mokoena on the basis the he did not comply with the RDR or the letter written to him by MODCOM is still applicable.
 2. The commissioner must also consider the fact that the position of Mr Mokoena do not [future] (sic) in the current RDR [SILENT] (sic), as such can he/or not be treated based on it.'
- [16] In addition, the applicant submitted a statement and documentary evidence to support his case. It is clear from the statement that the applicant's case was that he met all the requirements for promotion and that the third respondent failed to produce a policy on which it relied not to promote him. The applicant argued that the third respondent's aforementioned letter dated 31 July 2014 did not state that a diploma or degree was a requirement for his next promotion, but it encouraged him to obtain such, promoting the continuous development of employees.
- [17] It is apparent from the above that the parties specifically required the arbitrator to decide whether the third respondent's decision to decline promoting the applicant on the basis the he did not comply with the RDR or the letter written to him by MODCOM amounted to an unfair labour practice. In other words, the arbitrator was required to assess whether the third respondent's decision to apply the provisions of RDR in considering the applicant's promotion was fair and whether the third respondent's letter dated 31 July 2014 had the effect of setting the requirement required for the applicant to be promoted to level 11.
- [18] In his award, the arbitrator simply reproduced the parties' "common cause issues" and proceeded with the analysis of evidence and arguments. This is an indication that the dispute was determined on the basis of written arguments and without a stated case, which is clearly a reviewable irregularity.
- [19] In his analysis, the arbitrator stated the following:
- 'In this matter the onus rests on the applicant to prove that the respondent committed an act of unfair labour practice. According to the applicant's submissions, it seems that it is not in dispute that the RDR makes no provision for IT positions in order to appoint IT personnel a decision was taken to appoint IT technician as industrial technician with different requirements from those of an industrial technician. Accordingly, it seems as the RDR is used as a pointer by both the employer and the employees towards advertising at specific positions. In the applicant's submissions applicant conceded that the RDR does not make provisions to a promotion spot by the applicant. It seems that there was practice by the employer to promote employees outside RDR. It is unfortunate that the applicant bearing the onus to prove did not suffer to prove the practice by the employer. There is no specific prescript that the respondent omitted to apply. On the balance of probabilities the employer did not commit an unfair labour practice'
- [20] It is apparent from the above that although the arbitrator noted that the third respondent seem to have a practice of promoting its employees outside the provisions of RDR, he found that the applicant failed to prove the practice. This is clearly contradictory and nonsensical.

Having found that the third respondent had a practice of promoting its employees outside the RDR, it goes without saying that the applicant did prove such practice. In fact, it was not in dispute that the applicant was appointed and subsequently promoted outside the provisions of RDR. Thus, the arbitrator's finding is not supported by the evidence before him.

- [21] The arbitrator further found that "there is no specific prescript that the respondent omitted to apply." The basis of his finding was that "the applicant conceded that the RDR does not make provision to a promotion spot by the applicant". Although it is not clear what the arbitrator meant, it is apparent that he ignored the third respondent's practice to make appointments outside the RDR, which he found to be in existence in the first place. The arbitrator further failed to assess whether the RDR was applicable to the applicant or that the third respondent's letter dated 31 July 2014 set out the qualifications required for the applicant's promotion. In so doing, the arbitrator misconceived the nature of the enquiry and further failed to take into account and to consider all the evidence presented before him. As a result, he arrived at an unreasonable result.
- [22] In fact, the manner in which the arbitrator conducted this arbitration leaves much to be desired. His decision not to record the proceedings and to ignore the proceeding of 12 January 2018 amounts to a reviewable irregularity.
- [23] In light of the above, the applicant succeeded in making out a case that the arbitrator's decision was unreasonable and that he committed a gross irregularity in that he misconstrued the nature of the inquiry and that he disregarded the material evidence.
- [24] Turning now to the issue of substitution of the award, I find that based on the material before me, the manner in which the arbitrator elicited the evidence and his conduct throughout the proceedings, this is a case where both parties were not afforded a fair hearing. The Court, in keeping with the tenet of fairness, is inclined to remit the matter back to the GPSSBC) for a hearing de novo.

Costs

- [25] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.
- [26] Accordingly, the following order is made:

Order

1. The arbitration award issued by the second respondent (the arbitrator) under the auspices of the first respondent, the General Public Service Sectoral Bargaining Council (the GPSSBC) under case number GPBC 918/2017, dated 02 May 2018 is reviewed and set aside.
2. The matter is remitted to the GPSSBC) for a hearing de novo before an arbitrator other than the second respondent;

3. There is no order as to costs.

D Mahosi

Judge of the Labour Court of South Africa

Appearances:

Counsel for the applicant: Advocate

Dirk Groenewald

Instructed by: Serfontein,

Viljoen and Swart Attorneys

Counsel for the third respondent: Advocate Puseletso Leselo

Instructed by: State

Attorney, Polokwane

[1] Act 66 of 1995, as amended.

[2] [2007] 12 BLLR 1097 (CC).

[3] [2013] 11 BLLR 1074 (SCA) at para 25.

[4] [2004] 4 BLLR 297 (LAC) at para 73.

[5] Index: record, p 85

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