

SOUTH AFRICA / JUDGMENT

Mukwevho and Another v Eskom Holdings Ltd and Others (JR 1197/2018) [2021] ZALCJHB 27 (4 March 2021) [2021] ZALCJHB 27

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 1197/2018

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The
Labour Court of South Africa
(Held
at Johannesburg)
Not reportable
CASE NO: JR 1197/2018
In

the matter between:

HILDA
MUKWEVHO
First
Applicant
SIFISO
MANTSHINTSHI
Second
Applicant
and
ESKOM
HOLDINGS LTD
First Respondent
COMMISSION FOR
CONCILIATION
MEDIATION
& ARBITRATION
Second
Respondent
COMMISSIONER
NK DUBE N.O.
Third

Respondent
Application
heard: 04 March 2021.
Judgment
delivered: 04 March 2021. Judgment delivered electronically, by
email, sent to the parties' representatives.

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the third respondent (the arbitrator on 3 June 2018. In his award, the arbitrator held that the conduct complained of by the applicants did not fall within the definition of section 186 (2) of the Labour Relations act (LRA) and dismissed the referral.
- [2] The first respondent seeks condonation for the late filing of its answering affidavit. The application was not opposed and condonation is accordingly granted.
- [3] The arbitration hearing concerned an alleged unfair labour practice as contemplated in section 186 (2) (a), relating to alleged unfair conduct by the first respondent in relation to promotion. The award under review records the background to the dispute. During the course of November 2011, the applicants attended what is referred to as an Expo at which the first respondent advertised vacant posts in its operations and sought recruits to fill those vacancies.
- [4] The first and second applicants applied for positions at the T12 level. The first applicant was offered employment and appointed as a shift supervisor. The second applicant was also offered employment, and engaged as an assistant documentation officer. Both posts were at level T10. It was not in dispute that offers of employment were made and accepted on the basis that the applicants would be appointed at the T10 level. The applicants were aggrieved at having been appointed to posts graded lower than those for which they say they were interviewed. Some two years after their engagement, the applicants claimed that the first respondent had committed an unfair labour practice, lodged a grievance to this effect and ultimately referred the matter to arbitration.
- [5] The arbitration award summarises the evidence. The second applicant's evidence was that he attended the Expo and on 18 November 2011, received an offer of employment for the position of assistant documentation officer. The post for which he said he was interviewed was that of a documentation officer. On 24 November 2011, the second applicant signed the offer of employment and commenced work on 1 January 2012. Once he commenced working, he lodged a grievance in relation to the level of his appointment. Under cross-examination, the second applicant acknowledged that he received an offer for appointment as an assistant documentation officer, which he had signed. He insisted however that he had been told that he was being interviewed for both the documentation officer and assistant

documentation officer positions and that the first respondent's representative, Madlala, had told him after the interview that he did well. He accepted the written offer because he was desperate for job security and had no explanation as to why it had taken almost 2 years after his appointment for him to file a grievance relating to the level at which he was engaged.

- [6] The first applicant testified that she is a security operations officer, based at Komati power station. She had applied for the position of senior supervisor at the T12 level. The interview was successful and she ultimately received an offer of employment as a shift supervisor at the T10 level. She testified that this was not the position for which she had applied, or for which she had been interviewed. She signed the offer of employment because she wanted the job security. Some two years later she realised that the two positions were not the same and lodged a grievance on 16 October
2013. Under cross-examination, she too accepted that she was made an offer of employment as a shift supervisor at the T10 level. She also accepted that the advertisement had reflected the grade at that level.
- [7] An official of the National Union of Mineworkers, Mr Stanley Lebelo, testified that the applicants were members of the union and that he had assisted them when they referred an unfair labour practice dispute relating to promotion. In his view, the dispute arose from the failure by the first respondent to promote the applicants to the correct posts.
- [8] For the first respondent, Mr Looretz, a senior occupational health practitioner testified that he had been part of the panel that interviewed the second applicant. He denied that the second applicant had ever been told that he did well in the interview, and could not recall the position for which the second applicant had been interviewed.
- [9] Mr Mphuti, a safety manager, testified that the first applicant had been interviewed and appointed as a shift supervisor. The post had been advertised was at the T10 level and described as the senior shift supervisor. This was an error in that the position was that of a shift supervisor. This mistake and been corrected in the offer of employment made to the first applicant, and explained to the first applicant when she was interviewed. The first applicant did not raise any issues at that stage, but did so some two years later. Mphuti testified that the first applicant could not have been appointed at

the T12 level because there was no T12 post on the structure. The head of department was appointed at the T11 level. Under cross-examination, Mphuti accepted that the advertisement had referred to the post that is one of a senior shift supervisor, but confirmed that this was later corrected. The post of a senior shift supervisor did not exist, and the error was rectified. He reiterated that the first applicant had proffered no objections to the level at which she was appointed when she was interviewed.

- [10] The third witness for the first respondent was Mr Pillay, the risk and assurance manager at the Komati power station. He was not involved at the Expo, and could not comment on the post for which the second applicant was interviewed. The Expo was not the place at which any decisions regarding employment were to be made, other processes had to follow.
- [11] In his analysis of the evidence, the arbitrator recorded that the dispute had been referred late but in the circumstances (which included the review of a jurisdictional ruling made in April 2014 and the remittal of the matter to the CCMA) condonation was granted. The arbitrator then turned to the definition of unfair labour practice in section 186 (2) which in paragraph (a) refers to ‘unfair conduct by the employer relating to the promotion, demotion, probation... Or training of an employee or relating to the provision of benefits to an employee...’ The arbitrator recorded that the scope of the definition was limited and that arbitrators have no jurisdiction over complaints which did not relate to the matters listed in the definitions. He considered that the boundaries of section 186 (2) to be jurisdictional in nature, and confirmed that the onus was on the employee alleging that the employer had committed an unfair labour practice to establish unfair conduct falling within the terms of the definition. He recorded that it was for the first and second applicants to convince him first, that the act they complained of was one that fell within the ambit of the definition, and that the first respondent’s conduct was unfair. Secondly, the applicants were required to establish that the conduct of which they complained must necessarily have occurred during the course of employment. He noted that it was common cause that the employees wished to be promoted from the positions to which they had been appointed (at the T10 level, as reflected in their signed contracts of employment) to positions graded at the T12 level. Insofar as a dispute concerning promotion was concerned, for the purposes of section 186
- (2) (a), promotion involved a shift by an existing employee to a position which carries greater status, responsibility and authority, ordinarily followed by increased remuneration and benefits. The arbitrator found first that the applicants were not existing employees of the employer at the time the offers of employment were made. Put another way, at the relevant time, there was no existing relationship between the applicants and the first respondent. Secondly, he found that the first respondent had issued offers of employment with a clear indication as to the positions into which they would be appointed. The first and second applicants, without being misled or without any misunderstanding, understood, signed and accepted the offer on the terms presented. This was the starting point of their employment relationship with the first respondent. The first and second applicants had not objected to the offers, but signed them unconditionally accepting the terms offered by the first respondent. On their own evidence, the arbitrator found that the first and second applicants had accepted the offers because they sought job security. Having secured the job, it was not open to them to challenge the same offer. In short, the conduct complained of did not fall within the ambit of the limited definition of unfair labour practice and on that basis, the referral was dismissed.

[12] At one level, it would appear that the ruling under review is jurisdictional in nature. The arbitrator, as I have indicated, considers that the requirements of the definition in section 186 (2) have not been met, and he finds that the applicants were not employees when the dispute arose. There is some debate as to whether the first of these grounds is truly jurisdictional in nature, or whether it is simply a finding that the applicants had not proved their case. In the second, there are some instances at least in which an unfair labour practice might be described as ongoing, and which might extend from a pre-employment phase into a period of employment. At another level, the arbitrator appears to grapple with merits of the claim, and his conclusion that the conduct complained of does not fall within the 'limited definition of S186(2)' is indicative of a finding on the merits. Frankly, it makes no difference whether the decision to which the arbitrator came was one relating to jurisdiction, or a decision on the merits. For the reasons that follow, in my view, the arbitrator's decision meets the thresholds of both correctness and reasonableness.

[13] In their founding affidavit, the applicants contend that the arbitrator ignored the fact that the first respondent's conduct in appointing the applicants to lower positions was unfair conduct, and that insofar as the arbitrator had found that the applicants were not existing employees, the applicants were employed in the positions for which they applied and that changes were made only when it came to placement, which was a process after their employment. The finding that at the time the offers of employment were made there was no existing employment relationship between the applicants and the first

respondent was thus defective. Further, the applicants contend that it was common cause that while the applicants already employees of the first respondent, they applied to be promoted to the positions the respondent had advertised and for which they had applied and for which they had been successfully interviewed. In the supplementary affidavit filed in terms of rule 7A (8), the applicants contend that the award is contradictory, unreasonable and wrong. The applicants reiterate that the arbitrator ignored the fact that they had applied and were interviewed for certain positions and that once interviewed, the process of recruitment ended and what followed was placement to implement the successful recruitment. They contend that the first respondent did not have a discretion to change the positions after a successful interview. Further, the applicants contend that the arbitrator's finding that at the time the offers of employment were made there was no employment relationship between them and the first respondent was defective, unreasonable and legally wrong, since the offers had been made after the process for employment had been successfully completed and the offers came at the stage of placement and implementation of the recruitment decision. Finally, the applicants contend that the arbitrator failed to determine their case that, after they'd been appointed in the wrong positions, they applied for their positions to be upgraded to those for which they had initially applied, and in which they had been appointed, and for which they met all the relevant requirements.

[14] In the supplementary heads of argument filed on their behalf, the applicants contend that the LRA protects employees against unfair conduct relating to promotion, which is to be distinguished from appointment to posts by persons not employed by the employer

concerned. They submit that it is evident that they applied for specific positions, attended interviews as prescribed and that the first respondent's decision to place them on a lower position constitutes an unfair labour practice. Specifically, they contend that they were graded to lower positions without being consulted and that their respective salaries were cut commensurate with the lower positions, without any valid reason.

- [15] Insofar as the applicants submit that the arbitrator's award is unreasonable, this court may intervene if and only if the applicant establishes that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could come to it. A right of review has been clearly distinguished from a right of appeal. This court is not empowered to intervene simply because it would have come to a different conclusion on the same facts. The failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come

on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)). The Labour Appeal Court has affirmed this principle and held that while the failure of an arbitrator to apply his or her

mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable

outcome (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In other words, while a failure properly to assess the evidence is indicative of an unreasonable outcome, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons

of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.

- [16] As I have indicated, the factual background is not in dispute. In summary, on 8 September 2010 and 24 November 2011, the first respondent employed the first and second applicants in the position of security operations officer and assistant documentation officer respectively. Prior to the date of their employment, neither the first nor the second applicant were contracted to or employed by the first respondent in any manner whatsoever. Some two to three years after taking up employment with the first respondent, in 2013, the applicants declared an unfair labour practice dispute in circumstances where they alleged that they had applied and been interviewed for specific positions at the T12 level, that they unconditionally accepted employment in different positions with a lower grade (T10), but despite that acceptance, they were entitled to be appointed to the higher level positions for which they applied.

- [17] Insofar as the applicants seek in paragraph 1.5 of the notice of motion an order to the effect that the dismissals were substantively unfair and ordering the reinstatement effect from the date of their dismissal, that relief is incompetent since on their own version, the applicant's case does not concern any dismissal let alone one that is substantively unfair.
- [18] Regarding the balance of the relief sought, the award, in so far as it appears initially at least to proceed from the premise that the boundaries of section 186 (2) are jurisdictional in nature, as I have indicated above, might be questioned. The dispute referred to the CCMA was a substantive dispute in which unfair conduct by the first respondent relating to promotion was alleged. That was sufficient to clothe the CCMA with jurisdiction – the issue that served before the arbitrator was whether the applicants had established that the first respondent had indeed committed an unfair labour practice. That is not a jurisdictional enquiry; the arbitrator was required to determine whether on the evidence before him it could be said that the applicants had discharged the onus of establishing that the first respondent was guilty of unfair conduct in relation to promotion. In so far as the arbitrator suggests that he had no jurisdiction to determine the dispute on account of the fact that the conduct

complained of occurred prior to the establishment of any employment relationship, this is manifestly so. The conduct complained of, on the applicants' own version, related to an offer of employment made after an interview, but prior to acceptance of the offer. In other words, at the time the dispute arose, the applicants were applicants for employment and not employees as defined by section 213 of the LRA. For that reason, the CCMA had no jurisdiction to entertain their claim.

- [19] Even if I were to accept that the award is sought to be reviewed on basis not of a jurisdictional finding but a finding on the substantive merits of the case, and that the challenge to the award is one of reasonableness, I have no hesitation in concluding that the award meets the threshold of reasonableness. On the undisputed facts, the applicants were offered employment on specified terms and conditions, at the T10 level. They accepted that employment, on the terms that were offered. For some two years, they raised no complaint regarding the terms of their employment, or their status. A dispute about promotion necessarily concerns a claim by an existing employee (i.e. an employee in employment, seeking appointment to an elevated post) and unfair conduct by the employer in that regard. Put another way, the dispute must relate to a failure or refusal to promote. A disputed failure or refusal to appoint an applicant to a different position, even though that position is of a higher status, will not ordinarily be a dispute concerning promotion. At the time the offers about which the applicants complain were made, the applicants were not employed by the first respondent. They were applicants for employment. They agreed to the terms of an offer of employment made by the first respondent. The arbitrator's decision that the applicants should be held to the bargain that they had struck when they accepted the offer of employment is not unreasonable.

- [20] The applicants' real complaint, as the arbitrator recognised, is that they were not appointed at the higher (T12) level, which they allege was the subject of their initial applications for employment and the interview process. What they seek to do is to argue that they successfully applied for the respective posts at the T12 level, and that it was in the later phase of 'placement' that the changes of which they complain were made. This submission overlooks the undisputed fact that the offers of employment at the T10 level were made and accepted after the applications for employment and interviews. The applicants appear to consider that applying for and being interviewed for post x entitled them to appointment to post x. That is manifestly not so – it is not uncommon for advertisements to be issued and interviews to be conducted for a particular post, and for the offer of employment (if and when an offer is made) to be made on different terms. The prospective employee is then at liberty to accept or reject the terms of the offer. The arbitrator recognized as much when he said the following:
- [45] Secondly, the employer issued office of employment to the employees with clear indication as to which positions it is willing to appoint the matter. The employees, without any misleading misunderstanding lead knowingly read, understood, signed and accepted the offers. This was the start of the employment relationship. These were the terms and conditions that govern the relationship. At this point the employees were well within their rights to reject, disagree or refuse to sign the offers if they had objections or felt aggrieved. The employees did not object to this but instead signed the offers accepting what the employer had put on the table.
- [21] The applicants' supplementary heads of argument suggest that their real grievance is that after applying for posts at the T12 level, they were 'graded to a lower position without their consultation, and their respective salaries were also cut to such lower position without any valid reason'. This much is confirmed by the applicants in their evidence – the first applicant stated at the conclusion of her evidence in chief that 'it still stand to say that was the unfair conduct that I feel Employer unfairly treated me there, because of I was interviewed for a senior position but now when I have to be appointed it was a junior position (sic)'. Similarly, the second applicant describes his grievance in the following terms:

MR MANTSHINITSHI: Okay the circumstances that led to the dispute was the confusion in terms of the position that I went for, for an interview because the position that I went for, it was Officer Documentation but later on, when I received the offer later, it was totally different from what I was interviewed for.

- [22] Given the terms in which both applicants framed their grievances, logically, on the premises adopted, they ought properly to have complained about a demotion. The evidence given by the applicants, and the manner in which they have framed their complaint, does not suggest any unfair conduct by the first respondent in relation to promotion. Again, the applicants were not employees at the time the first respondent made offers of employment. They became employees once those offers had been accepted. The offers were accepted voluntarily, without coercion and without any reservation of rights or conditions. It is not

open to the applicants in these circumstances to complain about not being promoted. There was no post into which they sought to be promoted, nor did the first respondent's refusal to undo the bargain that was done about to conduct in relation to promotion. Simply put, the applicants were not seeking to be promoted. They were, opportunistically it might be said, and with

buyer's remorse experienced two years after reaching agreement with the first respondent on the terms of their employment, laying claim to more favorable conditions of employment.

[23] In short: the conclusion reached by the arbitrator is both correct and falls within a band of decisions to which a reasonable decision-maker could come on the available material. The application for review thus stands to be dismissed.

[24] Finally, in relation to costs, the court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. The first respondent sought costs on a punitive scale, and submitted that the application was frivolous and amounted to an abuse of this court's process. I agree with that assessment, but must necessarily take into account that the first and second applicants of individual employees who may have been the victim of poor advice initially from their union and later from the legal representatives. I must also take into account that the costs of opposition of the application are borne by a state owned entity, and that it is ultimately the taxpayer who will be

funding those costs. Further, as I have indicated, there is a degree of opportunism which permeates through the course of the proceedings

both in the CCMA and in this court. For these reasons, the requirements of the law and fairness would be best satisfied by an order for costs on the ordinary scale.

I make the following order:

1. The application is dismissed, with costs, such costs to exclude the costs of the first respondent's application to condone the late filing of its answering affidavit.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv R Mathevula, instructed by Mohale Inc.

For the first respondent: Adv E Sithole, instructed by Maponya Attorneys,

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