

SOUTH AFRICA / JUDGMENT

Nomtshongwana v Commission for Conciliation, Mediation and Arbitration and Others (JR 590/20) [2022] ZALCJHB 254 (12 September 2022)

[2022] ZALCJHB 254

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

JR 590/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JR 590/20

In

the matter between:

PHUMELELE

NOMTSHONGWANA

Applicant

and

COMMISSION

FOR CONCILIATION,

MEDIATION

AND ARBITRATION

First Respondent

VAN

DER BERG, G

N.O.

Second Respondent

AIR

TRAFFIC AND NAVIGATION SERVICES SOC LTD

Third Respondent

BOITUMELO

MAZIBUKO

Fourth Respondent

Heard: 31 May 2022

Delivered: In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 12 September 2022.

JUDGMENT

MAHOSI, J

Introduction

[1] The applicant, Phumelele Nomtshongwana (the employee) brought an application for an order to review and set aside the arbitration award (the award) issued by the second respondent (“the commissioner”) on 07 February 2020, under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (“the CCMA”), under case number JMD FSBF412-19[1].

Background

- [2] The employee is employed by the third respondent, the Air Traffic and Navigation SOC Limited (the employer) as a Technician. He applied for the position of Manager Technical Support: FABL (“the position”) in Bloemfontein and was shortlisted, together with Ms Mazibuko and another third candidate. After the interview, the employee was not appointed. Instead, the employer appointed Ms Mazibuko.
- [3] Aggrieved by the employer’s decision not to appoint him in the position he applied for, the employee referred an unfair labour practice dispute to the CCMA for conciliation. The dispute could not be resolved through conciliation. As a result, the employee referred the dispute to arbitration, which was held over several days commencing on 30 October 2019 and finalized on 31 January 2020. On 07 February 2020, the commissioner issued an award, which is the subject of this application.

The arbitration

- [4] The arbitration proceedings proceeded by way of stated case, where no oral evidence was led. The said stated case, which was signed by both parties, reflect as follows:

‘QUESTIONS OF LAW IN DISPUTE

55 Legal written arguments will be submitted on the following legal issue/s:

55.1 Whether or not the first respondent committed an unfair labour practice in terms of section 186(2) of the Labour Relations Act by not promoting the Applicant into the position he applied for.

55.2 The First Respondent claims that the claims for unfair labour practice is confined to the reasons as contained in paragraph 5.1.1 of the pre-arbitration minute.[2]

[5] Paragraph 5.1.1 of the pre-trial minute stated as follows:

‘...The applicant avers that he performed better in the interviews and psychometric test than Second Respondent, and that the promotion of the Second Respondent was thus unfair. The Employment Equity Plan as well as the Employment Equity Policy provide for the employment and promotion of female employees, but [are] applicable for the whole organisation and not for every specific department.’[3]

[6] The issues for the commissioner’s consideration were recorded in a pre-arbitration minute as follows:

‘6.1 Whether, with reference to the specific aspects set out in the applicants answer to the question, the Respondent’s failure to appoint the Applicant constitutes an unfair dismissal.’[4]

[7] Having had regard to the parties submissions, the commissioner issued an award in terms of which he found that the employer did not commit an unfair labour practice by not promoting the employee and promoting the fourth respondent, Boitumelo Mazibuko (Ms Mazibuko).

In this Court

[8] The employee based his review application on four grounds. The first ground was that the commissioner committed a gross irregularity in that he failed to appreciate the totality of evidence presented before him, particularly the provisions of the Recruitment Policy and further that he failed to see anything wrong about the recommendation

being made by Mr Boshielo who was not even part of the interview panel;[5]

[9] The second ground was that the commissioner’s finding that the employee’s assertion that he performed better in the psychometric assessment was misleading and a simplistic approach to the complexities involved in the psychometric assessment was neither supported by evidence nor preceded by proper evaluation and analysis of the psychometric assessment results.

[10] The third ground was that the commissioner’s finding that the employee was not promoted because Ms Mzibuko was “the best suitable person for the position and was also in line with the Employment Equity Plan” of the employer was not rationally connected to the documentary evidence that was before him and was not one that a reasonable decision maker could have reached.

[11] The fourth and last ground was that the commissioner failed to consider all the documents presented before him.[6]

[12] The employer supported the award and submitted that the commissioner properly understood and considered the issues before him and that his decision was not one that could not have been reached by a reasonable decision-maker.

Applicable law and

analysis

[13] The arbitration awards are reviewable in terms of section 145 of the LRA, which provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. Section 145(2) defines a defect as the commissioner's misconduct in relation to the duties of the commissioner as an arbitrator, gross irregularities in the conduct of the arbitration proceedings, exceeding the commissioner's powers or improperly obtaining an award.

[14] The test for review which has been stated in *Sidumo and Another v Rustenburg Platinum Mines and others*[7] was reiterated in *Herholdt v Nedbank Limited*[8] 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."

[15] The test is, therefore, whether the decision reached by the commissioner is one that a reasonable decision-maker could reach. The Court's approach to a review application should not be piecemeal. The question is whether on the evidence before the commissioner, the decision reached by the commissioner is one that fits into the bands of reasonableness.

[16] In *Ncane v R Lyster NO*, [9] the court outlined an approach to be taken by the commissioner when arbitrating disputes concerning unfair labour practice as defined in section 186(2)(a) and stated as follows:

[25] When it comes to evaluating the suitability of a candidate for promotion, good labour relations expect an employer to act fairly but it also acknowledges that this is not a mechanical process and that there is a justifiable element of subjectivity or discretion involved. It is for this reason that the discretion of an arbitrator to interfere with an employer's substantive decision to promote a certain person is limited and an arbitrator may only interfere where the decision is irrational, grossly unreasonable or mala fides. See on this *Goliath v Medscheme* (supra).

[26] But where an employer provides that certain rules apply as regards the decision to promote or to recommend a candidate for promotion, e.g. as in this case, the candidate who scores the most points must be recommended by the panel, good labour relations requires an employer to be held to this. A failure to comply with the rules may result in substantive unfairness.

[27] In the case where another person has been promoted to the post then the unsuccessful candidate must show that this is unfair. And as Wallis AJ (as he then was) said in *Ndlovu v Commissioner for Conciliation, Mediation and Arbitration and Others*:

"That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer is rational it seems to me that no question of unfairness arises..." [Footnotes omitted]

[17] In casu, the commissioner was required to determine whether the employer's decision not to promote the employee amounted to unfair labour practice. The evidence before the commissioner was that both the employee and Ms Mazibuko were invited to an interview. On 12 February 2018, the employee attended the interview, which consisted of four panelists, namely: Mr David Watts, Hanelle Drewers, Phillip de Lange and Ouma Selebogo. In the interview, the employee scored 49.25 points and Ms Mazibuko scored 37.5.[10] The interview panel recommended that both the employee and Ms Mazibuko be subjected to psychometric assessment. The results of the assessment showed that the employee was competent in thirteen areas with three areas on which he needed development and that Ms Mazibuko was also competent on all thirteen areas, but eight areas of development.

[18] There was a delay in the filling of the position and this prompted the employee to start making enquiries towards the end of April and early May 2018. On 29 May 2018, the Chief Technical Officer, Mr Zorro Boshielo (Mr Boshielo), recommended the Ms Mazibuko as the preferred candidate for appointment. In his submission, he mentioned that Ms Mazibuko was the preferred candidate as the employer "encourages growth, development and empowerment of women, which is based on the company's employment equity." Accordingly, Ms Mazibuko was offered the position and accepted it.

- [19] On 11 June 2018, Selebogo informed the employee that his application was unsuccessful and indicated that the reason he was not successful was that Ms Mazibuko was “more suited for the job and company needs at this time.” When the employee sought clarity, Selebogo informed him that she was “referring to the competencies for the role” and “the competencies of the job itself and the company specific ones, for example, ATNS leadership, values, motivation.”
- [20] On 14 June 2018, the employee lodged a grievance against Boshielo for victimization, intimidation and violation of the employer’s values when addressing matters, which included the issue of appointment of Manager Technical Services. In this regard, the employee alleged that Boshielo had intimidated him because he failed to assist him with his PHD proposal after he had previously asked him. This grievance was dismissed on 05 October 2018. This prompted the applicant to refer the dispute of unfair labour practice to the CCMA.
- [21] As aforesaid, the commissioner found in favour of the employer. The employee firstly challenged the commissioner’s finding that the procedure followed by the employer in the appointment of Ms Mazibuko was not fair. His main contention was that Boshielo had no authority to recommend a candidate for appointment.
- [22] The employer submitted that the employee’s difficulty was that the issue of Boshielo apparently interfering in the recruitment process was not an issue in dispute before the commissioner. In support of its submission, the employer referred Court to the judgment in *National Union of Metalworkers of SA and others v Driveline Technologies (Pty) Ltd and another*, the LAC stated as follows:
- ‘It is true, of course, that a pre-trial agreement is a consensual document which binds the parties thereto and obliges the Court (in the same way as the parties’ pleadings do) to decide only issue set out therein. In particular, a party who agrees to claim only limited relief would be bound by his agreement (*Shoredits Construction (Pty) Ltd v Pienaar NO & others*)
- [23] It is apparent from the above authority that the pre-trial minute is a consensual document, which effectively constitutes a contract between the parties. In casu, the record clearly shows the parties limited the scope of the issues in dispute that the commissioner was called upon to decide in the signed pre-arbitration minute and the agreed stated case. The pre-arbitration minute recorded that the employee’s averment was that the decision not to promote him was unfair as he performed better than Ms Mazibulo in the interview and the psychometric tests and further that although the employment equity and policy provides for the employment and promotion of female employees, it was only applicable to the whole organization and not departmental.

[24] In light of the above, the employee cannot be allowed to amend the issues for the commissioner's determination in the review proceedings. He is bound by the pre-trial minute and has not established the basis on which he should be allowed to resile from it. There is, therefore, no merit to this ground of review for the reasons that appear below.

[25] In any event, in his written submissions and heads of arguments, the employee did submit that Mr Boshielo's decision to recommend Ms Mazibuko was not unprocedural, unfairly and biased as it was a direct result of and retaliation for an action taken by him (the employee) to escalate the matter against him. These also appear in the award, which was an indication that they were considered by the commissioner. The employer submitted that Mr Boshielo's involvement in the recruitment process was entirely permissible in terms of the recruitment policy. This submission is supported by clause 4.2.1 of the employer's HR policy, which reads:

'In the event of the interview panel not reaching an agreement on the recommendation of the candidate, the relevant Executive and the Executive: Human Capital will be required to make a recommendation after taking into account all the evidence and concerns presented to them by the selection panel. It may decide to select none of the candidates or to re-advertise the position.'[11]

[26] It is not disputed that Mr Boshielo was the line Executive at the time and that he made the recommendation that was supported by Mr Dumisani Majozi, who was the Interim Executive: Human Capital. In light of the above, it cannot be said that Mr Boshielo had no authority to make a recommendation.

[27] As aforesaid, it was the employee's case that the decision not to promote him was unfair because he performed better than Ms Mazibulo in the interview and the psychometric tests. In this regard, the commissioner said the following:

'60. Whether the applicant performed better than the second respondent in the interviews and psychometric test and as a result, the appointment of the second respondent over him was unfair is the first issue in dispute. It is common cause that the applicant scored better than the second respondent in the interviews. The Recruitment Policy merely provides that the interview panel recommends a candidate for appointment. Three of the four members of the interview panel indicated that both the applicant and the second respondent were suitable for appointment in role. The panel members agreed to both candidates being invited for psychometric assessment. It is not disputed by the respondents that the applicant was evaluated by the Industrial Psychologist as being competent with areas for development. Similarly the second respondent was also evaluated as being competent with areas for development. The applicant's

allegation that he performed better in the psychometric assessment is simply misleading and a simplistic approach to the complexities

involved in the psychometric assessment.'[12]

[28] The employee challenged the commissioner's finding that his assertion that he performed better in the psychometric assessment was misleading and a simplistic approach to the complexities involved in the psychometric assessment. The basis for this challenge was that it was not supported by evidence and was not preceded by proper evaluation and analysis of the psychometric assessment results, especially when he failed to state what complexities of the results were.

[29] The fact of the matter is that psychometric assessments are scientific tools and their results are better interpreted by professionals. However, in casu, no oral evidence was led. The commissioner was left on his own to interpret the documentary evidence before him. What is of importance was that both candidates were found to be competent for the position both in the interview and the psychometric assessment. The psychometric assessments report states as follows:

'This report provides a summary of the competency potential for the candidate when compared to the role of Manager Technical Support (ATNS). Competency potential scores these candidates responses to the potential assessment described in this report. When interpreting the information in this report, SHOULD remain on the world competency requirements for the role mentioned above. This report only

represents the competency potential of this candidate against this specific role. The talent match score should not be generalised to other roles. For any critical decisions, that is selection decisions, these assessment results should not be used in isolation and should be integrated with other available and the relevant recruitment and selection information...'[13]

[30] In terms of the Recruitment policy, the employer is:

'... an equal opportunity employer that strives to achieve a diverse work force broadly that strives to achieve that those workforce is broadly representative of our people of our people. Positions will therefore be filled in a manner which is focused on the achievement of the company Employment Equity and resultant departmental equity targets.'

[31] In addition, the employer's Employment Equity Policy states that:

'1.1 ATNS is committed to employment equity. In order to achieve this goal, the employment equity policy will be implemented in accordance with the Employment Equity Act.55 of 1998 and the Bill of Rights.

1.2 The company recognises the diversity within the profile of its workforce is desirable from a number of perspectives. Seeking and valuing diversity will enlarge the pool of skilled applicants available to the company. It will better reflect the wider marketplace and assist in a better understanding of that marketplace. It will also develop creative human resources and other management skills and most importantly keep with the positive transformation of the South African society.

1.3 The company also recognises the need to remedy the negative effects of past discrimination on certain groups of people. Accordingly, the company will give affirmative treatment to suitably qualified black people, all women and people with disabilities (“designated groups”) in order to encourage more equitable representation in all occupational categories and levels within a reasonable period.

1.4 ATNS recognizes that Employment Equity is an appropriate response to eradicate historical imbalance created by apartheid and other forms of social discrimination.

1.5 ATNS therefore commits itself to not only removing all remnants of unfair discrimination, but at the same time introducing a programme of positive redress based on Employment Equity, affirmative through training and education, economic empowerment of designated groups and a change in the management ethics and value system to reflect and fully accommodate the Company’s diversity.’[14]

[32] In his memorandum, Mr Boshielo clearly articulate that although the employee was highest scoring candidate, the reasons for the

recommendation of Ms Mazibuko was because the employer’s policy encourages the growth, development and empowerment of women and that the Operation Technology Department had no woman in the Manager Technical Services role[15]. This rationale is supported by the employer’s Recruitment Policy and the Equity Policy.

[33] To an extent that the employer’s policies allowed for employment equity considerations in all recruitment and that “positions are to be filled in a manner which is focused on the achievement of the Employment Equity and resultant departmental equity targets” and it was not in disputed that at the time of recruitment the managers in the Technical Services department were overwhelmingly black males, its reason of appointing Ms Mazibuko was entirely rational, reasonable and fair. The employee could not persuade the commissioner that the decision not to appoint him was irrational, grossly unreasonable or mala fides. Thus, the employee’s submission that the employment equity and policy was only applicable to the whole organization and not departmental has no merit.

[34] The employee’s submission that the commissioner failed to consider all the documents presented before him in that he recorded, in the award, that he submitted a bundle of documents consisting of 156 pages instead of 209 pages. It was the employee’s further submission that the commissioner gave an impression that he considered all the record by referring to pages 205-206 of his bundle when he actually copied and pasted from his heads of arguments.

[35] In its answering affidavit, the employer submitted that the employee had initially submitted a bundle consisting of 156 pages and subsequently filed another bundle consisting of 209 pages, which included copies of the psychometric assessment results. To an extent that the employee submitted a bundle consisting of 209 pages, this ought to have been correctly recorded by the commissioner in his award. His failure to do so, amounted to an

irregularity. However, the question is whether the irregularity was so material. In this regard, I find the quote from *Head of the Department of Education v Mofokeng and Others*[16] apposite:

‘Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to

the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.’ [Footnotes omitted]

[36] In casu, the reading of the record and the award does not show that the commissioner’s error in recording the pages of the employee’s

documents had the distorting effect upon his conception of the inquiry before him. In fact, I agree with the employer that there is nothing material in the award to gainsay that the commissioner failed to take into account the psychometric assessment results, even if he did not record the supplemented pages in his award.

[37] Besides, there was no dispute of facts regarding the psychometric assessment results. It was common cause that both the employee and Ms Mazibuko were subjected to a psychometric assessed and they were both found to be competent, except that the former was found to be having three areas for development and the latter had eight areas of development.

[38] Without evidence to explain the report or to justify any conclusion that, the lesser numbers of areas of development entitled the employee to be appointed in the position he applied for and that the employer was barred from appointing Ms Mazibuko, the commissioner decision was reasonable. As such, all the employee’s grounds of review have no merit and his application stands to be dismissed.

Costs

[39] With regards to costs, I took the view that the requirements of law and fairness dictate that there should be no order as to costs.

[40] Accordingly, the following order is made:

1. The application for an order to review and set aside the arbitration award issued by the second respondent on 7 February 2020, under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration the under case number JMD FSBF412-19 is dismissed.
2. There is no order as to costs.

D Mahosi

Judge of the Labour Court of South Africa

Appearances

For the applicant:

Advocate M.Z. Seima

Instructed by:

MT Raselo Incorporated Attorneys

For the third respondent: Ms Fatima Salijee of Salijee Govender Van Der Merwe

[1] Paginated page 1

[2] Record, p 129 para 55

[3] Record, p 113 - 114

[4] Record, p 114 para 6

[5] See paginated page 11 to 12

[6] See paginated pages 45 to 47

[7] [2007] 12 BLLR 1097 (CC).

[8] [2013] 11 BLLR 1074 (SCA) at para 25.

[9] [2017] 4 BLLR 350 (LAC) at paras 25 and 26.

[10] Paginated page 7, paragraph 11

[11] Record, p 507 para 4.2.3

[12] Index: Pleading, p33 para 60

[13] Record, p 404

[14] Record, p513 para 1

[15] Record, p 494

[16] [2015] 1 BLLR 50 (LAC) at para 33.

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