

SOUTH AFRICA / JUDGMENT

City of Tshwane Metropolitan Municipality v South African Local Government Bargaining Council and Others (JR1706/17) [2021] ZALCJHB 390 (19 October 2021)

[2021] ZALCJHB 390

COURT

Labour Court Johannesburg

BEFORE

D Mahosi

CASE / FILE NUMBER

JR1706/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1706/17

In the matter between:

CITY
OF TSHWANE METROPOLITAN
MUNICIPALITY Applicant
and
SOUTH
AFRICAN LOCAL GOVERNMENT
BARGAINING
COUNCIL First
Respondent
MAGALE
LAZARUS MATLALA N.O Second
Respondent
IMATU
OBO MIRRIAM
MHLONGO Third
Respondent
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 by email. The date for hand-down is
deemed to be 19 October
2021

JUDGMENT

MAHOSI J

Introduction

- [1] This is an application brought in terms of section 145 of the Labour Relations Act^[1] (LRA) to review and set aside the arbitration award dated 11 May 2017, issued by the second respondent (the arbitrator) under the auspices of the South African Local Government Bargaining Council (bargaining council), under case number PMD101417.
- [2] Coupled with this application is a condonation application for the late filing of the abovementioned review application. Taking into consideration that the degree of lateness is not too excessive, the importance of the matter and the applicant's reasonable prospect of success, I am of the view that there is a need for an objective conspectus of all the facts. Therefore, the condonation application is granted.

Background

- [3] The third respondent's member, Mirriam Mhlongom (the employee), commenced employment with the applicant on 1 December 1994 and her current position is that of Functional Head: Human Resources Support.
- [4] On 21 September 2013, the applicant advertised two positions of Senior Human Resource Operational Services Specialist internally. In terms of the advertisement, one of the positions was intended for people with disabilities.
- [5] It is the employee's case that she applied for the advertised position, but was not shortlisted. As a result, the employee lodged a complaint with the applicant's City Manager.
- [6] On 14 November 2013, a meeting was held between the employee, Mr Phillip Ratsiane, Mr Oupa Ramashala and Mr Frans Labuschagne to discuss issues relating to the employee's application. During the said meeting, the City Manager allegedly instructed Ratsiane to shortlist the employee for the interviews of the advertised position.
- [7] The aforementioned meeting allegedly resulted in the employee's invitation to attend the interviews that were scheduled to take place on 29 November 2013. However, on 28 November 2013, the employee received an sms in which she was advised that the interviews had been postponed. The employee was allegedly never contacted again regarding the interviews and was later informed that the appointments had been made.

- [8] Aggrieved by the applicant's failure to invite her to the interviews, on 31 October 2014, the employee referred an unfair labour practice dispute to the bargaining council. On 8 December 2014, the matter was conciliated unsuccessful. The dispute was then referred to arbitration, which was held on 31 October 2016, 14 December 2016 and finalised on 2 May 2017.
- [9] Subsequently, the arbitrator issued an arbitration award in terms of which he found that the applicant committed unfair labour practice and ordered it to pay the employee compensation equal to her three months' remuneration. It is this award that the applicant is challenging.

Submissions

and analysis

- [10] The applicant seeks an order to set aside the award on the basis that the arbitrator committed gross irregularities in the conduct of the arbitration proceedings, committed misconduct in relation to his duties as an arbitrator and acted unreasonably in that he failed to properly apply his mind to all the relevant evidence presented before him during the arbitration proceedings.
- [11] The applicant submitted that the arbitrator was unreasonable in refusing to postpone the arbitration proceedings of 2 May 2017 despite being informed that its witnesses were off sick. This, according to the applicant, had the effect of denying the applicant the opportunity to lead the direct evidence of its witnesses.
- [12] It is common cause that during the last day of the arbitration proceedings, the applicant made an application for postponement of the proceedings on the basis that its two witnesses were off sick. The arbitrator refused to grant the postponement because the applicant failed to provide medical certificate in support of the allegation that the witnesses were sick. In the absence of the applicant's witnesses, the arbitrator proceeded to hear the parties' closing arguments.
- [13] It is trite that the granting of postponement is an indulgence which involves the exercise of a discretion on the part of the arbitrator. His refusal is reviewable if the discretion was not judicially exercised. In the current matter, it is apparent that the arbitrator considered the parties' submission and justified his decision not to grant the postponement. There is no allegation that the arbitrator failed to judicially exercise his discretion. Therefore, I find no irregularity that exists insofar as it relates to this ground of review .
- [14] The applicant further submitted that the arbitrator failed to apply his mind to its submission that the employee never applied for the advertised positions and further that she failed to provide any proof of her application for the position. In opposing, the employee submitted that the applicant failed to explain why she was invited to attend the interviews if she did not apply and meet the requirement for the appointment.

- [15] The only version before the arbitrator was that of the employee as the applicant's witnesses did not testify. Thus, the arbitrator found that, on a balance of probabilities, the employees applied for the advertised position by delivering the hard copy of application personally at the applicant's recruitment centre at Bothongo Plaza and that she never received any response from the applicant. Further that following his complaint to the City manager, Mr Ratsiane was instructed to include the employee in the shortlisting. The employee further referred the arbitrator to the correspondence with the Human resource officials about her application to which she received no response.
- [16] The question arose whether the position in question was filled through the migration policy or through recruitment process. In this regard, the applicant criticised the employee for failing to join Mr Qakaza as a party to the dispute. According to the applicant, had she joined Qakaza, the arbitrator would have had Qakaza's evidence before him, which he was required to take into consideration in making his award in this dispute.
- [17] This criticism is unfair and unwarranted as it was the applicant that submitted during the arbitration that it would call a witness to testify that Mr Qakaza was placed into the position through horizontal transfer in terms of the migration policy. However, it failed to call witnesses or to prove to the arbitrator that its witnesses were actually ill. Besides, the applicant did not raise a preliminary point of misjoinder at the arbitration proceeding. Thus, the applicant cannot cry foul in these proceeding only because it failed to call its witnesses at the arbitration. There is, therefore, no basis for this ground of review.
- [18] The applicant further submitted that the arbitrator committed a material error of law by using the employee's salary as at April 2017 and not August 2014 when the dispute allegedly arose, to award compensation. In his award, the arbitrator acknowledged that he had to calculate the compensation using the salary of the employee's position at the time the dispute arose. However, seeing that he did not have it at the time, the arbitrator decided to exercise his discretion to use the employee's salary scale for April 2017, which was different from her salary scale which was applicable in August 2014. There was clearly no basis for the arbitrator to award compensation based on the employees's salary as at April 2017. Thus, the arbitrator clearly committed a misconduct and exceeded his powers and the award of compensation stands to be set aside.
- [19] In view of the fact that there was no evidence led on the employee's salary scale which was applicable in August 2014 before the arbitrator, it is appropriate to remit the matter to the first respondent only for the computation of the awarded compensation by a different arbitrator.

Costs

- [20] 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.
- [21] Accordingly, the following order is made:

Order

1. The condonation for the late filing of the review application is granted.
2. The arbitration award issued by the second respondent under the auspices of the first respondent under case PMD101417, dated 11 May 2017 is reviewed and set aside.
3. The matter is remitted to the first respondent for the computation of the awarded compensation by an arbitrator other than the second respondent.
4. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances

Counsel for the applicant: Advocate P. Bekker

Instructed by Gildenhuys

Malatjie Incorporated Attorneys

For the third respondent: In person

[1] Act 66 of 1995 as amended.

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Prepared on 13 October 2026 · Esheria