REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no:C1148/2010

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
SAMWU obo C SYLVESTER, M MNGOMENI & W AKIEMDIEN	First Respondent
ADVOCATE COEN DE KOCK N.O.	Second Respondent
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	Third Respondent

Heard: 23 May 2012

Delivered: 7 September 2012

Summary: Review of arbitration award relating to promotion, approach to remedies in such application discussed.

JUDGMENT

Rabkin-Naicker J

[1] This is an application to review set aside an arbitration award in terms of section 145 (2) of the LRA issued on 10 November 2010.

[2] During April 2009, the applicant (the City) advertised 24 vacancies for the position of Senior Foreman in its "Department: Solid Waste Management Cleaning".

[3] The individual respondents were unsuccessful in their applications for the posts. The reasons given for their failure to be appointed were as follows:

3.1 MrMngomeni scored 9 out of a possible score of 20 for his written assessment, whereas the requirement was that he should score a minimum of 12 out of 20 to be considered for the post.

3.2 Mr Sylvester, scored the highest in the written assessment, but was not considered for the post as he had failed to meet the minimum requirements regarding his qualifications.

3.3 MrAkiemdien also did not meet the minimum qualification requirements and was not considered for the post.

[4] By the time this matter came before me, I was informed from the bar that as far as the latter two employees were concerned, the application had been withdrawn. A letter handed up to me written by the attorney for the City informed the Respondents' attorneys of record that they would be advised shortly as to "when the award in respect of Sylvester and Akiemdien will be implemented".

[5] In terms of the award, the City had been ordered to appoint all three individual employees to the position of Senior Foreman with effect from 1 April 2010 with back pay, by no later than 1 December 2010.

[6] The second respondent (the Commissioner) recorded in his award that Mr

Fick (Fick) for the City had conceded that Mngomeni complied with the relevant qualifications needed for the post, that he was currently acting in the post and had been so acting for some time already. The Commissonerstates at paragraph 8 of the award:

> "It appears that MrMongomeni is good enough to act in the position but not good enough to be appointed permanently in the position. There is a clear contradiction in the actions of the respondent in this regard and I therefore have no difficulty whatsoever in finding that the non-appointment of MrMngomeni amounted to an unfair labour practice"

[7] It was common cause that the City had filled only 16 of the 24 vacancies for the post at the time of the arbitration.

The grounds for review

[8] The main issues making the award susceptible to review according to the City were as follows:

8.1 There was no evidence that the City acted in breach of its own policies including its recruitment and selection policy.

8.2 No evidence was tendered or allegations made that the City acted in bad faith, with an improper motive, malice or grossly unreasonably.

8.3 The award is devoid of reasoning as to why acting in a position gives an employee the right to permanent appointment.

8.4 The Commissioner overlooked the correct legal position that the City as employer "has the managerial prerogative to make permanent appointments provided that it does not act in bad faith, with an improper motive or with malice".

8.5 The Commissioner committed a clear error of law in arrogating to himself the mantle of appointing authority in his remedy.

Evaluation

[9] The City reliedon the case of **SAPS V Security SectoralBargaining Council& Others**[1] to submit that it is not the place of an arbitrator to instruct an employer to promote a candidate into a position. In that judgment, the court per Basson J stated as follows:

"The decision to promote or not to promote falls within the managerial prerogative of the employer. In the absence of gross unreasonabless or bad faith or where the decision relating to promotion is seriously flawed, the court and arbitrator should not readily interfere with the exercise of the discretion…"[2]

[10] The statement is made as one reflecting a number of principles that have developed around promotion disputes. One judgment that considered these is that of **Arries v Commission for Conciliation, Mediation and Arbitration & Others**[3] which has been followed in a numberof CCMA awards.[4] In that matter,Nel AJ approached the question as follows:

> "What MsArries sought to persuade the commissioner of was to interfere with the merits of a discretion exercised by her employer whether or not to promote MsArries. I accordingly first considered how our courts generally have approached the question of interfering with a discretion which has been exercised by another party. Then I looked at how this has been approached in the employment jurisprudence. A consideration of this question discloses that there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can

1[2010] 8 BLLR 892(LC)
2At 897B-C
3(2006) 27 ILJ 2324 (LC)
4For example Msobo& IMATU (2008) 29 OLJ 459(CCMA); Dedering and UNISA (2008)29 ILJ 1312 (CCMA)

be demonstrated that the discretion was not properly exercised. Interference with the discretion of an employer is, in my view, akin to the interference on appeal with a discretion exercised by a court of law. In this regard Holmes JA in Rondalia Insurance Corp of SA Ltd v Page & others 1975 (1) SA 708 (A) at 720C, in relation to the exercise of a discretion pertaining to costs, said that -

> 'a Court making an order as to costs has a discretion to be exercised judicially on a consideration of all the facts; and in essence it is a matter of fairness to both sides. The power of interference on appeal is therefore limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question'.

Taking this proposition further, and applying what our courts have said in this regard to the employment field, I am of the view that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner (see Rex v Zackey 1945 AD 505 at 513; Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398; Ex parte Neethling& others 1951 (4) SA 331 (A) at 335D; Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A) at 781J and 783C; Shepstone H & Wylie & other v Geyser NO 1998 (3) SA 1036 (SCA) at 1045A).

This approach, I believe, is consistent with the test applied by judges sitting in the Labour Court and commissioners of the CCMA when considering the principles applicable to interference with an employer's decision in relation to the promotion or non-promotion of employees."

[11] Withrespect, the reasoning employed as set out above does not reflect the distinction that must be drawn between judicial and administrative exercise of discretion. It similarly assumes that an employer's discretion when deciding on whom to promote, is made from the same cloth.

[12] In my judgment the approach favored by the applicant in this matter, which treats the conduct of selection of an employee by an employer as akin to administrative decision making, needs to be re-evaluated.Regard must be had to the judgment in **Gcaba v Minister for Safety and Security and others**[5]in whichthe ConstitutionalCourt held that employment and labourrelationship issues did not generally amount to administrative action under PAJA: this was implicit in the constitutional recognition of the distinct

5 (2009) 30 ILJ 2623 (CC)

rights to fair labour practices in s 23 of the Constitution (regulating the employment relationship between employer and employee), and just administrative action in s 33 (which dealt with the relationship between the bureaucracy and citizens). The Court held that when the conduct of the State as employer had no direct consequences for other citizens, it did not amount to administrative action. [6]On this basis it found that the failure to promote and appoint the appellant in that matter was not administrative action.[7].

[13] The wholesale adoption of the review tests, and notions of 'setting aside' an employer's decision and sending it back to the employer for decision anew, thus appears misplaced.Rather, the yardstick of fairness to both parties, so successfully applied by our tribunals and courts, is in fact apposite. This does not mean that when a selection process is irrational, it should not be identified as such, but that such irrationally goes to the issue of fairness. The clear wording of section 186(2) of the LRAsupports such an approach:

> "Unfair labour practice" means any unfair act or omission that arises between an employer and an *employee*involving unfair conduct by the employer relating to the promotion …."

[14] In this matter, the fairness yardstick (although perhaps not clearly articulated as such) has been used by the Commissioner.He has found that in a situation where the applicant's post (in which he had been acting for five years) remained vacant after his non appointment, and where the City did not proffer any rationale for the pass mark in respect of the written assignment, nor explain the method of allocation of marks, it had been unfair not to appoint him.

[15] This court is able, with reference to the record of the proceedings, to find other reasons supporting the proposition that an unfair labour practice has beencommitted. As the LAC held in **Fidelity Cash Management Service v CCMA &Others:**[8]

6Paragraph [64]
7Paragraph [68]
8(2008) 29 ILJ 953 (LAC)

> "In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision."[9]

[14] Taking this approach, I note the following evidence from the record:

a) Mngomenihas been acting in the post he applied for the past five (5) years, and has been working for the City for over 17 years 10 months.
b) The minimum requirement for shortlisting for the post was Grade 10 (NQF Level 2) and at least 5 years relevant experience, plus knowledge of relevant legislation and safety standards. He pbtained Grade 10 in 1987.
c) Mngomeni who was born in 1966, was not interviewed because he did not pass the written assessment i.e. he scored 9 and was required to score 12 points in order to pass.
d) The written assessment questions were posed and answered in English, clearly not his first language.
e) In the document headed 'Notice of Appointment' which consists of a report of the selection process, one of the 'Services' of the selection process is described as:'Description of assessment process including how employment equity was considered (eg), interview, roleplay, reference check'.
f) The Description reads: "240 applications were received from this 97 applicants were shortlisted and were put through a technical assessment. A competency assessment and interview in which the following competencies were assessed: experience, technical, and supervisory aptitude was done for 52 applicants.
g) Under cross-examination about Mnogomeni, Fick was asked by the trade union representative: "shouldn't the City have recognized 'the prior

9At paragraph 102

learning' given he had been working in this position for about five years." The reply was that: "he was eliminated out of the process- and sorry for the terminology-he failed the assessment. He wasn't eliminated based on his qualification or his experience. He was afforded the opportunity to do the assessment." The exchange between the Commissioner and Fick of the City in the record is as follows:

> "COMMISIONER: But I'm just here to ensure that fairness prevails and that people and however you deal with people obviously there's a proper explanation for that. I must tell you, I mean, and we are on record, I- if that's common cause that MrNgomeni is acting in the position I cannot place much reliance on this written assessment. If that's the only reason that he was excluded.
> MR FICK: that was the only reason because he met all the other requirements.

[14] The City has submitted before court that should the award stand a 'floodgates' situation would prevail and the City's employees who number some 25, 000, and have acted in a position, will have an unqualified sense of entitlement to permanent employment to a position when advertised for filling.This argument cannot be sustained -each application for promotion must be assessed fairly, in its own right, and in line with relevant prescripts, as well as in light of the number of posts and the applicants for those posts.

[15] In this case, the employer is content to continue employing Mngomeni in an acting position, and to pay him the applicable allowance, after he was refused an interview based on a written assessment.There was no evidence before the arbitration as to how the written assessment was marked or as to why the applicable pass mark was chosen.Furthermore, there were not enough successful applicants to fill the vacant posts. Notions of equity and sensitivity to redress appear to have been limited to a formal reference to "employment equity" in the documentary report on the process.

[16] One further issue on which the City based its review application needs to be

addressed. It has submitted that the following renders the award reviewable: that despite having the onus to prove that an unfair labour practice was committed, none of the employees gave evidence and the Commissioner decided the matter based on the evidence given by the City's witness. Such an approach it is argued, neglects the fact that the onus in unfair labour practice disputes is on the applicant employee. From the record it is apparent that the employees did not give evidence on the basis that the facts before the Commissioner were common cause. It was on the basis of such facts that the Commissioner drew his conclusions of law and found that the failure to appoint the employees constituted an unfair labour practice.

[17] In all the circumstances, and taking cognizance of the evidence before the Commissioner as well as the relevant empowering provision of the LRA that: "An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation",[10]I find that his award is not susceptible to review on the grounds alleged. I therefore make the following order:

1. The application is dismissed;
2. The applicant is ordered to implement the award in respect of MrMnogomeni within 15 days of this order;
3. The applicant is ordered to pay the costs.

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H Rabkin-Naicker

Judge of the Labour Court

10Section 193(4) of the LRA

Appearances:	On behalf of Applicant: Adv G Leslie instructed by HeroldGie Attorneys
	On behalf of Respondents: J. Whyte, Cheadle Thompson and HaysomInc