



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 960/12

In the matter between:

Martin Thatayaone MELALETSA

Applicant

and

CCMA

First Respondent

COMMISSIONER GERALD JACOBS

Second Respondent

N.O.

**KUMBA IRON ORE (SISHEN IRON
ORE COMPANY) (PTY) LTD**

Third Respondent

WILLIAM GEORGE LESING

Fourth Respondent

JIM APPIES

Fifth respondent

LEBOGANG MOSALA

Sixth respondent

ELMO ISAACS

Seventh respondent

Heard: 8 May 2014

Delivered: 27 May 2014

Summary: Review – ULP – LRA s 186(2)(a).

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant employee, Mr Melaletsa, applied for a promotional post with the third respondent, Kumba Iron Ore (Sishen Iron Ore Company) (Pty) Ltd. He was unsuccessful. He referred a dispute to the CCMA (the first respondent) in terms of s 186(2)(a) of the LRA¹ claiming an unfair labour practice relating to promotion. The commissioner (the second respondent) found that the company's failure to shortlist and appoint the employee was not an unfair labour practice. The employee seeks to have the award reviewed and set aside.

Background facts

- [2] The employee has been working for the company since 1995. In 2009 he progressed to the position of drilling foreman. On 1 August 2011, the company advertised the position of "operator coordinator". That is a more senior job to that of drilling foreman. The employee applied for the promotional post together with four others, namely Willem Lesing; George Appies; Lebogang Mosala; and Elmo Isaacs.² He was unsuccessful. He referred an unfair labour practice dispute to the CCMA in terms of section 186(2)(a) of the LRA, alleging unfair conduct by the employer relating to promotion.

The award

- [3] The Commissioner came to the following conclusion:

"I, accordingly, find that the respondent's failure to not [sic] shortlist and appoint the applicant to the post of operations coordinator does not

¹ Labour Relations Act 66 of 1995.

² The fourth to seventh respondents.

constitute an unfair labour practice contemplated by section 186(2)(a) of the Act.

The applicant consequently failed to discharge the onus on him to prove that the respondent's conduct amounted to an unfair labour practice.

The applicant's case is dismissed.

There is no order as to costs."

- [4] In coming to this conclusion, the Commissioner accepted that the company's witness, Ms Lynette de Kock, simply assumed that the successful appointees had the relevant qualifications for the job. He also accepted her evidence that the appointees preferred over the employee "were because they scored higher than the applicant in performance levels." Performance levels were not part of the criteria set out in the advertisement. The Commissioner went on to say:

"The criteria set by prof Rycroft [in an *ILJ* article of October 2007] made it perfectly clear that by changing the necessary qualifications or inherent requirement for the job after the advertisement was unfair and constitute [*sic*] an unfair labour practice. Had this been the applicant's case he would have proved that the respondent's conduct constituted an unfair labour practice. But it was not his case."

Review grounds

- [5] Although other grounds of review were raised on the pleadings, the most significant ground relied upon by Dr Cloete was that at least one of the successful appointees, Mosala (the sixth respondent), did not meet the minimum criteria as advertised.

Evaluation / Analysis

- [6] There was no evidence before the Commissioner that Mosala met the threshold requirements for appointment. Despite having been subpoenaed to produce at the arbitration all certificates and documents that had to be submitted with the job applications, and despite his qualifications being challenged at arbitration, Mosala could not produce a grade 12 certificate

or an open blasting certificate. Despite this, De Kock simply assumed that he had the necessary qualifications and the commissioner accepted that.

Conclusion

- [7] The Commissioner could not reasonably have found that Mosala was qualified for appointment to the post and that his selection over that of the applicant was not unfair, given the evidence before him. That is a reviewable irregularity.
- [8] Given the nature of this misdirection, this is a matter that needs to be referred back to the CCMA to enable all the parties to put the relevant documentation and evidence before a different commissioner.
- [9] With regard to costs, I take into account that there is an ongoing relationship between all the parties involved. A costs order is not appropriate in law or fairness.

Order

The arbitration award of the second respondent, Commissioner Gerald Jacobs, of 15 November 2012 under case number NC 656-12 is reviewed and set aside. The dispute is remitted to the first respondent (the CCMA) for a fresh arbitration before a commissioner other than the second respondent.

Steenkamp J

APPEARANCES

APPLICANT: Neville Cloete attorney, Kimberley.

THIRD RESPONDENT: Thabang Mabote of Sishen Iron Ore (Pty) Ltd.