



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C238/2012

Not Reportable

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL FOR
COMMUNITY SAFETY, WESTERN CAPE
and**

Applicant

**THE PUBLIC SERVANTS ASSOCIATION
OF SOUTH AFRICA obo DAVID COETZEE**

1st Respondent

DONALD LACKAY

2nd Respondent

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

3rd Respondent

HILARY MOFSOWITZ N.O.

4th Respondent

Heard: 13 October 2016

Delivered: 3 February 2017

JUDGMENT

RABKIN-NAICKER, J

- [1] This is an opposed application to set aside an arbitration award under case number GPBC 3912/2010. The fourth respondent (the arbitrator) ruled that the applicant had committed an unfair labour practice relating to promotion.
- [2] On 7 June 2010, the senior management post of Director: Traffic Law Enforcement was advertised. Six applicants were shortlisted and interviewed including the first respondent, Coetzee, and the second respondent, Lakey. They were interviewed by a 5 member panel comprising senior members of the Department of Community Safety and the Western Cape Department of Transport.
- [3] Each of the panel members independently scored the candidates based on their performance in the interviews. Lakey achieved the highest aggregate score (72.40%) followed by Coetzee (72.00%). The panel then determined that the two highest ranked candidates undergo a management competency assessment conducted by an industrial psychologist. It is common cause that the final decision resided with the panel.
- [4] The said assessment reports (which were part of the record before the Arbitrator) state on their cover that: "This assessment only relates to the generic managerial

competencies required for effective performance as a member of the Senior Management Service. It does not reflect on the functional competencies required for the specific post. As such it only forms one part of the selection process.” The summary and conclusion of the report as to Mr Lakey is recorded as follows:

“5. SUMMARY AND CONCLUSION

Overall, Mr Lakey performed at a competent level with the potential to develop to the advanced level.

Based on this assessment he exceeded the required proficiency level in the following competency areas:

- Programme and Project Management
- Financial Management
- Change Management
- Service Delivery Innovation
- People Management and Empowerment
- Knowledge Management
- Client Orientation and Customer Focus

He performed at the required proficiency level in the following competency areas:

- Strategic Capability and Leadership
- Problem Solving and Analysis
- Communication

Hence, from a management and leadership perspective he performed above the expected level for the post. It is important to note that competency assessments

are conducted in conjunction with other recruitment methods and the final decision of appointment still lies with the relevant Executing Authority.”

[5] In respect of Coetzee, the report’s summary reads as follows:

“In general, Mr Coetzee demonstrated an advanced level of competence. In most areas he exceeded the required level of proficiency. However, for Service Delivery and Innovation he met the required proficiency level.

Based on his competency assessment, Mr Coetzee exceeded the requirements in following competencies:

- Strategic Capability and Leadership
- Program and Project Management
- Financial Management
- Change Management
- Knowledge Management
- Problem Solving and Analysis
- People Management and Empowerment
- Client Orientation and Customer Focus
- Communication

In addition, he met the required proficiency level in respect of Service Delivery Innovation.

It is important to note that competency assessments are conducted in conjunction with other recruitment methods and the final decision of appointment still lies with the relevant Executing Authority.”

- [6] Following the competency assessments, the selection panel reconvened and deliberated. It unanimously nominated Lakey as the most suitable candidate and he was appointed to the post on or about 1 September 2010. Coetzee's union referred an unfair labour practice to the third respondent on the basis that he was the best candidate for the position and the department had acted in bad faith in not appointing him.
- [7] In concluding that the department had acted mala fide and unfairly in appointing Lakey, the arbitrator found that:
- 7.1 The department ignored the results of the competency assessment which "clearly weighed heavily in favour" of Coetzee;
 - 7.2 Mr K. Afrika, the Chief Director: Traffic Safety Management, a member of the selection panel "may have had a vested interest in the process and failed to disclose this interest". There was "an indication of bias and improper motive."
 - 7.3 Coetzee's appointment would have advanced the department's employment equity targets. Yet the department allegedly failed to advance a plausible explanation for not taking this into account.
- [8] It is submitted on behalf of the applicant that the arbitrator did not ask herself whether Coetzee had been given a fair opportunity to be considered for promotion. Instead she based the award on her view that Coetzee was the better candidate. It was submitted that by asking the wrong question, she committed a material error of law, which deprived the parties of fair hearing.
- [9] In addition, it is argued that the Award is so unreasonable that a reasonable decision maker could not have arrived at it. Further, that the arbitrator mistook the true nature of her functions and the enquiry before her, exceeded her powers and/or committed one or more gross irregularities in the arbitration proceedings.

- [10] Coetzee's case at arbitration was that he was the better candidate and that there was some kind of conspiracy against him. However, applicant submits that this was unsupported by admissible evidence and amounted to conjecture. In addition it is submitted by applicant that Africa gave clear and coherent evidence about the process of appointment. The Arbitrator did not make an adverse credibility finding against him yet dismissed his evidence out of hand which, it is submitted, amounts to a material misdirection.
- [11] The applicant submits further that the finding that Africa should have recused himself because he had worked with Lakey for a long period of time to be 'astounding'. It argues that here is nothing sinister in a panel member having a working relationship with a candidate for promotion. Such a situation is the norm and not the exception.
- [12] On the issue of 'employment equity' applicant submits that it was uncontested that the employment equity statistics were taken into account at the short listing stage to the benefit of Coetzee. Further that Coetzee did not make any case of unfair discrimination.
- [13] In the Award, the Arbitrator had this to say inter alia in her analysis of evidence and argument:
- "I have noted the Department's submissions with regard to Lakey's qualifications and Africa's denial of undue influence. However this does appear to be a classic case of management wanting their candidate to win the race. The Department has not advanced any plausible reason why it ignored the competency assessment results. These results were undisputed and clearly weighed heavily in favour of Applicant. It makes no sense why the Department would submit its candidates to such a test if it were completely satisfied with the interview scores. The interview scores were close and therefore a more thorough investigation was implemented. It is undisputed that Applicant was rated at an advanced level of competency and scored higher results. This was an objective fact for preferring Applicant over Lackey.

It is also clear that Applicant's appointment would have advanced the Department's Equity Targets and the Department did not advance any plausible explanation for failing to take this into account when selecting its candidate.

While a panel has discretion, this must be exercised fairly and objectively. In the circumstances the panel has a positive obligation to consider a number of factors. In terms of the Department's Recruitment and Selection Policy, the Department has an obligation to promote Equity and meet their numerical targets as set out in their Employment Equity Plans. The policy also prescribes that Points allocated should be considered as a guideline with due regard to the employment equity targets of a Department to identify the most suitable candidate. It appears that the Department ignored this requirement.

It also appears that Africa may have had a vested interest in the process and failed to disclose this interest. It is a requirement of the Recruitment Policy that Panel Members disclose any interest in the outcome of the process. It is clear that Africa's overall scoring of Applicant was substantially lower than the rest of the panel. It was undisputed that Africa and Lakey worked together for a lengthy period. It was also undisputed that Africa was not satisfied with Applicant's work record and Applicant was transferred as a result. There is an indication of bias and improper motive.

Based on all the above factors, Applicant has discharged the onus to show that the Department committed an unfair labour practice in relation to promotion. I am persuaded that the Department's conduct was unfair to promote Lakey while ignoring the results of the competency assessments and the Employment Equity profile of the post. Applicant acted in the post for a considerable period and appears to have had the relevant experience for the post. Taking all these factors into consideration, the Department's conduct was unfair. I have especially considered that the Department has failed to comply with its own Recruitment and Selection Policy and therefore its decision warrants interference."

Evaluation

- [14] In my view the reasons given by the Arbitrator for finding 'bias and improper motive' on the part of Africa, amount to a gross irregularity of the latent type. Coetzee did not apply for the recusal of Africa. Further, an employer's selection panel cannot be equated to an

adjudicator (judge or arbitrator for example) and the tests in law for establishing bias¹ cannot simply be applied to an individual on such a panel. The applicant's evidence as recorded by the Arbitrator was that a panel of 5 people scored Lackey slightly higher than Coetzee and the final decision was a panel decision. The Arbitrator did not make any adverse finding in respect of Africa's evidence.

[15] The competency tests as their results clearly state do not stand alone as a recruitment tool. Nor do they relate to a specific post but evaluate a candidate's competency for a generic post at SMS level. Both candidates were assessed above the required competency for such a post, albeit that Coetzee scored on average at a more advanced level. There is no basis on the evidence before the arbitrator for her finding that the results of these tests were ignored by the panel.

[16] Coetzee's case on the issue of employment equity was recorded by the Arbitrator as follows:

"In terms of the Department's Employment Equity considerations, a White Male should have obtained preference and was the appropriate equity target for the post. Applicant is a White Male and Lakey is a Coloured Male. The Employment Equity Statistics (May 2010) reflected White Males at 11% and Coloured Males at 39% (at Senior Management Level). The Recruitment and Selection Policy imposes a duty on Respondent to meet its numerical targets as set out as set out in its Employment Equity Plans. The Department's own documentation reflects that Lakey's appointment does not advance employment equity."

[17] Coetzee benefited from obtaining a point at the selection process stage reflecting the target percentages per population group at SMS level in terms of the applicant's employment equity plan. However the Arbitrator seems to have accepted Coetzee's submission that a white male was the appropriate 'equity target for the post'. Such an understanding is incorrect in law, as the targets of affirmative action measures are designated groups in terms of the EEA as section 2 of that statute provides:

¹ BTR INDUSTRIES SOUTH AFRICA (PTY) LTD AND OTHERS v METAL AND ALLIED WORKERS' UNION AND ANOTHER 1992 (3) SA 673 (A)

“2 Purpose of this Act

The purpose of this Act is to achieve equity in the workplace by-

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.”

[18] As submitted by the applicant, Coetzee did not rely on unfair discrimination in the dispute. The Arbitrator’s finding that it was unfair for the applicant to ignore the employment equity profile of the post is one that a reasonable commissioner could not make or was a mistake in law. ² In all the premises I find that the result of the Award is one that a reasonable arbitrator could not make. That result is recorded as follows:

“AWARD

Applicant has discharged the onus to show that the Department committed an unfair labour practice in relation to promotion. The appointment of Lakey is overturned with immediate effect and the Department is ordered to redo the process for the position of Director: Traffic Law Enforcement from the interview stage. The panel must be a newly constituted panel.”

[19] There is an ongoing relationship between the parties and I do not intend to make a costs order in this matter. I find no purpose in remitting the award. I order as follows:

² In the LAC matter of MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and Others (JA10/2016) [2016] ZALAC 32; (2016) 37 (ILJ) 2593 (LAC) (28 June 2016) the LAC had this to say at paragraph 30:

“ In my view, there is much to be said for the proposition that an arbitrator in the CCMA or in a Bargaining Council Forum who wrongly interprets an instrument commits a reviewable irregularity as envisaged by Section 145 of the LRA; ie, a reasonable arbitrator does not get a legal point wrong. If so, the reasonableness test is appropriate to both value judgments and legal interpretations. If not, ‘correctness’ as a distinct test is necessary to address such matters. However, on either basis, the ruling in this case must be set aside. “

Order

1. The Award under case number GPBC 3912/2010 is reviewed and set aside and substituted as follows:

- 1.1 "The unfair labour practice dispute brought by David Coetzee is dismissed".

H. Rabkin-Naicker
Judge of the Labour Court

Appearances:

Applicant: S. Harvey instructed by the State Attorney. Heads of Argument drawn by G.A. Leslie

First Respondent: Adams & May Attorneys