



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C978/2018

In the matter between:

CITY OF CAPE TOWN

Applicant

and

IMATU obo Executrix of the

Estate of the late PAUL OLIVER

First Respondent

SOUTH AFRICAN LOCAL BARGAINING COUNCIL

Second Respondent

COMMISSIONER DE RETIEF OLIVIER N.O.

Third Respondent

WILFRIED SOLOMONS

Fourth Respondent

ALESIA BOSMAN

Fifth Respondent

FREDDIE PRINS

Sixth Respondent

ERNEST SONNENBERG

Seventh Respondent

Date heard: 3 March 2021 by virtual hearing

Delivered: 4 June 2021 by means of email

JUDGMENT

RABKIN-NAICKER J

[1] At the outset of the proceedings I granted an application for the substitution of the first respondent, Mr Paul Oliver, who sadly died of Covid complications on the 30 July 2020, by the Executrix of his deceased Estate (NO. 012530/20200), Mrs Marcia Catherine Oliver.

[2] The applicant (the City) is seeking to review an arbitration award under case number WCM 041706 in which the third respondent (the Commissioner) made the following Award:

“AWARD

56. The Applicant Mr. Oliver has proven the burden that the 1st respondent committed an unfair labour practice. The conduct of the 1st Respondent in the filling the post of Area Director was unfair and the applicant is entitled to the relief of compensation as sought.

57. I order the following:

57.1 I order that compensation be paid to the Applicant Mr. Oliver by the 1st respondent, the City of Cape Town, for the unfair labour practice committed, in terms of section 193 (4) of the Labour Relations Act.

57.2 Compensation equal to two months' salary must be paid to the applicant. This amounts to R163 847-50 (Based on annual salary of R983 085 = R81 923-75 per month X 2). I deem two months compensation justifiable in these circumstances where the unfairness relates to both procedural and substantive unfairness, and would not only warrant compensation in respect of a solatium.

57.3 The compensation must be paid in full within 30 days from the issuing of this award.”

[3] The Commissioner further stated that he recommended that the City “as the Appointing Authority investigate the appointment of Mr Sonnenberg and Ms Bosman to determine the lawfulness of the appointments.”

- [4] Paul Oliver (Oliver) had been employed as the Assistant Chief: Traffic Services by the City since 2010. Prior to this, he was employed as the Deputy Director: Traffic and Licensing at the City of Umhlatuze from 2003. He applied for the promotional post in the newly created vacant position of Area Based Director in the Area Based Service Delivery Directorate but was not shortlisted for an assessment for the position and the individual respondents were appointed. There were four vacancies for four different area based directors. The posts were advertised nationally. Approximately 160 applications were received. A shortlist of 10 was compiled and the applicant was not included. The Commissioner records as follows in dealing with the background to the dispute:

“....It was noted that the criteria for the position was as per the advertisement, but when the shortlisting criteria was requested the 1st Respondent indicated that the shortlisting criteria was not documented¹ and that Dr Scheepers, who determined and compiled the final shortlisting, would testify as to the specific shortlisting criteria.

The 1st Respondent further noted that the applicant was not shortlisted, as he did not meet the minimum requirements for shortlisting. The requirements for the advertised position of Director: Area Based Service Delivery was stated as:

“An appropriate tertiary qualification, extensive managerial and functional experience in Local Government.”

The job purpose was stated as:

“To ensure and facilitate area based service delivery through planning, co-ordination, implementation and monitoring of service integration and transversal projects.”

- [5] Oliver gave evidence at the arbitration that he was in possession of a B. Admin and B.Public Administration (Honours) degrees. At the time of the arbitration he formed part of Senior Management and was responsible for a

¹ i.e. there was no documentation as to the shortlisting and appointment process.

staff compliment of 178 and a budget on around R90 million. The Commissioner recorded his testimony as to his prior experience as follows:

“9.....Prior to his appointment with the 1st Respondent he held the position of Deputy Director: Traffic and Licensing at Grade T19 at the City of uMhlathuze. He held this position since 31 August 2003. In this position he had gained functional knowledge across areas other than traffic enforcement. His responsibilities included the management of the Technical Section (Road painting and signage), Nuisances Section, Informal Trading Section and Social Crime Prevention. In the structure of the 1st Respondent these sections fall outside of the Traffic Services Directorate.

10. For periods he also acted as the Director Community Services and Health being responsible for the management of functions outside of traffic and law enforcement. One of the key performance areas in his previous position and in his current position was to direct, lead, strategically manage and coordinate all operations under his control to ensure that service delivery is driven through the implementation of applicable systems, strategies, plans and policies aligned to the City's strategic objectives. This includes interacting with services across the City and liaison with the public.

11. While working in Kwa-Zulu Natal during the period 2000 to 2003 he was part of the 4-area service delivery model, which is similar to the area base service delivery model being introduced by the 1st Respondent. Referring to the benchmark designation schedule of the 1st Respondent the Applicant concluded that the management experience as required in the advert for the position is 8 Years. He stated he had in total in excess of 13 years of experience at a senior management level and therefore met all the requirements as a suitable candidate for the position.”

[6] Oliver also argued that his CV was not vague or confusing as the City claimed and as the Commissioner records in his summary of the evidence:

“He questioned that if he lacked functional broad experience how it could be that the CV's of the 3rd Respondent Ms Bosman, and the 5th Respondent, Mr. Sonnenburg, provided support for their shortlisting. The CV of the 3rd

Respondent indicated that she had been appointed to Sub Council Manager in November 2012 which provides her with only 4 years experience at a management level. According to the CV of the 5th Respondent he was appointed as a Sub Council Manager in December 2017. Prior to that he serves as a Councillor. At the time of the shortlisting the 5th Respondent had therefore three months experience as an employee at management level.

13. He concluded that it appears that the shortlisting and appointment process had been predetermined, a sentiment which was also expressed in the media.”

[7] It is undisputed that the City was unable to provide documentation as to the shortlisting and appointment process. Further, that although Dr Scheepers, an Executive Director at the City who compiled and finalized the shortlist for interviews for the post, was supposed to give evidence at the arbitration, he was not in fact called to testify. The City explains that the decision not to call him as a witness was because he was being subjected to disciplinary action related to the arbitration proceedings, clearly casting doubt on the appropriateness of instructing him to testify. It is submitted by the City that it was Swart who actually took the decision to exclude Oliver from the shortlisting, although Scheepers endorsed this.

[8] It is necessary to record the evidence by Mr Swart as set out in the Award at some length as follows:

“26. The second witness, **Mr Chris Swart** stated he is the Head: Talent Assessment. Due to the demands put on the recruitment and selection process by the ODTP process Mrs Scholz requested him to assist in the process for the recruitment and selection of senior managers. The Area Director positions were included in his task.

27. He received the pack of CV's and a spread sheet from the recruitment agency detailing the suitable candidates. He was told by Mrs Scholz to ignore the spread sheet from the consultants. He assessed the CV of over 160 candidates and made relevant notes on the CV's, which led to a shortlist of 26. The CV of all the candidates with his notes was provided to Dr Scheepers who removed those candidates lacking local government experience. Dr

Scheepers selected the shortlist of 10 candidates for assessment. He could not explain why none of the documentation including the notes he made on the CV's of the candidates were unavailable in the arbitration. He could also not understand why Mrs Scholz would fail to mention the document provided by the external recruitment consultants.

28. The criteria he had used to determine suitability of candidates was:

29.1 Qualifications

29.2 Management experience in local government

29.3 Employment Equity

29.4 Senior management experience, in at least two different directorates

29. He initially stated all the appointed candidates met the abovementioned criteria. Mr Oliver was not shortlisted because he did not have experience of working in different directorates and his experience was limited to traffic enforcement. He indicated that Dr. Scheepers' stated that it was critical to have multiple directorate experience. Other than this shortcoming he accepted that Mr Oliver met the other criteria for the position.

30. During cross questioning it was pointed out that the CV and covering letter of Mr Oliver clearly sets out that he managed units (eg road painting and signage, nuisance section, informal trading and social crime prevention.) In addition the Applicant had experience when acting as a Director in the Community and Health Directorate. He conceded that these units fall outside of the traffic services of the 1st Respondent, but he stated the applicant did not indicate the level and extent of that experience. Even so he viewed the experience of the Applicant in these areas to be focused on enforcement.

31. He was informed by Mr Craig Kessing, who designed the OTDP that the 4 area service delivery model introduced by the City was the first of its kind in the country. He did not therefore recognise the stated prior experience of the Applicant in a similar model. He acknowledged however that he did not investigate how the 4-area service model in Kwa-Zulu Natal operated.

32. He conceded that the 8 years requirement as stipulated in the job profile for the position had not been strictly enforced, as it was difficult to find candidates with the required transversal management experience. He agreed that transversal management was a new concept introduced within the City and that it was unlikely that there would be many employees who had worked in a variety of different directorates. He then indicated however that there were employees within the City who would head teams from different services directorates when coordinating events or implementing major development projects.

33. He also acknowledged that the requirement that the candidates must have senior management experience in two directorates was not strictly applied the case of the 3rd Respondent. He acknowledged that in terms of the criteria set, Ms Bosman, did not meet the minimum requirements as she only has experience in one Directorate. He further acknowledged that the shortlisting process should eliminate those candidates who do not meet the minimum requirements and therefore Ms Bosman should not have been shortlisted.

34. The 5th Respondent Mr Sonnenberg was appointed to a senior management position of Sub Council Manager in December 2016. At the time of the shortlisting the 5th Respondent would only have been in the position for three months. He accepted that the 5th Respondent had been a Councillor and did not have the required transversal functional and management experience as an employee. He conceded that it appears from the CV of the 5th Respondent that he was working for the City since 2006 which could be misleading. He acknowledged that Mr. Sonnenberg therefore also did not meet the minimum requirement for shortlisting, and should not have been shortlisted.

[9] The City submissions are to the effect that the Arbitrator committed misconduct in relation to his duties by failing to apply his mind to the evidence; that he arrived at an unreasonable conclusion and made gross errors of law and/or exceeded his powers as an arbitrator. However, in as far as the crucial evidence of Swart is concerned, the transcribed record of his cross-examination, is fairly summarised by the Commissioner, as set out above.

Swart further conceded during the cross-examination that on the basis of the CVs of Sonnenberg and Oliver, one could not include Sonnenberg to the exclusion of Oliver.

[10] The high watermark of the City's case as far as the Court is concerned, is the proposition that the 'functional experience' that was required in the advertisement for the post could only refer to "area based service delivery" involving "service integration and transversal projects" in "local Government". Functional experience in other areas would not be relevant it submits. While conceding no expert evidence was led on the meaning of "transversal management", it is submitted that it was clear that it is distinct from line management and involves management of integrated processes involving functions from different departments.

[11] Acknowledging that few applicants could be expected to meeting these requirements it argued that:

"It follows that the selection process could not be a "Tick-box" exercise but had to be a qualitative assessment of the relative strengths and weaknesses of applicants with a view to shortlisting those who were most suitable. Even though the term "minimum requirements" was frequently used in the proceedings, it needs to be understood in the above context: not as a set of formal criteria but as a combination of academic qualifications and sufficient practical exposure to transversal management in local government denoting a capacity to take on the challenge of implementing the ODTP. The curricula vitae ("CV's") of the 160 applicants formed the basis for judging their suitability in these terms."

[13] The above justification for the shortlisting of persons boils down to an assessment of applicants that is lacking in objective criteria. It also renders the minimum requirements as set out in the advertisement nugatory. This, combined with the absence of evidence by the person responsible for shortlisting the candidates, and of paper work to reflect the shortlisting process, makes the City's defense of the selection process challenging. In the Court's view, the Commissioner's finding that Oliver should have been shortlisted

based on his application, history and position in the City is reasonable, given the advertisement in question and the minimum criteria set out in it. The sixth respondent conceded that “technically”, she did not meet the minimum requirements for the post. Neither did Mr Sonnenberg, if regard is had to the advertisement.

[14] The City’s Recruitment and Selection Policy is part of the documentary record before the Commissioner. Under the head Selection, the document deals with the compiling of a short list:

5.2 Selection

5.2.1 Compiling a Short List

- 5.2.1.1 A short list of applicants, based on the agreed selection criteria, is developed and agreed in consultation between the line department and human resources.
- 5.2.1.2 The selection panel will have access to the short list and may recommend further inclusion or exclusion of candidates.
- 5.2.1.3 The selection panel is not obliged to shortlist all applicants who meet the minimum requirements and may select the most suitable applicants for the shortlist to be interviewed. The shortlisting criteria must be fair and objective and reflective of the inherent requirements of the position. Where particular criteria are utilized as “knock out” criteria for shortlisting (i.e. candidates not meeting these criteria will not be shortlisted on the basis of that particular criterion), this needs to be applied fairly and should reflect the inherent requirements of the position and be defensible as such...”

[15] I agree with submissions on behalf of the first respondent that the City’s own procedure was not followed in relation to the shortlisting. The bottom line is that persons were shortlisted who did not meet the minimum requirements. Criteria for selection, as now characterized in submission by the City, were not objective. In the Courts view, Oliver gave compelling evidence to demonstrate

that he met his onus in establishing that the employer's conduct in not shortlisting him was amounted to unfair conduct.²

[14] I am not convinced by the arguments on behalf of the City that the Commissioner evinced bias or exceeded his powers. His recommendation of an investigation was uncalled for. However, it was a recommendation, nothing more. The outcome of his Award was within the bounds of reasonableness and in the circumstances, I make the following Order:

Order

1. The application to review the Award under Case number WCM 041706 is dismissed.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Representation

Applicant: BCHC Inc

First Respondent: IMATU official

² Department of Justice & Constitutional Development & others v General Public Service Sectoral Bargaining Council & others (2018) 39 ILJ 2001 (LC) at para 52.