



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C839/2019

In the matter between:

GAVIN ADAMS

Applicant

and

THE GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

THERESA ERASMUS (COMMISSIONER)

Second Respondent

THE DEPARTMENT OF HIGHER EDUCATION AND

TRAINING

Third Respondent

Date heard: 26 November 2020 and 25 March 2021 by virtual hearing

Delivered: 30 June 2021 by means of email

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review an arbitration award under case number GPBC600/2019. In terms of the Award, the second respondent (the Commissioner) found as follows:

“I find that the applicant was not subjected to an unfair labour practice dispute, therefore the applicant is not entitled to any relief”.

- [2] In addition to the puzzling wording of the Award itself, given that she presided over an unfair labour dispute, the Commissioner also limited herself to two paragraphs of analysis of the evidence before her, having entitled another section of the award “Survey and analysis of evidence and argument”, which section related to the background to the dispute. The actual analysis which followed on a recordal of the evidence given at the arbitration”, is as follows:

‘186. Meaning of dismissal and unfair labour practice.

(2) ‘Unfair labour practice’ means any unfair act or omission that arises between an employer and an employee involving –

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating A to the provisions of benefits to an employee.” (sic)

36. The applicant seeks to be appointed to the advertised position. The applicant was not shortlisted as he did not adhere to the minimum requirement of 5 years’ working experience in Post-School Education and proven senior managerial experience of working in Technical and Vocational Education (TVET) and Continuous Education and Training (CET) environments, being one of the criteria used by the respondent’s panel for the shortlisting process for the advertised post. The applicant conceded that an applicant has to be shortlisted, before he/she can be interviewed. Clearly a candidate cannot be appointed without being shortlisted and interviewed.

37. The applicant was not shortlisted, due to the fact that he lacked the relevant working experience. There is no evidence before me that the applicant was treated any different to any other candidate. I therefore find that the applicant was not subjected to an unfair labour practice.”

- [3] In his opening statement at the arbitration proceedings the applicant stated that he requested the minutes of the shortlisting process but was told by the third respondent that no minutes were kept. The successful candidate was acting in the post before his appointment. As is recorded in the transcript, the applicant stated:

“MR ADAMS: Okay so the pattern commences with the acting appointment through to the shortlisting and then ultimately the appointment of the second respondent who is, now I deal with employment equity also Chair, who is a white male on the brink of retirement, he retires now next May.”

- [4] In delineation of the dispute before her the Commissioner stated as follows:

“COMMISSIONER: So do you know what it is you have to prove?

MR ADAMS: No

COMMISSIONER: You’ve referred an unfair labour practice dispute.....(intervention)

MR ADAMS: Ja

COMMISSIONER: And the definition of the unfair labour practice is with regards to promotion so that is what you’re disputing.

MR ADAMS: Yes.

COMMISSIONER: So you must prove to me that you were entitled to be promoted.”

- [5] Among the grounds of review in the applicant’s founding affidavit are that the Commissioner prevented the applicant from presenting his evidence on the Employment Equity infringements by the DHET during the shortlisting of candidates for the post, and that the Commissioner mischaracterized crucial facts in issue that were integral to the dispute. The ultimate Award, the applicant submits, was not one that a reasonable decision maker could reach.

[6] In as far as the characterization of the dispute was concerned, the applicant indicated that the dispute was about the unfairness in the shortlisting process in his referral form to the first respondent (the Bargaining Council), given his qualifications in respect of the post in question. The Commissioner incorrectly informed him he had to prove he was entitled to be promoted. It is trite that what he had to prove was unfair conduct by the employer in relation to promotion. This could include an employer's failure to apply its employment equity policy or an unfair selection process.

[7] The advertised position contained the following requirements for the post of Regional Manager:

"A recognized undergraduate qualification/Bachelor's/ Advanced National Diploma (NQF level 7) or equivalent qualification in Education and Training. A minimum of 5 years' work experience in Post-School Education and training. A postgraduate degree in Education would be an added advantage. At least 5 years proven experience at Senior Management Level (SMS). Consideration will be given to candidates with proven senior managerial experience of working in the Technical and Vocational Education Sector (TVET) as well as Continuous Education and Training environments. Understanding and knowledge of prescripts and legal frameworks applicable to both the CET and TVET sectors will be an added advantage. Further requirements are excellent and proven project management capabilities, problem solving and financial management skills, proposal and report writing and computer skills. Excellent project management and communication skills, including proposal and report writing. (sic). Ability to work under pressure and willingness to work extended hours. Skills required: Ability to work in a team, good interpersonal and communication skills, computer literacy, financial management, strategic planning and leadership. A valid driving licence and willingness to travel."

[8] In his covering letter to his application for the post, the applicant wrote the following:

“Dear Sir

POSITION: REGIONAL MANAGER, WESTERN CAPE AND NORTHERN CAPE.

(REF NO. DHET 142/09/2018)

I herewith express my appreciation at being granted an opportunity to submit an application for the above position. As such I include stipulated documents that in part, depict my credentials in support of my suitability for the position of Regional Manager – DHET. I hold a PhD degree in Human Resources Development and have worked within the TVET sector for almost twenty years. During this time, I have among others, headed up artisanship development within the TVET Colleges Chief Directorate in the Western Cape. As the provincial head for occupational programmes, I had intense interactions with the management structures of colleges, SETAs and government departments.

I have also had extensive involvement in determination of the annual staff establishments, oversight of salaries for part-time educators at FET colleges, the introduction of PMDS and exposure to adhoc ELRC matters. Before leaving the TVET sector in 2012, I conceptualised the Youth Develop Programme through which 100's of misplaced learners were given opportunities to fast-track their career paths in SETA based qualifications such as artisanship and alike. My tenure in the TVET Sector has been fruitful and involved curriculum as well as human capital development functions over the many years.

I am currently employed as Director at the Department of Trade and Industry where my role involves heading up the Western Cape Branch of the Regional Industrial Development (RID) unit. Over the past six years I've undertaken much research in government's effort to resuscitation state-owned industrial parks and the revitalisation of townships. These roles have involved national engagements in policy development as well as implementation of catalytic projects and the disbursement of incentives. As such, my exposure in the public service (PS) has been very instructive; it has honed my leadership capability and produced a keen insight to the dynamics of TVET in a volatile and largely uncertain economy as we currently experience it daily. I therefore bring a wealth of experience and doctoral insight to the TVET Sector. Delivering on the

Human Capital Development Imperative within the TVET Sector is an objective that bolsters sustainability of the broader education and training system.

I view the position of Regional Manager: Western and Northern Cape, as an important opportunity to assert an impetus that leads a differentiated and fully-inclusive post-school system that allows South Africans to access relevant post-school education and training, in order to fulfill the economic and social goals of participation in an inclusive economy and society. With this said, I look forward to the prospect of being interviewed for this prominent position in the WCED.”

- [9] The Department’s representative, Mr Boezak put it to the applicant that he did not meet the requirements in the advertisement. In particular, that he did not have “proven senior managerial experience of working in the Technical and Vocational Education Sector (TVET) as well as Continuous Education and Training environments.” The applicant stated that this was a subordinate requirement to that of 5 years experience at SMS level (he had 6 years of same, albeit at the Department of Trade and Industry as Director of Regional Industrial Development), and that the phrase ‘senior managerial experience in the TVET sector’ was generic and did not require an SMS post. The applicant conceded he did not hold an SMS post during the 20 years he worked in the Western Cape Department of Education. He was in the post of Manager: Occupational Training & Development (HRD). His CV sent in with his application records his employment as follows:

“November 1993- August 2012

Strategic management of occupational training and development (TVET) Programmes. Chairman of the Colleges Forum for Trades and Occupations. Headed-up the WSP Committee Development and implementation of staffing and remuneration systems for part-time staff. Negotiation and coordination of intergovernmental partnerships. Conceptualisation and oversight of diverse projects involving ICT, Engineering Infrastructure and youth Development. Provide strategic direction (HRD) to College leadership. Administer procurement and tender activities lined to the WSP and key development

projects. Provide technical support in Construction and Engineering Budget and HR Responsibilities.”

[10] His education qualifications listed in his CV include a PHD in Human Resource Development, a Masters Degree in Human Resource Development, a Btech Degree in Post School Education and Diplomas in Finance and Project Management. The qualifications of the successful candidate were unknown to the applicant because the Department had refused to disclose the CVs of those shortlisted to him, on the grounds that they were confidential. The CVs of the shortlisted candidates were not brought to the arbitration.

[11] Mr Mhlanga who was responsible for sifting and recording the applications for the purposes of the shortlisting process explained to the arbitration that he had put ‘no’ in the spreadsheet in answer to whether the applicant had 5 years experience in the post school education environment because :

“..in our advert we had indicated that the post, in these requirements we wanted the five years proven experience in the post school education and training meaning we needed that, we needed somebody in the environment of it, in the TVET or university.”

[12] He regarded all the criteria mentioned as ‘basic’, one presumes this means essential, and denied that there was any hierarchy of requirements in the advert. Under cross-examination, he conceded that the strategic management skills the applicant had referred to in his CV while in the TVET sector were required for the job. He then stated that:

MR GREGORY MHLANGA: It’s part of the Regional Manager you must give direction to all the TVET colleges that is under him so that part of the role, that one I’ll agree. It’s part of the role that he’ll do but remember the advert requested, it required some people who were in the TVET, CET environment at that particular time when the advert was made, you had to be in that environment when this post was advertised for you to be considered as part of the criteria for shortlisting which when you read your CV I’m not sure whether the CV was not well captured in the manner it should reflect those, it doesn’t

seem to reflect such except somebody on the sideline which's supporting the TVET, that's how I read it."

- [13] The advertisement did not require applicants to be working in the TVET, CVET environment at the time of application, or that an applicant had to be employed by a TVET college. A letter written to the applicant by the Director of HRM and Administration, in response to his query regarding shortlisting read as follows:

"Kindly be informed that the Department has thoroughly investigated your query regarding an alleged non-shortlisting into a position of Regional Manager: Western Cape/Northern Cape Regional Office. A minimum of five (5) years' work experience in Post-School Education and proven senior managerial experience of working in the Technical and Vocational Education and Training (TVET) and Continuous Education and Training (CET) environments was one of the criteria used for the shortlisting process the above mentioned post."

- [14] However, a document reflecting the selection criteria used by panel members during the shortlisting process records the following:

"(1) A recognized qualification/Bachelors Degree/Advanced National Diploma (NQF level 7)

(2) 5 years work experience in PSET.

(3) 5 Years proven experience at SMS level.

(4) Experience of working in the TVET as well as CET environment."

- [15] The Department also provided the arbitration with a heavily redacted information sheet which had been filled in by the HR administrator. All the other applicants on the particular sheet provided, i.e. the 46th to 57th applicants' details are redacted. Only the applicant's information can be read and it is clear from this that the word "No" is recorded under the column reading: "*5 Years Work experience in post school education and training*" while all other requirements are marked with a "Yes" including the 5 years SMS level experience requirement. How one concludes that the shortlisting process was

rational and fair in respect of all applicants with this extraordinary lack of transparency is difficult to fathom.

- [16] The witnesses the Department called were the HR staff who had 'sifted' the applications. The criteria in the form referred to above appeared to properly reflect the essential requirements of the post. In his testimony Mr Kgare, a Senior Personnel Practitioner in HR tried to explain why the criteria used for shortlisting did not marry with the content of the letter sent to the Applicant after his query regarding not being shortlisted, as follows:

MR RONALD KGARE: Page 29 ja that's where if you go to page 29 the second column on the indication of experience it talks about five years' work experience in post-school education and training and then on page 5 on the respondent's, I mean the response to the letter I think this where the Department has responded to Dr Adams and it says:

"A minimum of five years' work experience in post-school education and proven senior management experience."

But if you could look the, on the indication of experience there's a combination of five years' work experience in post-school and the experience as a senior management level. But during the shortlisting process where the panel set a criteria for shortlisting they have included that the proven experience of senior management experience it should be of working in a TVET or a CET environment. Remember on the advertisement it was saying only senior management experience which I said earlier on that any person who has five years' experience at a senior management level we will give it as a yes when we do the capturing. But during the shortlisting processes the panel set a criteria and in that criteria they needed someone with five years' experience, a management experience but now they added that with working in TVET or CET environment. So I think when the response to this letter they referred to the criteria that was set by the panel because on page 29 this is just a guideline to the panel to actually look at the criteria that was used when the sifting process was done. (My emphasis)

[17] The Department's Recruitment and Selection Policy provides that applications are sifted with the aim of the process "to eliminate applicants who clearly do not meet the minimum requirements for the job". The case for the Department was that the applicant did not meet the minimum requirements. This is also what the Commissioner found. It is noteworthy however that the criteria as set out in paragraph 13 above was drafted and agreed to by the Selection Panel. Mr Kgare's evidence suggests that the Panel at some stage changed the criteria to include a requirement that an applicant must have 5 years senior management experience in the TVET or CET environment. No evidence was given by persons on the Selection Panel. The evidence tendered by the Department was limited to those playing a role in the sifting process from the HR Department. Mr Mhlanga gave a different take all together – applicants had to be in the TVET environment at the time of application.

[18] Save for a criteria headed 'race' on the spread sheet compiled by the HR administrators, there was no documentary evidence presented to show that employment equity targets were taken into account as required by the Departments recruitment and selection policy. In as far as the applicant's raising of employment equity issues is concerned, (and the Departments targets which he referred to) it is interesting to note from the transcribed record that Mr Boezak, assistant director of labour relations, representing the third respondent (the Department), appears to have suggested that employment equity was not a consideration for the post in question. The exchange between him and the applicant is as follows:

MR BOEZAK: So where do you, where do you get the knowledge or the understanding from that and you were excluded or equity were not included or part of the considerations for appointment or even shortlisting in this processes?

MR ADAMS: It's because I looked at the data from the Education Department their annual report, I looked at their employment equity plan that they submitted to Department Labour okay and from the figures it shows clearly that they oversubscribed when it comes to white males and they are underrepresented when it comes to coloured males particularly in

the Western Cape and if you want to go and look at the numbers we can look at them but the data shows it and it's based, now like I said earlier on your recruitment division or your HR you know division is quite well you know capacitated so they cannot claim that we didn't know. So if I see data in their annual report or data that they submitted to DOL whatever and it shows that there is a deficit that they're not addressing the shortage of coloured males within the Western Cape in this case and Northern Cape then I can conclude that they're not interested, I cannot say that they don't know because this is their data.

MR BOEZAK: So Dr Adams can you prescribe to the Department that they must put in equity or they must consider equity when they do shortlisting, is that what's in your right as an applicant to do that?

MR ADAMS: No not, it's not my right as an applicant but as I read out that they should put in place strategies, employment equity strategies so that they can address the imbalances. So it's not my prescript, it's expected of them that in, amongst others processes like these that they can begin to address the imbalances and so I've, to answer the question no I can't prescribe but it's expected that they should know what they must do when it comes to those imbalances.

MR BOEZAK: So will you agree that Dr Adams that it's still a discretion for the Department to include such considerations or not in terms of equity, it's still theirs, not anybody else?

MR ADAMS: It's not their discretion actually they must comply with employment equity, they must, they must implement these measures. "

[19] If regard is had to the submissions made on behalf of the Department before me, it appears to have been Mr Boezak's instructions that because there was no reference to employment equity on the advertisement, this was not a post in which employment equity considerations were relevant. This is an extraordinary perception given statutory and constitutional framework in which public service advertisements are drawn.

[20] The Commissioner, as indicated, did not refer to employment equity considerations in her three paragraphs of 'analysis' in her Award. I have rarely read an Award such as that *in casu*. The Commissioner, having written down her recordal of the evidence in chief and cross examination of witnesses, then simply ran out of steam. There was no effort made to consider the discrepancies in the requirements for the post, the quality of evidence of the Department's witnesses, the impact of employment equity prescripts. In addition, the lack of transparency in the way in which the case was presented by the Department appeared to be of no moment to her. The evidence before her should have led her to find that the conduct of the Department in its recruitment and selection for the post was unfair. The Department informed me that the post is now vacant, the successful candidate having retired and it had taken no steps to advertise the post until the outcome of this case.

[21] In all the above circumstances, I am of the view that the Award cannot be considered as one that a reasonable Commissioner could have reached on all the evidence before her. The applicant has asked that the remedy he sought in his arbitration referral form should be granted by this Court. This was:

"A. Appointment to the position in due course;

B. Adjustment to current salary taking into account disadvantages attached to the possibility of loss of rank such as future promotion."

[22] It is not possible for the Court to appoint the applicant to the vacant post or to give him protected promotion. This matter, properly considered, was a dispute about an unfair selection (shortlisting) process for a promotional post in the Public Service. The applicant was denied a fair opportunity to compete.¹ Neither the Commissioner, nor the Court was able to compare the applicant's qualifications against others who applied for the post, because the Department was not prepared to disclose these. However, I am of the view that on the advertisement properly construed, and on employment equity principles properly applied, the applicant should have been among those shortlisted for

¹ Minister of Police v Safety and Security Sectoral Bargaining Council & Others (JR2339/15) [2018] ZALCJHB 136

the post. I am also of the view that he should receive compensation on account of the unfair procedure he was subjected to². Compensation must be fair and equitable and not exceed 12 months' remuneration. I am of the view, taking all the circumstances into account, including the extent of the breach of the rules of fairness, that six months' compensation would be fair and equitable.

[23] I make the following order:

Order

1. The Award under case number GPBC600/2019 is reviewed and set aside and substituted as follows:
 - 1.1 The Third Respondent committed an unfair labour practice in terms of section 186(2)(a) of the LRA;
 - 1.2 The Third Respondent is ordered to shortlist Dr Gavin Adams should he apply for the re-advertised post;
 - 1.3 The Third Respondent is ordered to pay an amount equivalent to six months of Dr Adams current salary as compensation for the unfair labour practice committed against him.

H.Rabkin-Naicker

² Noonan v SSSBC & Other (2012) 33 ILJ (LAC) p2608

Judge of the Labour Court

Representation on the papers

Applicant: In person

Third Respondent: C Tsegarie instructed by the State Attorney

LABOUR COURT