



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D880/10

In the matter between:

KWADUKUZA MUNICIPALITY

Applicant

and

LOGANANTHAN RAJAMONEY

First Respondent

NONHLANHLA DUBAZANE N.O

Second Respondent

SALGBC

Third Respondent

MARIUS J F PRINSLOO

Fourth Respondent

Heard: 06 November 2012

Delivered: 13 June 2013

Summary: Review of award which ordered the applicant to give the first respondent protective promotion - For the requirements of an advertised post to be met, cognizance must be taken of the objective of the policy to ensure that the candidate who best meets the selection criteria is appointed – no defect found in the award.

JUDGMENT

Cele J

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (the Act) to review and set aside the second respondent's award dated 30 August 2010, which ordered the applicant to give the first respondent protective promotion. The first respondent opposed this application.

Factual background

- [2] The first and fourth respondents together with other police officers in the employ of the applicant applied for an advertised post of Assistant Director: Crime Prevention. The applicant appointed the fourth respondent to the post with effect from 1 December 2008 on the basis that he achieved the highest score following an interview process that was held. At the time that the post was advertised, the job description listed as one of the “requirements” of the post the holding of a Code EC (code 14) drivers’ license. Subsequent to the appointment of the fourth respondent, the job description was changed to ‘relax’ the license requirement to a Code 08 Driver’s License.
- [3] Due to a failure of the applicant to appoint him, the first respondent lodged a grievance with the applicant. The applicant recommended to its council that attempts be made to settle the matter. Council of the applicant was not prepared to settle the matter.
- [4] The first respondent then referred an unfair labour practice dispute to the third respondent, citing that he had been unfairly treated *vis-à-vis* the fourth respondent in that the first respondent:
1. met all the requirements of the post, and the fourth respondent did not and should not have been even short-listed; and

¹ The Labour Relations Act No 66 of 1995.

2. that, as the second-placed candidate and a person who could perform the required tasks he should have been appointed.

[5] Conciliation failed to resolve the dispute and it was referred to arbitration. The second respondent was appointed to arbitrate the dispute. She found that the applicant had committed an unfair labour practice in not appointing the first respondent. She, however, found that, due to the time lapse that had since passed, it would be unfair and improper to order the applicant to remove the fourth respondent from the post and she ordered the applicant to give the first respondent protective promotion instead.

[6] It remained common cause between the parties that the fourth respondent scored 84.2% at the interview whereas the first respondent scored 63%. The scoring was not challenged by the parties. The chief findings of the third respondent are:

1. The point of departure was to look at the advertisement to see what the requirements for the disputed post are and to ascertain from evidence presented whether the fourth respondent met them.
2. The first respondent met the requirements for the post, which was evident from the findings of the grievance hearing and from a document marked annexure G, containing detailed information on the validity of the first respondent's driver's license that was not challenged by the applicant
3. A candidate ought to be short listed only if he or she meets the necessary requirements for the post. A consideration of the intention of the drafters of the advertisement was necessary. From the evidence, it was clear that someone who possessed an EC driver's license, as at the time of the application, was sought. There would be no significance flowing from a subsequent decision to change that requirement, such as at the time of making the appointment. If there was to be any amendment to the advertisement a due process was to be followed entailing the re-advertisement of the post for purposes of fairness to all who were interested in applying for the post.

4. The amendment of the advertisement without a due process followed was grossly unreasonable unfair.
5. In the absence of satisfactory evidence that the fourth respondent had the EC driver's license, the fourth respondent did not meet the requirements for the post.
6. The appointment process followed was flawed in that the applicant short-listed and appointed a candidate who did not meet the necessary requirements for the post, thus committing an unfair labour practice.
7. Protective promotion was the appropriate remedy to the first respondent due to the time lapse of approximately 16 months since the fourth respondent was appointed to the post.

Grounds for review

[7] A number of review grounds have been outlined by the applicant in support for this application. The submissions made were that:

1. The second respondent failed to deal with the evidence placed before her that a prior interview process had taken place at which the interviewing panel were unable to recommend an appointment. As a consequence, it was decided that all internal applicants were to be short listed. This included the present incumbent together with the first respondent. The second respondent's failure to deal with this evidence constitutes a material irregularity as she has failed to take into account a material aspect of the applicant's evidence at the arbitration. Had she taken this aspect into account, a different result might have ensued.
2. Even if the second respondent was correct in finding that the applicant's failure to abide by its own selection criteria which included the requirement of an EC license constituted a fatal flaw in its selection process, she was not empowered to award the first respondent a protected promotion which in effect obliges the applicant to pay the first respondent on the same terms and conditions it pays the current incumbent.
3. The second respondent, at best for the first respondent, was obliged to set aside the present incumbent's appointment and to refer the matter

back to the internal interview process for the matter to proceed *de novo*.

4. The second respondent ignores the Applicant's human resources policy manual with particular reference to the recruitment selection and retrenchment policy. The policy emphasises that the applicant must ensure that it matches "human capital to the strategic and operational needs of the organisation". The policy specifically states that no candidate will be unfairly discriminated against solely through lack of formal qualification where the applicant does not meet the basic minimal and formal qualification requirement. The second respondent committed an irregularity in deciding that the failure by the present incumbent to possess an EC driver license was material enough to award the first respondent a protective promotion.
5. The award does not explain on what basis the second respondent finds that the present incumbent's failure to possess an EC driver's license outweighs his experience in a managerial position nor does it take into account the vast difference in respect of scores at the interview between the current incumbent and the first respondent.
6. It is important to note that the second respondent's award states that the applicant committed an unfair labour practice in not appointing the first respondent into the current incumbent's post. In reaching this conclusion, the second respondent exceeds her powers and misconceives the basis of the dispute she was to determine.
7. The second respondent concluded that the requirements for the post as described in the advert were necessary or essential requirements. This conclusion is not based on any evidence placed before her during the course of the arbitration.
8. The second respondent also took into account the application of the applicant's Employment Equity Plan ["EEP"]. It was conceded by the first respondent that the EEP does not apply as it only came into operation after the appointment of the current incumbent. It was not applicable at the time he was interviewed.

Analysis

- [12] In the recent case of *Herholdt v Nedbank Ltd*,² the Labour Appeal Court has set a review test in cases on gross irregularity relating to latent irregularity as follows:

‘There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconstruing the whole nature of the enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, *with such having potential for prejudice and the possibility that the result may have been different.*’³ (emphasis added)

- [13] It must, therefore, be determined in this application whether the second respondent has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different had such failure not occurred.

- [14] On 26 March 2008, the Municipal Manager of the applicant gave approval to the human resources policy manual of the applicant, the policy manual, which was in operation at the material times to the advertising and filling of the contested post. Clause 4 of the policy manual provides for the recruitment, selection and retention policy and to the extent relevant here it reads:

‘4 RECRUITMENT, SECTION AND RETENTION POLICY

OBJECTIVE

The objective of the policy is to ensure that the candidate who best meets the selection criteria is appointed.

POLICY

² (2012) 23 ILJ 1789 (LAC). See also *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC) – paras 261 to 266.

³ *Herholdt* at para 39. This test was first set by Van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC); [2009] 11 BLLR 1128 (LC) at para 17.

- 1) Municipality recruitment, selection and retention processes will fundamentally be about matching human capital to the strategic and operational needs of the organization and ensuring the full-utilisation and continued development of these resources.
- 2) The Municipality aims to attract, obtain and retain people with the required competencies (knowledge, skills and attributes) within the organization.
- 3) In addition this policy aims to ensure that a continuous supply of high caliber employees is available to meet the Municipality's immediate and future human resources needs...

Municipality will continuously create an environment that promotes equal opportunity for all desiring to enter the organization and for further advancement within the organization based on job requirements, qualifications, experience, skills and prevailing job profile.

....

However, affirmative action strategies must be taken into consideration when recruiting candidates. No candidate will be unfairly discriminated against solely through lack of formal qualifications, where the applicant does not meet the basic minimum formal qualification requirement...'

- [15] For the requirements of an advertised post to be met therefore, cognisance must be taken of the objective of the policy to ensure that the candidate who best meets the selection criteria is appointed. The short listing of a candidate who least meets the set selection criteria will ordinarily fly on the clear face of the objective of the policy. Such short listing would then be arbitrary as contrary to the selection criteria. The applicant set out requirements to be met for the contested post. The fairness of the selection process lay in the screening of all candidates against the set requirements in a similar approach. It has to be borne in mind that there would be people who desired to apply for the contested post but did not submit their applications merely because they did not meet the set requirements. It would also be unfair to set all candidates who met all requirements against any candidates who lack any of the requirements.

[16] According to the policy manual, the applicant aims to attract, obtain and retain people with the required competencies, which refers to the knowledge, skills and attributes within the organisation. In addition, this policy aims to ensure that a continuous supply of high caliber employees is available to meet the Municipality's immediate and future human resources needs. The setting of requirements for a post is the method by which the set aims of the applicant are achieved. In its considered wisdom, the applicant decided to have selection criteria which included the requirement of an EC driver's license for the contested post. It was within its powers to make that decision. It remained open to the applicant to classify this requirement as a recommendation for the post, if the applicant wanted to retain a discretionary right on how to utilise this aspect.

[17] The second respondent, therefore, committed no defect in relation to the findings she made on the post requirements and with particular reference to the findings that:

'A candidate ought to be short listed only if he or she meets the necessary requirements for the post. A consideration of the intention of the drafters of the advertisement was necessary. From the evidence it was clear that someone who possessed an EC driver's license, as at the time of the application, was sought. There would be no significance flowing from a subsequent decision to change that requirement, such as at the time of making the appointment. If there was to be any amendment to the advertisement a due process was to be followed entailing the re-advertisement of the post for purposes of fairness to all who were interested in applying for the post.'

[18] The applicant criticised the second respondent saying she ignored the applicant's human resources policy manual with particular reference to the recruitment selection and retrenchment policy emphasising that the applicant had to ensure that it matched "human capital to the strategic and operational needs of the organisation". The policy specifically stated that no candidate would be unfairly discriminated against solely through lack of formal qualification where a candidate did not meet the basic minimal and formal qualification requirement. A proper interpretation of the policy on this issue

would have to take into consideration the first sentence where the policy appears, which reads:

‘However, affirmative action strategies must be taken into consideration when recruiting candidates.’

- [19] The applicant led no evidence to show that it was applying affirmative action when it short-listed the fourth respondent who did not meet the code EC driver’s license. The issue of a failure to possess an EC driver’s license outweighing the fourth respondent’s experience in a managerial position or the vast difference in respect of scores at the interview between the current incumbent and the first respondent was irrelevant when he did not deserve to be short listed, in the first place. The applicant has, therefore, not made out a case for a finding that the second respondent committed any gross irregularity in the finding she made in this regard.
- [20] The applicant contended that the second respondent committed an irregularity in deciding that the failure by the fourth respondent to possess an EC driver license was material enough to award the first respondent a protected promotion. It is trite that “protected promotion” may be granted as a relief where evidence showed that but for the unfair labour practice the contesting candidate would probably have been appointed to the contested post.⁴ Such evidence was overwhelming in this matter. Again, no defect has been shown to have been committed by the second respondent. Nor has such defect been shown to exist in respect of any other grounds of review, in the light of the critical finding that the fourth respondent ought not to have been short listed in the first place. The second respondent applied her mind to the period that elapsed since the appointment of the fourth respondent was made and the date of the award when considering the appropriate relief. Protective promotion was one of the decisions a reasonable decision maker could reach.⁵

⁴ See *Minister of Safety and Security v SSSBC and Others* [2010] 9 BLLR 965 (LC). See also *PSA v Department of Justice and Others* [2004] 2 BLLR 118 (LAC) where the only impediment to granting a similar relief was a failure to join the party with a direct and substantial interest in the matter.

⁵ See the case of *Minister of Safety and Security v SSSBC and Others* at footnote 4 above.

[21] Accordingly, the following order stands to be issued:

1. The review application in this matter is dismissed.
2. No costs order is made.

Cele J.

Judge of the Labour Court

APPEARANCES:

For the Applicant: Mr M G Maeso

Instructed by: Shepstone and Wylie, Umhlanga Rocks.

For the First Respondent: Mr T E Seery

Instructed by: Loganathan Rajamoney, Stanger.

LABOUR COURT