Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT DURBAN

Case no: D 1310/16

In the matter between:

KING CETSHWAYO DISTRICT MUNICIPALITY	**Applicant**
and	
ZANDILE FLORENCE NHLABATHI	**First Respondent**
ASHNEE LAMBERT (*N.O.*)	**Second Respondent**
SALGBC	**Third Respondent**
THADAZILE FRANCISCA MNGUNI	**Fourth Respondent**

Heard: 29 November 2017

Delivered: 31 July 2018

Summary: (review – unfair labour practice – appointment to position of s 56 manager under Municipal Systems Act – claim successful candidate not competent – MEC for local government ought to have been joined – award set aside – disclosure of panellist's interest or relationship with a candidate (*obiter*))

JUDGMENT

LAGRANGE J

Background

[1] This is an opposed review application of an unfair labour practice determination relating to promotion. Condonation applications in the matter were dealt with previously on 7 September 2017 and the court does not have to address those.

[2] The first respondent in this matter, Ms Z Nhlabati ('Nhlabathi') had unsuccessfully applied for promotion to the post of Deputy Municipal Manager: Planning and Economic Development, which was advertised on 4 August 2013.

[3] Nhlabathi alleged that the successful candidate, the fourth respondent, Ms T Mnguni ('Mnguni') was not competent to fill the post and the panel had failed to consider her own work experience. Secondly, she claimed that there had been irregularities in the establishment of the selection panel, its method of weighting candidates and that a member of the panel had failed to disclose their business interest with the successful candidate.

[4] Apart from herself and Mnguni, one other candidate was shortlisted for interviews. Nhlabathi and the unsuccessful candidate scored 60.8% and 60% respectively in the interviews, whereas Mnguni obtained a score of 86.7%.

[5] The municipal manager, who sat on the three-person selection panel had a previous business relationship with Mnguni, which was not disclosed before or after the interviews.

[6] At the arbitration, it was conceded by the secretary of the panel, an advocate that, it was a pre-requisite and not a discretionary matter to disclose such an interest.

[7] The weighting system adopted by the panel was to allocate 80% to the outcome of the interview and 20% to the competency assessment. The weighting system had been decided after interviews had already taken

place. Nhlabathi claimed that the weighting system adopted by the panel was also contrary to chapter 3 of the recruitment and selection guidelines.

The award

[8] At the arbitration, a preliminary jurisdictional objection was raised by the applicant ('the municipality'). It was common cause that the disputed post was a post established in terms of section 56 (5) of the Local Government: Municipal Systems Act ('MSA'). The applicant argued that the arbitrator had no jurisdiction to hear the matter, but the arbitrator decided that until the appointment to place the applicant in the post was taken, she was not an employee under section 56 and accordingly, she had jurisdiction to hear the matter.

[9] Neither the municipal manager nor Mnguni testified at the arbitration hearing.

[10] The arbitrator found that the municipal manager's duty to disclose his past business relationship with Mnguni was not simply a moral question but was a requirement in terms of the regulations. Panel members were also provided with disclosure and confidentiality forms they were required to sign and no rational explanation was provided for the failure to disclose the business relationship. The arbitrator felt this went to the heart of the credibility of the panel though she also found there was no evidence to suggest that the outcome of the interview would have been different if disclosure had made.

[11] Consequently, the arbitrator decided the failure to disclose prior business relationship constituted an unfair labour practice and set aside appointment of the successful candidate and ordered the reconstitution of the interview process with all shortlisted candidates within 60 days of the award.

The review

[12] In its founding papers, the applicant persisted on review with the jurisdictional challenge to the arbitrator's authority, but belatedly abandoned this point, when it filed its heads of argument. Ultimately, it only relied on two grounds of review.

The arbitrator was unreasonable in her interpretation of the obligation on a panellist to disclose his business relationship with Mnguni.

[13] The municipal manager claimed that the evidence before the arbitrator showed that his business relationship with the successful candidate ended when he had ceased to be a member of the same close corporation by 20 October 2008. By the time the post was advertised and when the interviews were conducted in 2014, there was no interest or relationship and had not been one for five years. Therefore, there was nothing to disclose. In this regard, the municipality points out that Regulation 12(5) of Regulations on Appointment and Conditions of Employment of Senior Managers[1] made under the MSA prescribe that "(a) panel member must disclose any interest or relationship with shortlisted candidates during the shortlisting process."

[14] Nhlabathi retorts that the role of the deponent as the municipal manager extends beyond the provisions of the regulation and that there was a duty to disclose the past business relationship. Nhlabathi also points out that the municipal manager's averments in his founding affidavit were not part of the evidence before the arbitrator, so even if the duration or timing of the business relationship was a relevant consideration, that issue was not raised before the arbitrator. One of the difficulties raised by regulation 12(5) is whether the 'interest' or 'relationship' refers strictly to a current interest or relationship at the time the interview panel is convened. It is easy to see that a narrow reading of the regulation as referring strictly to contemporaneous interests or relationships with a candidate could defeat the object of the regulation. In any event, as this application falls to be decided on the issue of non-joinder, it is not necessary to decide this issue.

[15] The question of an alternative remedy being exhausted, or alternatively the issue of non-joinder raised by the applicant concerns the effect of certain provision of s 56 of the MSA. The relevant provisions state:

> 56 Appointment of managers directly accountable to municipal managers
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> (1) (a) A municipal council, after consultation with the municipal manager, must appoint-
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> (i) a manager directly accountable to the municipal manager; or

[1] GN 21 of 17/01/14 (GG 37245).

(ii) an acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed.

(b) A person appointed in terms of paragraph (a) (i) must at least have the skills, expertise, competencies and qualifications as prescribed.

(c) A person appointed in terms of paragraph (a) (ii) may not be appointed to act for a period that exceeds three months: Provided that a municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed three months.

(2) A decision to appoint a person referred to in subsection (1) (a) (ii), and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if-

(a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or

(b) the appointment was otherwise made in contravention of this Act,

unless the Minister, in terms of subsection (6), has waived any of the requirements listed in subsection (1) (b).

(3) If a post referred to in subsection (1) (a) (i) becomes vacant, the municipal council must-

(a) advertise the post nationally to attract a pool of candidates nationwide; and

(b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.

(4) The municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.

(4A) (a) The municipal council must, within 14 days of the date of appointment, inform the MEC for local government of the appointment process and outcome, as may be prescribed.

(b) The MEC for local government must, within 14 days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister.

(5) If a person is appointed to a post referred to in subsection (1) (a) in contravention of this Act, the MEC for local government must, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal council with this Act, which steps may include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the municipal council.

…

[16] The municipality contends that Nhlabathi should have first given the MEC for local government and opportunity to exercise his powers under s 56(5) before referring her complaint to arbitration, or at least should have joined the MEC as an interested party in the arbitration.

[17] The municipality relies in this regard on the judgment of the *Labour Appeal Court in Merafong City Local Municipality v SA Municipal Workers Union & another* .[2] In that matter the union had obtained an interdict preventing the appointment of a municipal manager. The LAC found that the applicants in the interdict proceedings should have invoked the alternative remedy provided by s 54 of the MSA, viz:

> (8) If a person is appointed as municipal manager in contravention of this section, the MEC for local government must, within 14 days of receiving the information provided for in subsection (7), take appropriate steps to enforce compliance by the municipal council with this section, which may include an application to a court for a declaratory order on the validity of the appointment, or any other legal action against the municipal council.
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> (9) Where an MEC for local government fails to take appropriate steps referred to in subsection (8), the Minister may take the steps contemplated in that subsection.

In *Merafong,* the LAC found that even though the applicants for the interdict had alerted the MEC to their complaint about the appointment, and the MEC had not responded, they still ought to have sought the minister's intervention under s 54(9) before applying for an interdict.[3]

[18] Section 54 and 56 of the MSA are not identical in the internal remedies they provide for appointments in contravention of the Act, but clearly s 54 does provide a role for the MEC to intervene in relation to appointments of s 56 managers, which are alleged to be in contravention of the MSA.

[19] It is true that, unlike in *Merafong*, we are dealing here with an unfair labour practice dispute and not an interdict. In the case of an interdict, the existence of an alternative, internal, remedy is sufficient to deny a party urgent interdictory relief. Nevertheless, it was clearly a significant part of Nhlabathi's case at the arbitration that Mnguni did not have the competence to be appointed to the post. To all intents and purposes, that is the same as saying that Mnguni was not a suitable person for the panel to select for appointment, which would mean her appointment was in contravention of s

[2] (2016) 37 *ILJ* 1857 (LAC)

[3] At 1875-6 paras 74-76.

56(1)(b) and s 56(3)(b) of the MSA. By virtue of s 56(5) the MEC for local government would have an interest in appointment in contravention of the MSA and even if it can be argued that Nhlabathi need not have directly called upon the MEC to take steps under that provision, the MEC ought to have been joined as a party to the arbitration proceedings.

[20] Nhlabathi argued that the court should not entertain this issue because it had never been pleaded. However, it is trite law that an issue of non-joinder can be raised even at the stage of an appeal[4], so I am bound to consider it.

[21] I appreciate that, at the time the arbitrator decided the matter the LAC judgment in *Merafong* was relatively recent and had not yet appeared in the published law reports, so she was no doubt unaware of it, as the parties probably were also. Nevertheless, I am bound to follow the principles set out there.

[22] As the review succeeds on the basis of non-joinder, it stands to be remitted to arbitration to correct that defect, but given the elapse of time, I am reluctant to compel the parties to re-enter the fray on the issue. Accordingly, the award must be set aside but whether the arbitration is re-opened is a matter for Nhlabathi to elect to pursue.

[23] As the matter is decided on a point raised belatedly, it would be inappropriate to award the applicant its costs.

Order

[1] The Second Respondent's award issued on 29 August 2016 under case number KPD 091422 is reviewed and set aside.

[2] In the event First Respondent wishes to pursue her unfair labour practice claim, within 30 days of the date of this judgment, she must:

[4] See ***Bowring NO v Vrededorp Properties CC and Another*** **2007 (5) SA 391 (SCA)** at 398, paras [19] to [21], where the SCA entertained the objection on appeal, even though it ultimately dismissed the plea of non-joinder on its merits.

2.1 request the Third Respondent in writing to re-enrol the matter for arbitration before an arbitrator other than the Second Respondent and the Third Respondent must comply with such request, and

2.2 Simultaneously apply to join the relevant MEC for Local Government as a party to the arbitration proceedings.

[3] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	R Pillemer instructed by Ndwandwe & Associates Inc.
FIRST RESPONDENT:	J Forster of Philip Walsh Inc.