



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D 11/2021

Not Reportable

In the matter between:

ETHEKWINI MUNICIPALITY

and

SALGBC

C OAKS N.O.

NHLANHLA CAIPHUS MTHETWA

P.W. AUBREY MTHETWA

SHADRACK NXUMALO

ERIC MANDLA KHUZWYO

SIPHIWE NDLOVU

STEVEN MIDDLETON

Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eighth Respondent

Application heard: 5 August 2022

Delivered: Electronically and deemed to have been delivered on 14 September 2022

Summary: The evidentiary burden on an employee in an unfair labour practice dispute about shortlisting and promotion – the issue of so-called protected promotion

JUDGMENT

WHITCHER J

Introduction

- [1] This is an opposed review application brought by the applicant in terms of section 145 of the Labour Relations Act, 1995, to set aside in part the award of the second respondent ('the Commissioner').
- [2] The award concerns unfair labour practice disputes which were referred by the third to seventh respondents (Nhlanhla Mthetwa, Aubrey Mthetwa, Nxumalo, Khuzwayo and Ndlovu) and pertains to the promotion of the eighth respondent (Middleton) to the post of Head: Metropolitan Police, oft referred to as Head: Durban Metro Police.
- [3] In 2017, the applicant advertised the post. The closing date was 3 November 2017. The advert set out the job purpose and key performance areas, which essentially involves crafting and implementing policy and operational measures for municipal policing, interpreting relevant laws, briefing senior personnel, preparing and controlling budgets, engaging with relevant law enforcement agencies such as the SAPS, the SANDF and other Metro Police Services and with Business Communities.
- [4] The listed essential requirements for the post are a relevant Bachelor's Degree and seven years relevant experience at a management level, two of which must have been at a senior management level.
- [5] Out of 237 applications, six candidates were shortlisted which included Middleton, Nhlanhla Mthetwa and Aubrey Mthetwa, and one Sbonela Mchunu. Nxumalo, Khuzwayo and Ndlovu were not shortlisted. The shortlisted candidates

were interviewed and, save it seems in the case of Sbonela Mchunu, also subjected to an occupational assessment. Middleton scored the highest in the interview questions, namely 20 out of 25, followed by Sbonela Mchunu at 14, Nhlanhla Mthetwa at 13 and Aubrey Mthetwa at 10. Middleton also scored the highest in the occupational assessment, namely 9.15, followed by Aubrey Mthetwa at 8.4 and Nhlanhla Mthetwa at 8.35. The interview panel ranked Middleton as the most suitable candidate. Sbonela Mchunu was ranked second, Nhlanhla Mthetwa third and Aubrey Mthetwa fourth.

- [6] Nhlanhla Mthetwa and Aubrey Mthetwa each contended, for different reasons, that they should have been appointed to the post. One of the reasons, cited by Aubrey Mthetwa, was that Middleton was not a member of the Metro Police Services, it being common cause that in terms of Section 64C (1) of the South African Police Act, 1995 (the SAPS Act), the Executive Head of a Municipal Police Service, to be appointed, must be a member of the Metro Police Services.
- [7] The Commissioner upheld their claims. He reasoned that:
- “There is no evidence provided by the [Applicant] and [Middleton] to indicate that he [Middleton] is a traffic officer in terms of Regulation 11 and therefore a member...It is abundantly clear from all the evidence that [Nhlanhla Mthetwa and Aubrey Mthetwa] were both more suited to the position...than Mr Middleton. He is not a member of Metro Police as required in terms of section 64C(1) of the South African Police Service Act, 1998 which should have resulted in his exclusion from the recruitment process.”*
- [8] He ordered the applicant to retrospectively promote both of them to the post, to accept such promotions as “protected promotions” and to pay them all due additional remuneration as a result of the retrospective operation of the promotions.
- [9] As to why he granted “protected promotion” to both of them, he stated it is not within his powers to determine who is the better candidate, but to determine whether comparing them with Middleton they are more suited than he is to the position.
- [10] Nxumalo, Khuzwayo and Ndlovu claimed that they should have been shortlisted. The Commissioner upheld Khuzwayo and Ndlovu’s claims and ordered the

applicant to pay to each compensation equal to six months of their current monthly salaries. His reasons:

“The [applicant] did not shortlist [Khuzwayo] and [Ndlovu] because their qualifications were not relevant to the post. The [applicant] provided a list of relevant qualifications, namely BA Criminology, Traffic Management, Police Science, Police Management and BA Military Science. However Mr Mchunu had an LLB which in terms of the list is not a relevant qualification, yet he was shortlisted and ranked second. It just does not make sense that [Khuzwayo] and [Ndlovu] were not shortlisted. [Khuzwayo] has a Degree in Criminology and [Ndlovu] has a B.Tech degree in Public Management. This is unfair.”

- [11] The Commissioner found that Nxumalo did not qualify to be considered for the position, it being common cause that he was not a member of the Metro Police Services. The Commissioner, nevertheless, held that he deserved six months' compensation because the requirement was not disclosed in the advert.
- [12] The applicant contends that on the law and the evidence that served before the Commissioner, no reasonable arbitrator could have come to these findings and issued such an award. Before I address that, I need to record certain facts.
- [13] First, the Commissioner did not set aside Middleton's appointment. The effect is that irrespective of the outcome of this review, Middleton retains his position as the Head of the Durban Metro Police, and as the only operational head. The so-called protected promotions did not create parallel operational Heads, who are permitted to perform the functions of the post.
- [14] Second, the ruling that Nxumalo did not qualify to be considered for the post also stands in this review. There is no cross-review.
- [15] Lastly, Middleton was the second respondent in the arbitration and by virtue of this he exercised his right to oppose the referrals, and adduced evidence in this regard.¹

¹ When the Covid-19 lockdown came into effect, the arbitration was part-heard in that the evidence and cross-examination of only three parties were done, namely that of Nxumalo, Aubrey Mthetwa and Ndlovu. The parties then elected to continue the hearing by submitting affidavits. Middleton, Nhlanhla Mthetwa and Khuzwayo filed same.

The findings under review

Nhlanhla Mthetwa and Aubrey Mthetwa

- [16] In response to Aubrey Mthetwa's claim that he is not a member of the Metro Police Service, Middleton placed into evidence a document styled "Appointment Certificate". According to its contents, he is a certified member of the Durban Metropolitan Police Service and was appointed as such in 2008 with the rank of Assistant Commissioner. He also drew to the attention of the Commissioner, section 64G which provides that: "A document in the prescribed form certifying that a person has been appointed as a member of the municipal police service, shall be *prima facie* proof of such appointment".
- [17] The authenticity of the certificate was not challenged. The Commissioner was therefore enjoined to find that that Middleton was indeed a member of the Metro Police Service. He did not. Instead, he engaged in an interpretative exercise of the regulations and provisions of the SAPS Act and essentially found that Middleton's certificate was unlawfully issued because on his interpretation a person must be a registered traffic officer to qualify to be a member of the Metro Police Service. In this, he not only exceeded his powers, but misinterpreted and misapplied the law.
- [18] Primarily, in order to qualify for appointment as a member of the Metro Police Services, a person must meet the conventional appointment requirements set out in Regulation 11(1) of the SAPS Act, which include as an appointment criterion the requirement in Regulation 11(1)(a) that a person must have successfully completed training required for registration as a traffic officer prescribed in terms of the Road Traffic Act. Persons appointed as members under these criteria are those who are registered as traffic officers.
- [19] Those persons, like Middleton, who do not meet the aforesaid criteria are nevertheless eligible for appointment as members. These persons are appointed on the basis of meeting the appointment requirements in Regulation 11(1)(h) which constitutes an exception to the general rule, for which specific provision is made under the transitional provisions of section 64Q of the Act. This section requires that members otherwise non-compliant with the conventional appointment criteria in Regulation 11(1)(a) must render themselves compliant,

as contemplated in Regulation 11(1)(h), by successfully completing a training course prescribed for this purpose by the National Commissioner in terms of section 64L of the SAPS Act. There are thus two lawful avenues for appointment as members of the Metro Police Service having disparate requirements.

[20] Middleton explained in his evidence that in 2008 he successfully completed the training prescribed by the National Commissioner under section 64L and it was in these circumstances that he was issued his Certificate of Appointment.

[21] A perusal of the award indicates that the Commissioner's incorrect finding that Middleton was not a member of the Metro Police Services fundamentally impacted his decision that Nhlanhla Mthetwa and Aubrey Mthetwa should have been appointed.

[22] Turning to another aspect of that decision - in the case of *Ndlovu v CCMA and Others*², Wallis J (as he then was) held as follows:

[10] In regard to that question Mr Ngcobo said the following and I quote:

"There is no doubt in my mind that the applicant is eminently qualified for a senior position in the ranks of Government. It is also quite clear that he has rendered sterling service to his employer. Is he, therefore, on the aforementioned basis entitled to a senior position? If indeed he is so entitled, does he stand head and shoulders above everyone else who is so qualified?"

There is no evidence to persuade me that the answers to these two questions should be in the affirmative...In sum, I am not convinced that the respondent committed an unfair labour practice in failing to promote the applicant. It is nowhere evident that the applicant was entitled to the promotion. It is also not clear that the successful applicants was or were not more deserving than the applicant. No evidence was led to show that the respondent was capricious or arbitrary in its decision."

[11] In my view, the questions which the Commissioner asked in the first paragraph of that quotation were wholly justifiable questions in relation to a dispute over a matter of promotion. It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post.

² (D544/99) [2000] ZALC 153 (1 March 2000).

That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed.

- [12] The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise.
- [23] I should also mention here a trite rule of evidence. In an unfair labour practice dispute, the employee bears the onus of proving that the conduct of the employer was unfair. A rebuttal from the employer is only required where the employee has established a *prima facie* case of unfairness, in other words, where the employee has made all relevant allegations and has fleshed out the allegations with evidence to a degree that its version requires an answer or rebuttal.
- [24] To the extent that the Commissioner found that Nhlanhla Mthetwa and Aubrey Mthetwa were more suited to the post on merit, the award discloses that he ignored crucial evidence that was properly before him and also failed to appreciate that the grievants had failed to discharge the initial evidentiary burden that had rested on them, which was to demonstrate that they stood head and shoulders above Middleton in all respects.
- [25] In support of their cases, Nxumalo, Aubrey Mthetwa and Ndlovu referred to Middleton's CV and Middleton also addressed it in his evidence. The evidence shows that he has a Bachelor of Military Science, was a Senior Military Officer before he joined the applicant (as it then was) as its Deputy Chief of Security; he joined the Durban City Police in 2004 as its Deputy Head: Logistics (Task Grade 19); in 2013, he was appointed Deputy Head: Metro Police responsible for Operations (Task Grade 21); and, in 2017, he was appointed as the Acting Head of the Durban Metro Police (Task Grade 22).
- [26] Given its job purpose, KPAs and that the post operates at a high level, these credentials spoke for themselves. Middleton more than met the essential requirements for the post, namely a relevant Bachelor's degree and seven years

relevant experience at a *management level*, two of which must have been at a *senior management level*.³

- [27] In comparison, on his evidence, Aubrey Mthetwa rose to a senior management level in 2015 (when he attained the rank of senior superintendent), barely making the essential requirement of two years at a senior management level by November 2017 (the closing date for applications for the post). Middleton, on the other hand, had occupied management and senior management positions for more than 10 years; was a senior military officer before he joined the applicant; in 2013, he was appointed Deputy Head: Metro Police responsible for Operations (Task Grade 21); and, in 2017, he was appointed as the Acting Head of the Durban Metro Police (Task Grade 22).
- [28] He claimed that Middleton's experience within the Metro Police was confined to Logistics and Security, a claim which was not only incorrect but did not explain why such experience was not relevant.
- [29] He also claimed that one of the key responsibilities of the job is to interact with its members and Middleton did not have this experience. He, on the other hand, has been an integral part of the Metro Police since 2003 when he began as a registered traffic officer and in 2015 when he rose to the rank of senior superintendent. This claim against Middleton was not substantiated. In any event, he pointed to no KPA which implies that active traffic policing experience and extensive years of interacting with members are inherent requirements of the job given that the position operates at a high level.
- [30] In response to his claim that his Bachelor of Law degree is more suitable to the job than a Bachelor of Military Science, Middleton pointed out that the Metro Police Service is a para-military organisation. It was also put to him [Aubrey Mthetwa] that a key performance area of the post is to engage with and coordinate operations with the SANDF when necessary, to which he provided no real response.
- [31] Turning to Nhlanhla Mthetwa, as to his credentials, he merely stated that his CV gave a clear narrative of his experience as a police officer and his capabilities in

³ Emphasis added.

police management and administration. He did not describe these and how they stacked up against those of Middleton.

- [32] Nhlanhla Mthetwa's case actually rested on one ground, the contention that as a member of a designated group and in terms of the demographics in the occupational level he should have been preferred over Middleton. According to these demographics, in respect of White males, the "required" demographic is 3 and the "current" demographic is 11 and, in respect of African males, the "required" demographic is 45 and the "current" demographic is 47.
- [33] It is significant that the Commissioner made no finding on this claim. It did not factor in his decision that Nhlanhla Mthetwa was more suitably qualified for the post than Middleton. Presumably because he found no merit in the claim, which would have been correct. Even if it was arguable that the applicant's recruitment policy conferred on designated employees a right to affirmative action as individuals⁴, the demographics do not point to an *underrepresentation* of African males in the occupational level. The required demographic was 45 and the current demographic was 47. Nhlanhla Mthetwa also did not respond to Middleton's submission that his (Middleton's) last two substantive positions and the disputed post fall within the same occupational level which hold task grades 19 to 25 and this means that his promotion did not have an adverse effect on the objectives of the equity plan and its demographics, and that Nhlanhla Mthetwa was already in that occupational level. Furthermore, his claim does not address the problem that another African male was ranked ahead of him.
- [34] Finally, and most important, the Commissioner failed to take into account that the non-appointment of Aubrey Mthetwa and Nhlanhla Mthetwa followed after they were given a fair opportunity to compete for the position. They were both shortlisted and interviewed and subjected to a compulsory occupational assessment but scored less than Middleton in all categories. It was common cause that Middleton scored the highest in the interview questions, namely 20 out of 25, followed by Nhlanhla Mthetwa at 13 and Aubrey Mthetwa at 10. Middleton also scored the highest in the occupational assessment, namely 9.15, followed by Aubrey Mthetwa at 8.4 and Nhlanhla Mthetwa at 8.35.

⁴ See: *Dudley v City of Cape Town & another* (2008) 29 ILJ 2685 (LAC).

- [35] In the face of all this, no reasonable commissioner could have found that Nhlanhla Mthetwa and Aubrey Mthetwa were more suited to the position than Middleton and that the Applicant had exercised its prerogative unfairly.
- [36] It was contended on behalf of Aubrey Mthetwa that the Applicant did not adduce evidence and thus provide an explanation relating to the basis upon which it shortlisted and appointed Middleton. As stated by the Commissioner: “I do not have the explanation regarding the reason why [Middleton] was the most suitable candidate for the post of head of metropolitan”. Accordingly, absent an explanation from the employer, the Commissioner was bound to find that the non-appointment of Aubrey Mthetwa was unfair.
- [37] This contention has no merit. The Commissioner improperly ignored the fact that Aubrey Mthetwa (and for that matter, Nhlanhla Mthetwa) failed to establish a *prima facie* case of unfairness⁵ and that Middleton’s evidence in any event demonstrated that the Applicant had good reason to appoint him in preference to Nhlanhla Mthetwa and Aubrey Mthetwa.
- [38] Turning to the order that the applicant must promote both Nhlanhla Mthetwa and Aubrey Mthetwa to the position, even if my judgment above is wrong, the order is patently irrational. A Commissioner cannot be said to be acting reasonably in dictating to an employer to promote two more persons to one post especially in a command type structure and to indefinitely siphon from a public funded entity three remuneration packages. It is not an answer to suggest that the Applicant was not present and did not tender evidence to the contrary. There can never be a justification for such an order.
- [39] The irrationality of awarding two protective promotions is underscored by its equally irrational premise, namely that the Commissioner could not decide who between Nhlanhla Mthetwa and Aubrey Mthetwa is more suited to the post. The Commissioner’s self-imposed dilemma emphasizes that the Legislature did not

⁵ As indicated earlier on, in unfair labour practice disputes the employee bears the onus of proving that the conduct of the employer was unfair. A rebuttal from the employer is only required where the employee has established a *prima facie* case of unfairness, in other words, where the employee has made all relevant allegations and has fleshed out the allegations with evidence to a degree that its version requires an answer or rebuttal.

intend to require a commissioner to assume the role of selection panels, which are specially elected to make the hard decision of selecting one candidate.

[40] The award further does not disclose an enabling authority for “protected promotion”. The concept once existed in a provision in the Public Service Staff Code. This provision no longer exists and when it was operational only the Public Service Commission had the power to recommend protected promotion and this power was narrowly defined. Such recommendation could only be made if the Commission “without doubt” established that the employee concerned is indeed the “most” suitable candidate. Further, the provision stipulated that “only one candidate can be the most suitable candidate at any specific moment and the protective promotion of only one candidate can be considered at a time.”⁶

[41] Furthermore, in the case of *KwaDukuza Municipality v SALGBC & Others*⁷ the court (per Pillemer AJ) ruled that protected promotion is merely a disguised form of compensation, which may not be granted in the absence of proof that the employee has suffered an actual loss, and is unlawful if it exceeds the one-year limit on compensation prescribed by the LRA.

Khuzwayo and Ndlovu

[42] As stated earlier on, to succeed in such an unfair labour practice dispute relating to promotion, the aggrieved employee must demonstrate that he or she met the essential requirements of the post and was comparatively a stronger candidate than the successful candidate and the employer has provided no good reason for preferring the successful candidate.⁸ To my mind, the same principles must apply where an employee lodges an unfair labour practice dispute relating to promotion where the employee complains that he was not shortlisted. There is no lesser burden.

[43] On the evidence which was before the Commissioner these questions were not canvassed at all. Certainly no evidential basis was placed before the Commissioner to suggest that they even met the essential requirements of the post, let alone that they compared more favourably than the successful

⁶ *The Department of Justice v CCMA and Others* (unreported, Case No. C718/00).

⁷ (2009) 30 ILJ 356 (LC).

⁸ See: *Ndlovu v CCMA* (above).

candidate. How a reasonable Commissioner could ignore this and simply give a largess of six month's compensation on a marginal claim - that they should have been shortlisted because another candidate with an LLB was shortlisted but they with, respectively, a B. Criminology and a B.Tech in Public Management, were not - is beyond comprehension.

- [44] I note that accordingly to the award, Ndlovu was promoted to the rank of senior superintendent in 2016. This means he did not meet the essential requirement of at least two years of relevant managerial experience at a senior management level.

Nxumalo

- [45] The Commissioner found that Nxumalo did not qualify to be considered for the post, it being common cause that he was not a member of the Metro Police Services. The Commissioner, nevertheless, found that he deserves six months compensation because this requirement was not listed in the advert. No reasonable arbitrator could have made such a finding. Compensation is awarded for the loss of a right. The evidence and award does not disclose what right possessed by Nxumalo was infringed when the Applicant did not spell out the law in the advert. At most, Nxumalo suffered an inconvenience of his own making, which amounted to writing and sending out a job application. It is even more alarming that the Commissioner clocked out compensation which is close to a half a million rand for this. One would think that a person applying for such a post would know they must be a member of the Municipal Police Services.

Conclusion

- [46] There is no trace in the evidence that served before the Commissioner that the applicant acted unfairly as against the third, fourth, fifth, sixth and seventh respondents and the award in their favour falls to be set aside.

Correction or remittal

- [47] The LRA expressly gives the Labour Court power, when entertaining reviews under section 145, to 'determine the matter in the manner it considers appropriate', or 'to make any order it considers appropriate about procedures to

be followed to determine the dispute'.⁹ The court may correct a defective decision rather than remit it to the decision-maker (in this case the SALGBC) when the result is a foregone conclusion and it would be a waste of time to require the decision-maker to reconsider the decision; remission would cause a further delay that would prejudice the applicant; and/or the court was/is in as good a position as the Commissioner to decide the matter.¹⁰ All these factors apply to the present case. Also, the third, fourth, fifth, sixth and seventh respondents exercised their right to oppose the review and addressed the merits of the disputes and evidence that served before the Commissioner.

Order

1. The award issued by the second respondent in favour of the third, fourth, fifth, sixth and seventh respondents is reviewed, set aside and substituted as follows:
 - (a) The referrals and unfair labour practice claims of the third, fourth, fifth, sixth and seventh respondents are dismissed.

B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:

J Nxusani SC, instructed by Farrell Inc. Attorneys

⁹ Section 145(4).

¹⁰ See: *Consol Ltd t/a Consol Glass v Ker NO and Others* [2002] 4 BLLR 367 (LC).

For the Third and Seventh Respondents:

S.D.M Maduma, instructed by Maduma Attorneys

For the Fifth Respondent:

The Respondent

For the Fourth and Sixth Respondents:

M.N. Xulu, instructed by M Dlamini Attorneys

Labour Court