



REPUBLIC OF SOUTH AFRICA

Of Interest to Other Judges

**THE LABOUR COURT OF SOUTH AFRICA,
IN DURBAN**

**CASE NO'S: D 408/11
& D542/11**

In the matter between:

**KWAZULU NATAL DEPARTMENT OF
TRANSPORT**

Applicant

and

**GENERAL PUBLIC SERVICE
SECTORAL BARGAINING COUNCIL**

First Respondent

DR R J T MCANN (N.O.)

Second Respondent

**PUBLIC SERVANTS ASSOCIATION
obo HARILAL**

Third Respondent

**PUBLIC SERVANTS ASSOCIATION
obo SHEWNARAIN**

Fourth Respondent

N E THAFENI

Fifth Respondent

Heard: 07 May 2013

Delivered 17 November 2014

Summary: (Review – unfair labour practice relating to promotion – sound basis for arbitrator’s decision – applicant’s unfairly excluded from selection process – selection process fundamentally flawed – reckless approach of panel in making appointment – award upheld)

JUDGMENT

LAGRANGE, J

Introduction

- [1] There are two applications before the court in this matter. The first is a review application concerning an arbitration award in a residual unfair labour practice dispute relating to promotion. The second is an application by the third and fourth respondents, the aggrieved employees in the unfair labour practice dispute, to make the arbitrator’s award an order of court.
- [2] The applicant has also applied for the late filing of the review application some four weeks late. Although the explanation for the delay is sketchy and poor because it blames delays in internal procedures of the applicant, the main reason for the respondents’ opposition to the condonation application is based on the merits of the review rather than any prejudice occasioned by the delay. In the circumstances, I consider it appropriate to condone the late filing of the review application and deal with the merits of the review application.

The evidence before the arbitrator

- [3] The arbitrator concluded that the applicant had committed an unfair labour practice relating to the appointment process when it appointed the fifth respondent, Ms N Thafeni (‘Thafeni’) to the position of Chief Provincial Traffic Inspector: Midway in the Ladysmith region, at a starting salary of approximately R 158,000 per annum in 2008. As a remedy, he ordered that the appointment be set aside with the post being re-advertised and also ordered costs against the applicant.
- [4] The common cause facts mentioned at the commencement of the arbitration proceedings were-

- 4.1 The post was advertised.
- 4.2 Both the third and fourth applicants, Mr R Harilal ('Harilal') and Mr V Shewnarain ('Shewnarain'), jointly referred to as 'the aggrieved employees', applied for the post but were not shortlisted or interviewed, even though they met the criteria in the advertisement.
- 4.3 The applicants were excluded from consideration because they were Indian males, whereas the target was the appointment of an African female.
- 4.4 Thafeni, who was the only candidate out of 19 applicants who was shortlisted and interviewed, received an interview score of 40 out of 80.
- 4.5 On 12 May 2008 the Manager: Human Resource Management, Ms C Zwane ('Zwane') wrote a letter to the Acting General Manager: Implementation in which she:
 - 4.5.1 referred him to paragraph 11.4 of the Department's Recruitment and Selection Procedures which stated that a selection committee should approach with caution the appointment of any applicant who scored below 60% and should only recommend the appointment of such person "...if the selection committee is certain that the applicant is competent to fulfil the requirements of the position or that the applicant has the potential to acquire the necessary competence within a reasonable time frame", and;
 - 4.5.2 asked the selection committee to clarify in what way they are satisfied that Thafeni satisfied either of these requirements.
- 4.6 Thafeni's two years' experience as a City Parks manager, three years as a Metro Police Constable and two and a half years as a facilitator for the Safer Cities were also common cause. Other aspects of her experience were in dispute.

Aspects of the evidence before the arbitrator

- [5] When Zwane was questioned about the response to her question about the low score obtained in the interview by Thafeni, she said that she was satisfied from the response she received that the interviewing panel was able to determine in the interview that Thafeni had the potential to be able to demonstrate the required competencies in a reasonable time. She also referred to a submission made to the assistant manager of employment equity to accept the selection panel minutes in terms of employment equity targets. The submission contained the comment that “The nomination of an African female at this level and in this category are supported because it is in line with Department’s EE plan.” The advertisement for the position also stated that it was the intention of the Department to fill the post with a person from the disabled community or an African female unless otherwise indicated.
- [6] Zwane was also referred to the experience reflected in Thafeni’s CV and asked to comment on what appeared to be a lack of any supervisory experience in the traffic law enforcement environment by Thafeni, whereas three years experience of this kind was listed as one of the job requirements. In Thafeni’s CV she recorded her work as a project facilitator working with NGOs, community workshops, community organisations, partnerships with CDO’s, FTO’s and government structures. Under cross-examination, Zwane suggested that where a person performed “top management activities” it could involve a project within road safety in which that person performs project management which would not require that person to be on the road that they might still be performing within a road safety function. When pressed as to whether the post in question was not calling for someone with experience of managing police officials and more specifically traffic policeman, Zwane said she believed that in managing an NGO she would have been managing policemen.
- [7] In explaining how a candidate who had obtained only a 50% rating in an interview could be appointed, she stressed that the interview score was for other things and the fact that she did similar work meant that she could

have the potential and the panellists on how they determined that. She also argued that the policy was only a guide and did not prevent promoting someone who obtained a score below 60%.

- [8] When questioned about the fact that the employment equity plan of the Department for 2006 to 2010 showed that at senior management level female staff accounted for 40.71% and males 39% at that level, Zwane's answer was that statistics changed on a daily basis as each post is filled.
- [9] Zwane was also referred to a circular on the interviewing of applicants for advertised posts which read as follows:

“INTERVIEWING OF APPLICANTS FOR ADVERTISED POSTS

1. It has been noted that some selection panel's only interview those applicants from the equity target group are set out in the advertisement e. g. an advertisement indicates that preference will be given to a person from the disabled community or an African Female and all applicants who do not form part of this group but to meet with the advertised requirements are either not been considered during the shortlisting process or are being considered during the shortlisting process but not been invited for an interview.

2. Kindly note that whilst an advertisement may express equity targets, it is only once applicants had been scored on competence that equity targets should be applied. This implies that the selection process should be brought to the last stage (i. e. interviews) before equity targets are applied. This is in accordance with the Department's Recruitment and Selection Policy and Procedures.

3. In view of the above, selection panels are advised to refrain from the practice of only interviewing applicants from the equity target group set out in the advertisement.

4. Kindly ensure that the content of this circular is brought to the attention of all concerned.”

[10] Zwane confirmed that just because African females might be the target group, that did not mean other candidates should not be shortlisted and interviewed as long as they qualified. However, she confirmed that if the target group was African females, applicants not falling within this category would not be able to get the post, because they did not 'feature' in the Departmental targets at the time.

[11] Mr Maphalala ('Maphalala'), the Control Provincial Inspector, who is responsible for Chief Provincial Inspectors was involved in the interview and also testified. In relation to the dispute that XT had the required three years supervisory experience in traffic law enforcement, he referred to her CV in which she had stated that she had worked as a Project Manager/Facilitator in the Metro Police Department: Social Crime Prevention (Safer Cities Program). They considered that this experience was enough to indicate that Thafeni had the required years of experience for the sake of elucidation, Thafeni had described her duties in the post as including:

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- *facilitation and coordination of community meetings*
- *monitoring, and managing community interventions (projects)*
- implementation of projects*
- *report writing*
- *ensuring community involvements in preventing crime*
- *doing presentation (PowerPoint) to Senior Management Team and other stakeholders*
- *branding and marketing of the city through projects*
- *doing community awareness campaigns”*

[12] When Maphalala was asked what other considerations the panel took into account having only awarded Thafeni a score of 50%, it was decided in discussion that she had the potential to do the job and should be recommended. Hence, he had written the letter to Zwane in response to her query saying:

“The selection panel agreed to recommend the appointment of the candidate is that identified that she has the potential to succeed in carrying out the duties allocated to the post is based on her previous work experience and she would be in a position to acquire knowledge within the shortest possible time.”

- [13] When asked about the selection process he agreed that 19 candidates were excluded because they fell outside the employment equity target criteria or because they did not have enough experience. When asked why Thafeni was still shortlisted when there was no indication she had even one day of experience in traffic law enforcement, the explanation provided by Maphalala was that law enforcement involved a number of projects. The panel was satisfied that the projects she was doing were in traffic law enforcement. When further questioned about how she could have acquired supervisory experience when she was working for Metro Police as a constable, he said that even though she was a constable there would be other new constables she would have to supervise and as a Project Manager she was supervising employees in the workforce.
- [14] He could not explain why the letter dated 29 May 2008 from the Social Crime Prevention Unit in The Cape Town Metropolitan Police Department confirming Thafeni's duties in that post made no reference to traffic related work at all. For reasons which were not explained, this letter from Thafeni's former employer was only issued nearly a fortnight after Maphalala had already written to Zwane explaining why they had recommended Thafeni's appointment notwithstanding her poor score.
- [15] When asked why three other candidates, including two black woman were not interviewed, Maphalala explained that even though they were Provincial Principle Inspectors there was nothing in their CV's that met the requirements of the post . He was satisfied that it was not necessary to interview anyone else because Thafeni's experience showed that she had Project manager experience and they could not interview the others who did not meet minimum requirements.
- [16] He was also asked to try and explain why the panel determined that despite her poor interview score the panel had nonetheless determined

that she was suitable, to which he replied that the line of questioning made them able to determine that she had the potential to do the job. When pressed on what it was in particular that gave them this impression, all he could say was that, it was the manner in which she answered questions even though she was not working in the Department and it was that which made them feel she would be able to come up to speed to satisfy the requirements in a short time. When asked why Thafeni was still appointed when only one panellist rated her above 60% (two panellists had rated Thafeni at only 40%, another at 65% and he himself rated her only at 55%) all Maphalala could say is that after interviewing her the panel unanimously agreed she would be able to do the job despite that.

[17] Lastly, when he was asked why a number of better qualified candidates in Kwa Zulu Natal were overlooked in favour of someone from the Western Cape who in her letter of application had shown an interest in discussing any openings within the department and expressed a very strong desire to develop a career in community services and in particular in working in social development because of her keen interest in the social growth of communities, unless there was someone in the Department who is looking for any reason to place in the post, Maphalala's only response was that he did not agree because the Western Cape was far from Kwa-Zulu Natal.

[18] The last witness was Ms N Themba, an Assistant Manager in the Employment Equity Section of the Department. She explained that African female candidates were targeted to correct imbalances at salary level 9 and that the targets were calculated on a monthly basis.

The arbitrator's reasoning

[19] In his award, the arbitrator gave a detailed account of the evidence above and an equally detailed account of the arguments of the parties. The arbitrator's reasoning in arriving at his conclusion are summarised below.

[20] Noting that the chairperson had testified that all males had been excluded from the selection process and that even to other African female candidates who met the criteria were excluded on the basis of not having experience, he found it somewhat unlikely that out of 20 possible

candidates for a relatively senior position only one would meet the relevant criteria.

- [21] The requirement of three years supervisory experience in traffic law enforcement environment did not seem an unreasonable requirement given the nature of the post because the incumbent would have a had number of other subordinate inspectors reporting to him or her. It is not unreasonable to suppose that such a person would have needed that experience in order to be able to function effectively in the post. In assessing the panel's conclusion that her prior work experience qualified her, the arbitrator disagreed with the chairperson's assessment that she had been a manager in the Metro Police department as she had only been a manager in the City Parks department and then was seconded to Metro Police where she had worked as a constable. Moreover the two years experience in city parks could not be equated with three years supervisory experience and the traffic law enforcement environment. Moreover being a Project facilitator could not be equated with being a Project manager. At best she was a manager or facilitator of social projects which is very different from traffic law enforcement. He also rejected as very unlikely Mister Maphalala's rationale that even as a constable she would have supervised other constables and developed supervisory experience in that context.
- [22] The arbitrator concluded that her application for employment which was used to shortlisted for this interview did not reveal she had the appropriate experience as required by the advertisement. As such she should also have been excluded from shortlisting as a candidate like the others that were rejected for not having sufficient experience. This revealed that a fair procedure was not followed in the selection process this also led to other African female candidates who met employment equity requirements been disqualified as well.
- [23] Although the figures presented at the arbitration did not demonstrate that African females were necessarily underrepresented, the arbitrator accepted that it was possible that when the target was set for that particular post, statistics might have shown that this was a category in

which there was a shortfall at the time. Nevertheless, the aggrieved employees were not even shortlisted even though there was no dispute that they met the advertised requirements for the posts. This meant that their race was an absolute barrier to their advancement, which was unfair. Those requirements should have been only applied after the interviews were completed and after an assessment of their suitability had been made. The circular which was sent out subsequently by Zwane confirmed this was the correct approach.

- [24] In relation to the interview itself, the arbitrator was of the view that the scoring by the panellists could not be reconciled with the recommendation for her appointment. Turning to the explanation given by Maphalala as to how the recommendation was made, the arbitrator found that he could not give a coherent reason why a person with no traffic supervisory experience could have been brought up to speed within a reasonable time even though Maphahlala was given more than one opportunity to indicate which answers Thafeni had given which had persuaded the panel that she was suitable for appointment. It would have been more prudent in the circumstances to have re-advertised the post than to push forward with her appointment in the light of the “circumspect results” of her interview and the fact that her supervisory experience in Traffic Law Enforcement environment was virtually non-existent.
- [25] The arbitrator concluded then on a balance of probabilities that the applicant had committed an unfair labour practice pertaining to promotion in so far as Thafeni was the only candidate shortlisted and then appointed.
- [26] He dismissed the relief sought by the grievants of appointment to the post, or alternatively a protected promotion, from the date of the. He did so because it is uncertain whether if the process had been fairly conducted, either of the two applicants would have been appointed particularly when considering the department’s employment equity plan. It was the selection process itself which was seriously flawed and accordingly setting aside the post re-advertisement and re-interviewing candidates was the appropriate remedy.

[27] On the issue of costs, arbitrator agreed with the grievants that the applicant should never have defended the matter. Moreover most of the delays in the arbitration process were caused by the respondent not being ready to proceed. Consequently an order of costs against the applicant was reasonable.

Grounds of Review

[28] The applicant essentially attacks the reasonableness of the award and tries to suggest that there is no basis for a number of the arbitrator's subsidiary conclusions. It does so by advancing a number of criticisms of the arbitrator's findings. I am mindful that this approach may be the kind of piecemeal approach to reviews that the LAC rejected as improper *in Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*¹, but nonetheless I address each one below even though some grounds appear to be more appropriate to an appeal. Obviously, the merits of the review application based on reasonableness, must be determined in accordance with the principle reaffirmed in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*², namely:

“That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is

¹ (2014) 35 ILJ 943 (LAC) at 949, para [18]

² (2013) 34 ILJ 2795 (SCA) at 2802, para [12].

one a reasonable decision maker could reach in the light of the issues and the evidence.”

- [29] The applicant says that there was no factual basis for the arbitrator suggesting that it was unlikely that out of 20 possible candidates only one would meet the qualifying criteria. This conclusion of the arbitrator must be seen in the context of the existence of other candidates with direct experience in traffic law enforcement environment, the admitted fact that both the grievants met the criteria and particularly vague evidence given by Maphalala that was unsubstantiated with any documentation about the lack of any supervisory experience amongst the other candidates.
- [30] The applicant also takes exception to the arbitrator's conclusion that it was strange given the scoring of Thafeni that she was recommended for the post. This is not a conclusion in isolation but was an inference drawn in the context of what can only be described as a very poor interview score in which only one panellist rated Thafeni above the threshold of 60% and two panellists did not even rate her above 40%. The respondents regard this conclusion as irrational because there was clear and undisputed evidence that the panel was satisfied that Thafeni had the potential for the post. However, the respondents failed to appreciate that Maphalala could not really explain why they had decided she had the potential except by reference to the manner in which she answered questions, yet those very answers produced a very low score.
- [31] It is also contended by the applicant that the arbitrator's conclusion that Thafeni did not have the appropriate experience as required in particular three years supervisory experience in traffic law enforcement flew in the face of clear evidence from of its witnesses that she had the necessary experience. The applicant appears to conflate an assertion of Thafeni's experience by its witnesses with objective evidence of that experience. Zwane's evidence about Thafeni's experience was largely speculative and she herself disclaimed any knowledge about traffic law enforcement. The only other evidence was that provided by Maphalala, who struggled to explain why someone who had only been a constable would have had

supervisory experience in the traffic law enforcement field and why Project facilitation in social projects should be seen as equivalent to very specific supervisory experience in a particular field of expertise. The arbitrator's conclusion on this issue in the light of the poor evidence supporting the conclusion that she did have the relevant experience, and the fact that much of it appeared to be surmise on the part of Maphalala, was not unreasonable at all.

- [32] The arbitrator's conclusion that there was an absolute barrier placed in the way of any candidates who were not from the designated group, being African females was taken in complete disregard of: Zwane's evidence of the need to prioritise African females; the fact that the post was advertised specifically with the object of filling the post with an African female, and paragraph 5.3.4 of the recruitment and selection policies and procedures which provides that an applicant falling outside the target group specified in an advertisement must be disqualified. In fact, there was no reference in any of the evidence to this particular paragraph. Moreover, Zwane in her testimony made it clear that it was necessary to ensure consistency in the practice of the Department to write a letter on 31 December 2008 clarifying that candidates who were not designated still should be shortlisted and interviewed and that equity targets should only be applied at the last stage of the interviews. It is readily apparent that the grievants were not even considered for shortlisting on the basis of their race, so it was not unfair to say that in that particular recruitment exercise, race was an absolute barrier to appointment, as it was used as a criterion for exclusion from consideration for the post altogether. Oddly, in the review application the applicant continued to defend the action of the selection panel in excluding the grievants on this basis notwithstanding Zwane's acknowledgement of the shortcomings of the approach.
- [33] The applicant also is aggrieved that the arbitrator felt it should never have defended the matter and submits that the cost award was won that no reasonable arbitrator could have made as it was fully entitled to present its evidence to justify its recruitment and selection processes. The making of a cost award is something within the discretion of an arbitrator to decide on the basis of what is just and equitable. The arbitrator was of the view

that the selection process was so seriously flawed that it should have been obvious to the applicant that it should rather have re-advertised the position than proceeding with the appointment. In that context, I do not think it was an unreasonable exercise of the arbitrator's discretion to make a cost award against the applicant.

[34] The applicant claims that arbitrator completely ignored the law in concluding that it had committed an unfair labour practice in shortlisting and appointing Thafeni, particularly in relation to the premium placed by the employer on employment equity. The applicant failed to pursue this line of argument at the hearing of the review application and provided no authority for this argument.

[35] The arbitrator's finding that the process was seriously flawed and that setting aside the appointment and re-interviewing was the appropriate remedy in the circumstances, is attacked by the applicant as being without any basis. In particular it cites what it refers to as "the extensive evidence regarding the application of the equity target" and there was no evidence of gross unreasonableness or *mala fides* on the part of the applicant. The arbitrator did not ignore the fact that there was a preference for employing an African female based on the employment equity target. Clearly, what concerned him was that the grievants had been excluded from the start instead of the employment equity considerations been taken into account in the interview stage. Secondly, the exclusion of all other candidates and the lack of any objective basis or concluding either that Thafeni had the requisite traffic law enforcement supervisory experience, as well as the lack of any substance in Maphalala's evidence as to what persuaded the panel that Thafeni had the potential to succeed in the position notwithstanding her poor rating in the interview clearly supports an inference that a rational basis for her selection and appointment was absent, even if there was no direct evidence of *mala fides*. In the circumstances, it cannot be said that the arbitrator's decision that the best way of remedying the situation was to re-advertise the post was unreasonable. Indeed, it offered the applicant a practical way out of the manifold problems with the appointment. Instead, it chose to contest it. In this regard, it is important to note that the arbitrator specifically avoided

awarding compensation or any form of promotion to the two grievants. The relief he awarded was of a process related kind of remedy the unfairness which lay in the fundamentally flawed appointment process leading to an appointment that could be not be rationally justified on the evidence presented.

[36] This makes it distinguishable from the award in a case such as ***National Commissioner of the SA Police Service v Safety & Security Sectoral Bargaining Council & others***³. In that matter, other job applicants had not been considered and the arbitrator awarded the aggrieved employee compensation when no connection had been shown between the procedural flaw and the prejudice suffered by him that could justify the relief granted. After some to-ing and fro-ing between the arbitrator and the court, the arbitrator had awarded compensation to the employee.

[37] The honourable Musi, AJ (as he was) effectively agreed that this could not be justified in the absence of proving that the employee would have been successful but for the irregularity. However, the court clearly did not view this as the end of the matter and considered the alternative remedy of the appointment process being reopened, but declined to go that route because the successful candidate had not been cited as a party in the arbitration proceedings, unlike in these proceedings. In the circumstances, the court opted for a solution which allowed the arbitration proceedings to be reopened by setting aside the arbitrator's award.⁴ Thafeni was joined in the arbitration proceedings in this matter and despite obvious efforts to encourage her to attend, which the arbitrator alluded to, she decided not to.

Concluding remarks

[38] In the circumstances, I am not satisfied that the applicant has established a basis for setting aside the award, including the costs order. This is also an instance in which all parties could have avoided further unnecessary costs if the applicant had simply abided by the outcome of the arbitration,

³ (2005) 26 ILJ 903 (LC)

⁴ *Ibid*, at 910-911, paras [21]-[22].

instead of challenging it with poor prospects of success. I see no reason why the respondents should be burdened with the costs of defending the award.

[39] The case does raise a couple of serious concerns. In the absence of evidence to show that Thafeni met an important prerequisite for consideration as a candidate, and in the absence of meaningful evidence of an objective basis for the recommendation of the selection panel that she had the potential to overcome this deficiency, especially against the backdrop of her poor rating, as well as the selection panel's blanket exclusion of all other candidates from consideration, a rational basis for employing Thafeni is difficult to find. There is reason to believe that the appointment might have been made with a reckless disregard for whether or not public expenditure might be wastefully incurred in paying the salary of the fifth respondent. Secondly, the case does raise the question, whether it was reasonable for the applicant to have incurred the cost of reviewing the award. In the circumstances, I believe it is appropriate to bring the appointment to the attention of the Internal Audit department and to the Provincial Auditor General to consider whether the appointment of Thafeni and, or alternatively, the review application entailed fruitless or wasteful expenditure as defined in the Public Finance Management Act, 1 of 1999, namely: expenditure made in vain which could have been avoided had reasonable care been exercised.

[40] It is regrettable that so much time has passed since the appointment, but the arbitration proceedings were delayed in the main by the applicant and it took eight months to file its supplementary affidavit, in circumstances where the transcribed record was short. When embarking on the review proceedings, the applicant must have been alive to the very real possibility it would not succeed, with all the attendant risks that entailed.

Order

[41] In light of the above the following order and directive are made:

41.1 The late filing of the review application is condoned.

41.2 The application to review and set aside the arbitration award dated 23 February 2011 under case number PSGA737-08/09 is dismissed and the said award is made an order of court.

41.3 The applicant must pay the respondents' costs.

41.4 The registrar is directed to refer a copy of this judgment to the head of the Applicant's Internal Audit Department and to the Auditor-General for Kwa-Zulu Natal, under cover of a letter requesting the said officers to consider the judgment and in particular the contents of paragraph [39] in the light of the Public Finance Management Act 1 of 1999.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: M M Poseman

Instructed by: Lamberti & Associates

For the First Respondent: B Macgregor or Macgregor Erasmus