THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C 24/2022

In the matter between:

THE CITY OF CAPE TOWN	Applicant
And	
ASIA COETZEE (nee TOUTIE)	First Respondent
IMATU	Second Respondent
COMMISSIONER BELLA GOLDMAN N.O.	Third Respondent
SALGBC	Fourth Respondent

Date of Hearing: 25 June 2024

Date of judgment: 6 December 2024

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This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 06 December 2024.

Summary: Section 145 of the LRA – Review application of an arbitration award where the Commissioner found that the employee was subjected to unfair labour practice related to a promotion and awarded compensation. Arbitration award upheld. Review application dismissed.

JUDGMENT

DANIELS, AJ

INTRODUCTION

1. This judgment is concerned with an application to review and set aside the third respondent's decision, in her capacity as Commissioner appointed by the fourth respondent, the South African Local Government Bargaining Council ("the Bargaining Council") to arbitrate the unfair labour practice dispute between the Applicant and the first respondent, Ms Coetzee. The third respondent found that Ms Coetzee was subjected to unfair labour practice relating to promotion by not being shortlisted for the position of Senior Professional Officer advertised by the Applicant in September 2020. The Commissioner awarded Ms Coetzee

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compensation in the amount of R89 324.00 with interest if not paid by 31 January 2021.

2. The Applicant challenges the third respondent's decision in terms of section 145 of the Labour Relations Act ("the LRA")[1] on the basis that there was no evidence upon which the Commissioner could reach the conclusion that the decision not to shortlist Ms Coetzee, amounted to an unfair labour practice.

3. The Applicant challenges the arbitration award on the following grounds:

   3.1. The arbitration award was improperly obtained given that the arbitrator took into account irrelevant considerations whilst ignoring crucial evidence.

   3.2. The award is based on irrelevant and non-existing evidence giving rise to unreasonable conclusions.

   3.3. The arbitrator impermissibly entered the fray and displayed an attitude of bias against the City officials.

4. The application is opposed by Ms Coetzee, on the basis that the third respondent's decision falls squarely within a band of reasonableness and there is no justification for interference with the decision reached by the Commissioner in her award. Ms Coetzee essentially contends that another arbitrator would have

[1] Act 66 of 1995.

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come to the same conclusion, namely, that she was subjected to an unfair labour practice relating to promotion. Ms Coetzee accordingly seeks that the application be dismissed.

BACKGROUND FACTS

5. Central to the dispute between the parties is the vacancy of Senior Professional Officer advertised by the Applicant. Both external and internal candidates were invited to apply prior to the closing date, being 2 October 2020.

6. Ms Coetzee had been employed by the City in terms whereof she occupied a number of positions over time. Prior to making her application for the position of Senior Professional Officer, Ms Coetzee was employed by the City as a Professional Officer in the Water and Sanitation Department.

7. In or around 2 October 2020, Ms Coetzee submitted her application for Senior Professional Officer: FM [Facilities Management] Services. The following requirements had to be met by a prospective candidate. I quote from the advertisement:

"*Requirements*

- *A relevant B. Degree in Management, administration or Facilities / property Management.*
- *8 years' relevant experience with Facilities Management*.
- *Computer Literacy (MS Office, SAP advantageous)*

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- *Proven Supervisory skills*
- *A valid Code EB Drivers Licence*"

8. The advert further records the required Key Performance Areas among others as follows:

- "*To assist the Head FM and Maintenance with the management of tenant related services.*
- *To Assist with the management of stakeholder's relationship through effective communications and regular feedback.*
- *Conducting tenant management meetings.*
- *The development of policies and standards.*
- *To assist in maintaining a computerized data base for buildings.*
- *Management and Administration of contracts, tenders and Service Level Agreements.*
- *To assume responsibility for the management of all immovable assets with the area.*
- *Maintaining and assisting with office space audits.*
- *To assist with the compilation of annual capital and operating budget requirements for the area.*
- *Maintaining internal financial control and cost recoveries*.
- *To assume responsibility for the management of operational staff and contractors*.
- *To ensure that evacuation plans are executed*.

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- *Drafting correspondence and ensuring that all information is accurately reflected*.
- *To represent the Head FM and Maintenance*."

9. According to Ms Coetzee's Curriculum Vitae ("CV"), which formed part of her bundle of documents during the arbitration, she worked as a Professional Officer between the period "January 2019 to Current", the latter being the date of submitting her application for the position of SPO. The following was further recorded in Ms Coetzee's covering letter to her application:

> "*I am employed at the City of Cape Town, Water and Sanitation Department as a Professional Officer. I've been in a management position for the last 9 years. I have been employed as a Senior Facility Officer, Facility Officer, Team Leader and Swimming Pool Lifeguard while employed at the City of Cape Town*."

10. Ms Coetzee summarized her Key Performance Areas related to the position of Professional Officer as follows:

> "*My current designation as a Professional Officer comprises of the following functions, but not limited to facilities management, vendor management, tenant management, asset management, project and program scoping, implementation and monitoring, personnel management, customer service, performance management, risk management, health and safety, communication and operational management.*"

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11. A total of 79 applications were received in response to the advertisement for the position of PSO. Only 7 (seven) candidates were shortlisted for the position including Lyndon Groep (Groep) and Lynn Norris. The first respondent was not shortlisted, which gave rise to a dispute between the parties.

12. The second respondent in the arbitration proceedings, Ms Trudy Gibbons ("Gibbons"), was appointed to the position of Senior Professional Officer, Facilities Management.

13. In or around 10 November 2020, the first respondent addressed a letter to the Applicant and requested feedback on the outcome of the shortlisting process pertaining to the post of Senior Professional Officer. The following day, on 11 November 2020, the Applicant addressed a letter to Ms Coetzee in reply and advised her that she was not shortlisted as she did not meet the minimum requirements of the post as per the advertisement.

14. Aggrieved by the Applicant employer's decision, Ms Coetzee represented by her union the second respondent, referred the matter for arbitration to the Bargaining Council where she sought to have the decision not to shortlist her declared an unfair labour practice and to be compensated.

15. The third respondent arbitrated the dispute and issued an award on the 14 December 2021 wherein she found that Ms Coetzee was subjected to an unfair labour practice relating to promotion by not being shortlisted for the position of

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Senior Professional Officer advertised in September 2020 and awarded Ms Coetzee compensation in the amount of R89 334.00.

16. It is this arbitration award and decision of the Third Respondent which is being challenged.

EVALUATION

17. An unfair labour practice is defined in section 186(2) of the LRA as –

> "(2) …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 reasons relating to probation) or training of an employee or relating to the provision of benefits to an employee…"

18. The test in review applications of this nature remains the same, as enunciated in Sidumo and later applied and confirmed by this Court and the Labour Appeal Court (LAC). This Court must deal with the grounds of review within the context of the test to be applied in deciding whether the arbitrator's decision is reviewable. The test as set out in ***Sidumo and another v Rustenburg Platinum Mines Ltd and others***[2] (*Sidumo)* , is whether the decision reached by the Commissioner is one that a reasonable decision maker, on the material before

[2] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

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them, could not reach[3]. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

19. The LAC in ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others***[4] *(Goldfields)* affirmed the test to be applied in review proceedings and held that:

> "*In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable*.'[5]

20. It is trite that the review test is a stringent and conservative test of reasonableness. The Applicant must show that the arbitrator arrived at an unreasonable result. It is accordingly trite that an Applicant that seeks to review and set aside an arbitration award, bears the onus to prove its case on a balance of probabilities on the facts and evidence which served before the arbitrator and in light of the review test set out above.

21. The LAC recently reaffirmed the legal position and test in a review concerning a promotion dispute in **Department of Higher Education v Commissioner Bheki Smiza**[6] as follows**:**

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3 At para 110.
4 [2013] ZALAC 28: (2014) 35 ILJ 943 (LAC).
5 At para 16.
6 (JA53/2022) [2024] ZALAC 5; [2024] 5 BLLR 447 (LAC); (2024) 45 ILJ 1981 (LAC) (22 February 2024).

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"[7] The test for the review of an arbitration award in an unfair labour practice dispute, as in a dismissal dispute, is whether the commissioner misconceived the nature of the enquiry, or arrived at an unreasonable result in the sense that the decision made is one that a reasonable decision-maker, on the material before them, could not have reached.

[8] A determination as to the fairness of a promotion decision is typically weighted heavily on an evaluation of the process and the justification given for the promotion decision made by the decision-makers. An employer is required to act lawfully and adhere to the objective standards of fairness and the criteria that it has set for promotion, including its own policies, in order to ensure that an eligible employee is provided with a fair opportunity to compete for the post. Conduct that does not allow an employee such a fair opportunity will usually be found to constitute an unfair labour practice. The evaluation of the suitability of a candidate for promotion is required to be assessed fairly, rather than mechanically, with a justifiable element of subjectivity or discretion reserved for the employer.

[9] To succeed in an unfair labour practice claim related to promotion usually requires an employee to prove that they were not given a fair opportunity to compete for a post. This may involve evidence that the process was unfair and that despite the employee having the necessary experience, ability and technical qualifications for the post,

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an unfair appointment decision was taken. An arbitrator is required by section 193(4) to determine an unfair labour practice dispute on terms that are deemed reasonable and may, where it is just and equitable, in terms of section 194(4), award compensation to an employee.

22. In **Ncane v Lyster NO and Others**[7] relying on the Constitutional Court case of ***Khumalo and Another v MEC Education***[8] the LAC held as follows regarding the approach to an unfair labour practice disputes relating to a promotion:

"[25] When it comes to evaluating the suitability of a candidate for promotion, good labour relations expect an employer to act fairly but it also acknowledges that this is not a mechanical process and that there is a justifiable element of subjectivity or discretion involved. It is for this reason that the discretion of an arbitrator to interfere with an employer's substantive decision to promote a certain person is limited and an arbitrator may only interfere where the decision is irrational, grossly unreasonable or mala fides.

[26] But where an employer provides that certain rules apply as regards the decision to promote or to recommend a candidate for promotion, e.g. as in this case, the candidate who scores the most points must be recommended by the panel, good labour relations require an employer

[7] (DA27/15) [2017] ZALAC 1; (2017) 38 ILJ 907 (LAC); [2017] 4 BLLR 350 (LAC) (10 January 2017)
[8] 2014 (5) SA 579 (CC).

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to be held to this. A failure to comply with the rules may result in substantive unfairness.

[27] In the case where another person has been promoted to the post then the unsuccessful candidate must show that this is unfair. And as Wallis AJ (as he then was) said in Ndlovu v Commissioner for Conciliation, Mediation and Arbitration and Others:

'That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer is rational it seems to me that no question of unfairness arises."

23. Mr Mbobo for the Applicant and Ms Geldenhuys for the first respondent, relied, amongst others, upon the above cases in their heads of argument and during oral argument.

24. The Applicant's case is essentially that Ms Coetzee was not subjected to an unfair labour practice. The Applicant argued that: it has a discretion to add additional criteria when shortlisting Applicants for the post, that Groep was erroneously shortlisted and there was no evidence that the Applicant deviated from its recruitment and selection policy and the law permits the exercise of discretion which the Applicant's recruitment and selection policy made provision for. In summary the Applicant contended that there were four knock out factors which resulted in Ms Coetzee not being shortlisted for the post: first, Ms Coetzee's qualification did not fit within facilities management; second, she

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lacked the relevant managerial experience in facilities management; third, her documentation was lacking and fourth, she lacked financial management experience.

25. The Applicant further contends that the comparison to other candidates is inconsequential and wrong in light of the knockout factors and the fact that neither Groep nor Norris were appointed to the post. The Applicant submits that this is supported by the authorities it relied upon. The Applicant also argued that Ms Coetzee failed to show a causal connection between the unfairness complained of and the prejudice she suffered.[9]

26. Ms Coetzee does not dispute the legal principles enunciated in the aforesaid authorities but sought to distinguish her case, in particular from that of the Department of Higher Education v Commissioner Bheki Smiza, extensively relied upon by the Applicant. Most significantly Ms Coetzee highlighted that it was not the Applicant's case in arbitration, that Groep and Norris, in particular Groep was erroneously shortlisted.

27. It was argued on behalf of Ms Coetzee, that when evaluating the process followed regarding who made the shortlist it is clear that the inclusion of certain candidates on the one hand, like Groep and Norris, and the exclusion of Coetzee on the other, was done in a haphazard and irrational manner, without adherence

[9] Sun International Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JR939/14) [2016] ZALCJHB 433 (18 November 2016).

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to an objective standard of fairness, especially in light of the fact that Ms Coetzee met the minimum requirements of the post as advertised.

28. According to the evidence in the arbitration, the criteria set for the promotion was amended and more flexible. Considering the above LAC authorities, even if it is accepted that an employer can amend the criteria for purposes of shortlisting candidates and that it has a discretion in this regard, this amended criteria was not consistently applied in this instance. The reasons for Stander and Francis' exclusion of Coetzee, because of experience, was irrational and had no valid basis. The evidence in the record illustrates that Stander's reasons changed as the matter went along. So too did the reasons advanced by Francis for including Groep. On the one hand, Stander defended the inclusion of Groep on the shortlist, based upon Groep's Certificate in Facilities Management, yet on the other hand, he disregarded Coetzee's B Tech: Human Resources (obtained within the management faculty of CPUT), which was underpinned by a National Diploma in Public Management as irrelevant. There was also no evidence that the inclusion of Groep was an error. This was raised for the first time in the review application and in argument.

29. In the decision of **Ncane v Lyster NO**[10], the LAC explained the manner in which an arbitrator must approach an unfair labour practice dispute, dependent upon whether the aggrieved party claims that they were unfairly denied the chance to compete versus when the challenge pertains to the ultimate selection of the successful candidate. I must agree with the first respondent's contention that the

[10] Supra.

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facts and evidence illustrate that Coetzee's case is about the former situation, namely, being unfairly denied an opportunity to compete for a post in circumstances where an applicant meets the minimum requirements of the post applied for.

30. Stander and Francis, as the Human Resources practitioner, had an obligation to engage with and acquaint themselves with the nature and value of the qualifications set out by applicants in their CV and with the experience and qualifications listed in an applicant's application. They failed to do so.

31. I agree with the submissions advanced by Ms Geldenhuys, that Ms Coetzee was an eligible employee, who was denied a fair opportunity to compete for the promotional post as different criteria were applied to the candidates in determining who made it into the shortlist. I have already dealt with the inconsistency and irrationality in the manner the said criteria was applied in shortlisting candidates.

32. Mr Mbobo in the heads of argument field on behalf of the Applicant and in oral argument, relied extensively on the case of Department of Higher Education and Training v Commissioner Bheki Smiza to advance an argument that a shortlisting panel has a discretion to impose additional criteria to select the best candidates. That may be true and good law. However, what the Applicant disregarded is that in exercising such discretion, any such additional or varied criteria must be objectively and consistently applied in order to meet the fairness threshold. The Applicant unfortunately failed to apply its discretion in a fair and objective manner

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which would meet the fairness test, when it exercised its discretion in applying what appears to be additional and/or varied criteria in shortlisting the candidates to be interviewed for the PSO: FM post.

33. The facts of the present matter are distinguishable from that of Department of Higher Education v Commissioner Bheki Smiza[11] where Mr Serai was erroneously shortlisted and where this was not enough to establish unfair treatment of the employee who was not shortlisted because the said employee did not meet the minimum requirements set by the panel. Here Ms Coetzee met the minimum requirements, and as I have stated above the additional more flexible criteria were not consistently and fairly applied, resulting in Ms Coetzee being treated unfairly.

34. It cannot be countenanced that the fairness of the selection process lay in the screening of all candidates against the set requirements in a similar approach.[12] It is apparent from the evidence before the Commissioner that the distinction and decision by the panel, was irrational and arbitrary and accordingly the conduct of the Applicant amounted to an unfair labour practice.

New evidence at arbitration and allegations that arbitrator entered the frey

35. I agree with the first respondent, the arbitration is not restricted to only consider the documents that served before the shortlisting panel. It is clear from the record

[11] Supra.
[12] Kwadukuza Municipality v Rajamoney and Others (D880/10) [2013] ZALCD 17 (13 June 2013) at para 15.

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that the documents referred to pertained to the different qualifications of the candidates and was entered into evidence to illustrate that the panel did not do their due diligence when assessing the value and relevance of the different qualifications.

36. This ground of review thus cannot be sustained.

37. I similarly do not find any evidence to sustain the ground of review that the arbitrator impermissibly entered the frey. The Applicant did not persist with this ground of review in earnest during argument.

38. The Commissioner found that there was no rational basis to exclude Ms Coetzee from the shortlist and that the selection was not done fairly. Based on the evidence before her, in the arbitration, the Commissioner also found the evidence of Applicant's witnesses to be inconsistent and thus the basis for her findings cannot be faulted.

39. In light of the above test for review and threshold in an unfair labour practice dispute related to promotion, I find that the Commissioner's decision falls within a band of reasonableness and passes the review test.

40. There is accordingly no basis upon which this Court should interfere with the award of the Commissioner.

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In the result the following order is made:

ORDER

1. The application is dismissed.
2. There is no order as to costs.

Daniels AJ

Acting Judge of the Labour Court of South Africa

Representatives

For the applicant: Adv S. Mbobo instructed by Laas & Scholtz Inc.

For the respondent: Ms Geldenhuys of IMATU.

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