REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case No: D678/09

In the matter between:

HEALTH AND OTHER SERVICE

PERSONNEL TRADE UNION OF SA

(HOSPERSA) **First Applicant**

MOLOANTOA PETRUS SEETA **Second Applicant**

and

THE PUBLIC HEALTH AND WELFARE

SECTORAL BARGAINING COUNCIL **First Respondent**

KATE MATABOGE N.O. **Second Respondent**

MEMBER OF THE EXECUTIVE COUNCIL

RESPONSIBLE FOR HEALTH:

NORTH WESTERN PROVINCE **Third Respondent**

ERIC BATSIETSENG **Fourth Respondent**

Heard: **20 August 2013**

Delivered: 20 December 2013

Summary: Review of award – unfair labour practice relating to promotion – a consideration of further dimensions after the interview process not unfair in the circumstances.

JUDGMENT

CELE, J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act,[1] the Act, for an order reviewing and setting aside an award by the second respondent, sitting in her capacity as an arbitrator under the auspices of the first respondent. The issue to be determined by the second respondent ("the arbitrator") was whether failure by the third respondent ("the employer") to appoint the second applicant employee to fill an advertised post of "Nursing Manager: Operational" amounted to an unfair labour practice in the form of unfair conduct by the employer relating to promotion as contemplated by section 186(2) (a) of the Act. The arbitrator had to determine whether the process of selection was fair and whether, as a result, the second applicant had been fairly excluded from the appointment. The employer opposed the application.

Factual Background

[2] The second applicant, Mr Seeta was in the employment of the third respondent, hereafter referred to as the Department or the employer, as from 1 December 1998, as a Professional Nurse. At the time material to this matter, he held the position of a Chief Professional Nurse, the CPN, working as a clinical professional nurse at a clinic run by the employer. The

[1] Act No 66 of 1995.

Department advertised the position of a Nursing Manager which Mr Seeta applied for together with a number of other candidates. He met the set requirements as a result of which he was among the six candidates identified for a job interview. At the end of the interview process, he topped all the interviewed candidates with the score of 76. 5. The next highest candidate was the fourth respondent who scored 71.5. At the time of the interviews, the fourth respondent was employed by a gold mining company and was therefore an external candidate, as opposed to the internal candidate Mr Seeta.

[3] The interviewing panel recorded that its assessment indicated that:

3.1 Eric Batsietseng (fourth respondent) was "well conversant with the services, procedures and monitoring with a matured and broad spectrum of management issues"; that "he answered 3 out of 4 questions very intelligently and confidently although he was not knowledgeable with clinic supervision".

3.2 Mr Seeta was "presently working at Matlosana Sub-District Tigane CHC as a clinical professional nurse"; and that he "seemed unsure but managed to answer questions correctly, only need (*sic*) to be groomed for confidence and firmness".

[4] The panellists decided to consider two more factors, in addition to the score. These were the performance evaluation results for 2007/2008 and the leave record for 2008. These factors were then used to determine the best candidate between Mr Seeta and the fourth respondent. Mr Seeta's performance evaluation results considered were of 52% and those of the fourth respondent were of 4.1 out of 5. On the leave issue, Mr Seeta was found to have taken 17 days of unplanned leave while the fourth respondent had 12 days leave. In the final analysis, the fourth respondent was found to be the most suitable candidate for the post and a recommendation for his appointment was made and later he was appointed against the contested post.

[5] Mr Seeta was aggrieved by a failure of the Department to appoint him, which would have been a promotion to him and he referred an unfair labour practice dispute which had arisen for conciliation and later for arbitration. The second respondent was appointed by the first respondent to arbitrate the dispute. The Department called and led the evidence of two witnesses being the Chairperson of the interviewing panellists, Ms Abrams. She was the Assistant Director: Community Health Services of the Department. The second witness was a Local Area Manager in the Department, Ms Tebogo, to whom reported the Facility Managers. Ordinarily, Mr Seeta reported to a Facility Manager but had an occasion to report to Ms Abrams when the post of a Facilitation Manager was vacant. Mr Seeta was the only witness for his case. The second respondent found no unfair labour practice to have been committed by the Department and she dismissed the claim.

Chief findings of the second respondent

[6] The latter part of the award contains the second respondent's chief findings which are fairly brief and may be quoted directly as:

> 'It is trite law that as substance is concerned (i.e. the reason why an employer ultimately decides to prefer one employee to others) an arbitrator should exercise the difference to an employer's discretion. (See in this regard *Marra v Telkom SA Ltd* (1999) 20 ILJ 1964 (CCMA).) If the employee is suitable for promotion, the employer retains discretion to appoint whom it considers to be the best appointment to suit the employer's operational needs. In this case the respondent saw it fit to appoint an external candidate because he was seen as the best candidate.
>
> Abrams' version must therefore succeed. It must further succeed not only because it was unchallenged but because even if it was, the Respondent would have acted discriminatory against the other candidate if it appointed the applicant based on the fact that he was internal even if he did not meet the requirements of the interview.
>
> In his closing argument, the applicant averred that the Respondent did not disclose the three dimensions mentioned in the interview on its advertisement. Assessing this argument from a different perspective, even if

the Respondent made the disclosure, the applicant would still not have qualified because his leave would still have been considered, his performance as well as the overall score scored which formed the basis of the three dimensions mentioned supra. The other candidate on the other hand, would still have been the recommended candidate based on the same criterion.

Lastly, by confirming that the Respondent's questions were fair and practical can only that the Respondent's conduct was actually fair. If the interview was fair the Respondent's conduct was fair.'

Evidence on the additional dimensions

[7] The evidence of Ms Abrams was that the panellists considered three dimensions, being the score, the annual assessment results and the leave profile once they had two competing candidates, after the elimination of the four. Mr Seeta, although he scored high during the interview, on the second dimension being the annual assessment he appeared to be a moderate performer with only marginal performance with a total score of 53%. The fourth respondent had a score of 4.1 against 5, which in percentage works out to about 80%. She said that on the leave profile he had a total of 17 days of absenteeism, while the fourth respondent had 14 days' absence. The final result was that the fourth respondent came out as the best candidate.

[8] As to why the Department decided on the additional dimensions apart from the interview results, she said that the practice was resorted to because, in senior positions there was a need to have someone who would have to lead by example, that is, somebody that would always be there. She said that it was the first time that they had interviews for senior managers and that a similar practice was adopted after the interviews for the post of a Chief Accounting Clerk, a senior position, where, after the interview, the scores were even. She denied that the practice was not in existence and was followed only to eliminate a particular candidate, more so as there was the comment," knowing Mr Seeta very well, most of his leave was unplanned." She denied that it was unfair to use the practice, maintaining that in senior position the practice had to be followed. She knew of only one day that Mr Seeta took as an unpaid leave. As to how the fourth respondent took his

leave, she said it was written in the leave record provided. She said that if Mr Seeta had lesser score than the fourth respondent but had a good leave profile and a good performance record, Mr Seeta would have been appointed.

[9] Mr Seeta testified and said that he was the second in charge at the clinic and was, therefore, involved in the smooth running of the clinic. He took his year leave in February. In the event that a staff member was sick or had a sick child or relative, they would telephone the office before 10h00 and would bring the sick note later. He did the same. Sometime in 2007, he wrote a letter asking to be relieved of supervisory duties because of personal problems that he was going through at the time, stating also that he was not enjoying supervising people. At his initiative, he utilised the Employment Assistance Programme (EAP). He went to consult a Departmental psychologist. His supervisor did not come with any intervention plan. At the time of the interview, he was a supervisor and was enjoying it.

[11] When his immediate supervisor resigned, Ms Tebogo came to the clinic and held a meeting with staff members. She called for a vote by a show of hands for the election of their supervisor. At the time, he was the assistant supervisor and the election system took him by surprise.

[12] He said that he came to the job interview prepared. The questions that were asked were fair as they related to the job that he was doing. He did not know that after the interview there would be other dimensions considered. He felt that he should have been told of that practice and so implementing the practice was unfair as it was not catered for in the Public Service Act.

Grounds for review

[13] In his founding affidavit, Mr Seeta averred that the second respondent failed to appreciate the nature of the enquiry she was asked to determine and that

she failed to apply her mind to the proper questions raised for her consideration in that:

13.1 The criteria used by the selection panel had not been explained to the candidates before hand;

13.2 No precise and objective methods were used by the panel to evaluate the candidates in respect of the criteria that were used and

13.3 That, in respect of the objectives, the explanation was necessary especially in a situation where an internal candidate was compared with an external candidate.

[14] The further contention was that the second respondent ought to have taken steps to have the fourth respondent joined as a party to the proceedings, as his suitability to the post was called to question and therefore that he had a direct and substantial interest in the dispute. Further submissions as appear in the supplementary affidavit averred that the second respondent failed to appreciate the nature of the enquiry she was asked to determine in that:

14.1 The minutes of the interviewing panel revealed the procedure that had to be followed up to the allocation of points for each candidate;

14.2 Once that was done, the process threw up an obvious choice of who scored considerably higher than the next rated contender.

14.3 There was no need for the process to be taken further. That was more so when the written comments of the panellists were considered;

14.4 It was not clear why the panel decided, only at that late stage, to amplify the criteria it would consider by holding over its decision until it could study the performance evaluation results for 2007/2008 and the leave record for 2008 for each of the two contenders. The minute did not show why it decided to act in that manner. A plausible inference was that, at least one of the panellists was seeking additional material that would justify the non-appointment of Mr Seeta despite his being

the highest scoring candidate. A reasonable arbitrator would have explored this consideration.

14.5 In making a selection to fill a post in the Public Service, the selection panel was not free to choose whatever criteria it wanted but had to be guided by section 11 of the Public Service Act (Proclamation no 103 of 1994) and regulation D.5 of the Public Service Regulations.

14.6 While the performance evaluation results for 2007/2008 might arguably be a legitimate criterion that fell within the ambit of section 11 (1) (b) and regulation D.5 the leave record for 2008 was not a valid criterion.

Opposition to the review application

The condonation application

[15] The law on the factors to be considered in a condonation application is trite.[2] The answering affidavit was filed some 40 days out of time for which lateness the Department seeks condonation. The applicants did not oppose the application. The reason for lateness, being that the instruction to counsel was misfiled at the North West Bar and when the papers were received back by the State Attorney from the Advocates' Chambers, the required deponent to the answering affidavit was on leave with the result that the duly deposed answering affidavit was only sent back to the State Attorney from the Department on 5 January 2011. Characteristic of this matter by this time, inordinate delays had already been occasioned at the hands of the applicants. Seen in this light, therefore, while the reason is not a plausible one, seen in context of the progress of the matter, it is a satisfactory one. A brief reflection on the grounds of opposition to the review application is informative that there reasonably good prospects of success. There are no other considerations that negate the granting of condonation. Condonation for the late filing of the answering affidavit is granted.

Non-joinder of the fourth respondent

[2] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F.

[16] The contention was that Mr Seeta did not in his dispute referral seek his appointment to the specific contested post in which the fourth respondent had already been appointed but merely sought an appointment at a similar seniority/salary level. Also, in argument at the arbitration, Mr Seeta's representative requested that he be appointed in a reserved position with all the benefits applicable to the position of nursing manager. It was submitted that in view of the relief sought by the applicants at the arbitration, the fourth respondent was not a necessary party to the arbitration proceedings and his joinder was certainly not required as a matter of law. Accordingly, that purported ground for review ought to be rejected.

Selection Criteria

[17] The submission was that in her award, the second respondent succinctly captured the essence of the issue in dispute, namely, whether the failure of the Department to appoint Mr Seeta as opposed to Mr Batsietseng caused the Department to have committed an unfair labour practice. It was never the applicants' case at the arbitration hearing that the Department was by law precluded from using the three main selection criteria in question. More specifically, it had not been put to any of the applicants' witnesses at the arbitration, that additional main selection criteria were added "belatedly" in order to disqualify or eliminate Mr Seeta. In fact, not even Mr Seeta testified that the Department had acted arbitrarily or had an ulterior motive in using the selection criteria in question. At best for Mr Seeta, a bald submission was made in closing argument that the Department deviated from a previous recruitment and selection policy, which alleged policy was not placed in evidence before the second respondent.

[18] It was averred that an applicant in a review application might not, for the first time on review, raise a point which did not properly serve before the arbitrator. Only jurisdictional challenges might be raised for the first time on review and the applicant's belated submissions regarding the lawfulness of the selection criteria employed by the Department did not constitute a jurisdictional issue, but purely related to the alleged unfairness of the appointment of the fourth respondent. It was submitted that this Court was precluded from considering

these submissions, which had neither been put to the Department's witnesses at the time nor was it placed before the second respondent in any other manner, who was, accordingly, likewise precluded from dealing therewith at the time of the award.

[19] Alternatively and in the event of the Court finding that the applicants were permitted to, at this belated stage, contend that the work attendance record of a candidate for employment was unlawful based on section 11(2)(b) of the Public Service Act and/or Regulation VII/D.5, then and in that event, the Department submitted that:

1. The application of the work attendance records of the candidates was applied objectively and consistently not only to the candidates concerned, but also in other cases involving recruitment.

2. The dimensions were not prohibited in terms of the Act and Regulations as they constituted "valid criteria" and were "competence/efficiency/suitability" based.

[20] A further submission was that, in arbitrating the matter, the second respondent clearly applied her sense of fairness to the applicant's contentions raised at the arbitration, as she was enjoined so to do.

Analysis

[21] This application has been brought in terms of section 158 (1) (g) of the Act which to the extent relevant reads:

> 'The Labour Court may subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law.'

[22] Then, section 145 to which section 158 (1) (g) refers, (as paraphrased for present purposes) provides that:

> '(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award.

(2) A defect referred to in subsection (1) means –

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.

[23] The first respondent bargaining council as is evident from its very name is a public sector bargaining council dealing with the Health and Social Development Sector. Section 37(5) of the Act provides that:

'A bargaining council established in terms of subsection (2) has exclusive jurisdiction in respect of matters that are specific to that sector and in respect of which the State as employer in that sector, has the requisite authority to conclude collective agreements and resolve labour disputes.'

[24] In their submissions, the applicants have placed reliance on regulation VII.D.5 which reads:

'The selection committee shall make a recommendation on the suitability of a candidate after considering only-

(a) information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;

(b) the training, skills, competence and knowledge necessary to meet the inherent requirements of the post;

(c) the needs of the department for developing human resources;

(d) the representativeness of the component where the post is located; and

(e) the department's affirmative action programme.'

[25] Mr Seeta has made it clear in his evidence that he is not challenging the interview process up to when he emerged as the highest scoring candidate. According to him, it was unfair to take the process any further and therefore in so doing the Department committed an unfair labour practice. The nub of the complaint lies in the consideration of the leave record for 2008. He has said that it was arguable whether the annual performance assessment fell within the ambit of the requirements set out in section 11 (1) (b) and regulation VII. D.5.

[26] The onus to prove the unfair labour practice complained of lay on Mr Seeta. It cannot be doubted that the annual performance assessment falls within the ambit of the requirements set out in regulation VII. D.5. (b), which provision refers to various factors, such as the training, skills, competence and knowledge necessary to meet the inherent requirements of the post. The concession by Mr Seeta was, accordingly, well made. A need of the Department to develop human resources depends largely on the ability of the candidates for training to attend such training consistently and without undue interruptions. Put differently, once the training programme has been set up, the staff to be trained must avail themselves, otherwise the programme stands to be interrupted at the risk of losing Departmental funding which comes from tax payers. It must follow from this that the leave profile is a valid method or part of the criteria or instruments for selection. In that even, it lay at the door of Mr Seeta to prove that a resort to such criteria was bias or discriminatory.

[27] In his evidence, Mr Seeta did not testify as to a resort to the leave profile *per se* was bias or discriminatory. All that he wanted was to have the interview stage as being the last process. It must follow from this approach that had the leave profile and the annual performance assessment results been available and considered just before the scoring process, he would have had no issue with the process. In that event, he would probably have not emerged as the highest scoring candidate. The fourth respondent would probably be the successful candidate. While commenting on the test for reviewability in the

Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,[3] the Labour Appeal Court in *Fidelity Cash Management Service v CCMA* and Others,[4] stated:

> '… there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend – at least solely – upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account.'

[28] In this matter as well, other reasons upon which the second respondent did not rely to support her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. On the three dimension approach adopted by the panellists, Mr Seeta has not succeeded in showing that unfair labour practice has been committed. This finding goes against all three submissions made on behalf of Mr Seeta in the founding affidavit and in the supplementary affidavit on this issue. As correctly pointed out by the Department, the joinder of a party is the prerogative of the applicant, depending on the relief sought. In this case, Mr Seeta did not specifically seek to unseat the fourth respondent. This ground must suffer the same fate as others.

[29] More specifically, and as submitted by the Department, it had not been put to any of the applicants' witnesses at the arbitration, that additional main selection criteria were added "belatedly" in order to disqualify or eliminate Mr Seeta. In fact, not even Mr Seeta himself testified that the Department had acted arbitrarily or had an ulterior motive in using the selection criteria in question. At best for him, a bald submission was made in closing argument that the Department deviated from a previous recruitment and selection policy.

[3] (2007) 28 ILJ 2405 (CC) at para 110.
[4] (2008) 29 ILJ 964 (LAC), at para 102.

[30] In the circumstances, the following order shall issue:

1. The condonation application for the late filing of the answering affidavit is granted, with no order as to costs.

2. The review application in this matter is dismissed.

3. No costs order is made.

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Cele J

Judge of the Labour Court.

APPEARANCES

For the Applicant:	A L Christison
Instructed by:	Llewellyn, Cain Attorneys
For the Third Respondent:	M G Hitge
Instructed by:	The State Attorney, Mafikeng.