Republic of South Africa

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR187/2010

Reportable

In the matter between

TRANSNET LIMITED	**Applicant**
and	
TRANSNET BARGAINING COUNCIL	**First Respondent**
ADV M. DOLLIE, NO	**Second Respondent**
M. LUUS	**Third Respondent**
UASA-THE UNION	**Fourth Respondent**

Heard: 26 April 2013

Delivered: 30 April 2013

Summary: Review of award - unfair labour practice not committed by a failure to shortlist employee for an interview in a promotional post – pre-arbitration agreement narrowed issues with a binding effect – commissioner failed to discharge his duties.

Judgment

Cele J

Introduction

[1] This judgment follows an order in a review application after the matter was heard on 26 April 2013 with reasons having to follow. This was an application in terms of section 158 (1) (g) of the Act[1] in which the applicant sought to have the arbitration award issued by the second respondent on 11 December 2009 reviewed and set aside. The application was opposed by the third respondent, Mr Luus in his capacity as the employee of the applicant. The assailed award was issued in his favour.

Background Facts

[2] Mr Luus was in the employment of the applicant. The applicant advertised a post of Manager: Service Codes, a senior management level 109 position Mr Luus showed interest in the post by lodging his application but he was not short listed. His colleague Mr Rakolojane was the successful candidate. Mr Luus referred a dispute of unfair labour practice to the first respondent as a result of the applicant deciding not to shortlist him for the position. The dispute was not capable of resolution at conciliation and he referred it to arbitration. The second respondent was appointed to arbitrate it.

[3] The second respondent was requested to decide whether the applicant in this matter erred in not inviting Mr Luus to the interview for the contested position and whether that failure constituted an unfair labour practice in terms of section 186(2)(a) of the Act. Parties held a pre-arbitration conference, agreed on common cause issues and listed them in a pre-arbitration minute which they produced and filed for the arbitration hearing. In terms of the minute the following issues were agreed upon:

- The advertisement for the position was what it purported to be and the requirements in terms of the advertisement were essential for the position;
- Mr Luus' application for the position did indeed list the necessary attributes that had been required for the position. He

[1] The Labour Relations Act Number 66 of 1995 as amended.

was the only candidate in possession of a train operation certificate that had applied for that position;

- Mr Luus attended managerial skills training and he received a certificate for such training while he was the Chief Administration Officer;
- He achieved a score of 3.3 in a management proficiency evaluation and the required benchmark for the position was 2.9 or 2.6;
- Mr Luus, by virtue of his role as a manager, was performing some of the functions contained in the advertisement;
- He was appointed as a Junior Manager: Service Codes on 1 July 2007 three months prior to the advertisement for the position. He acted in the position for a period of three months prior to his appointment as a Junior Manager: Service Codes;
- He reported to the successful candidate, Mr Rakolojane amongst other line managers in his position as a Chief Administration Officer and he had been working with Mr Rakolojane in the same environment since 2004;
- At a talent forum held in April 2008 for managers the feedback that was given to Mr Luus was that he needed managerial intervention;
- He was advised that the reason why he was not appointed as the Senior Manager: Service Codes and Design was due to the fact that he had lacked managerial skills;
- The advertisement for the position did not require managerial competency assessment as a prerequisite for the position;
- All short listed applicants were in possession of a tertiary qualification which the applicant did not have.

[4] The second respondent described the relief sought by Mr Luus as a placement on the 1st notch of the 109 level salary band, alternatively any other relief that might be determined to be fair under the circumstances.

[5] At the arbitration hearing Mr Luus had to prove the unfair labour practice complained of. He said that he was appointed into the office in 1999 when the office started and he was the person who implemented the service code design, getting it off the ground. He was the only one who trained the sales and marketing personnel in respect of the service code designs. He regarded himself as having very good experience in respect of the system used. In respect of the key accountabilities he said that he had a few thousand service codes which were divided up into various portfolios under his control which had to look after mainline passenger transport, coal transport and local line transport. He said that his was a hands on environment regarding the day to day activities with the system on the line without a delay even on the face of problems.

[6] Of the five candidates invited for the interview, the only person who worked in the office was Mr Rakolojane. None of the other people had experience in the service code design and indebt knowledge of the system. Three of them being Patience Dlamini, Albert Matebane and Dunzane Dungale had never worked in the service code design environment. Mr Rakolojane had been acting in the position for only three months and he had only five years of service in the 610 level which was the same level as of Mr Luus.

[7] In respect of knowledge and skills Mr Luus said that he was experienced in yard, transportation of hazardous material and was the only one qualified in train operations. He regarded himself as the most senior in respect of the knowledge and operating background in the service code environment. He testified about his individual competency based assessment centre report which had been carried out by a ratings agency called Resolve. He said that the report showed him to be above the benchmark which had been set. According to him Mr Rakolojane did not have sufficient experience in respect of the system; he did not have knowledge of how the system was to be checked and could not resolve problems regarding system design without delegation. He referred to an incident when Mr Rakolojane recommended an incorrect wagon for the transportation of unleaded petrol with serious

consequences. He had further instances of comparison of his abilities, pitting them against inabilities of Mr Rakolojane.

[8] In opposing the matter at arbitration the applicant's testimony, particularly that of Mr Ntshingila, was essentially that four candidates had been shortlisted for the position that Mr Luus was now contesting and that Mr Luus was not shortlisted because of his lack of managerial experience. Furthermore, he had failed to fill the critical requirements of having a degree or experience in logistics management. Mr Ntshingila said that the position that had been advertised had been a second level management position which was the manager of managers and not the actual doer of the job. In respect of the actual function, Mr. Ntshingila stated that it was the ability to access the system which could be learnt as it was secondary to the actual management of the process.

[9] Mr. Ntshingila stated that the short-listing process was done by him, Human Capital and the Resolve consultants. The competency assessment of Resolve was not relevant under the circumstances and which was meant purely for the restructuring process. Ultimately, the decision to shortlist, interview and recommend a particular candidate was done by Human Capital and was referred to Resolve for inputs only. In respect of the allegation that Mr. Luus was unfairly excluded, Mr. Ntshingila stated that he was assessed at the level through the performance management system and given the fact that he was only in the position for three months and reporting within his structure, that was not sufficient time to assess his managerial ability. Furthermore, the fact that he had acted in the position prior to the appointment was only on a rotational basis and the acting in a position would give the employee exposure to that position but did not necessarily make him accountable for that position which responsibility lay with the Executive Manager.

[10] Mr Ntshingila said that knowledge in respect of train operations was not a requirement for the position and also not a competency that was required in the management function. It was not required that the incumbent was to have insight into the various aspects of train operations and it was not a

requirement that he had to have a diploma in train operations either. Mr. Rakolojane was in the environment as a manager since 2003 whereas Mr. Luus was only there since July 2007. Mr. Ntshingila testified that the process required the effective management of people and that Mr. Luus was a junior official reporting to Mr. Rakolojane.

Grounds for review

[11] It is the applicant's case that the second respondent failed to discharge his duties and committed gross reviewable irregularities. As a result, he reached conclusions no reasonable decision-maker could have reached. His arbitration award is therefore unreasonable and is reviewable in terms of section 145 of the Act and the grounds relied upon therein. The second respondent was said to have committed a gross reviewable misconduct by failing to confine himself to and decide the issues the parties hand requested him to decide in their pre-arbitration minute. The parties had requested the second respondent to decide whether the applicant had erred in not inviting Mr Luus to the interview as well as whether that constituted unfair labour practice. Instead of limiting himself to those issues, the second respondent went on to decide whether or not Mr Luus was the best candidate for appointment to the position.

Grounds in opposition to the review

[12] It was submitted that, based on the requirements for the disputed position as well as Mr Luus' skills, knowledge and experience, the conclusion which the second respondent arrived at, was one which a reasonable decision maker could have reached. The requirement for the job was not that the candidate must have had managerial experience and academic qualification, but that unless the applicant could demonstrate that he had developed the necessary competencies through experience, a degree in business or logistics management or related field was required. It was never disputed at the arbitration hearing that Mr Luus had developed the necessary competencies through experience.

[13] It was contended that the second respondent was not only required to decide whether or not the applicant had erred in not inviting Mr Luus to the interview as well as whether that constituted unfair labour practice, the second respondent was also called upon to place him on the 1st notch of level 109 salary band, or any other relief the second respondent might have deemed fit in the event he found in his favour.

[14] The submission went on to say that the crux of the issue was that in terms of the pre-arbitration minutes parties agreed that in the event the second respondent found in favour of Mr Luus, the second respondent either had to place him on the 1st notch of the level 109 salary band or to award any other relief that the second respondent might have deemed fit. The conclusion which the second respondent arrived at was said to fall squarely within the relief agreed to between the parties in terms of the pre-arbitration minutes, in the event the second respondent found that the applicant had committed an unfair labour practice.

[15] In the event the Court determined that the second respondent exceeded his powers when finding that Mr Luus was the best candidate for the disputed position, the submission made was that, parties at the arbitration proceedings in leading their respective witnesses did not confine themselves to issues agreed upon in the minutes of the pre-arbitration hearing and that the second respondent was obliged in law to take all relevant material before him into consideration. It was further submitted that by not confining their evidence on the issues agreed upon in terms of the pre arbitration minutes, parties by conduct or tacitly, amended the second respondent's terms of reference.

Analysis

[16] The applicant has submitted that the second respondent failed to exercise his duties and committed a gross irregularity, resulting also, to reaching conclusions which no reasonable decision maker could reach. Section 145 referred to in section 158 (1) (g) of the Act, to the extent relevant, states that

any party who alleges a defect in any arbitration proceedings may apply for an order setting aside the arbitration award. In terms of section 145(2) of the Act: 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.

[17] In Southern Sun Hotel Interests (Pty) Ltd v CCMA & others[2], this Court held per van Niekerk J that:

"…..section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this Court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification".[3]

[18] **In** the case of Komape v Spoornet (Pty) Ltd & others[4] Court held that:

'the question for consideration at the review level is not whether the decision of the commissioner is correct but rather whether the inference drawn from the facts before the commissioner is one which a reasonable decision maker could not have drawn'.

[2] [2009] 11 BLLR 1128 (LC)
[3] At para 17
[4] (2009) 29 ILJ 2967 (LC) page 2792 at paragraph 27.

[19] The main consideration raised by this application is whether the second respondent went beyond the scope of the issues he was called upon by the parties to determine. Within the scope of what had to be ascertained, lies the question whether Mr Luus did prove, at arbitration, the commission of an unfair labour practice by the applicant.

[20] The contents of the pre-arbitration minute make it clear that the initial relief sought by Mr Luus, in the event he was successful in proving the commission of an unfair labour practice, was compensation and not an appointment to the contested post. Page 8 of the transcript of the arbitration proceedings has Mr van Straten, representing Mr Luus, addressing the second respondent and indicating that compensation was the relief sought at the end of the arbitration hearing. At that stage of the proceedings the pre-arbitration minute had become part of the documents for the hearing.

[21] In the case of NUMSA & Others v Driveline Technologies (Pty) Ltd & another[5] the Labour Appeal Court held that:

> "It is true, of course, that a pre-trial agreement is a consensual document which binds the parties thereto and obliges the court (in the same way as the parties' pleadings do) to decide only the issues set out therein. In particular, a party who agrees to claim only limited relief would be bound by his agreement (Shoredits Construction (Pty) Ltd v Pienaar NO & others [1995] 4 BLLR 32 (LAC) at 34C–F)."

[22] Mr Luus submitted that it was possible for parties at an arbitration hearing to amend the terms of reference by agreement, even possibly by one concluded tacitly, or by conduct. True as the law in this respect is, this approach is however not borne out by any evidence on the record. Parties never by any means agreed to go beyond the pre-arbitration minute. Knowing the limits which the parties had set for themselves, the second respondent would have

[5] [2000] 1 BLLR 20 (LAC) at para 16

indicated in the award that an agreement had been reached to extend the scope of the probe.

[23] As correctly submitted by the applicant, the effect of Mr Luus' complaint at arbitration was procedural in that it focused on not being invited for interview and not that he should have been appointed. Had the second respondent decided the point in issue as required and found in favour of Mr Luus, he would not have ordered the applicant to promote him. The second respondent therefore failed to discharge his duties within the confines of the power given to him and in this regard, committed a defect as defined in section 145 of the Act.

[24] The next issue is whether any unfair labour practice was proved by evidence to have been committed by the applicant in failing to short list Mr Luus. The evidence of Mr Ntshingila was that the knowledge in respect of train operations was not a requirement for the position and also not a competency that was required in the management function. It was not required that the incumbent was to have insight into the various aspects of train operations and it was not a requirement that he had to have a diploma in train operations either.

[25] It turned out that Mr Luus had the least management experience compared to all short listed candidates. In the pre-arbitration minute parties agreed that the advertisement for the position was what it purported to be and the requirements for the position in terms of the advertisement were essential for the position. Under the sub-topic knowledge and skills the advertisement specifically indicated the fields of management required of the successful candidate. Mr Luus fell far short in that regard as his knowledge and skills were limited to yard operation, transportation of hazardous material, train operations and operating in the service code environment. He had only nine months of management experience.

[26] The applicant therefore did not commit any error in not inviting Mr Luus to the interview for the contested position. No unfair labour practice was accordingly committed by the applicant, hence the order issued by Court at the hearing of this matter, on 26 April 2013 namely that:

1. The review application in this matter is granted.
2. No costs order is made.

_____

Cele J

Judge of the Labour Court.

APPEARANCES:

1. For the applicant: Mr Maserumule of Maserumule Attorneys
2. For the third respondent: Mr Manganyi of