Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 939/14

In the matter between:

SUN INTERNATIONAL MANAGEMENT (PTY) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
RAMAEDIMELA JACKY MATETA *N.O.*	**Second Respondent**
SACCAWU obo MAEKELELA DANIEL MAGORO	**Third Respondent**

Heard: 17 November 2016

Delivered: 18 November 2016

Summary: (Review – unfair labour practice – promotion – misdirections by arbitrator – obiter comments on proper approach to factual disputes)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review and set aside an arbitration award relating to an unfair labour practice dispute concerning promotion. The third respondent Mr Magoro ('Magoro') applied for a position of an Assistant Mechanical Maintenance Manager in November 2012. His application was unsuccessful. He challenged the failure to appoint him on a number of grounds which he alleged amounted to an unfair labour practice relating to promotion. These are set out in paragraph 4 of the arbitrator's award.

The award

[2] The arbitrator's main findings were:

2.1 He was faced with irreconcilable versions and accordingly compelled to determine matters after making a credibility assessment of the witnesses. This led him to determine that the Mogoro was a credible witness and neither of the applicant's two witnesses were credible.

2.2 The applicant failed to advertise the post internally before advertising it externally and this had the effect of denying Mogoro the opportunity of promotion.

2.3 It was not disputed that the newly appointed incumbent, a Mr Bhengu, was always coming to him for assistance, nor was it disputed that if he had been given the opportunity to contest the post, he would have been found to be the best candidate. On a balance of probability, the arbitrator found that Mogoro would have been preferred as the most suitable person both with respect to internal and external candidates if he had been given a chance to compete for the position.

2.4 The applicant did not comply with its recruitment selection and placement policy and procedure because it failed to first advertise the position internally at the unit for a period of 7 days as required by its policy.

[3] The arbitrator accepted that in order for Mogoro to succeed, he had to establish that it was not enough for him to merely show that he qualified

for the post but that he merited the promotion and that the decision to appoint someone else was unfair.

[4] The arbitrator awarded Mogoro six months' remuneration as compensation in light of the fact that no submissions were made why he should award maximum compensation as he had requested.

Grounds of review

[5] The applicant contends that the arbitrator applied the wrong principle in determining that Mogoro had been unfairly refused promotion, by simply adopting Mogoro's grounds of complaint as the test for whether or not his non-promotion was an unfair labour practice. The applicant also argues that the important factual findings of the arbitrator were based on speculation and not evidence. In particular, there was no basis on the evidence for the arbitrator to conclude that Mogoro was the better candidate simply because he had claimed that he would have been shown to be the best had he been interviewed and because the present incumbent asked him for assistance. Thirdly, the arbitrator did not explain why Mogoro would necessarily have been appointed, had only internal candidates for appointment being considered. Moreover, it was simply incorrect that he was denied the opportunity of competing for the post because he had in fact applied and was considered for it.

[6] On the question of Mogoro being the most suitable internal candidate, the applicant argues that the arbitrator also failed to consider the relevance of the fact that none of the internal applicants including Mogoro were considered suitable for the post because they did not meet the minimum requirements. In this regard, the applicant also points out that Mogoro had in fact acknowledged in the arbitration that his CV did not demonstrate that he had the necessary managerial experience, and submits that the evidence relied on by the arbitrator to conclude to the contrary that he did have the necessary qualifications were insufficient to reasonably support that conclusion.

[7] The applicant also attacks the decision to award compensation equivalent to 6 months remuneration as unreasonable and without any discernible justification on the face of the award.

Evaluation

[8] While I accept that the factors identified by the Commissioner may not have been irrelevant, he had nevertheless still had to determine the dispute in keeping with the accepted principles governing promotion disputes under section 186 of the Labour Relations Act, 66 of 1995 ('the LRA'). The correct approach arbitrators should adopt was set out in *Ndlovu v Commission for Conciliation, Mediation & Arbitration & Others*, viz:

> "[11] In my view, the questions which the commissioner asked in the first paragraph of that quotation were wholly justifiable questions in relation to a dispute over a matter of promotion. It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed.
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> [12] The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise." [1]

The arbitrator ought to have been well aware of this from the pre-arbitration discussions which he placed on record at the start of the proceedings. In particular he recorded as one of the issues he was required to determine the following:

> "So under substantive fairness I'm required to prove as to whether the promotion policy was followed, secondly that as to whether the applicant

[1] (2000) 21 *ILJ* 1653 (LC) at 1655-6.

> would have been the better candidate amongst all those who contested including the incumbent of the [position]."

[9] It is important to note that in these type of cases, it is also incumbent on an applicant to show a causal connection between the unfairness complained of and the prejudice suffered. See *National Commissioner of the SA Police Service v Safety & Security Sectoral Bargaining Council & others*.[2] Consequently, it is not sufficient just to show that there was a breach of protocol or procedures in the recruitment process. It is necessary also for the complainant to show that the breach of the procedure unfairly prejudiced him. Accordingly, the question is whether but for the alleged failure to consider internal candidates first, Mogoro would have been appointed.

[10] The arbitrator reached the conclusion that Mogoro's evidence that he was the better candidate was not disputed. But the reason given by the applicant for not short-listing Mogoro was that he did not meet the minimum requirements. In this regard, it is clear from the transcript that he conceded that his CV did not disclose any managerial experience as required by the advertisement, though he contended that his supervisory experience was equivalent. In light of this, it is absurd to suggest that the applicant did not contest that Mogoro would have been chosen had he been interviewed: the essential point is that the applicant argues that Mogoro would not have been chosen because he would not have been interviewed at all because he did not meet the minimum requirements.

[11] There was also no evidence before the arbitrator as to why the interview process would have necessarily have resulted in Mogoro's appointment. Having inferred, wrongly or rightly, that Mogoro did have the minimum qualifications, the arbitrator then jumped to the conclusion that he therefore was the best candidate, which is illogical. The arbitrator overlooked that Mogoro also needed to demonstrate not only that he was a suitable candidate for consideration but that he was the best candidate, even if he was only compared with the other internal candidates, who

[2] (2005) 26 *ILJ* 903 (LC) at 907-8, paras 10-11

incidentally were also found to be insufficiently qualified. The arbitrator did not even consider this issue.

[12] However it was argued for Mogoro at the review application hearing that the arbitrator's conclusion was perfectly justifiable because there was no evidence before him of the qualifications of the other internal candidates. It appears from the evidence of Mogoro that he seemed to believe he was the only internal candidate and therefore by default he would have been appointed, assuming of course that he did meet the minimum requirements contrary to the contentions of the applicant.

[13] Under cross-examination Mr Williams, a witness for the applicant, mentioned the names of at least three other internal candidates who were also not considered adequately qualified. When Mr Mafifi (another HR manager) testified, he also named an additional internal candidate who likewise did not make the grade in terms of the minimum requirements of the post. When he was challenged on the veracity of his claim that there were other internal candidates he said that he was aware of them because he had read their CV's, though he did not have them with him.

[14] The arbitrator decided on a balance of probabilities, having decided that only Mogoro was a credible witness, that if Mogoro had been given a chance to contest "both internally and externally" for the post he would have been the successful candidate. Implicit in this conclusion is that, he would have outshone all other contenders. Yet nowhere in his award does the arbitrator explain why the opportunity to be interviewed, which he appeared to conflate with the opportunity to contest the position, would have yielded that result. His conclusion also implicitly suggests that even though Mogoro was able to apply for this position and even though his eligibility for it was considered, he was prejudiced because he was not interviewed.

[15] The arbitrator also does not explain on what basis he reached the conclusion that the applicant would necessarily have succeeded against the internal applicants, none of whom were considered suitably qualified by the employer. The arbitrator appears to have accepted that there were other internal applicants but gives no reason why Mogoro would most

probably have been more highly rated than any of them, even though no evidence was adduced to demonstrate Mogoro's superiority over those candidates. Perhaps the arbitrator believed that it was for the applicant to prove that Mogoro would not have been the best of them and by failing to adduce that evidence, it had to accept the risk that the only evidence of any internal applicant's qualifications before the arbitrator were those of Mogoro. Whatever underpinned the arbitrator's thinking on this point, once he accepted that there were other candidates and proceeded to make a finding on their merits relative to Mogoro's merits, he needed an evidentiary basis for doing so. The only way he could reach the conclusion he did was if he placed the onus for proving the comparative merits of the candidates on the applicant, thereby reversing the onus which lies on Mogoro to prove that he was the better candidate. Having accepted that there were other internal candidates with whom Mogoro would have to be compared, and realising that it would be necessary for Mogoro to show that, on a balance of probabilities he would have been successful if they were his only competitors, the arbitrator ought to have alerted Mogoro to this so that Mogoro could consider whether to call upon the applicant to discover the qualifications of those candidates.

[16] Of course, consideration of this aspect of the arbitrator's reasoning only arises if the applicant is wrong in contending that the arbitrator unreasonably ignored Mogoro's concession that his CV did not reveal that he had the necessary managerial experience, and therefore did not qualify for shortlisting.

[17] It needs to be mentioned that perhaps the arbitrator felt he could simply disregard the evidence of the applicant's witnesses because of his sweeping findings on credibility which he justified on the basis that the conflicting versions were 'irreconcilable'. In construing the versions as irreconcilable, the arbitrator misunderstood the evidence. The versions were not irreconcilable though there were points of disagreement. He should not have so readily rushed to make credibility findings. The constitutional court has cautioned against too easy reliance on credibility

findings to determine factual disputes.[3] There is a noticeable trend in recent arbitration awards for arbitrators to resort to credibility findings as an easy way of avoiding evaluating the inherent and relative probabilities of evidence which should be discouraged.

[18] Considering all the above, I am satisfied that:

18.1 There was insufficient evidence for the arbitrator to reasonably conclude that Mogoro ought to have been shortlisted on the basis that he met the minimum requirements of the job.

18.2 The arbitrator reached the conclusion that Mogoro was the best candidate for the position without sufficient evidence to support such a finding on the probabilities and that accordingly his finding was unreasonable.

18.3 Although the arbitrator was aware of the test he was required to apply he did not follow the principles he ought to have in terms of the judgement in *Ndlovu*'s case which caused him to misconstrue how he ought to evaluate the evidence before him.

Order

[19] The arbitration award of the second respondent dated 21 February 2014 is reviewed and set aside.

[20] No order is made as to costs.

[3] *President Of The Republic Of South Africa And Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 42-5, paras [77] – [84]. See also *Allie v Foodworld Stores Distribution Centre (Pty) Ltd And Others* 2004 (2) SA 433 (SCA) at 442-443 at paras [38]-[41]. The preferred approach is that set out by Voyi AJ in *Assmang Ltd (Assmang Chrome Dwarsriver Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2015) 36 ILJ 2070 (LC) at 2077-8, paras [38] to [49], where the court *inter alia* stated:

> "[49] It is possible for a commissioner to arrive at his decision simply on the probabilities and without having to make specific findings of the credibility of the witnesses. In National Employers' General Insurance A Co25 it was held thus:
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> '[I]t is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.'"

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	G Mashigo instructed by K Makapane
THIRD RESPONDENT:	L Marakalala of SACCAWU