

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

Case No: JR2081/2008

In the matter between:

DOROTHY PETRONELLA MANANA Applicant

AND

THE DEPARTMENT OF LABOUR 1st Respondent

THE GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL 2nd Respondent

KIRSTEIN N.O. 3rd Respondent

NTELELE RACHEL MASHA 4th Respondent

Judgment

Molahlehi J

Introduction

[1] This is an opposed review application in terms of which the applicant seeks an order reviewing and setting aside the arbitration award issued by the third respondent (the commissioner) on 5 June 2008 under case number PSAGA 129-07/08.

- [2] In terms of the arbitration award the commissioner dismissed the applicant's unfair labour practice claim.
- [3] The applicant has also applied for the condonation of the late filing of the review application.

Application for condonation

- [4] It is common cause that the applicant's application was filed outside the 6 (six) weeks period prescribed in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA).
- [5] The legal principles governing the requirements for the granting or refusal of condonation are well established in our law. *In Dial Tech CC v Hudson and Another*, [2007] ZALC 2701(LC), this Court in dealing with what factors are to be taken into account include considering whether or not to grant condonation restated and the relevant factors to consider are as follows:

"The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames. (c) bona fide defence or prospects of success in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgment, (f) the convenience of the court; and (g)

avoidance of unnecessary delay in the administration of justice."

- [6] According to the applicant the reason for the delay in filing her review application is due to the fact that the time of instructing her attorneys of record she had assumed that her legal insurance would cover the costs of the review, only to discover that it would not. She then took some time to raise the necessary funds for the legal fees.
- [7] I am of the view that the applicant has sufficiently and adequately dealt with the factors relevant to the present matter in support of her application for condonation. The explanation tendered by the applicant for the delay is reasonable and acceptable. The other reason why the applicant's application for condonation stands to succeed is because she has in terms of the principles in *Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)*, shown good prospects of success.

The background facts

- [8] It is common cause that the first respondent internally advertised a post of Manager: Bank Reconciliation, the closing date of which was 2nd June 2006. The applicant and the fourth respondent applied for the post. The interviews were conducted on the 7th July 2006, by an interviewing panel, which the first respondent had

constituted. The interviewing panel found the fourth respondent to be the suitable candidate for the post and was accordingly appointed.

- [9] The applicant was not happy with the outcome of the interviewing panel and for that reason filed a grievance about her non-appointment into the post on the 18th August 2006. Her letter of grievance reads as follows:

“I am aggrieved because I could not understand why I was not appointed in the advertised position of Deputy Director Bank reconciliation, despite meeting all the requirements let alone academic qualification and years of management experience.

Further I have been performing the tasks/duties that are in this position without any flaws and the person appointed who was my subordinate under my supervision and did not meet the requirements.

I believe that the Fund has contravened paragraph 4.5 of the recruitment and selection policy and therefore believe that I was unfairly treated. I now enquire (sic) for an explanation why I was not appointed.”

- [10] The first respondent replied to the above complaint as follows:

“Dear Ms Manana

I acknowledge receipt of your letter dated 18 August 2006.

Please note that you could not be appointed as Manager: Bank Reconciliations due to the fact that you were not found to be the most suitable candidate for this post. It is on record that you had difficulties responding to questions on strategic planning and dispute resolution mechanism in the public service. You are further more informed that the post of Manager: Bank Reconciliation is a newly created post in the new structure of the Fund. No employee of the Fund was tasked with the responsibilities attached to this post before this post was filled.

Finally, let me assure you that the Fund regards you as one of its asset and that will be seriously considered in the future when filling positions where your knowledge and skills are needed.

Yours Faithfully”

[11] The above was based in essence on the finding of the interviewing panel which in its evaluation of the applicant had made the following findings:

- *“Ms Manan is in possession of Matric and National Diploma in Cost management Accounting and she is*

currently busy with BTech in Cost and Management Accounting.

- *She is currently employed in the Fund as an Assistant Manager: Bank:Bank reconciliation with 7 years of experience in the finance environment.*
- *She was confident and managed answer some of the questions asked by the panel.*
- *She has minimal understanding of how to ensure that Bank Reconciliation is correct.*
- *She has minimal understanding treasury regulations with regard o the suspension account but couldn't explain how she is involved in the suspension account.*
- *She was confident and managed to answer some of the questions asked by the panel.*
- *She has minimal understanding of the Strategic Planning.*
- *She has minimal understanding of the Dispute Resolution mechanism in the public service.*
- *The panel did not recommend her for the post.”*

[12] In relation to the fourth respondent the interviewing panel found as follows:

- *“Ms Masha is in possession of a Matric and currently studying towards a BCom degree.*
- *She is currently working in the Fund as a Senior Accounting Clerk with 10 years of experience.*
- *She was confident and managed to answer all questions asked by the panel.*
- *She explained how she will ensure the correctness of bank reconciliation. The panel was impressed with her detailed explanation.*
- *She elaborated on how to ensure that complete information is loaded on Axson/GL.*
- *She explained how to go about to ensure that bank reconciliation is done on a weekly basis.*
- *She understands the treasury regulations with regard to the suspense account and she explained how she is involved in dealing with the suspense account.*
- *She has knowledge of the strategic planning and elaborated on how the strategic planning should be done.*
- *She displayed good management skills when answering the question on dispute resolution mechanism in the public service.*

- *Based on her responses to the questions, the panel recommended her for the post of Manager: Bank Reconciliation.”*

Grounds for review

[13] The applicant in her founding affidavit contended that the arbitrator in his arbitration award committed gross irregularity and or exceeded his powers. In substantiating the grounds for irregularity the applicant challenges the manner in which the arbitrator interprets or analyzes the evidence of one of the witnesses, about her acting as a team leader prior to the restructuring process in 2005. The applicant disputes acting as a team leader in 2005. The applicant contends that this finding by the arbitrator is evidence that he did not apply his mind to the evidence before him.

[14] The applicant further challenged the arbitrator’s finding that she did not have relevant experience within the meaning of the first leg of the minimum requirements for the position being a degree or national diploma with no less than 3 (three) years experience.

[15] In analyzing the issues before him the arbitrator found that the case of the applicant was based on two grounds being that:

- that the first respondent did not comply with the minimum requirements of the post and
- that she (the applicant) was the most suitable candidate..

[16] The arbitrator noted further in the arbitration award that the post in question was advertised as follows:

“Relevant degree or national diploma with no less 3 years experience or Matric with 5 years relevant experience at managerial level.”

[17] The arbitrator found that although the panel members had corporate knowledge, that did not influence them when evaluating the applicant’s knowledge of strategic planning and dispute resolution mechanism He further found that: *“Even if the panel members were not allowed to take into account their corporate knowledge of candidates, it cannot be determined that the panel members did not apply their minds in accordance with the recruitment policy.”*

[18] It would appear that the arbitrator came to this conclusion on the basis of the provisions of paragraph 4.5 of the first respondent’s Recruitment and Selection Policy which reads as follows:

“The selection criteria shall be based on the inherent requirements of the job in order to find a suitable qualified candidat. The most appropriate candidate shall be selected from the pool of candidates who meet the minimum requirements of the job and demonstrate potential. Selected

candidates will be supported by skills development and career management programs.”

[19] In interpreting the facts before him the arbitrator concluded that the first respondent did not contravene the recruitment and selection policy.

Evaluation

[20] The test to apply in assessing whether or not to interfere with the decision of an arbitrator is that of a reasonable decision maker as enunciated in *Sidumo and Another v Rustenburg Platinum Mine (Pty) Ltd and Others* [2007] 12 BLLR 1097 (CC).

[21] In applying the reasonable decision maker’s test in the present instance the question to answer is whether the decision of the arbitrator is one which a reasonable decision maker could not have reached. In *Bato Star Fishing Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (4) 490 (CC), the Court held that:

“What will constitute a reasonable decision depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the

competing interests involved and the impact of the decision on the lives and well-being of those affected".

[22] The first respondent argued in its heads of argument that both the fourth respondent and the applicant met the minimum requirements of the job advertisement. The first respondent further argued that however, the applicant failed dismally during the interview and that although the fourth respondent had Matric, she had more supervisory experience.

[23] In support of its argument the first respondent relied in the decision of *Goliath v Medscheme (Pty) Ltd [1996] 17 ILJ 760 (IC) at 768 at 7681*, where the Court held:

"Inevitably, in evaluating various potential candidates for a certain position, the management of an organization must exercise discretion and form an impression of those candidates. Unavoidably, this process is not a mechanical or a mathematical one where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointment will not always be the correct one. However, in the absence of gross unreasonableness which leads to the Court to draw an inference of mala fides,

this Court should be hesitant to inference with the exercise of Managements' discretion".

[24] The other authority which the first respondent relied on in support of its argument is that of *in George v Liberty Life Association of Africa Lt (1996)17 ILJ 571 (IC)*, where the then the Industrial Court held that: *"an employer has a prerogative or wide discretion as to whether he/she will promote or transfer to another position. Courts should be careful not to intervene too readily in disputes regarding promotion and should regard this area where managerial prerogatives should be respected unless bad faith or improper motive such as discrimination are present."*

[25] In the present instance I am of the view that the issue is whether or not the arbitrator applied his mind and appreciated the nature of the dispute he was dealing with and whether if he failed to do so such failures amount to gross irregularity.

[26] The test for gross irregularity as was articulated in *Gold Fields Investment Ltd & another v City of Johannesburg & another 1938 TPD 551* is summarized in *Sidumo* by Ncobo J (at page 1178-F) as follows:

" . . . patent irregularities," that is irregularities that takes place openly as part of the proceedings, on the one hand, and "patent irregularities, that is

irregularities that take place inside the mind of the judicial officer which are ascertainable from the reasons given by the decision maker.”

[27] The crucial enquiry in determining the existence of gross irregularity in terms of *Sidumo* is whether the conduct of the decision maker complained of prevented a fair trial of the issues.

[28] In terms of the advertisement for the position in question, if the candidate had relevant degree or national diploma he or she should have a 3 (three) years relevant experience in order to meet the minimum requirements. A candidate with a Matric certificate needed to have a 5 (five) years managerial experience in order to meet the minimum requirement to satisfy the minimum qualification requirement.

[29] The arbitrator found that the first respondent had not contravened its recruitment and selection policy although; it was not disputed during the arbitration hearing that the fourth respondent was appointed despite not meeting the minimum requirement of the advertised post. The fourth respondent had a Matric certificate and therefore in terms of the advertisement she ought to have had at least a 5 (five) years relevant managerial experience.

[30] It has not been disputed that the fourth respondent was prior to the restructuring process a subordinate of the applicant. In her CV the fourth respondent makes no reference to managerial experience.

[31] Assuming that the fourth respondent acquired the managerial experience whilst serving as a team leader, the period of such an experience did not amount to a 5 (five) years relevant experience as was required by the advertisement. In terms of the CV the fourth respondent took the position of the team leader during October 2003.

[32] The applicant on the other hand has a national diploma and therefore needed a 3 (three) years relevant managerial experience.

[33] In my view had the arbitrator applied his mind to the evidence and the other material before him he ought to have found that the first respondent had breached its recruitment and selection policy in that it appointed the fourth respondent when she did not meet the minimum requirements of the advertised position. In failing to comply with its policy the first respondent committed an unfair labour practice as defined in section 186 (2) (a) of the LRA. Section 186 (2) (a) of the LRA reads as follows:

“(a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation)

or training of an employee or relating to the provision of benefits to an employee; . . .”

Conclusion

[34] In my view, the arbitrator failed to appreciate the issue raised by the dispute and accordingly denied the applicant a fair hearing. It is for this reason that I believe that the applicant's application stands to succeed. I also see no reason in both the law and fairness why the first respondent should not be required to pay the applicant's costs.

[35] Accordingly the following order is made:

1. The arbitrator's arbitration award is reviewed and set aside.
2. The arbitrator's award is substituted as follows:

“2.1 The first respondent committed an unfair Labour practice in appointing the fourth respondent, who did not meet the minimum requirements, at the expense of the applicant, who met all the minimum requirements for the position.

2.2 The appointment of the fourth respondent is set aside.

2.3 *The first respondent is ordered to re-advertise the position of Manager: Bank Reconciliation.*

2.4 *The first respondent is ordered to pay the costs of the applicant.”*

Molahlehi J

Date of Hearing: 29th October 2009

Date Judgment: 16th February 2010

Appearance

For the Applicant: Mr N.P. Voyi

Instructed by: N.P. Voyi and Associates Inc

For the Respondent: Mr K. I Choe

Instructed by: State Attorney