IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN

Not Reportable
Case No: D796/09

SA POST OFFICE — Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) — First Respondent

SUBRAMONEY V N. O. — Second Respondent

BUTHELEZI M N — Third Respondent

Date heard: 22 February 2011

Date Delivered: 19 August 2011.

JUDGMENT

CELE J

Introduction

[1] This is an application in terms of section 145 (2) of the Labour Relations Act (the LRA)[1] for the review and setting aside of an arbitration award dated 23 August 2009 issued by the second respondent as a commissioner of the first respondent. The third respondent in whose favour the award was issued opposed this application.

[1] 66 of 1995.

Factual background

[2] The third respondent, Ms Buthelezi is in the employ of the applicant in the position of an Employee Assistance Program Practitioner (the EAP). She commenced that employment in August 2000.

[3] The applicant internally advertised a position of Manager EAP/OD with the closing date as 1 June 2007. Ms Buthelezi was among the applicants that were shortlisted and interviewed but no appointment was subsequently made even though she scored the highest marks among the interviewed candidates. The applicant re-advertised the post both internally and externally, with the closing date then as 11 December 2007. Again Ms Buthelezi applied, was shortlisted, interviewed but not appointed. In July 2008, the applicant announced the appointment of an external candidate, Ms Zungu to the post.

[4] Ms Buthelezi lodged a grievance due to her non appointment, alleging that she would have been appointed to the position had the applicant followed its recruitment and selection policy. She alleged that her non appointment was predicated on applicant's capricious and unreasonable methods in executing the appointment. When the matter could not be resolved by the parties, she referred to conciliation an unfair labour practice dispute pertaining to a failure by the applicant to promote her. She referred it to arbitration when conciliation failed to resolve it.

[5] In February 2009, Ms Zungu resigned from the post in question which remained vacant during the arbitration hearing.

[6] The second respondent was appointed to arbitrate the dispute and the chief findings of the arbitration process are that:

1. The second interview was a case study, testing three dimensions. Ms Buthelezi was tested on a total of thirteen dimensions. While all these dimensions might have been important in determining the suitability of candidates, there was no consistent application of the tools used.
2. Ms Buthelezi was the only candidate that met all the minimum requirements in terms of the position and she was an internal candidate.
3. At the time of the interview and arbitration, Ms Buthelezi occupied the position of an EAP Practitioner, was on management development plan, qualified in terms of applicant's employment equity plan and had undertaken a one year course in OD, at the time of the interview, which she had since successfully completed.
4. She had ten years experience in EAP, a Masters Degree in Social Work (specialised in EAP) and studied HIV and AIDS at the Post Office, which was directly related to the position.
5. No one was called to give evidence on how Ms Zungu came to be shortlisted.
6. No plausible explanation was given of why the applicant had waived its own minimum requirements and specifications in order to make it possible to shortlist and later appoint Ms Zungu to the post.
7. The applicant was reluctant to provide the original information of the interview in respect of candidate assessments and ratings by the panel and their scores. The applicant failed to produce written records of the

panellists' assessments of each candidate, how each candidate was scored and the selectors' deliberations and recommendations. The applicant's policy is that recruitment and selection should be done by using an objective, scientific, consistent and auditable process. The records placed at the arbitration were not the originals and the names of the candidates were changed.

8. Applicant's view that Ms Buthelezi was not appointed because she had performed poorly at the interview or its claim that Ms Zungu, possessed more of the OD requirements and combined competencies that they were looking for was without merit and stood to be rejected. Ms Zungu only worked as an EAP Practitioner for about a year and that too, not directly in EAP but on a consultative basis. That was not even half of the relevant experience that the position required as a minimum. On the other hand Ms Buthelezi had been an EAP Practitioner since August 2000.

9. From the evidence at arbitration and a comparison of qualifications and experience of Ms Buthelezi and Ms Zungu, there was no question that the applicant's decision to appoint Ms Zungu over Ms Buthelezi was irrational and unfair. There was no compelling evidence to support the applicant's view that Ms Buthelezi, who possessed the requisite skills, experience and competency, was the weaker candidate.

10. According to a vetting process commissioned by the applicant. Ms Zungu had obtained her matriculation certificate in 2007. That questioned the period when she could have obtained the rest of her post matriculation qualifications and experience. None of Ms Zungu's

post matriculation qualifications had been verified by the relevant issuing bodies, which was in direct breach of the applicant's policy. The spelling of her name on her various degrees was not the same as one in her identity document.

11. Clause 13 of applicant's Recruitment and Selection policy provides that internal job applicants who do not meet all the job requirements but show potential to do so, within a reasonable period, might be appointed on development. The applicant did possess the key competencies and requirements for the contested position. No compelling reason was shown why the applicant did not appoint her on that basis either.

12. Promotion is an advancement to which employees could aspire but which they did not have an automatic right to as it was the exclusive prerogative of the employer. However, in light of the applicant's unreasonable and unfair conduct, an incursion into this exclusive domain was both warranted and necessary.

13. Ms Buthelezi successfully discharged the onus to prove that the conduct or practice complained of did take place. The applicant failed to present evidence or to explain fully as to why Ms Buthelezi was not appointed to the post and its defence that she was an unsuitable candidate and had not performed well at the interview could not be sustained. The appointment of Ms Zungu was seriously flawed and irregular.

14. The failure by the applicant to appoint Ms Buthelezi as a Manager EAP &OD constituted an unfair labour practice.

[7] The second respondent ordered the applicant to promote Ms Buthelezi to the contested position with retrospective effect from 1 August 2008 and to pay her such additional remuneration and benefits as would have accrued to her had she been promoted to Manager EAP &OD on 1 August 2008. She ordered the applicant to pay costs.

Grounds for review

[8] Various grounds for review were outlined by the applicant from paragraph 13 to 18 of its founding affidavit. Neither a supplementary nor a replying affidavit was filed to supplement the review grounds. The submission, in a nutshell, was that the:

- second respondent committed number of gross irregularities in the conduct of the proceedings and
- award was not one that a reasonable decision maker could have arrived at.

[9] Various submissions were traversed in support of the grounds for review which need not be repeated here. Essentially the submissions are that the second respondent:

- failed to apply the law of evidence by placing the onus of proof in unfair labour practice proceedings on the applicant and by applying the incorrect evidentiary standard of proof;
- did not apply the substantive law pertaining to the unfair labour practice relating to promotion of employees by, *inter alia*, reviewing the employer's decision and decision making process, instead she treated

the proceedings as *de novo* hearing in which the issue is the fairness of an employee's dismissal ;

- did not apply her mind to all materially relevant factors, *inter alia,* in respect of the applicant's Recruitment and Selection policy, the vetting process and by rejecting the panel's conclusion that Ms Zungu possessed more of the OD requirements and combined competencies than Ms Buthelezi;
- disregarded materially relevant factors and
- did not weigh up all materially relevant factors and issues,

and so deprived the applicant of a fair hearing.

[10] After the applicant had received the transcript of the arbitration proceedings, it chose not to file a supplementary affidavit to supplement the grounds of review with reference to the record as it was entitled to do. It further chose not to file a replying affidavit to gainsay any of the evidence and submissions made by Ms Buthelezi. This application is therefore to be considered with reference to the submissions made in the founding affidavit and as elucidated in the heads of argument. Any new grounds of review which are outlined in the heads of argument but have not been foreshadowed in the founding affidavit will not be considered for this application. It is trite that the applicant's case ought to have been made in the founding affidavit, in the absence of supplemented grounds, see *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau No and Others*[2].

[2] (2009) 30 ILJ 269 (LAC) at para 26.

[11] When the matter was presented, Mr Ungerer for the applicant relied mainly on two review grounds, namely that the second respondent:

- did not apply the substantive law pertaining to the unfair labour practice relating to promotion of employees by *inter alia*, reviewing the employer's decision and decision making process, instead she treated the proceedings as *de novo* hearing in which the issue is the fairness of an employee's dismissal and
- did not apply her mind to all materially relevant factors, *inter alia* by rejecting the panel's conclusion that Ms Zungu possessed more of the OD requirements and combined competencies than Ms Buthelezi.

[12] Ms Buthelezi's submissions in opposing this application are essentially that the key findings by the second respondent have not been shown to be visited by any defect as alleged, are reasonable and have to be allowed to stand. She pointed out that the failure of the applicant to file a supplementary affidavit demonstrating how the second respondent committed the so-called gross irregularities with reference to the record should lead to the dismissal of this application. She said that the prominent feature of the applicant's founding affidavit was a nit picking of certain comments made by the second respondent without regard to the context within which such comments were made.

Evaluation

[13] Ms Buthelezi bore the onus of proving the unfair labour practice she complained of. The analysis of the evidence by the second respondent

commences in paragraph 56 of her award where she outlined the issue. Paragraphs 58 to 60 of the award clearly leave no room that the second respondent was conscious of where the onus of proof lay, namely with Ms Buthelezi. She thereafter went on to examine the evidence of the applicant and went on to give a critic analysis thereof. This is a clear indication that she allowed the evidentiary burden of proof to guide her in the assessment of various components of the evidential material led by the parties. Having first considered what Ms Buthelezi said, the second respondent went on to check what the applicant said in answer to the allegations made against it. This is a common feature through the arbitration award.

[14] Therefore, the criticism levelled by the applicant on the issue of the onus and the burden of proof is, in my finding, nothing more than the nit picking of certain comments made by the second respondent without regard to the context within which such comments were made, as described by Mr Mgaga for Ms Buthelezi. Paragraph 6.13 of this judgment encapsulates the second respondent's findings as an example of her approach in the following terms:

> "Ms Buthelezi successfully discharged the onus to prove that the conduct or practice complained of did take place. The applicant failed to present evidence or explain fully as to why Ms Buthelezi was not appointed to the post and its defence that she was an unsuitable candidate and had not performed well at the interview could not be sustained. The appointment of Ms Zungu was seriously flawed and irregular".

[15] It is difficult to understand the submission by the applicant that the second respondent did not apply the substantive law pertaining to the unfair labour practice relating to promotion of employees by reviewing the employer's decision and decision making process and that instead, she treated the proceedings as *de novo* hearing in which the issue is the fairness of an employee's dismissal. The second respondent firstly examined whether Ms Buthelezi met the minimum requirement set by the applicant for the job. She then examined whether there was evidence of relevant experience Ms Buthelezi had. She went on to compare the competencies of the two candidates. She then checked if the applicant had complied with its own policies to the extent that such policy was applicable in various considerations arising for a decision. She proceeded to apply her mind on all evidential material and other considerations and then made her findings. Her chief findings as summarised herein above evince her proper approach to the matter. The fact that she never referred to any cases as her guiding legal principles did not detract from the fact that she understood the applicable substantive law. Her award is not the product of speculation. She allowed herself to be guided by the evidence which was led at arbitration.

[16] The allegations that the second respondent did not apply her mind to all materially relevant factors, *inter alia*, in respect of the applicant's Recruitment and Selection policy, the vetting process and by rejecting the panel's conclusion that Ms Zungu possessed more of the OD requirements and combined competencies than Ms Buthelezi, are not supported by any reference to the record of the proceedings. Therein lies the difficulty with the

criticism levelled against the second respondent. Ms Buthelezi was an internal candidate who acted on the post in question. She had sufficient appropriate experience. At the time of the interview, she was furthering her studies in a relevant field and thus showed that she qualified to be appointed "on development" in line with applicant's policy. The second respondent was entitled to consider this aspect as part of policy considerations of the applicant that was made available to her by the parties, whether it was specifically raised by Ms Buthelezi or not. A private company was to do the vetting. Anything about the academic qualifications had then to be left to that body so as to obviate any subsequent dispute of facts on the issue.

[17] The award clearly speaks to each of the issues raised by the applicant to the extent that the only reasonable inference to draw in the circumstances is that the second respondent considered all relevant and material issues fully and fairly as envisaged in paragraph 268 in the case of *Sidumo and Another v Rusternburg Platimun Mines Ltd and Others.*[3]

[18] The exercise of a discretion of the applicant, as an employer can only be interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a bias manner (see *Arries Commission for Conciliation, Mediation and Arbitration and Others.*[4]) The second respondent was alive to this principle, hence her finding in paragraph 66 of the award that:

[3] [2007] 12 BLLR 1097 (CC).
[4] (2006) 27 ILJ 2324 (LC) and cases therein cited.

> "Promotion is an advancement to which employees could aspire but which they did not have an automatic right to as it was the exclusive prerogative of the employer. However, in the light of the applicant's unreasonable and unfair conduct, an incursion into this exclusive domain was both warranted and necessary."

[19] The view I have taken of this matter makes it unnecessary to traverse each and every ground of review outlined by the applicant in the founding affidavit. I note that a failure to respond to the answering affidavit leaves the issues raised by Ms Buthelezi uncontested. She has challenged a number of the issues raised by the applicant in the founding affidavit.

[20] In the premises, and having considered the law and fairness in respect of the costs order, the following order is issued:

1. The review application is dismissed.
2. The applicant to pay the costs thereof.

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Cele J.

Appearances:

1. For the applicant: R G Ungerer Instructed by Sean Molony Attorneys
2. For the third respondent: B Mgaga Instructed by Knight Turner Attorneys.