IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR961/13

In the matter between

GA-SEGONYANA LOCAL MUNICIPALITY	**Applicant**
and	
PM VENTER N. O	**First Respondent**
H VAN ROOYEN	**Second Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Third Respondent**

Heard: 19 May 2016

Delivered: 11 October 2016

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

[1] This is an application to review and set aside the award issued by the First Respondent, (Commissioner) on 15 April 2013 under case number NLD 011303 under the auspices of the Third Respondent, (the SALGBC). In the award, the Commissioner found that the Applicant (respondent in the arbitration proceedings) committed an unfair labour practice by not promoting the Second

Respondent (Van Rooyen) to the rank of a Chief Traffic Officer (Level 3). The Applicant was then ordered to promote Van Rooyen, to the rank of Chief Traffic Officer, salary level 3 (R20 583-33 per month) with effect from 1 May 2013.

[2] Aligned to the determination of the review application is whether the dispute has not become academic in view of the fact that it is common cause that Van Rooyen has subsequent to the closing of pleadings in this review application, left the employ of the applicant.

Background:

[3] Van Rooyen was employed as a Senior Traffic Officer (level 5) with effect from 03 February 1997. It was common cause that he was also appointed as Acting Chief Traffic Officer (level 3) from 08 July 2010[1] was duly paid an acting allowance.

[4] On 04 August 2011 the Applicant invited interested parties to apply for the position of Chief Traffic Officer within its Traffic Department. The vacancy had occurred as a result of the then incumbent, Mr H. Leeto, having been dismissed by the Applicant for misconduct in March 2013. Van Rooyen had duly applied for the position. He was shortlisted and interviews for the position were scheduled and postponed on no less than four times. It appears that the recruitment process was abandoned at some point and the vacancy was re-advertised.

The arbitration proceedings and the award:

[5] Aggrieved by the Applicant's failure to appoint him to the vacant position, Van Rooyen referred an alleged unfair labour practice dispute to the SALGBC on 15 January 2013. The Commissioner heard the matter on 02 April 2013. By agreement between the parties, no oral evidence was led, and the dispute was to be determined on the basis of documents submitted and the parties' written arguments. The submissions of Van Rooyen were summarised by the Commissioner as follows;

5.1 He had been acting in the position over an extended period inclusive as at the arbitration hearing, and an inference should be drawn from

[1] Paragraph 7.1 of Second Respondent Answering Affidavit

the fact that since he had been the only one appointed to act, he was just not the best suitable candidate for the position, but the only one;

5.2 Whilst acting in the position, at no stage did the Applicant raise concerns about his performance, and the primary issue was that it was unfair conduct on the part of the Applicant to let Van Rooyen act for such extended periods and not to promote him to the position;

5.3 It was unfair to invite the shortlisted candidates on four different occasions to attend interviews but only to postpone them on account of the interviewing panel not being available;

5.4 Because the position was advertised prior to the finalisation of the unfair dismissal dispute of the previous incumbent, that could not be used as an excuse for not filling the position, particularly since he had continued to act even after that dispute was finalised in October 2013;

5.5 The Applicant had no compelling reasons the position could not be filled as required in terms of the provisions of clause 7.1.4 of the Northern Cape Conditions of Service Collective Agreement[2];

5.6 Due to Van Rooyen having acted in the position over extended periods, and to the extent that he was the best and only suitable candidate for the position, a legitimate expectation had been created by the Applicant that he would be promoted;

[6] The Applicant's case before the Commissioner is summarised as follows;

6.1 An employee was not entitled to a promotion, even if he or she had acted in that position. The position could not be filled as the Applicant had to wait for the outcome of the alleged unfair dismissal dispute referred by the previous incumbent;

6.2 A promotion is a managerial prerogative and the employer enjoyed a discretion in that regard. For posts to be filled, the Applicant had to

[2] Which provides that;
'Vacant posts on a municipality's permanent staff establishment should be filled within 6 (six) months unless there is a compelling reason not to do so'

follow internal processes, including advertising and interviewing candidates.

[7] The Commissioner findings and conclusions were based on the following;

7.1 The onus to establish that an unfair labour practice had been committed was on the employee party;

7.2 Van Rooyen had been acting since July 2010, and had performed satisfactorily and met the requirements of the post. He should have been promoted;

7.3 The dismissal dispute between the Applicant and the previous incumbent of the post had been finalised on 31 October 2013, and the Applicant had not provided compelling reasons the post was not been advertised immediately thereafter nor why it could not fill the post within six months, especially since in terms of a collective agreement, an employee could not act in a position for longer than six months.

Mootness:

[8] The award of the Commissioner was issued on 15 April 2013 in terms of which promotion of Van Rooyen was to take effect from 1 May 2013. After the review application was filed and the pleadings were closed, the Applicant through its attorneys of record had filed a supplementary affidavit on 15 May 2016, in which it was averred that Van Rooyen had tendered his resignation as an employee of the Applicant on 31 January 2015. In the light of these events, it was contended that the review application had become moot as the promotion of Van Rooyen in terms of the Commissioner's award would not have any practical effect.

[9] It is trite that unless exceptional circumstances dictates, a court will only entertain a dispute as long as such dispute remains live between the parties. It is so because a court does not need to make an order that will be incapable of

execution by virtue of the matter having become academic[3]. In *Rand Water Board v Rotek Industries (Pty) Ltd*[4] the Supreme Court of Appeal held that;

> *"The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle . . . that Courts will not make determinations that will have no practical effect.' Section 21A (1) of the Supreme Court Act 59 of 1959 provides: 'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone."*

[10] In this case, and to the extent that Van Rooyen had left the employ of the Applicant, any order emanating from his award that he should be promoted has indeed become academic and would not have any practical effect. There is however a second part to the award, which was that had the award been complied with, Van Rooyen would have been entitled to salary level 3 (R20 583.33 per month) with effect from 1 May 2013. As I understood the submissions made during the hearing of this application, the parties are *ad idem* that the only issue for determination, to the extent that the award would have been implemented, remains that of compensation, i.e., the salary he would have earned from 1 May 2013 until 31 January 2015 when Van Rooyen left or retired from the applicant's employment.

[11] The salary Van Rooyen would have been entitled to had the award been complied with is however not a compensation within the meaning of section 193 (4) of the LRA which provides that;

> *"An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation."*

[12] The remedial power of compensation is derived from the above provisions and is a *sui generis* remedy. It is not derived from remunerative entitlements originating in and subject to pre-requisites being met, such as those governing the

[3] Potgietersrust Platinum Limited & another v Godfrey Ditsela & 2 Others Case No. JA66/12 at para [9]
[4] *2003 (4) SA 58 (SCA) para 26*

implementation of salary upgrades following upon a promotion. Thus an order requiring an employer to promote an employee has the effect of creating new terms and conditions for the latter, and should the employer fail to comply with that order for whatever reason, at best, the employee will only have a contractual claim in respect of the new salary or benefits he or she would have gained had the award been complied with. To the extent that the order of the Commissioner cannot by all accounts be construed to include compensation within the meaning of sections 193 (4) and 194 (4) of the LRA, the conclusion to be reached is that the award or order of the Commissioner will not have any practical effect. In the event that I may be incorrect in my approach, I will then deal with the merits of the review application.

Grounds of review:

[13] The Applicant seeks that the award be reviewed and set aside on a variety of grounds including that;

a) It is its responsibility to make and fill all positions of employment contracts in terms of its Recruitment Policy as adopted by the Municipal Council on 23 August 2007;

b) In terms of the provisions of that Policy, all vacant positions must be filled as soon as possible after they had been advertised internally and externally;

c) In this case, there were compelling reasons not to appoint or promote Van Rooyen to the position in question in that no interviews were conducted; and further that it had abandoned the recruitment process to allow the dispute between the applicant and Leeto to be finalised;

d) The Commissioner in ordering the appointment of Van Rooyen usurped the functions of the Applicant to employ whoever was suitable for a position and thus committed a gross irregularity in the conduct of proceedings

e) The fact that Van Rooyen had acted in the position over a prolonged period did not automatically entitle him to a promotion, which remains the prerogative of management. The Commissioner at paragraph 13 of the award had acknowledged this position and yet came to an unreasonable conclusion.

The review test and evaluation:

[14] The review test as enunciated in *Sidumo*[5] was summarised in *Herholdt v Nedbank Ltd and Another*[6] as follows;

> *"In summary, the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable."*

[15] Van Rooyen opposed the application on a variety of grounds including that the Applicant had *inter alia*, deviated from the standard procedure in the workplace in letting him act for prolonged periods in contravention of clause 7.1.4 of the Collective Agreement on Conditions of Service for the Northern Cape Division of the SALGBC as well as its own policies. It was contended that the Applicant had not proffered compelling reasons as to why Van Rooyen was not appointed after having acted for about two years and nine months and despite the fact that the Applicant had conceded that he met all the requirements for the post.

[16] To the extent that the Applicant had given the ongoing dispute with Leeto as an excuse, Van Rooyen further submitted that the said dispute was finalised on 31

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[5] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2 (2007) 28 ILJ 2405 (CC).
[6] 2013 (6) SA 224 (SCA) at para [25]. See also Goldfields Mining South Africa v Moreki (2014) 35 ILJ 943 (LAC) where the LAC held that;

> "In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable."

October 2011, and that the even then, the applicant had not filled the post in contravention of the provisions of clause 7.1.4 of the Collective Agreement.

[17] In considering whether the award is susceptible to a review, the grounds in that regard as advanced by the Applicant must be assessed within the context of the evidence, if any, that was before the Commissioner as well as the findings that were made. This is so bearing in mind that no oral evidence was led in the arbitration proceedings, the parties having opted to present their respective cases by a mere submission of documents and written submissions. The perils of presenting a case in this manner before arbitrators especially at Bargaining Councils have been discussed at length by this Court[7] and I fully endorse them.

[18] It is trite that in an unfair labour practice dispute relating to promotion, the onus is on the employee to show that a higher post existed for which he or she was a contender, and that the employer refused or failed to promote the employee to that post for an unfair reason. The Commissioner appreciated the that the onus rested on Van Rooyen to establish that an unfair labour practice had been committed.

[19] Having done that, the Commissioner further appreciated that the fact that Van Rooyen had acted in a position did not entitle him to that position. He then went on to consider factors which in his view where distinguishable from decided cases, and it is at that point that he clearly failed to apply his mind to issues which were material to the determination of the dispute, misconceived the nature of the enquiry and ultimately came to a decision that no reasonable decision maker could have come to. My conclusions in that regard are based on the following;

[20] In *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others*[8]; it was held that the overall test is one of fairness, and that in deciding whether or not the employer had acted unfairly in failing or refusing to promote the employee, relevant factors to consider include

[7] The South African Social Security Agency v NEHAWU obo Malizo Punzi and others case number C233/14.
[8] (2013) 34 ILJ 1156 (LC), in further reference to Aries v CCMA & others (2006) 27 ILJ 2324 (LC)

whether the failure or refusal to promote was caused by unacceptable, irrelevant or invidious considerations on the part of the employer; or whether the employer's decision was motivated by bad faith, was arbitrary, capricious, unfair or discriminatory; whether there were insubstantial reasons for the employer's decision not to promote; whether the employer's decision not to promote was based upon a wrong principle or was taken in a biased manner; whether the employer failed to apply its mind to the promotion of the employee; or whether the employer failed to comply with applicable procedural requirements related to promotions. The list is not exhaustive.

[21] Central to appointments or promotion of employees is the principle that that courts and commissioner alike should be reluctant, in the absence of good cause, to interfere with the managerial prerogative of employers in making such decisions[9]. In my view, good cause would entail a consideration of the factors set out in *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others* as above.

[22] The Commissioner in his award came to a conclusion that Van Rooyen was due to a promotion in view of having acted in the position over prolonged periods, which position was also advertised. He further stated that the collective agreement specified that an employee should not act for more than six months; that Van Rooyen met the requirements for the post and had been performing the duties in that regard satisfactorily; and that in essence, the Applicant had not provided compelling reasons why the position had not been advertised over a long period.

[23] The starting point in this case is that it was common cause that Van Rooyen had acted in the position over an extended period of time, and this factor appears to have influenced the Commissioner in his

[9] Provincial Administration Western Cape (Department of Health and Social Services) v Bikwani and Others (2002) 23 ILJ 761 (LC) at paras 29 – 30. See also SAPS V Security Sectoral Bargaining Council& Others [2010] 8 BLLR 892(LC) at para 897B-C

> *"The decision to promote or not to promote falls within the managerial prerogative of the employer. In the absence of gross unreasonableness or bad faith or where the decision relating to promotion is seriously flawed, the court and arbitrator should not readily interfere with the exercise of the discretion…"*

conclusions. Contrary to Van Rooyen's contentions however, and a factor which the Commissioner had appreciated, the fact that an employee has acted for prolonged periods in a position does not give rise to an automatic right or entitlement to a promotion to that position[10]. Any such right might arise in exceptional circumstances such as where there is a statutory or contractual right to promotion. Even then an employee further has a right to a fair opportunity to compete for that particular post. In the absence of a right to a promotion being established, the employee nevertheless needs to demonstrate that the conduct of the employer in failing to promote him was unfair, taking into account the factors outlined in the cited authority.

[24] In this case, Van Rooyen relied on the provisions of clause 7.1.4 of the Collective Agreement as well as paragraph 1.1 of the Applicant's own recruitment policy. It is accepted that the provisions of the collective agreement ordinarily forms part of Van Rooyen's terms and conditions of employment. Be that as it may, to the extent that the Applicant had not complied with these provisions, and further to the extent that Van Rooyen sought that those provisions be applied in ensuring his promotion, his remedies were to be found in the provisions of section 24 (2) (a) of the LRA, particularly since that collective agreement did not make provision for a dispute resolution procedure.

[25] Thus it is not for this court to determine whether a failure to comply with the provisions of a collective agreement or not led to the failure to appoint Van Rooyen. The fact that he had acted over prolonged periods despite the prescripts of the collective agreement did not entitle him to a promotion, moreso in the light of other procedural factors to be taken into account in effecting promotions. Thus in relying on *inter alia* the provisions of the collective agreement in coming to his conclusions, the Commissioner not only misconstrued the nature of the enquiry, but also committed a fundamental error in law by failing to distinguish between a dispute pertaining to an unfair labour practice, and one pertaining to the

[10] Spoornet v United Transport & Allied Trade Union obo Holtzhause (2003) 24 ILJ 267 at page 270E

application and/or interpretation of a collective agreement within the meaning of section 24 of the LRA.

[26] The Commissioner effectively exceeded his powers by placing reliance on the provisions of the collective agreement in that any determination regarding those provisions was only to be made within the context of a section 24 (2) a) of the LRA dispute and its determination. When the provisions of 193 (4) of the LRA provides that an arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, it does not by all accounts imply that the arbitrator must exceed his powers. What was before the Commissioner was whether the Applicant had committed an unfair labour practice or not, whether the application and/or interpretation of the collective agreement.

[27] Van Rooyen further placed reliance on the provisions of the Applicant's own recruitment policy in contending that it had committed an unfair labour practice. Clause 1 of that policy enjoins the Applicant to fill all vacant permanent posts as soon as possible, and after having been advertised both externally and internally. It further provides for a process of shortlisting and it follows that interviews should thereafter take place. The Commissioner nevertheless failed to take into account these procedural requirements in ordering Van Rooyen's promotion, and this in my view proved fatal to the reasoning and conclusions reached by him.

[28] It was further common cause that the recruitment process did not go beyond the shortlisting process. The Applicant's contention was that the post could not filled immediately as required by the policy in that Leeto's matter was still pending. In my view however, nothing turns on this explanation. The fact of the matter is that the recruitment process came to an abrupt end.

[29] To the extent that the recruitment process came to an abrupt end, it follows that no appointments could have been made unless that process was revived or completed. It was therefore not for the Commissioner to

take it upon himself to promote Van Rooyen in the absence of any recruitment process having been followed, or any of the considerations outlined in *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others.* Whether the dispute in regards to Leeto had been finalised or not is irrelevant, and it is apparent that the Commissioner misconceived the enquiry that was supposed to have been undertaken in determining whether the failure to promote was fair or not.

[30] Furthermore, the authorities[11] relied upon by Van Rooyen in contending that the Commissioner's award was unassailable are clearly distinguishable from the facts in *casu* in that in those cases, the recruitment process had been embarked upon in earnest, including a process of shortlisting and interviews. Thus to the extent that the Applicant had not complied with its own recruitment process, and further to the extent that its policy required that process to be followed prior to making any appointments or promotions, there was no basis for the Commissioner to conclude that the failure to promote Van Rooyen was unfair. Even if it were to be argued that Van Rooyen had a legitimate expectation that he would be promoted, that expectation could only have been assessed within the context of a normal recruitment process having been followed.

[31] In *Head of the Department of Education v Mofokeng and others*[12] the Labour Appeal Court held that that the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner and that there should be a fair trial of the issues. In this case, the Commissioner did the opposite by placing reliance on irrelevant considerations and ignoring material factors in determining whether the failure to promote Van Rooyen was unfair. In so doing, the Commissioner ultimately arrived at an unreasonable result. It therefore follows that the Commissioner's award ought to be reviewed and set aside.

[11] City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others (supra);
[12] (2015) 1 BLLR 50 (LAC).

[32] I have had regard to the requirements of law and fairness, and I am of the view that a cost order in this case would not be warranted. Accordingly, the following order is made;

Order:

i. The arbitration award issued by the First Respondent under case number NCD011303 on 15 April 2013 is reviewed and set aside.

ii. The above mentioned award is substituted with an order that the failure to promote the Second Respondent did not constitute an unfair labour practice as contemplated in section 186 (2) of the Labour Relations Act.

i. There is no order as to costs

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Tlhotlhalemaje J

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Adv. T Tshitereke
Instructed by:	Mogaswa Incorporated Attorneys
For the Respondent:	R Schmidt of IMATU