THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Of Interest to other Judges

Case No: JR350/16

In the matter between:

SEILE EDWIN LETSOGO **Applicant**

and

THE DEPARTMENT OF ECONOMY & ENTERPRISE DEVELOPMENT **First Respondent**

THE GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL) (Pretoria) **Second Respondent**

P ROOPA N.O **Third Respondent**

RUTH DZANIBE **Fourth Respondent**

Heard: **12 July 2017**

Delivered: **09 January 2018**

JUDGMENT

GOLDBERG AJ

Introduction

[1] The preliminary issues of condonation concerning the failure by the applicant to timeously apply for a date for the matter to be heard (the six months rule – section 145 (5) of the Labour Relations Act[1] (LRA) was not opposed; it was also not challenged at court, further the reasons given for the delay were valid and there are prospects of success; I accordingly grant condonation in respect of all periods of delay.[2] The review application was filed on 03 March 2016 after having been served on all the respondents including the fourth respondent.

[2] This matter concerns an alleged unfair labour practice in the appointment of a suitable candidate to an advertised position after shortlisting and interviews.

[1] Act 66 of 1995 as amended.

[2] The first respondent, as the only party opposing the review application raised the issue that the applicant was meant in terms of section 145 (5) apply for a court date within six (6) months of the review application having been launched (03 March 2016) but that it failed. The applicant then applied for condonation setting out that the second respondent failed to file the record at the Labour Court within the ten-day period referred to in Rule 7A (2) (b) despite complaints by the applicant's attorneys to the second respondent urging timeous compliance; the Record as filed was incomplete (no electronic recordings and no bundles); the applicant's attorneys complained threatening an application to compel; an email was sent to the applicant that the third respondent had passed away and that second respondent was doing its best to obtain the record from his office; follow ups were made by the applicant's attorneys who established that De Villiers Attorneys were appointed to manage the affairs of the late third respondent's law practice and the record was obtained but same only contained the evidence of the three (3) witnesses of the first respondent; the evidence of the applicant was missing; no further records could be obtained; the missing evidence needed to be reconstructed; a reconstruction meeting was held on 25 August 2016 and on this day the parties (applicant and first respondent) reached agreement as how to proceed; the evidence was then agreed upon on 30 September 2016. The applicant filed the agreed record on 21 October 2016. On 24 October 2016 the applicant filed a notice in terms of Rule 7A (8) (b); an answering affidavit was filed by first respondent on 02 December 2016. Condonation was unopposed. The applicant applied for a hearing date on 28 March 2017.

[3] I must decide if the award is reviewable where the arbitrator found that there was no unfair labour practice committed by the first respondent in terms of section 186 (2) (a) of the LRA in that it did not promote the applicant despite him qualifying for the position; this where the fourth respondent was promoted to such position, even though she never qualified for the position as per the requirements initially set out in the advertisement.

[4] The facts are mostly common cause.

[5] On 01 February 2013 the post of Director: Consumer Affairs (the "*Position*") was advertised at the first respondent.[3]

[6] The advertisement sets out certain minimum requirements (to be considered for the Position) which were *inter alia*:

[6.1] A minimum of three (3) years in Middle Management Services ("*MMS*"); and,

[6.2] Computer literacy.

[7] Various candidates including the applicant and the fourth respondent applied for the Position.[4] The applicant met all the necessary requirements as set out in the advertisement; this was in that the applicant was the Deputy Director: Consumer Affairs which was a position at the MMS level and he was computer literate.[5] On the other hand, the fourth respondent did not possess the necessary requirements;[6] she had only held the position of Assistant Director which was not a MMS position.[7]

[8] Six (6) of those who applied for the Position, including the applicant were shortlisted. The fourth respondent was not shortlisted.

[3] The advertisement is at Vol. 2; p110. The post was advertised internally and externally.
[4] The Interview minutes set out that a total number of seventy-eight (78) applications were received.
[5] See Record vol. 2 pp376 – 377. Also see the applicant's CV at Record vol. 2 p111 – 117.
[6] See Record vol. 3 p377 line 11.
[7] See Record vol. 3 p379 line 17; vol. 2 p273 – work profile as contained in the interview minutes.

[9] The selection panel then, *mero motu*, changed the selection criteria by removing the MMS experience requirement set out in the advertisement (the first requirement) and replacing it with the requirement termed as follows: "*recognised experience within career stream from Assistant Director level from Government sector services, and to scrutinise applicants' C.V. from private sector to counterpart duties as outlined in the advert.*"[8] According to the minutes of a meeting at which such change was discussed the basis to same was that: "*the advert did not specify the type of required qualification(s) for the position.*"[9] In evidence at arbitration Sekgapane testified that: "*So, this is the decision that the panel took that its Assistant Director at that level, would be considered middle management. It was a decision that the panel took as the criteria was developed."*[10]

[10] The new selection criteria (that were "*developed*") were not re-advertised but a new shortlisting was done whereby the applicant, the fourth respondent and four (4) others were then short-listed for the Position.[11] The selection pool was subsequently narrowed [it seems via the MEC,[12] who was informed to choose two (2) of the three (3) recommended and was seemingly not informed of the issues at hand] to only the applicant and the fourth respondent who were then nominated to undergo a competency test.[13] Subsequently the selection panel appointed the fourth respondent. As such the only person that could and did benefit from such change was the fourth respondent.

[11] The applicant saw this action by the selection panel as unfair and referred an unfair labour practice dispute to the second respondent. The third

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9 See Record vol. 2 p267 (shortlisting minutes).
10 Record vol. 3 p367 (at the bottom) – 368 (at the top). Also see the shortlisting minute at Record vol. 2 p 267 where it is confirmed that the selection panel determined and agreed to the new criteria that were to be applied.
11 Record vol. 2 p68 (shortlisting minutes).
12 See Record vol.2 p280 (interview minutes)
13 Record vol. 2 p184 (interview minutes).

respondent was appointed and did preside over the matter which led to the award which is the subject of the present review application.[14]

The award

[12] The arbitrator heard the evidence of the parties and decided that there was no unfair labour practice in that, as he set out in his analysis: *"I have no doubt in my mind that the applicant has not made out a proper case to succeed in his claim that the respondent had committed an unfair labour practice by not appointing him to the position of Director: Consumer Affairs."*[15]

[13] He found that the "*managerial requirement*" set out in the advertisement was *"patently wrong and if followed, would automatically preclude candidates in industries outside the public service, a most ridiculous situation which needed to be addressed and appears to have been addressed in a most logical manner."*[16]

[14] The arbitrator concluded that he could not find that any unfair labour practice had been committed by the first respondent and dismissed the applicant's referral.

The applicant's review

[15] I must mention that both parties delivered heads of argument very late. The applicant filed its heads of argument on 28 June 2017 and the first respondent on the day of the hearing being 12 July 2017;[17] this was despite a directive being issued by the court requesting same in or about January 2017[18] and the set down notice having been sent to them on 08 June

[14] The arbitration award is at pleadings pp34 – 39. The award is dated 26 November 2014 – meant to be dated 26 November 2015; the award was said to have been received by Applicant on 25 January 2016.
[15] Pleadings p38 (in the middle of the page).
[16] Pleadings p39 (second paragraph).
[17] At Court the first respondent whose heads were dated 06 July 2017 set out that it could not submit its heads of argument as it could not locate the file; this excuse is invalid.
[18] This notice is not in the court file.

2017.[19] Further both sets of heads of argument failed to deal with various issues. The applicant's heads, while relevant and on the topic, failed to properly set out the legal basis for the relief sought whereas the first respondent's heads of argument dealt with completely incorrect principles, shows a total misunderstanding of the matter on review, sets out incorrect facts and refers to documents without setting out where same were in the record and even refers to documents and legislation which were not submitted at arbitration and / or not dealt with in evidence at arbitration. On 12 July 2017 and at court I stood the matter down and I placed further questions to the parties and allowed them time to respond thereto by the delivery of supplementary heads dealing with such questions and to which they responded.[20] Further the court file was poorly organised; the transcripts were not properly done in line format (they only have page numbers not line numbers); further there was much research to be done, hence the delay in this judgment.

Analysis

[16] The applicant raises various grounds of review in its papers but in the main these amount to: "*the contention that the award is bereft of any reasoning and that the Arbitrator malfunctioned as an arbitrator; and, the contention that the decision ultimately arrived at by the Arbitrator (namely that an unfair labour practice had not been committed) was one that a reasonable decision maker could not have come to.*"[21] There is the further ground of legitimate expectation that the applicant by being appointed to act in the Position and receiving favourable recommendations from the first respondent in respect of the performance of his duties but there was no proof and indeed no case in this regard.

[19] The proof of service is in the court file, the notice sets out that heads are to be filed by the applicant not less than ten (10) court days before the hearing and by the respondent not less than five (5) days before the hearing.
[20] See parties' supplementary heads of argument.
[21] See applicant's heads of argument p2 point 3.

[17] The applicant seeks an order reviewing the award. The applicant further seeks an order setting aside the appointment of the fourth respondent and ordering that the applicant be placed in the Position retrospectively as if he had been appointed. In the alternative, the applicant seeks an order granting him a protective promotion.

[18] The test on review in respect of an unfair labour practice was well set out in the Labour Appeal Court case of *Head of Department of Education v Mofokeng*[22] per Murphy AJA:

> [31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act[23] ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence.[24] Moreover, judges of the Labour Court should keep

[22] [2015] 1 (JA14/2014) [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) (1 October 2014).
[23] Act 3 of 2000.
[24] *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) at para 12.

in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.[25]

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result.[26] Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the

[25] *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) at para 76.
[26] *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) at para 21-25.

inquiry.[27] In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA.[28] Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."[29]

[19] The question to be asked is did the arbitrator misconceive the nature of the enquiry and was such misconception material and / or did he misdirect

[27] Perhaps somewhat at variance with the Constitutional Court in *Tao Ying*, the SCA in *Herholdt* (para 25) was of the opinion that material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable. In *Tao Ying,* the Constitutional Court seemed to take the view that a factual or legal error would be reviewable if it was material to the determination of the dispute submitted to arbitration.

[28] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at paras 49-54.

[29] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 52-78, 85-88.

himself in that he ignored materially relevant factors which when considered in totality rendered the result or outcome that he arrived at unreasonable?[30]

[20] Further in respect of the need for a fair trial of the issues in respect of an unfair labour practices the Labour Court, per Nel A.J., has set out that:

> "[17] Taking this proposition further, and applying what our courts have said in this regard to the employment field, I am of the view that an employee can only succeed in having the exercise of a discretion of an employer 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 biased manner (see *Rex v Zackey* 1945 AD 505 at 513; *Madnitsky v Rosenberg*1949 (2) SA 392 (A) at 398; Ex parte Neethling & others 1951 (4) SA 331 (A) at 335D; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781J and 783C; *Shepstone H & Wylie & other v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045A)."[31]

[21] What I need to consider is could the selection panel change the requirements for the post and did the arbitrator consider this issue correctly?

[22] In my view the arbitrator misconceived the enquiry that he needed to undertake. He got too bogged down in the credibility of the witnesses and the reliability of their testimony and failed to deal with the facts of the matter most of which were common cause. The arbitrator failed to realise that the selection panel could not *mero motu* change the requirements for the Position; they did not have the power and / or the authority to do so. These requirements as set out in the advertisement were set out by the relevant executive authority, being the Minister and could only be changed by him /

[30]See the Judgment of Molahlehi J in *Ga-Segonyana Local Municipality v Venter N.O. and Others* (JR961/13) [2016] ZALCJHB 391; (11 October 2016).

[31] Also see *Minister of Home Affairs v General Public Service Sectoral Bargaining Council and Others* (JR1128/07) [2008] ZALCJHB 23 (26 March 2008). *Nainaar v Department of Works*, *KZN and Others* (D839/05) [2015] ZALCD 26 (19 May 2015). *South African Police Services ("SAPS") v Gebashe and Others* (D676/11) [2014] ZALCD 68; (2015) 36 ILJ 1620 (LC) (24 November 2014).

her. And what is more the Minister would have to set out his / her reason for doing so and such deviation would have to have a legal basis. It was peremptory that only the Minister could change the requirements of the Position as set out in the advertisement. Only once this issue was decided could the arbitrator even consider whether the requirements were discriminatory or not and whether the witnesses' testimonies were credible. As such the arbitrator by delving into the question as to whether the action by the selection panel in changing the requirements for the Position was reasonable, bypassed this absolute requirement. His award as such needs to be reviewed and set aside. Further the arbitrator fails to deal with the issue that the fourth respondent should have been eliminated from the process right from the beginning in that she did not possess the required qualifications for the Position. It could be said that she had no right to even apply for the post.

[23] The first respondent not only committed an unfair labour practice when it changed the requirements for the Position (via the panel) but also committed an unfair labour practice where it failed to re-advertise the Position once it had changed the requirements.[32] These failures were unfair particularly to the parties to the process.[33]

[24] Further by then including the fourth respondent in the process and then later lining her up against the applicant it again committed an unfair labour practice firstly because she was not meant to be part of the process and secondly because the applicant was at such time the only qualified candidate left in the running and as such only he could be appointed to the Position. As such the process embarked upon by the panel post the shortlisting phase was not only unfair to the applicant who now had a running mate to challenge him where he should have been alone but same was unlawful in that the required steps (as per the law) were not taken and

[32] Failing this step, the process could be seen to be prejudicial to those wanting to apply but not having had the qualifications necessary as set out by the advertisement. See *NUTESTA v Technikon Northern Transvaal* [1997] 4 BLLR (CCMA) at p. 473 where the arbitrator recommended that the position be re-advertised with the changed/amended requirement.

[33] See the case of *Noonan v Safety and Security Sectoral Bargaining Council and Others* quoted from, at paragraph 31 of this judgment, where the citation is referred to as well.

instead the panel acted *ultra vires* and usurped the functions of the Minister.[34]

[25] Further the first respondent's explanation, provided at arbitration, as to why the requirements (as set out in the advertisement) needed to be changed or were to be deviated from by the panel; which was because they were discriminatory; was flawed firstly in that there was no proof that they were discriminatory,[35] at least not legally defined discrimination;[36] and secondly, the requirement of public work experience was based on attributes pertaining to the candidate's personal qualifications and experience which is not as such directly related to attributes or characteristics which have the potential to impair the fundamental dignity of the potential candidates so as to amount to discrimination. Once this explanation is removed (which it must be) the decision to amend the requirements becomes arbitrary. The requirement of experience is specific and mandatory.[37] No application without the required experience should have been accepted. The fourth respondent had no right to even apply or respond to the advertisement. The requirement of experience as set out in the advertisement was the yardstick set by the Minister which all those who wanted to apply for the Position had to possess prior to applying. While the provisions of section 20(5) of the

[34] The exercise of administrative power must have its genesis in lawful authority. (GE Devenish et al: Administrative Law and Justice in South Africa (2001) at p.31) It is a time-honoured principle that any person who exercises public power without deriving such from lawful authority, will be acting unlawfully. (Baxter L: Administrative Law (1984) p.74) Also *see Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 CC at p58 where this principle was reaffirmed. The *Fedsure* case also set out that it is central to our conception of constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they exercise no power and perform no function beyond that conferred upon them by law. Also see *Dunn v Minister of Defence and Others* 2006 (2) SA 107 (T). It is unlawful for the selection panel to have deviated from the requirements as set out in the advertisement. As such the very appointment of the fourth respondent was *void ab initio* in that it was unlawful. Further in appointing or promotions: The person whose act is under scrutiny must be authorised by the law to take such action; the action must be procedurally fair, and the action must be rational, not arbitrary or capricious. Section 11 of the Public Services Act sets out that: "*In the making of appointments and the filling of posts in the public service due regard shall be had to the equality and other democratic values and the principles enshrined in the Constitution. All the candidates who qualify for the appointment shall be considered."* (My underlining) As such the action by the panel could be both unlawful and irregular. If irregular, then it would be voidable.

[35] For the acceptable test on discrimination see the case of *Harksen v Lane NO and others* 1997 11 BCLR 1489 (CC) where it was set out that for differentiation must amount to discrimination AND whether it amounts to unfair discrimination. (At paras 45 v& 46)

[36] See *Mothoa v Minister of Safety and Security* (2007) 9 BLLR (LC).

[37] According to Public Services Regulations 2001, Chapter 1 Part VII Regulation C.2.2. provides as follows: "*An advertisement for a post shall specify the inherent requirements of the job, the core title and the core functions.*"

Employment Equity Act[38] (EEA) expressly state that an applicant may not be rejected merely for reasons of experience this was not applicable here in that this was not used by the employer to discriminate in that there was no basis for comparison and there were other qualifications than experience set out in the advertisement. While the determination of the basis to the requirement of management experience is not relevant in that the award is reviewable on the first question as to whether or not the selection panel could amend the requirements the award further fails on the second question in that the amendment made is arbitrary in that it is not based on the requirements of the job but on the need to try and make the requirements less severe. The determination of suitability must take into account all relevant requirements. There was no proof provided by the fourth respondent of this. As such once the applicant proved his case the first respondent failed to justify such unfairness. Further it was clear that the requirement of management experience was justified when considering the nature of the Position. Clearly one cannot be slotted into a management position with limited or no experience in such a position. Further the "*experience was not the sine qua non for the purposes of appointment or promotion.*"[39] There was also the second requirement of computer literacy.

[26] Further, as set out above, the process was also flawed in that once the advert was amended it should have been re-advertised to allow candidates who did not possess the management experience to apply and thereby to open the application process to a wider range of potential candidates.[40] All the change did was to allow the fourth respondent to be in the running where

[38] Act 55 OF 1998.

[39] See *Harmse v The City of Cape Town* [2003] ZALC 53 at para 41.

[40] See the case of *Khumalo and Ritchie v The MEC for Education Kwazulu-Natal* (LAC) Judgment delivered 29 August 2012 at para 8 where the Court set out that the task team had found that "*could not be appointed as he did not meet the requirements of the position he was appointed to and "the decision to appoint him rendered 'the process unfair, especially to potential applicants to whom the advertised experience requirements proved to a barrier and therefore did not bother to apply.'*" Here the court *aquo* found that 's appointment "*was not lawful, reasonable or fair and was accordingly invalid."* The LAC found the task team's findings justified (at para 39). The LAC also set out that: "*But for the fact that an administrative act is unlawful does not necessarily follow that it had to be set aside. In reviewing and considering whether to set aside an administrative action, Courts are imbued with a discretion and may in the exercise thereof refuse to order the setting aside of an administrative action, notwithstanding substantive grounds present for doing so (Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2010 (1) SA333 (SCA) at para 33)"* (par 42). Despite this it found that the decision of the court *a quo* to set aside the promotions (of Khumalo and Ritchie) to be correct (at para 45).

she was not meant to be. As such it was clear that the selection panel not only acted unlawfully in subverting the process but acted unfairly, capriciously and with bias in amending the requirements; it can be said that the selection panel acted in a manner which sought to earmark the Position for the fourth respondent who it then sought to and did appoint into the Position. This was clearly unfair.

[27] In the case of *Ga-Segonyana Local Municipality v Venter N.O. and Others*;[41] Tlhotlhalemaje, J. approved of the following:

> "[20] In City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others;[42] 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 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

[41] (JR961/13) [2016] ZALCJHB 391; (11 October 2016).
[42](2013) 34 ILJ 1156 (LC), in further reference to *Aries v CCMA and others* (2006) 27 ILJ 2324 (LC).

> decisions.[43] 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 and others* as above."[44]

[28] As such in deciding on an unfair labour practice the courts have clarified the test to be that of fairness.

[29] In *Apollo Tyres SA (Pty) Ltd v CCMA and Others*,[45] the Labour Appeal Court quoted from *Du Toit et al*,[46] with approval on the meaning given for the term / word "*unfairness*" as follows:

> [53] ... unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.[47]

[30] The applicant in its heads of argument set out various cases dealing with unfair labour practices where the person that was appointed / promoted did not qualify for the post and ought to have been eliminated at the very first stage.[48] I have only set out those cases which I find that the principles exposed therein are relevant herein.

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[43] *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 and 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…".*

[44] Also see *Mbatha v Safety and Security Sectoral Bargaining Council and Others* (JR372/13) [2015] ZALCJHB 332 (30 September 2015).

[45] (DA1/11) [2013] ZALAC 3; [2013] 5 BLLR 434 (LAC); (2013) 34 ILJ 1120 (LAC) (21 February 2013).

[46] Du Toit et al: *The Labour Relations Act of 1995*; 2nd edition at page 443.

[47] Such action is reviewable by a Court – see *Basson v Provincial Commissioner (Eastern Cape), Department of Correctional Services* [2003] 4 BLLR 341 (LC); *Mafongosi and Others v United Democratic Movement and Others* 2002 (5) SA 567 (Tk); *Pharmaceutical Manufacturers Association of SA and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241; *Bel Porto School Governing Body and others v Premier, Western Cape, and Others* 2002 (3) SA 265 (CC) 2002 (9) BCLR 891 at para 152.

[48] The applicant correctly sets out that these persons should not have been in the running. Only those applicants that have the qualifications can compete in the selection process. See *Swarts vs National Commissioner South African Police Services and Others* (D915/13) [2015] ZALCD 7 (20 January 2015); *Manana v Department of Labour* [2010] BLLR 664 (LC); *City of Tshwane Metropolitan Council v South African Local Government Bargaining Council and Others* [2011] 12 BLLR 1176 (LC).

[31] In the appealed case of *Noonan v Safety and Security Sectoral Bargaining Council and Others*; [49] concerning a promotion where the successful candidate had failed to disclose information which affected his suitability for the position the LAC considered the "***fairness of the process***" as a whole, and came to the conclusion, that the employer had committed an unfair labour practice against the unsuccessful employee in that the successful candidate unfairly participated in the selection process.

[32] In *City of Cape Town v SA Municipal Workers Union obo Sylvester and Others*[50] the court expressly rejected the notion that the employer has the prerogative to decide who to appoint and that it should not be questioned when it exercises that discretion. The court stated that the proper yardstick was "*fairness to both parties*".

[33] In the case of *Kwadukuza Municipality v Rajamoney and Others*[51] Cele J set out the following:

> [15] For the requirements of an advertised post to be met therefore, cognisance must be taken of the objective of the policy to ensure that the candidate who best meets the selection criteria is appointed. The short listing of a candidate who least meets the set selection criteria will ordinarily fly on the clear face of the objective of the policy. Such short listing would then be arbitrary as contrary to the selection criteria. The applicant set out requirements to be met for the contested post. The fairness of the selection process lay in the screening of all candidates against the set requirements in a similar approach. It has to be borne in mind that there would be people who desired to apply for the contested post but did not submit their applications merely because they did not meet the set requirements. It would

[49] *Noonan v Safety and Security Sectoral Bargaining Council and Others* (PA 1/11) [2012] ZALAC 9; [2012] 9 BLLR 876 (LAC); (2012) 33 ILJ 2597 (LAC) (1 June 2012).
[50] (C1148/2010) [2012] ZALCCT 40; [2013] 3 BLLR 267 (LC); (2013) 34 ILJ 1156 (LC) (7 September 2012).
[51] (D880/10) [2013] ZALCD 17 (13 June 2013).

also be unfair to set all candidates who met all requirements against any candidates who lack any of the requirements.

[34] In the case of *KwaZulu Department of Transport v Hoosen and Others,*[52] where the facts were very similar to the present case, Judge Whitcher found that the promotion of a candidate who did not meet the requirements of the advertised post amounted to an unfair labour practice. The learned Judge set out that the employee's "*promotion was irregular by want of his meeting the minimum criterion for the position."*[53]

Valuation

[35] But what I need to establish is whether there is good cause to interfere with the decision of the arbitrator.

[36] At arbitration, the first respondent set out that the change in the first requirement for the Position was based on the discriminatory nature of the original advert in that by its requirements (as set out therein) it excluded those not in the public service. The arbitrator found discrimination based on an invalid reason and without a valid comparator.

[37] But what I need to consider is was there an unfair labour practice and is the award reviewable? An unfair labour practice is defined in the LRA. Section 186(2)(a) of the LRA provides as follows:

> '(2) Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving:
>
> (a) unfair conduct by the employer relating to the promotion...of an employee.'

[52] 2016 37 ILJ 156 (LC).
[53] At para 23.

[38] Relevant to this matter are also the following pieces of legislation or documentation: The Constitution of the Republic of South Africa,[54] [55] The Public Service Act;[56] the Public Service Regulations (2001); and, the SMS Handbook.

[39] Section 11 of the Public Services Act regulates appointments and the filling of posts in the public service. Section 11 sets out:

> "[1] In making of appointments and the filling of posts in the public service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.
>
> [2] In the making of any appointment in terms of section 9 in the public service-
>
> a. all persons who applied and qualify for the appointment concerned shall be considered; and
>
> b. the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress, in accordance with the Employment Equity Act, 1998 (Act 55 of 1998), the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability."

[40] In short, to compete in the process, to be shortlisted, or even considered for appointment an applicant for employment must possess the necessary qualifications. Only then can you as the employer consider other factors such as training, skills, competence, knowledge and the need to redress imbalances of the past. The selection panel can only consider those candidates that so to say pass muster, that is, those that meet the minimum

[54] 108 of 1996.
[55] In particular section 23(1) of the Constitution provides that: "*Everyone has the right to fair labour practices.*"
[56] Act 103 of 1994.

requirements as set out in the advertisement. "*Screening of applicants should take place according to the initial criteria for the job.*"[57]

[41] The SMS Handbook further regulates such matters *vis-a-vis* public service. The SMS Handbook has the status of a collective agreement and as such it is imperative to abide by its terms.[58] Chapter 2 of such handbook regulates recruitment and selection.[59] Clause 8.3 (1) of Chapter 2 of the SMS Handbook sets out:

> "8.3 **Screening**
>
> (1) After the closing date, the application documents should be screened to determine whether applicants comply with the basic criteria laid down in the advertisement. When in doubt additional information should be requested. The thoroughness with which this phase is conducted determines the success of the selection activities to follow. During this phase candidate who do not comply with the minimum advertised requirements may be eliminated with noting of reasons, resulting in a preliminary pool."

[42] As such while it may not be compulsory, it is recommended that those who do not have the qualifications as per the advertised criteria be eliminated with "*noting of reasons*" and as such, such persons should not be allowed to proceed to the next step; in short those who do not qualify (as per the advertised job specifications / qualification) need to be immediately eliminated, prior to the process proceeding to the next stage.

[43] Then there is also the Public Service Regulations which regulate appointment and promotions. Section C.1.1 of these Regulations sets out the following: "*An executing authority shall determine the composite*

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[57] Dissertational work: "*Recruitment Policies and Practices in the Department of Public Service and Administration*"; by Ramokhojoane Paul Motsoeneng, UNISA, February 2011.
[58] See *Mashiane v Department of Public Works* (J1773/12) [2012] ZALCJHB 69 (18 July 2012) at para 16.
[59] The relevant Chapter (Chapter 2) of the SMS Handbook is at Record vol. 2 pp281 – 295.

requirements for employment in any post on the basis of the inherent requirements of the job."

[44] The Public Service Act[60] defines "*executing authority*" in section 1 as follows: "*the member of the Executive Council responsible for such portfolio.*" In short this means that the MEC is the only person who has the authority to determine and / or vary and / or change the requirements for a post. It is unlawful for the selection panel to change or vary the requirements for a post.

[45] If one peruses the arbitration award it is apparent that the arbitrator came to conclusions which are completely without reason or basis. For example: he sets out in the very beginning of his analysis that "*I have no doubt in my mind that the applicant has not made out a proper case to succeed in his claim that the respondent committed an unfair labour practice by not appointing him to the position of Director: Consumer Affairs.* "[61]

[46] The arbitrator uses his own reasoning and basis when he sets out in respect of the initial requirements of the Position as advertised: "*In fact, the managerial requirement appearing in (sic) the advertisement was patently wrong and if followed, would automatically preclude candidates in industries outside the public service, a most ridiculous situation which needed to be addressed and appears to have been addressed in a most logical manner.*"[62] The problem with this reasoning is that it is not based on anything except for the personal beliefs of the arbitrator (and his biases) who came to such a conclusion without taking into account the evidence, the circumstances of the matter and the law that restricted such action by the selection panel.

[47] Clearly there was no scope for the selection panel to divert from the requirements as set out in the advertisement and their action in doing so vitiated the process, but not the entire process, so that one needs to start

[60] Act 38 0f 1994.
[61] See award at pleadings p38 (in the middle of the page).
[62] See award at pleadings p39 (second paragraph).

again.[63] The panel's action of changing the requirements for the Position was *ultra vires*. The arbitration award seems to skirt this issue and fails to set out how the selection panel could subvert the law in favour of widening up the Position to those who never qualified as per the advertisement; it only sets out that same was justified or "*logical*"[64] as the original advert was discriminatory. The advertisement had to set out the necessary requirements for the Position.[65] As such the selection panel's duty was only to assess the suitability of candidates for the Position; not to change the requirements as set out in the advertisement so as to widen the pool of candidates.[66]

[48] The fourth respondent was appointed directly due to the unlawful actions of the selection panel in varying the selection criteria; this was clearly unfair to the applicant (to those others that were shortlisted). It was correctly argued by the applicant in its supplementary heads that: "*but for the unlawful amendment to the advertised criteria which permitted Dzanibe to be in the running for the Position; Letsogo would have been appointed."*[67] I believe this is a correct summation of the matter.

[49] The arbitration award is irrational; it shows that the arbitrator failed to apply his mind or his reasoning to those issues that were important to determine the matter. He failed to deal with the issue that the actions by the selection panel were unlawful and instead found them to be "*logical*".[68] Further the arbitrator misconducted himself and the conclusion or outcome he reached is poorly reasoned, and irregular. He "*shirk (ed) his task as an arbitrator."*[69]

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[63] Further once the reason is removed the action of the panel can be seen, in my opinion, to be "*an unceremonious attempt to change horses midstream*" and its actions seriously prejudiced those that had been shortlisted in terms of the requirements as set out in the original advertisement including the applicant.

[64] See the award at Pleadings p39 (2nd paragraph).

[65] Section C.1. of the Regulations sets out: "*An advertisement for a post shall specify the inherent requirements of the job, the job title and the core functions.*" The advert for the Post correctly set out such parameters. Should the criteria not have been fair the selection committee should have complained to the Minister and sought to annul the process and to re-advertise the position with more acceptable requirements if they were seen by the Minister to be exclusionary).

[66] This is covered in Sections D.5 – D.7 of the Regulations and paragraph 8.3.1 of the SMS Handbook.

[67] Applicant's heads of arguments p20 para 61.

[68] See the award at Pleadings p39 (2nd paragraph).

[69] In *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another [2002] 3 BLLR 189 (LAC) (JA52/00) / [2002] ZALAC 3 (1 February 2002)* it was set out that: *"52. In my view the following principles emerge:*

The arbitrator both misconceived the necessary inquiry (by considering whether the amendment by the selection panel was logical) and came to an unreasonable decision in finding that no unfair labour practice had been committed.

[50] Clearly the fourth respondent was not able to make it past the first round of recruitment; she should have been immediately eliminated. Her CV and application should never have reached the selection panel because she could not be shortlisted in that she never possessed the qualifications as set out in the advertisement.

[51] Further it was not within the purview of the selection panel to change and / or expand and / or relax the requirements of the Position as advertised; this was even when same was done with valid reason, which I must mention there was none here. The use of the word "*logic*",[70] by the arbitrator, defies reason. His reasoning and findings are illogical. As set out by the applicant in his heads of argument: "*It was imperative for the recruitment process to be confined to the applicants who met the requirements (inclusive of the requirement of experience): and it was not open to the selection panel to vary or relax the advertised requirements, as the requirements falls outside*

A court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. It is equally implicit in the agreement under which an arbitrator is appointed that he is fully cognizant with the extent of and limits to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result per se not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment. Gross irregularity 53. In Goldfields Investments Ltd v City Council of Johannesburg and another 1938 TPD 551,560 (a case according to Corbett CJ in Hira's case 87A dealing with the first and narrowest species of review, not common law review) Schreiner J distinguished between gross irregularities that are patent – and occur during the course of the trial – and those that are latent – that occur in the mind of the judicial officer . These are only ascertainable from the reasons given by him. In neither case need there be intentional arbitrariness of conduct or any conscious denial of justice. The crucial question is whether the irregularity prevented a fair trial of the issues. A wrong conclusion on law or fact does not necessarily lead to a conclusion that there has not been a fair trial. But if a mistake of law leads to a material misconception of the nature of the inquiry or of the court's duties in connection therewith, then the losing party has not had a fair trial."

[70] See the award at Pleadings p39 (2nd paragraph).

their purview and within the purview of the MEC."[71] Further once the fourth respondent is removed from the final shortlisting process for the Position there is only the applicant left; he was the only (legitimate) candidate that was meant to be left in the running for the Position.[72] The arbitrator as such committed a manifest misconduct in this matter; that is that the error was material to the determination of the dispute and the result arrived at was unreasonable and cannot stand.

[52] In respect of relief, I sought at court that the parties set out to me as to what should happen going forward should I decide that the applicant should have been appointed by the selection panel instead of the fourth respondent. The following questions are relevant: should the applicant be reinstated into the position or should he be only appointed as from the date of this judgment? Should the applicant get the salaries / backpay he should have earned? Should he be appointed in the Position or in a protected position at the same level as the Position and what should happen to the fourth respondent? In this regard the first respondent in both its heads of argument and at court failed to argue against any decision that I sought / could make. At court, the applicant party argued fiercely for the (re)instatement of the applicant from the date of possible appointment. At court, the first respondent's main (and seemingly only) argument was that the case law that was cited by the applicant in its heads of argument were not relevant in that the facts were different. This was even after I pointed out to Mr. Gumbi (who appeared on

[71] Applicant's heads of argument p16 para's 51.1 – 51.2.

[72] See the case of *South African Police Services v SSSBC and Others* case number P426/08 where it was set out that: *"…the appropriate remedy, as a general rule is to set aside the decision and refer it back with or without instructions to ensure that a fair opportunity be given. Since the interest is the fair opportunity to compete, it follows that that should the appropriate remedy rather than appointing the applicant to the post (or to a post on equivalent terms) or to compensate (there being no loss). There are two exceptions. This principle does not apply to discrimination or victimisation cases in respect of which different and compelling interests are at stake. It also does not apply if the applicant proves that but for the unfair conduct, she would have been appointed."* (Own emphasis) Also see the *Kwadukuz*a case (mentioned above at paragraph 33 of this judgment) at para 20 where the Labour Court (per Cele J) set out that: "*It is trite that a 'protected promotion' may be granted as a relief where evidence showed that but for the unfair labour practice the contesting candidate would probably have been appointed to the contested post"* Further the court cites the cases of Minister *of Safety and Security v SSSBC and Others* [2010] 9 BLLR 965 (LC) and *PSA v Department of Justice and Others* [2004] 2 BLLR 118 (LAC) in which cases the only impediment to granting of similar relief was a failure to join the party with a direct and substantial interest in the matter.

behalf of the first respondent) that what was relevant was not the facts of such cases but the principles expounded therein.

[53] The first respondent's actions herein in acting unlawfully and in later trying to justify such action at arbitration are unacceptable. There was clearly no discrimination in the advertisement in that the requirement was justified (at least at face value and that is all that is needed); there was not even a comparator upon which to compare to or even to consider whether discrimination existed. The first respondent has shown no good cause and its actions were unfair and unlawful. The decision made to appoint the fourth respondent was unlawful, biased, arbitrary, capricious and unfair.

[54] It is clear from what I have set out above that the applicant should have been appointed in the Position by the first respondent instead of the fourth respondent. As such there is no need for me to direct that he be appointed into a protected position going forward. Further the fourth respondent should be removed from such position immediately. I believe that it would only be fair to instate the applicant into the Position as of the date of the appointment of the fourth respondent which I am advised was 01 November 2013 and that it be seen that he was appointed since such date in such position and that he is to be paid all the salaries / backpay due since such date until the date he is appointed by the applicant into the Position including interest and increases. Further such instatement of the applicant is to take place within ten (10) days of this Order.

[55] It is to be noted that the fourth respondent never appeared at arbitration and further never opposed the applicant's review application despite being served with same. The fourth respondent (or the person who took over from her) is to be removed from the Position with immediate effect; her / his promotion is as such set aside. The prejudice caused by such promotion is irreversible and same cannot be allowed to stand. In this regard I have considered my possible discretion in regard of the nullification or not of such promotion of the fourth respondent to the Position;[73] the just and

[73] See the *Khumalo* case mentioned in ft. 36 above.

equitableness of backdating thereof or not; the need to minimise injustice; the need for practicality;[74] and as a result my order, as set out below, covers for same.[75] Anyway, as set out above the first respondent failed to argue that the fourth respondent should be retained in the Position and / or that a protective appointment be created for the applicant where I find in the applicant's favour (as I have done).

[56] I am bound by the principles of this Court in respect of costs. There is an ongoing relationship between the parties and the true cause of the misconduct or error herein was the arbitrator; the first respondent was entitled to defend the findings, the decisions and the resultant award. As such I am not going to award costs to either party.

[57] In the premise, the following order is made:

Order

1. The fourth respondent (or the person who took over from her) is to be removed from the post of Director: Consumer Affairs with immediate effect, his / her promotion is as such set aside.

2. The applicant is to be appointed (retrospectively) into the post of Director: Consumer Affairs.

3. The applicant is to be instated as the Director: Consumer Affairs as of the date of the appointment of the fourth respondent into such position (01 November 2013), and that it be as if he was appointed on such date

[74] See *Eskom Holdings v New Reclamation Group* (Pty) Ltd 2009 (4) SA 628 (SCA) and mentioned in the *Khumalo* case (see ft. 36 above, for citation) at para 53 thereof.

[75] For a similar order see the matter of *Baxter v National Commissioner, Correctional Services and another* [2006] JOL17476 (LC) where at par 54 Cele AJ (as he then was set out that: "*It is, in my understanding of the relief sought by the applicant, that recourse can be had to section 158 (1) (a) (iii) of the Act. An order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of the Act, will in my view, accord with justice of this case.*" Also see *Dunn v Minister of Defence and others* 2006 (2) SA 107 (T).

in such position and such, such instatement is to be retrospective; that is the applicant is to:

3.1. be paid all the salaries / back pay due (as a result of such instatement as of 01 November 2013) from 01 November 2013 until the date he is appointed by the applicant;

3.2. to receive all bonuses (only where such bonuses are not performance related bonuses);

3.3. to receive all benefits; and

3.4. to be paid all interest due at the relevant rate of interest.

4. Further such instatement of the applicant (or reinstatement as it was referred to by the parties in their heads of argument) is to take place as soon as possible and at the latest within ten (10) days of this order being delivered.

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A Goldberg

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: R Itzkin

Instructed by: Assenmacher Attorneys

For the Respondent: M Gumbi

Instructed by: The State Attorney