

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA3/18

In the matter between:

**DEPARTMENT OF RURAL DEVELOPMENT
AND AGRARIAN REFORM**

Appellant

And

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

First Respondent

COMMISSIONER KELVIN KAYSTER N.O.

Second Respondent

L MUSISI

Third Respondent

Held: 27 November 2019

Delivered: 06 January 2020

Summary: Unfair labour practice related to promotion –employee acting in the position for a number of years referring an unfair labour practice - employer advertising position but failed to complete appointment process – commissioner appointing employee to the post – Department contending that it had the discretion to appoint and that deference should be given to its decision and that employee not having the required qualification – court confirming principle courts and arbitrators should be reluctant to interfere with an employer’s decision to refuse promotion but that they will do so only when the decision or reasoning is assailable because there is evidence that the employer acted on the basis of some unreasonable, irrelevant or invidious consideration; or the decision was arbitrary, capricious or unfair; or the employer failed to apply its mind to the promotion or acted in bad faith. Court upheld the commissioner’s finding that the Department’s dilatory failure to fill the vacant critical and funded post, without good reason, when there was a perfectly suitable candidate with experience and a record of exemplary performance in the post, was patently capricious and unfair. The court further rejected the Department’s ground that the employee did not possess a BSc degree because the employee’s testimony that his degree was an equivalent qualification was not seriously contested or rebutted in cross-examination and thus constituted sufficient proof of that fact. Labour Court’s judgment upheld and appeal dismissed costs.

Coram: Davis and Sutherland JJA and Murphy JA

JUDGMENT

MURPHY AJA

- [1] The appellant, the Department of Rural Development and Agrarian Reform, Eastern Cape (“the Department”), unsuccessfully made application to the Labour Court (Mooki AJ) for review of an arbitration award of the second respondent (“the arbitrator”). It appeals against the decision of the Labour Court with the leave of this court.
- [2] The question before the arbitrator was whether the Department’s failure to promote the third respondent (“Musisi”) amounted to an unfair labour practice in terms of section 186(2)(a) of the Labour Relations Act¹ (“the LRA”). The relevant part of section 186(2)(a) of the LRA provides that an unfair labour practice includes any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion of an employee. In terms of section 193(4) of the LRA, any unfair labour practice dispute referred to arbitration may be determined on terms that the arbitrator deems reasonable.
- [3] The arbitrator held that the failure to promote Musisi was an unfair labour practice and directed the Department to promote him to the vacant post of Director: Economics, Marketing and Statistics Services for which he had applied. The Labour Court, for reasons which will appear later in this judgment, found that the award of the arbitrator was reasonable and dismissed the application for review.
- [4] Musisi commenced employment with the Department on a permanent basis in January 2000. In 2006, he occupied the post of Deputy Director: Economics, Marketing and Statistics. In 2007, the Senior Manager: Economics, Marketing and Statistics Services (“SMEMSS”), Mr. L Coetzee, was seconded to the Eastern Cape Rural Finance Corporation and Musisi was invited and appointed to act in his position. By way of various extensions of the acting

¹ Act 66 of 1995.

appointment, Musisi occupied the S MEMSS post for most of the four-year period from 1 March 2007 until 31 March 2011.

- [5] In January 2009, Coetzee's secondment came to an end and he was recalled on appointment as General Manager: Entrepreneurial Development Branch with effect from April 2009. This rendered the S MEMSS post vacant. The post was advertised in early 2009. In May 2009, shortlisting was concluded but before the interviews could be held, the MEC for the Department placed a moratorium on various appointments including the post in question. The post could thus not be filled. As a consequence, Musisi's acting appointment was extended a number of times over the ensuing years.
- [6] In April 2011, the Superintendent-General of the Department issued an internal advertisement of posts by way of a circular including a vacancy announcement for the S MEMSS post. The pertinent requirements for the position were stated to be:

'B.Sc Agriculture or equivalent qualification in Agricultural Economics or Economics – A Honours degree/post graduate qualification will be an added advantage – At least 5 years appropriate experience in the field of Agricultural/Development Economics field of which 3 years should be at Manager/Deputy Director level....Thorough knowledge of the Agricultural/Development Economic environment – Strategic leadership abilities – Excellent communication skills, ability to work independently, knowledge of relevant legislative framework and prescripts – Proven administrative and financial management abilities.'

- [7] For reasons which are not clear, this vacancy announcement was withdrawn. The position was advertised again in July 2011 with exactly the same selection criteria except for one minor but significant change. The degree requirement was now stated to be:

'B.Sc in Agricultural Economics/Development/Economics/Statistics/Marketing'.

- [8] Thus, the July 2011 vacancy announcement no longer spoke of an "equivalent qualification in Agricultural Economics or Economics". The earlier vacancy announcement required a BSc in Agriculture or alternatively any

other equivalent qualification or degree in Agricultural Economics or Economics. The July 2011 vacancy announcement required a BSc degree in any one of the five identified subjects: Agricultural Economics; Development; Economics; Statistics; or Marketing. Hence, a BSc in Agriculture (the original primary qualification in the April 2011 vacancy announcement) or any other Bachelor's degree in Agriculture, Agricultural Economics, Development, Economics, Statistics or Marketing would not suffice. The Department has offered no rational explanation for the introduction of this measure of rigidity in the degree requirement. Musisi intimates that the more rigid requirement was introduced to exclude him from eligibility.

- [9] On 12 January 2012, the shortlisting panel convened but Musisi was not shortlisted as he did not have the required BSc degree. Musisi has a BA (Hons) in Economics and Rural Economy and a Postgraduate Diploma in Business Management. His evidence during the arbitration that his degree is equivalent to the required BSc was never meaningfully disputed.
- [10] Interviews for the position were held on 21 January 2012. The candidate who scored the highest was Mr. Mayekiso ("Mayekiso"). However, on 13 February 2012, before an appointment could be made to the post in question, the MEC suspended all recruitment and selection processes until further notice.
- [11] Musisi was aggrieved at his exclusion from the interview process on the grounds of his alleged ineligibility. On 23 April, 9 July and 20 August 2012, he wrote to the Superintendent-General querying and appealing against his not being shortlisted for the interviews conducted on 12 January 2012.
- [12] The Superintendent-General eventually replied to Musisi in a letter dated 20 September 2012 as follows:

'Receipt of your letter dated 20 August 2012 is hereby acknowledged.

You will recall that a moratorium was placed on all recruitment and selection processes in the Department during February this year. The moratorium has recently been lifted which enables the Department to proceed with the filling of very critical posts.

A decision was taken by the Department to shortlist all officials who have been acting in higher positions that were advertised, even if they do not meet all the requirements as per the advertisement. You have subsequently been shortlisted for the post of Senior Manager: Economics, Marketing and Statistics. HR will shortly advise you on details relating to your interview.'

[13] The decision of the Department in effect widened the scope of the eligibility criteria for the post. It did so fairly in that it did not introduce lesser criteria that unreasonably prejudiced a wide class of previously excluded potential applicants (for example BA graduates) who had not applied on account of not meeting the original criteria. The extension of eligibility was limited to the pool of potential applicants who had previously acted in the advertised positions. There is no contention that the Department acted unlawfully or unreasonably by extending the eligibility criteria in this limited way.

[14] Musisi was invited to attend an interview on 2 November 2012. He scored the same as Mayekiso who had been interviewed in February 2012. He, Mayekiso and another candidate were sent for competency testing. The interviewing panel drafted a memorandum combining the first and second set of interviews and found that both Musisi and Mayekiso were suitable for the post but recommended Mayekiso for appointment, and if Mayekiso did not accept the appointment, for Musisi to be offered the post. The memorandum specifically dealt with Musisi's eligibility for the post as follows:

'At a Top Management meeting held on 13 May 2012, the MEC instructed the Top Management that all officials that happened to act in vacant funded posts were to be included in the shortlisting regardless of their qualifications. This therefore implies that Mr Musisi is eligible for an opportunity to be interviewed for the post of Senior Manager: Economics, Marketing and Statistic Services by virtue of him acting for an extensive period since 2007 in the vacant post. He also acted in the post when Mr Coetzee vacated the post due to his appointment as General Manager.'

[15] For reasons that are not clear, and in respect of which the Department led no evidence at the arbitration, the recommendation of the interview panel was not given effect to and the post remained unfilled. More than one year after

the interviews, on 20 December 2013, Musisi referred an unfair labour practice dispute to the first respondent, the General Public Service Sectoral Bargaining Council (“the bargaining council”).

[16] In its founding affidavit, the Department referred to a moratorium that might explain the failure to fill the post in 2012. It stated that “towards the end of February 2014 the moratorium was lifted”. It led no evidence in this regard at the arbitration and it is thus difficult to determine precisely whether there was a second moratorium. In his letter of 20 September 2012 to Musisi, the Superintendent-General intimated that the moratorium had been lifted already at that time and, as just said, there is no evidence that it was reinstated after that. Be that as it may, the Department went on to say that the 2012 process of employing “a Director: EMSS” had become stale and “the issue of the BSc degree seemed a problem, so the Superintendent-General.... favoured more liberal wording in the advert, particularly on the qualification required, and instructed the Human Resources department to re-advertising (sic) the post in question together with other vacant posts in the department”. Again there was no evidence before the arbitrator supporting these averments raised for the first time in the founding affidavit. The record of the review application discloses that on 28 February 2014, the post, now referred to as “Director: EMSS”, was re-advertised and no longer required a BSc degree as a qualifying requirement.

[17] Musisi was the only witness to testify at the arbitration held on 26 November 2014. The Department closed its case without leading any evidence. Musisi set out the pertinent facts in relation to the repeated advertising of the post and his involvement. He also referred to his performance assessments while acting in the post, which rated his performance as “highly commendable performance” and “significantly above expectation”. He testified that the other candidates who had been short-listed during the 2012 process, including Mayekiso, were all on probation in their respective positions, and as such did not meet the eligibility requirement of three years’ management experience. This evidence was not meaningfully controverted in cross-examination and the Department led no evidence to rebut it.

[18] In concluding that Musisi had been subjected to an unfair labour practice, the arbitrator reasoned as follows:

'The applicant's testimony is largely undisputed and I could find no reason to doubt his testimony. The matter is indeed unique in the sense that the position that the applicant is contesting has not been filled. It is common cause that the position was advertised several times. The latest advertisement was on 6 April 2014, and the post had not been filled to date – some 8 months later. It is therefore clear that the post is indeed funded.....

It is common cause that with the previous advertisement in 2011 (sic) the applicant and a Mr. Mayekiso achieved equal scores. The applicant's undisputed testimony is that Mr. Mayekiso was on probation at the time and did not meet the requirement of 3 years' management experience. He should therefore not even have been shortlisted for the position. In view thereof the applicant was indeed the most suitable candidate.

The applicant has acted in the position for a considerably long time. I agree with the respondent that acting in a position does not necessarily entitle an employee to be appointed in the position. When considering his excellent performance assessment during that time, it does however show that the applicant is certainly competent to perform the duties attached to the position.

The respondent's only explanation is that it has a discretion/prerogative whether or not to fill the position. It is indeed correct that the advertisement grants the respondent that discretion. However, it is trite law that such a prerogative must be exercised fairly and reasonably....It is common cause that the Treasury in its audit report commented that the post is critical, funded and permanent on the organogram. The Treasury further expressed its concern that the applicant at the time was required to fulfil the functions of two posts.....

I accept that the position has not been filled. However, the fact that it was advertised several times shows an intention on the part of the respondent to fill the position. The respondent failed to advance any reasonable explanation why the position was not filled on the previous occasion. In view thereof I find that the respondent's failure to promote the applicant to the post of Director: EMSS indeed constituted an unfair labour practice.'

- [19] In sum, the arbitrator reached his conclusion on the cogent evidence that Musisi was the only candidate eligible for appointment and one who had demonstrated competence and exemplary performance in the post; and the post, although critical and funded, remained vacant despite having been advertised several times. He accordingly instated Musisi in the position with effect from 1 May 2014 (on the basis that the post had last been advertised in April 2014) and directed the Department to pay Musisi the difference between his current salary and that of the Director: EMSS from that date.
- [20] On review before the Labour Court the Department contended: i) it enjoys a wide discretion in promotions, with limited grounds for interference with the exercise of this discretion; ii) Musisi was ineligible for promotion because he did not have a BSc. degree as required in terms of the vacancy announcement and thus did not meet the educational qualifications required by the post; iii) the arbitrator did not verify or require any corroboration of Musisi's evidence, being the sole testimony before him; iv) the arbitrator disregarded material and relevant evidence; and v) the arbitrator should not have stepped into the employer's shoes for purposes of making an appointment. The Labour Court held that the arbitrator had proper regard to all relevant considerations that merited the promotion and was alive to the need for deference but equally that the decision not to promote had to be taken fairly and reasonably. It was accordingly not persuaded that the decision of the arbitrator was unreasonable.
- [21] On appeal, the Department argued that the arbitrator and the Labour Court erred in promoting Musisi while the 2014 appointment process was still under way and the 2012 process was never completed. In regard to its failure to lead evidence in the arbitration, it argued that it had no onus to discharge and all the relevant documentation was before the arbitrator. Moreover, there was no corroborating evidence that Musisi had an equivalent qualification to a BSc degree. It argued again that it is established law that employers have a wide discretion in promotions and it had the right not to make one.
- [22] A decision on the merits of an unfair labour practice dispute stands to be reviewed in light of whether it is one that no reasonable commissioner could

reach. The essential question for determination in this appeal, therefore, is whether the arbitrator's finding that the Department's omission to promote Musisi was unfair, and his deeming it reasonable to order the promotion, were unreasonable.

[23] The Department's contention that restraint and deference are called for is not entirely misplaced, though somewhat overstated in the context of this case. Courts and arbitrators should be reluctant to interfere with an employer's decision to refuse promotion. They will do so only when the decision or reasoning is assailable because there is evidence that the employer acted on the basis of some unreasonable, irrelevant or invidious consideration; or the decision was arbitrary, capricious or unfair; or the employer failed to apply its mind to the promotion or acted in bad faith.² But equally, where there is no rational relationship between the decision not to promote, the purpose of the promotion and the information upon which the impugned decision is based, interference with the decision will be justified. Because there is ordinarily no right to promotion, arbitrators and courts should hesitate before appointing the aggrieved employee to the post. Such deference, however, will be less compelling where the employer has unfairly discriminated against an employee or acted otherwise egregiously. Likewise, the remedy of reinstatement might be appropriate where it will cause no prejudice to another successful candidate because the post is vacant; or the employee proves that but for the unfair conduct he, or she, would have been appointed.³

[24] The arbitrator's reasoning in his award indicates that he fully understood these principles. In his view, the employer's dilatory failure to fill the vacant critical and funded post, without good reason, when there was a perfectly suitable candidate with experience and a record of exemplary performance in the post, was patently capricious and unfair. The post was vacant and no third party or another successful candidate could be prejudiced by the chosen remedy.

² *SAPS v Safety and Security Sectoral Bargaining Council & others* [2016] JOL 35883 (LC) para 41.3

³ *SAPS v Safety and Security Sectoral Bargaining Council & others* [2016] JOL 35883 (LC) para 41.5

[25] The only apparent substantive reason for not appointing Musisi, persisted with on appeal, was his lack of a BSc degree and his failure to provide corroborating proof that his BA (Hons) in Economics and Rural Economy was an equivalent qualification. The persistence with this ground by the Department evinces that this was its primary reason for excluding Musisi, notwithstanding the interview panel not seeing it as a bar to its recommendation. The Department's decision on that basis is unsustainable and unfair for two cogent reasons. Firstly, the decision of "Top Management" to add the alternative criterion of experience acting in the post, as enunciated in the letter of the Superintendent-General of 20 September 2012, meant that Musisi's lack of a BSc was irrelevant. Moreover, Musisi's testimony that his degree was an equivalent qualification was not seriously contested or rebutted in cross-examination and thus constituted sufficient proof of that fact. Added to that, the degree requirement in the pertinent vacancy announcement was not for a degree in pure sciences. A BSc in Economics would have sufficed. Musisi had a BA (Hons) in Economics. His honours degree in Economics was, therefore, more than equivalent; it was better – in fact, an "added advantage" in terms of the selection criteria for the post. But the nature of his degree and the acceptance of its equivalence were in any event irrelevant. Musisi qualified for appointment to the post by virtue of his having acted in the position and his fulfilment of all the other criteria for appointment.

[26] The apparent reliance by the Department on these irrelevant factors regarding the nature of Musisi's degree to exclude him from consideration for promotion to the post was hence irrational, capricious and unfair. The Department's stance is made even more irrational by its subsequent dropping of the requirement in the 2014 process. The fact that the Department re-advertised the post in 2014 and had not completed the appointment process is of no consequence. The unfair labour practice was committed during the 2012 process. The arbitrator's finding that the decision constituted an unfair labour practice was accordingly reasonable. There was no basis for the Labour Court to interfere with the finding and thus it did not err in not doing so.

- [27] Having determined that the Department's unfair conduct constituted an unfair labour practice, the arbitrator was at large in terms of section 193(4) of the LRA to determine the unfair labour practice on terms he deemed reasonable, and the remaining question on appeal is whether his determination itself was reasonable.
- [28] As a starting point, it may be re-called that the interview panel accepted that Musisi was fit for appointment and recommended his appointment in the event that Mayekiso could not take up the post. The evidence confirms that Mayekiso was not eligible for appointment given his lack of the required managerial experience. Musisi was accordingly the only candidate eligible and suitable for appointment. Moreover, as already discussed, the arbitrator was able to satisfy himself on the evidence that he was not imposing on the Department an incompetent candidate who could not fulfil the required tasks. On the contrary, Musisi had acquitted himself in the vacant post for four years with a performance rating above expectations. In the circumstances, the arbitrator was in as good a position to take the promotion decision as the Department which through its caprice and irrationality had lamentably abdicated its responsibility to fill the critical and funded post for five years or more.⁴ The relief granted by the arbitrator was entirely reasonable and there was no basis for the Labour Court to interfere with it.
- [29] The appeal is accordingly dismissed with costs.

JR Murphy

Acting Judge of Appeal

I agree

⁴ See *Mlokoti v Amathole District Municipality* [2009] 2 BLLR 168 (E) at 191B - C.

DM Davis
Judge of Appeal

I agree

R Sutherland
Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:

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