

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE DIVISION)**

Case No: 2314/06
Date Delivered: 28/01/08

In the matter between

TSEDISO MKUMATELA

Applicant

and

**THE NELSON MANDELA METROPOLITAN
MUNICIPALITY**

First Respondent

MR S V P MAFONGOSI

Second Respondent

JUDGMENT

REVELAS J

[1] In February 2006, the first respondent advertised the post of Assistant Manager: Waste Operations, in its Environmental Services Business Unit. The applicant unsuccessfully applied for the position. The applicant, and the second respondent, (who was eventually appointed in the position), were shortlisted with six other applicants. Sixty two persons had applied for the post. Relying on section 33(1) of the Constitution of South Africa Act ("the Constitution"), the applicant seeks to review and set aside the selection and appointment process, as well as the second respondent's appointment. The latter has indicated that he would abide by the Court's decision in this application. In addition to the aforesaid relief, the applicant seeks a directive to the effect that the first respondent commences the recruitment and selection process afresh in terms of its own procedures and guidelines, as incorporated in a document termed the "Recruitment Selection and Placement Policy". The basis

of the applicant's complaint against the selection and appointment process was that the first respondent did not comply with the procedures prescribed in the aforesaid document, which I will refer to in this judgment as "the Policy".

[2] The facts of this matter were largely common cause and much of what occurred in the selection process and the eventual appointment of the second respondent, ("Mafongosi"), could be gleaned from a memorandum written by a Ms Zamxaka to the manager of the first respondent's Environmental Services Business Unit on 3 April 2006.

[3] In terms of the Policy, and in particular paragraph 4.3.3 thereof, the Appointments Committee who was to interview candidates for a post such as the one in dispute ("Top Management ('non-section 57 employees') Middle Management"), had to be composed as follows: The Manager: Human Resources (or proxy), Manager of the relevant Business Unit (or proxy), an affirmative action officer from Human Resources and a representative of each of the two in-house trade unions. The last three panellists mentioned, only had observer status, which according to the applicant, excluded them from participation in the scoring process, which was the prerogative of the Business Unit Manager (or proxy) and the Human Resources Manager (or proxy) only. The latter two comprised the Appointments Committee.

[4] In this case, Ms Zamxaka was the proxy of the Manager: Environmental Services Business Unit, Mr Jamda was the proxy of the Manager: Human Resources. Ms Mdaka was the affirmative action panellist and Mr Gwadelala and Ms Meltz, represented the two in-house trade unions, (SAMWU and IMATU) respectively. Zamxaka, Jamda and Mdaka constituted the initial shortlisting panel. The Selection Panel consisting of the aforesaid five persons met on 30 March 2006, 31 March 2006 and 3 April 2006.

[5] The applicant's main complaint against the selection process was that the panellists who only had observer status (Mdaka, Gwadelala and Meltz), participated in the scoring process. He contended that but for their participation in the scoring process, he and not Mafongosi, would have been appointed to the post in question.

[6] Apart from opposing the matter on the merits, the first respondent raised the vexed question of the Labour Court's exclusive jurisdiction as opposed to that of the High Court in a matter such as this. It was argued that the applicant should have sought relief in terms of the Labour Relations Act 66 of 1995 ("the LRA") and brought his application in the Labour Court. The first respondent also argued that decision to appoint Mafongosi, as opposed to the applicant, did not amount to administrative action under the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA") which the applicant chose to "disavow" by clothing his application as a "so-called constitutional review".

[7] In respect of the question of the jurisdiction of this Court, I invited supplementary heads of argument, because during the course of writing this judgment, the Constitutional Court handed down the judgment of *Chirwa v Transnet Limited and Others unreported case number CCT 78/06 [2007] CC23* where the Constitutional Court (the majority) seems to have pronounced that cases about unfair dismissal disputes should fall within the exclusive jurisdiction of the Labour Court in certain circumstances. I thank the parties of their assistance in providing me with such heads.

[8] The applicant submitted that the *Chirwa* case is not applicable because the Constitutional Court, unanimously decided in *Fredericks v MEC for Education and Training, Eastern Cape 2002 (2) SA 680 (CC)*, that the Labour Court did not have exclusive jurisdiction in all matters arising from an employment relationship. In the *Chirwa* judgment it was specifically emphasized by **Skweyiya J** that the judgment in *Fredericks* was distinguishable since no reliance was placed in that case on section 23(1) of the Constitution which protects the right to fair labour practices. In the *Chirwa* case, the applicant premised her case squarely in terms of the definition of an unfair dismissal in terms of the Labour Relations Act. The applicant stressed that, as was the case in *Fredericks*, he does not rely on the unfair labour practice provisions of the LRA.

[9] Even though the Labour Relations Act is the primary source in matters concerning disputes about unfair dismissal and unfair labour practices, it would appear that a properly formulated right would not be excluded by the *Chirwa*

judgment. In this application, the applicant challenges the failure of the first respondent to exercise the public power of implementing a policy document. *Chirwa's* complaint was that there had been a failure to comply with the mandatory provisions of items 8 and 9 of Schedule 8 of the Labour Relations Act. The two formulations are different.

[10] The first respondent contended that had the applicant been successful in his application for the position, it would constitute a promotion and he would be entitled to formulate a cause of action with reference to section 186(2)(a) of the Labour Relations Act, contending that the first respondent had committed an unfair labour practice in not "promoting" him. That is correct, but in terms of the *Fredericks* case, read with the *Chirwa* case, the applicant had a choice as to which Court he could approach.

[11] In *United National Public Servants Associations of SA v Digomo NO and Others*, [2005] 26ILJ 1957 (SCA), several employees challenged a decision not to promote them. **Nugent JA** said the following about the nature of their claim.

"The appellant's claim ---- was not that the conduct complained of constituted an "unfair labour practice giving rise to the remedies provided for by the Labour Relations Act, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair administrative action – a right that has its source in section 33 of the Constitution and that is protected by section 33 – which is clearly cognizable in the ordinary courts".

[12] In my view the first respondent (a municipality) cannot argue that promoting its employees does not constitute administrative action. It is an organ of state and in promoting employees, it exercises a public power and it performs a public function in doing so. It clearly performs an administrative act when acting in terms of its policies and implementing them. This Court therefore has the necessary jurisdiction to entertain this application. I now return to the merits of this matter.

[13] It was common cause that Jamda and Zamxaka (the only two panellists who were entitled to score) could not find consensus on a preferred candidate. Jamda identified Mafongosi as his preferred candidate whereas Zamxaka's choice was the applicant. To resolve the impasse, the scores of the three panel members who only

had observer status were permitted and all three of them scored in favour of Mafongosi. Panellists with observer status only, are however permitted to complete score sheets for their own benefit and these are kept for record purposes, according to Mr Ndoyana, the Acting Manager of the first respondent's Human Resources Business Unit. He gave this explanation to the Acting Municipal Manager in a letter dated 6 April 2006, wherein he recommended that Mafongosi be appointed in the post in question.

[14] Apart from the scoring process which the applicant argues was defective, no chairperson was appointed by Zamxaka, as was prescribed in the Policy. The advertisement for the position was also outdated in that it required a tertiary qualification for an applicant in order to be appointed.

[15] In my view, the fact the there was no chairperson appointed, was not fatal to the selection process. There was no obvious need for a chairperson in the panel in question, given the fact that the Appointments Committee consisted of two managerial employees in a committee of five members, of which three members had only observer status. In this regard it must also be noted that the Policy, being a body of guidelines, does not have the imperative force of legislation.

[16] Insofar as the advertisement is concerned, the fact that it was outdated did not prejudice any of the applicants for the post. Neither the applicant nor Mafongosi had a tertiary qualification and this requirement was in any event relaxed by the panel who decided that an internal appointment be made to save costs, and decided to focus on an internal applicant's previous experience in Waste Operations. The eight applicants who were shortlisted consisted of two females (a coloured and an african) and six males (all african). It was also decided that only african males would be considered. (apparently because of "demographic" considerations). Subsequently only four of the six african males were subjected to scoring. They were Mafongosi, the applicant, a Mr Skweza and a Mr Malaka.

[17] The recruitment and selection Policy of the first respondent which was adopted in 2000, has as its stated objective, to ensure fair and objective selection and recruitment by providing, *inter alia*, "objective principles and procedures with the

ultimate purpose of reducing the potential for labour disputes". The guidelines contained in the Policy were clearly not carried out to the letter by the Appointments Committee, as mentioned hereinbefore. The question is whether the imperfections complained of rendered the decision to appoint Mafongosi, (and not the applicant) reviewable. The answer to that question would depend on the nature of the information which the relevant decision maker had at his disposal.

[18] In terms of paragraph 4.2.1 of the first respondent's policy and section 55(c) of the Municipal Systems Act, 32 of 2000, the Municipal Manager is responsible for the appointment of staff on the recommendation of the Appointments Committee as composed of the persons set out in paragraph 4.3.3 of the Policy. In this case the decision of the *acting* Municipal Manager to appoint Mafongosi, will have to be scrutinized for determination of this application, because he was the final decision maker.

[19] The selection panel was not empowered to appoint Mafongosi. Its function was only to make recommendations to the Acting Municipal Manager who, as indicated above, had the authority to make an appointment at this level, in consultation with the executive mayor. The Policy requires a selection panel to "*attempt to reach consensus*". There is no suggestion in the Policy, (which by its own description constitutes guidelines), that the selection panel *must* reach consensus, failing which its recommendation will be a nullity. The two relevant panellists (the Appointments Committee) disagreed. The Policy is unfortunately silent on what steps are to be taken by a committee consisting of two persons who disagree on their choice of a preferred candidate.

[20] In her memorandum of 3 April 2006 to the Business Unit Manager, Ms Zamxaka, (who was not in support of the recommendation to appoint Mafongosi and the only member of the panel consisting of five persons who felt this way) recorded the manner in which the disagreement in the Appointments Committee was dealt with by the panel members. It is very important in determining this matter, to assess the conduct of the panel members in respect of this problem. They did not leave the dispute unresolved. At least they found agreement on the method to resolve their disagreement. The letter to the Acting Municipal Manager recommending

Mafongosi's appointment, clearly explains the circumstances in which the selection panel made the recommendation. The Acting Municipal Manager was appraised of all the facts surrounding the recommendation. Given the facts facing the Acting Municipal Manager, I am not persuaded that his decision to confirm the recommendation, and not to reject it, constituted reviewable conduct. The manner in which the impasse was resolved was neither unreasonable nor impermissible in terms of the Policy.

[21] The Appointments Committee deliberated with members of their own interview panel, who in any event were entitled to complete score sheets, even though only for their own benefit. In this regard it is also instructive that paragraph 4.5 of the Policy requires the selection panel to keep adequate records, which include "*copies of all other assessments utilized*". The fact that the score sheets of panellists with mere observer status are kept on record, is an indication that their assessment of a candidate is of value in the whole process. Recognising their assessment in resolving the dispute between the two appointment panellists, could hardly render the whole process invalid, or reviewable.

[22] In her memorandum dated 3 April 2006 Ms Zamxaka wrote the following:

"On the basis that consensus could not be reached, it was noted that the final decision would have to be made by the Acting Municipal Manager and that a report indicating the deliberations would be prepared by HR. Subsequently, HR advised that scores of all panel members i.e. including the observers (union) be added and the totals would determine the preferred candidate. This was conducted amid indications from the Business Unit that only two scores i.e. Jamda and Zamxaka should be should be considered.

The outcomes of such scores led to the recommendation of the following candidates:

- | | | |
|-----------------|----------------|-------------------------|
| 1. Mr Mafongosi | (201 points) | (the second respondent) |
| 2. Mr Skweza | (193.5 points) | (the second respondent) |
| 3. Mr Mkutamela | (181.5 points) | (the applicant) |

The Business Unit raised that the proper scoring and ranking would indicate:

- Mr Mkutamela scored 83.5 points ranked 1
- Mr Skweza scored 82.5 points ranked 2
- Mr Mafongosi and Mr Malaka scored 78 points, ranked 3."

[23] Before the above scoring was noted, Jamda gave Mafongosi and the applicant 44.5 and 42.5 points respectively. Zamxaka gave Mafongosi 33.5 and the applicant 41. Skweza was given 40 by Zamxaka and 42.5 by Jamda. One can see from these figures that Zamxaka had a strong preference for the applicant. Jamda gave scorings which were less disparate than Zamxaka's scoring of the two candidates in question. This demonstrates how one panellist's scoring can influence the result quite substantially. When there are only two panellists scoring, it would make sense if the input of the other appointed panellists are called upon, in the case of a dispute. Not only is it sensible, it is also democratic and transparent in these circumstances.

[24] Zamxaka concluded her memorandum by noting that the disagreement was dealt with as follows on 3 April 2006 at 17h45:

“---- the HR recommendation (that Mafongosi be appointed) was signed by all the parties with an agreement that a report would accompany such and would be submitted to the Environmental Services Business Unit Manager for a final decision”. (Emphasis added)

[25] This information, together with the letter written by Mr Ndozana, (the Acting Business Unit Manager: Human Resources) properly explained the situation in which Mafongosi was recommended for appointment to the disputed post. The final decision maker clearly had enough information at his disposal to confirm or reject the recommended appointment. He therefore exercised his discretion based on all the material and relevant facts, including the disagreement as to how the deadlock between the two members of the Appointments Committee could be breached, which was an occurrence not regulated by the Policy.

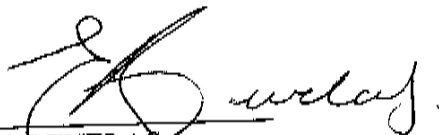
[26] The matter of appointing a suitable person cannot be reduced to a question of pure arithmetic. Scoring also has a personal and subjective component to it. It is not correct that had only the correct panellists been allowed to score, the applicant would have been appointed in the disputed post. It would depend on whether or not one takes into account actual scores or positions. Different scores can be given to the same positive attributes of a candidate by two different persons. When a disagreement between scorers occurs, it is imminently reasonable to call upon other members of the existing panel for their input. The Policy does not make provision for the adding of accumulated scores with the view to breaking such deadlock. Adopting pure arithmetics would be an approach in conflict with the

requirement that consensus must be sought as far as possible. The applicant has not demonstrated how else the deadlock could be overcome.

[27] The following guidelines in paragraph 4.2.1 ("Roles of Participants in the Selection Process" should also be noted. In the appointment of staff at the level in question, the Business Unit Manager (Zamxaka in this case) was responsible for the recruitment, shortlisting, interviewing process and making recommendations to the Municipal Manager. She had to make the appointments "*in collaboration*" with the other panel members. Their input is clearly relevant. Paragraph 6 of the Policy provides that in terms of appointments at operational level (which is not the level of the position in question) the final decision lies with the Business Unit Manager, subject to the Municipal Manager amending it. At the level in question "top ('non-section 57 employees') and middle management levels, "the final decision to appoint is at the discretion of the Municipal Manager". (Emphasis added). It appears to me, that when applicant's attorneys wrote to the first respondent on 18 April 2006, claiming that the selection process was "the antithesis of procedurally fair administrative action" and that during the panellists' deliberations "chaos prevailed", they believed that the post was on the "operations" level. An appreciation of the actual level of the post in question, must alter one's perspective of the process.

[28] Considering the scores of other panellists (even with mere observer status), rather than relying on the scores of only one panel member who meted out more points than the only other panellist who was also entitled to score, seems to be less arbitrary. In my view, the applicant was not treated unfairly and has no valid complaint, constitutional or otherwise. More than likely, if the applicant had indeed been appointed, the second respondent (Mafongosi) would have had the stronger case on review. Therefore this review application must fail.

[29] The application is dismissed with costs.


E REVELAS
Judge of the High Court