COURTS AND COMMISSIONERS SHOULD NOT INTERFERE WITH EMPLOYERS' PREROGATIVES RELATING TO EMPLOYMENT AND PROMOTIONS – WHY?

The previous article, covered the issue of unfairness claims arising from promotions (in relation to section 186(2) of the Labour Relations Act 66 of 1995 as amended {LRA}). Of particular significance, is that the courts do recognize the existence of the employer's prerogative when it comes to issues of promotions and employment at workplaces (*Ngcobo v Standard Bank of South Africa and Others (D439/12)[2013] ZALCD 33 (25 September 2013*). It is for that reason that **courts and arbitrators alike should not interfere with the employer's managerial prerogative in making promotions and employment related decisions if there is no good reason/cause,** (*Ga-Segonyana Local Municipality v Venter N.O. and Others (JR961/13)[2016] ZALCJHB 391 (11 October 2016*).

Let's refer to some decided cases to facilitate understanding of the principles referred to above. In *Ga-Segonyana supra*, the employee/official had acted in the higher position for about two years and nine months and was duly paid an acting allowance. When the position was advertised, he applied for it along with other candidates. However, the recruitment process came to an abrupt end due to challenges encountered by the employer, Ga-Segonyana Local Municipality. The employee/official eventually lodged a dispute which was arbitrated by a Commissioner acting under the auspices of the South African Local Government Bargaining Council (SALGBC). The Commissioner, however, appreciated that acting in the position did not give the employee/official entitlement or right to that position. Nevertheless, he ordered the employer to promote the employee/official citing the following grounds/reasons:

- The employee/official had acted in the position over prolonged periods, (i.e. before it was advertised and after, including the date of arbitration);
- The collective agreement on which the employee/official relied specified that an employee should not act in a position for more than six months;
- The employee/official met the requirements for the post and had been performing the duties in that post satisfactorily;
- The employer's own recruitment policy enjoins the employer to fill all vacant permanent posts as soon as possible; and
- The employer had not provided compelling reasons why the position had not been advertised over a long period (after the recruitment process had come to an abrupt end).

The employer, dissatisfied with the Commissioner's arbitration award (the award), took the matter up with the Labour Court on review and to set aside the said award. According to section 145 of the LRA, any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. A defect means -

a) That the commissioner –
    I. Committed misconduct in relation to the duties of the commissioner as an arbitrator;
    II. Committed a gross irregularity in the conduct of the arbitration proceedings; or
    III. Exceeded the commissioner's powers; or
b) That an award has been improperly obtained.

The Labour Court Judge analytically looked into the matter in general and the award in particular. He found that the Commissioner had misconstrued the nature of the dispute and consequently came to a wrong conclusion and wrong/inappropriate decision. He held that the Commissioner had failed to distinguish whether or not the dispute pertained to an unfair labour practice; or to the application and/or interpretation of the collective agreement. He further, held that the Commissioner, in promoting the employee had usurped the employer's powers/prerogative; and that **an order requiring an employer to promote an employee has the effect of creating new terms and conditions of employment for the employee, which meant that if the employer could fail to comply with that order for whatever reason, the employee will have a contractual claim in respect of the new salary and/or benefits attached to the new position resultant from that promotion** (*Ga-Segonyana supra*).

Essentially, making appointments and promotions remains the prerogative of the employer. Equally important, an employer has an obligation in terms of section 186(2) of the LRA to act fairly towards the employee in the selection and promotion processes. However, the exercise of that prerogative is not immune from scrutiny (*Pamplin v Western Cape education Department & Education Labour Relations Council*). That is why the labour tribunals are inundated with the unfair labour practice disputes.

In *Ga-Segonyana supra*, the recruitment process came to an abrupt end after shortlisting due to some challenges that were encountered by the employer. The Labour Court Judge therefore held that it is logical that no appointments/promotion could be made unless that process was revived or completed. The Judge stressed that it was therefore not for the Commissioner to take upon himself to promote the employee, in the light of other procedural factors that had to be taken into account in effecting promotions. He further said that it was apparent that the Commissioner misconceived the enquiry that was supposed to have been undertaken in determining whether the failure to promote the employee was fair or not.

Section 193(4) of the LRA further stipulates that an arbitrator appointed in terms of this Act (LRA) may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation. However, it does not by all accounts imply that the arbitrator must exceed his powers (*Ga-Segonyana supra*). Essentially, he must execute his role with the objective of dispensing fairness to both parties (*Pamplin v Western Cape education Department & Education Labour Relations Council supra*).

As there is no right to promotion in the ordinary course, the appropriate remedy as a general rule, is to set aside the decision and refer it hack with or without instructions to ensure that a fair opportunity is given. Since the interest is the fair opportunity to compete, it follows that that should be the appropriate remedy rather than appointing/*promoting* 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 victimization cases in respect of which different and compelling constitutional interests are at stake. However, it does not apply if the applicant proves that if it was not for the unfair conduct of the employer, she would have been appointed/*promoted* (*Ngcobo v Standard Bank of South Africa supra*).

In conclusion, to mention just a few cases, in *Pamplin v Western Cape education Department & Education Labour Relations Council supra*, the matter was referred back to the Education Labour Relations Council (ELRC) to be heard afresh before a new Commissioner; whereas in *Ga-*

Segonyana supra, the Commissioner's decision was set aside and substituted with an order stating that failure to promote the official did not constitute an unfair labour practice.

(An opinion from the labour desk.
2nd Quarter employee relations article for 2020/21 Financial Year).
MH Ngcobo