

WHEN CAN A COURT AS AN EXCEPTION GRANT A PROMOTION

The previous two articles (for 1st and 2nd quarters) addressed the issue of 'promotion claims' in the employer-employee relationship (arising from advertised posts/positions). Reference was made to prevailing case laws, authoritative principles and labour law jurisprudence. Emphasis was placed on a prevailing position that **"central to appointments or promotion of employees is the principle that courts and commissioners alike should be reluctant, in the absence of good cause, to interfere with the managerial prerogative of employers in making such decisions"**(*Ga-Segonyana Local Municipality v Venter N.O. and Others (JR961/13)[2016] ZALCJHB 391 (11October 2016)*). It was also stressed that since 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 back with or without instructions to ensure that a fair opportunity is given. Since the interest is fundamentally the fair opportunity to compete, it follows then that there should be an 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 where the principle referred to above does not apply. It does not apply to discrimination or victimization cases in respect of which different and compelling constitutional interests are at stake; and **it also does not apply if the applicant proves that if it was not for the unfair conduct of the employer, she/he would have been appointed/promoted** (*Ngcobo v Standard Bank of South Africa and Others (D439/12[2013] ZALCD 33 (25 September 2013)*). This article focuses on the latter exception referred to herein. This case was decided and reported as *Letsogo and the Department of Economy and Enterprise Development, Case No: JR350/16 in the Labour Court of South Africa (LC), Johannesburg*. In the Department of Economy and Enterprise Development (the Employer), a post of Director: Consumer Affairs was advertised with the following requirements which any prospective candidate had to meet to qualify to be shortlisted:

- A minimum of three (3) years in Middle Management Services ("MMS"); and
- Computer literacy.

Various candidates including the applicant (for current case review at the Labour Court) and the official that was appointed to the Position, all applied (for the Position). Six (6) of those who applied including the applicant were shortlisted. However, the candidate that was appointed to the Position did not meet the requirements referred to above (as she was an Assistant Director at the time) and, as such, was not shortlisted. The selection panel then changed the selection criteria by removing the MMS experience requirement and replaced it with the following: *"recognized experience within career stream from Assistant Director Level from government sector services, and to scrutinize applicants' C.V. from private sector to counterpart duties as outlined in the advert."* They thus enabled the said candidate to be shortlisted and, consequently appointed to the Position.

The applicant then referred an unfair labour practice dispute to the General Public Service Sector Bargaining Council (GPSSBC) in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 (LRA), as amended. The duly appointed GPSSBC Arbitrator found that there was no unfair labour practice committed by the Employer, and that the requirements (as set out in the advertisement) were discriminatory. The applicant consequently referred to matter to the Labour Court (LC) for review in terms of section 145 of the LRA.

The (LC) highlighted the fact that the following pieces of legislation or prescripts are relevant to this matter: the Constitution of the Republic of South Africa, the Public Service Act (PSA), the Public Service Regulations (PSRs), and the Senior Management Services Handbook (SMS Handbook).

For instance, section 11 of the PSA sets out:

- 1) In making of appointments and filling of posts in the public service due regard shall be had of equality and the other democratic values and principles enshrined in the Constitution.
- 2) In making of any appointments 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, 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.

Further, the SMS Handbook, at 8.3 sets out: *"after the closing date, the applicants 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, candidates who do not comply with the minimum advertised requirements may be eliminated with noting of reasons, resulting in a preliminary pool"*.

Lastly, Regulation C.1.1 of the PSRs set out: *"an executive authority shall determine the composite requirements for employment in any post on the basis of the inherent requirements of the job"*.

The LC indicated that 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 the employer consider other factors such as training, skills, competence, knowledge and the need to redress imbalances of the past. The LC stressed that the initial advertisement was not discriminatory. The LC held that the selection panel did not have the power and/or the authority to change the requirements for the Position as set out in the advertisement because those requirements were set out by the relevant executive authority and only he/she could approve such change/s. In this regard, the Employer committed unfair labour practice. The LC further held that the Employer committed unfair labour practice when it failed to re-advertise the Position once it had changed the requirements to enable all interested candidates to apply (in relation to the changed requirements). Furthermore, by then including in the process the candidate (that did not meet the requirements set out in the advertisement) and later lining her up against the applicant, the Employer again committed unfair labour practice. This is because firstly, the said candidate was not meant to be part of the process and secondly, 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.

The Labour Court ordered that:

1. The candidate's promotion be set aside and that she be removed from the post of Director: Consumer Affairs with immediate effect.

2. The applicant be appointed into the post of Director: Consumer Affairs (retrospectively to the date of appointment of the candidate into such position being 01 November 2013).
 - 2.1. The applicant be paid all salaries/back pay due from 01 November 2013 until the date he is appointed by the Employer;
 - 2.2. To receive all bonuses (only where such bonuses are not performance related bonuses);
 - 2.3. To receive all benefits; and
 - 2.4. To be paid all interest due at the relevant rate of interest.
3. Further, such instatement/reinstatement of the applicant is to take place as soon as possible and at the latest within ten (10) days of this order being delivered.

In conclusion, it is imperative for the employer to know and understand the prevailing prescripts (e.g. relevant labour legislation, policies, and procedures) to avoid mistakes that could be costly to the organization.

*(An opinion from the labour desk.
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