**THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA**

Not Reportable
Case no: PR24-21

In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL**
**DEPARTMENT OF SPORT AND RECREATION**
**ARTS AND CULTURE, EASTERN CAPE** **Applicant**

and

**NOMPENDULO MONICA MAFUNDA** **First Respondent**

**GENERAL PUBLIC SERVICE SECTORAL**
**BARGAINING COUNCIL** **Second Respondent**

**W BLUNDIN** **Third Respondent**

**Heard**: **02 July 2024**
**Delivered**: **25 July 2024 (This judgment was handed down electronically by emailing a copy to the parties. The 25 July 2024 is deemed to be the date of delivery of this judgment).**

**Summary:**

**JUDGMENT**

**JESSOP AJ**

Introduction

[1] This is an application for the review and setting aside or correcting of an arbitration award handed down by the third respondent dated 15 December 2020 in the matter between the applicant and the first respondent under case number GPBC1535/2020 in terms of which the third respondent found that the dismissal of the first respondent was substantively unfair but procedurally fair and ordered the applicant to reinstate the first respondent retrospectively and to pay her back pay with effect from the date of dismissal.

[2] The application for review was filed outside the relevant time period and as such, the applicant sought condonation for the late filing of the review.

[3] The first respondent filed her answering affidavit outside the relevant time period and equally sought condonation from the above Honourable Court.

[4] Both parties agreed not to take issue with the late filing of the review and the answering papers and there is no basis upon which this Court intends to take a different view in relation to the condonation of the late filing of the process.

[5] At the outset of proceedings, condonation was thus granted for the late filing of the review application and for the late filing of the answering papers on behalf of the first respondent.

Background

[6] The applicant is the Member of the Executive Council, Department of Sport, Recreation, Arts and Culture for the Eastern Cape Province (Department).

[7] The first respondent is Nompendulo Monica Mafunda, an adult female and former Senior Manager of the Department who was serving as District Manager in the OR Tambo District before her dismissal from the Department.

[8] The applicant advertised the position of Principal Museum Scientist. In terms of the advertisement, the applicants to the post were required to have a degree/diploma in history/heritage/philosophy/social science with three years relevant experience or matric with five years experience in the field of museum and heritage as well as knowledge and understanding of government processes, project management skills and good communication and interpersonal skills.

[9] A selection panel was approved to conduct shortlisting and interviews on 7 March 2018 and on 19 March 2018, the shortlist of candidates for the post was recommended and approved.

[10] Initially, five candidates were shortlisted, namely :

10.1 S. Z Khumalo;
10.2 N. L Ncapai;
10.3 Z Dukuza ;
10.4 U Madyibi ; and
10.5 M Ngcai.

[11] The panel was duly constituted and interviewed the candidates.

[12] One of the candidates dropped out and of the remaining candidates, the panel scored them as follows:

12.1 M Ngcai: 18.33;
12.2 S Z Khumalo: 16.50;
12.3 U Madyibi: 15.00; and
12.4 Z Dukuza: 12.00.

[13] The panel made the following recommendation to the first respondent, the Senior Manager: OR Tambo District:

> 'The panel hereby submitted the 4 candidates in order of merit and feels strongly that Mr Monwabisi Ngcai has the ability to perform the duties of Principal Museum Human Scientist at Wild Coast Museum in the O. R. Tambo District office.
>
> The candidate performed well in the interviews and the panel members were all satisfied. Without doubt, this candidate will add value in the department.
>
> Therefore, the Senior Manager is requested to approve the recommendations done by the Committee.
>
> The process leading up to this selection of the aforementioned candidate has been a fair one.'

[14] The recommendation was signed and proposed by the chairperson of the selection committee on 29 March 2018.

[15] On 29 March 2018, the first respondent did not approve the recommendation and commented as follows:

> 'I will approve the appointment of candidate No. 3 – she worked for the Department and took the museums to higher levels when she was leading, the Wild Coast requires her strength as it is currently badly performing. No. 1 – I am not aware of any strength he could contribute since he's not currently in a similar environment. No. 2 is currently in the environment and not adding any value to improve the performance of the museum.
>
> I therefore approve No. 3 due to the reasons I have above.'

[16] In short, the first respondent declined to appoint the panel's preferred candidate and went along with third-ranked candidate, Ms Madyibi.

[17] Mr Ngcai learnt of the fact that he was the top performing candidate in the interview process and that he was recommended for the position and upon learning that Ms Madyibi had been appointed in his stead, he took issue with the applicant and ultimately referred the matter for investigation by the Public Service Commission (PSC).

[18] On 5 July 2019, the PSC addressed a letter to the head of the Department pertaining to allegations of the irregular appointment of Madyibi to the post of Principle Museum Human Scientist.

[19] The PSC recorded in its letter, *inter alia,* that:

> 'This office also noted the comments made by the Senior Manager, Miss N M Msi, in her capacity as the employer who overruled the recommendation of the Selection Committee. She further commented about performance of each candidate and created the impression that she knows the two candidates except Mr Ngcai. Miss Msi's comments appears as defeating the principles of fairness and this may be detrimental to the recruitment and selection process.
>
> This office is of the view that this case can be disposed of without further delay and as such, your valued input and resolution of the complaint will minimise wastage of resources.'

[20] On 14 November 2019, the acting senior manager HRM of the applicant penned a letter to the State Legal Advisor requesting assistance to lodge an application to set aside the appointment of Madyibi on the basis that the appointment was made irregular, premised that it was not based on merit and premised on the senior manager's personal knowledge of the recommended candidates.

[21] In the letter, the applicant records the suggestion that an application be made to Court to set aside the appointment should Madyibi not resign. There is no evidence that the applicant persisted with this application.

[22] Further, the letter stated that disciplinary proceedings be proffered against the first respondent for exceeding her powers, the fruitless and wasteful expenditure that had been incurred due to her actions and that in-house training be facilitated for all departmental employees with appointed delegations. It is interesting to note that the applicant did not give the first respondent the benefit of in-house training.

[23] On 27 January 2020, almost two years later, the first respondent was issued with a notice to attend a disciplinary hearing to which the first respondent acknowledged receipt on 18 February 2020.

[24] The following allegations of misconduct were levelled against the first respondent:

> 'Allegation 1 – Abuse of delegated authority: In that
>
> You abused your delegated powers as the appointing authority in that you deviated from the recruitment and selection committee's recommendation to appoint Ms Madyibi to the post of Principal Museum Human Scientist without any compelling reasoning thereby causing the Department financial strain.
>
> Allegation 2 – Bringing the Department into disrepute: In that
>
> Your actions of appointing Ms Madyibi instead of Mr Ngcai to the post of Principal Museum Human Scientist has disgraced the department in that your malpractice has been reported to the office of the Public Service Commission for intervention of the Head of Department.
>
> Allegation 3 – Favouring of colleague: In that
>
> You favoured Ms Madyibi to the post of Principal Museum Human Scientist based on your personal knowledge of her even though she was scored third by the recruitment and selection committee.'

[25] The first respondent was found guilty of all the alleged misconduct and her services were terminated.

[26] The first respondent referred the matter as an unfair dismissal dispute to the GPSSBC and the matter was heard on 24 November 2020.

[27] The award was issued on 15 December 2020.

[28] In terms of the arbitration award, the second respondent came to the following conclusion:

> '[55] The Applicant's dismissal was procedurally fair but substantively unfair.

[56] The Respondent is ordered to reinstate the Applicant as from 1 February 2021, without the loss of any benefits.

[57] The Applicant is ordered to report for duty on 1 February 2021.

[58] The Respondent is ordered to pay back the amount R596,624.72 less statutory deductions to the Applicant by lot later than 26 February 2021.

[59] No order as to cost.'

[29] The third respondent ultimately found that the first respondent's dismissal was substantively unfair as the applicant could never have found her guilty on charges 1, 2 and 3.

[30] The applicant was not satisfied with the arbitration award and thus launched review proceedings on or about 26 February 2021.

Arbitrator's findings – charge 1

[31] In relation to charge 1, being the abuse of delegated authority, it is important to note that the third respondent found that the first respondent was the appointing authority who had the power to appoint.

[32] The third respondent found that the applicant had failed to make out a case that the first respondent did not have the power or authority to make an appointment contrary to the panel's recommendation. The third respondent finds, in particular, that the applicant failed to provide evidence that according to the Recruitment and Selection Policy, the appointing authority cannot deviate from the recommendations made.

[33] The third respondent, effectively, found that in the absence of evidence that would point out limitations or restrictions on the applicant's power to appoint, he could only conclude that the first respondent does have the authority to deviate from the recommendations made by the panel.

[34] The third respondent furthermore found that the applicant did not provide any evidence that the first respondent had breached the recruitment policy by

deviating from the recommendations made by the panel, nor did it produce any evidence to the effect that the policy requires the first respondent to provide compelling reasons to deviate from the panel's recommendations.

[35] In that context, the third respondent found that the applicant had not established the rule which the first respondent had breached in accordance with the Department's recruitment policy.

[36] The third respondent finds thus, on the evidence before him that the first respondent had the authority to deviate from the Selection Panel's recommendations and that she provided reason for doing so and thus found the first respondent not guilty of charge 1.

*Grounds of review - charge 1*

[37] The applicant advances three grounds of review in respect of the third respondent's findings concerning charge 1.

[38] Firstly, the applicant alleges that the arbitrator failed to apply his mind by focusing on the powers of the first respondent to appoint, in terms of her delegated authorities, instead of looking at the recommendations that were made by the panel and the reasons why the first respondent deviated from the recommendations of the panel.

[39] In answer to the above, it is clear that the arbitrator did apply his mind, considered her authority to make an appointment that deviated from the selection panel and had regard to her reasons for doing so.

[40] The findings of the arbitrator relative to charge 1, as set out herein before, are unassailable and in any event, are findings which a reasonable arbitrator would have arrived at in the circumstances of the matter. No abuse of authority was established by the applicant.

[41] For there to have been an abuse of authority, there must have been limits to the first respondent's authority.

[42] Neither counsel could point me to anything on the record that had established, in terms of evidence submitted on behalf of the applicant that the applicant's authority was limited, other than with reference to the policy and prescripts.

[43] It is worth noting that the Recruitment And Selection Policy, as issued by the Department of Public Service and Administration in March 2012, and specifically, Part 2 thereof, item 7 sets out the prescript relative to approval/disapproval of panel recommendations.

> 'When the Minister (his/her delegated authority) does not approve a recommendation of a selection panel, she/he shall record the reasons in writing…
>
> (7.2) The Minister (his/her delegated authority) shall, before taking a decision on the filing of a post:
>
> (7.2.1) satisfy her/himself that the candidate qualifies for all respects for the post and that claims made by the applicant for the post had been verified;
>
> (7.2.2) record his/her decision in writing.'

[44] The relevant prescript, therefore, recognises that a delegated authority, such as the first respondent need not approve a recommendation of a selection panel.

[45] It is just that the delegated authority must record the reasons in writing and satisfy her/himself that the candidate to fill the post must qualify for the post and record the decision in writing.

[46] In terms of the Public Service Regulations[1] (PSR), regulation 67(8) records:

> 'If an executive authority does not approve a recommendation of a selection committee, he/she shall record the reasons for his/her decision in writing…'

[1] Public Service Regulations GNR 877 of 29 July 2016.

[47] It follows that similar considerations must thus apply to a delegated authority such as the first respondent.

[48] Nowhere in the prescript, nor in the regulation, is there a requirement that the reasons must be 'compelling'.

[49] Nowhere in the prescript, nor in the regulation is there a requirement that the appointing authority shall not appoint any person that he or she may know.

[50] That is not to say that the first respondent cannot be charged for misconduct should the reasons have been, at its core, *mala fides*, on the part of the first respondent. By way of example, such *mala fides* could be evinced by acts of nepotism, cronyism and/or corruption.

[51] Senior counsel for the applicant submitted that the provisions of paragraph 6 of Part 2 of the Recruitment and Selection Policy of the Department of Public Service and Administration, must be read with and read into provisions of paragraph 7, pertaining to the approval and/or disapproval of panel recommendations.

[52] Submissions were made that paragraph 6.2 therefore bound the first respondent in exercising her authority to appoint:

> 'A scoring grid will be used to evaluate/compare candidate's suitability during an interview process. The highest score will determine the appointment of the most suitable candidate followed by the second highest score to determine the second most suitable candidate and so forth.
>
> The scoring grid must be used in sequential order.'

[53] I find no scope for this interpretation.

[54] The provisions of paragraph 6 inform the role and responsibilities of the selection committee/panel and has no bearing on the approval/disapproval of panel recommendations by the appointing authority.

[55] The provisions of paragraph 6 thus inform the recommendation of the panel.

[56] The provisions of paragraph 7 inform the duties of the appointing authority.

[57] Secondly, the applicant submits that the arbitrator failed to apply his mind to the relevant provisions of the Constitution, the Public Service Act[2] (PSA) and the PSR, and completely misunderstood the nature of the enquiry that he was required to undertake. In this regard, he committed a gross irregularity and/or gross misconduct in the execution of his duties as an arbitrator. He exceeded his powers in this regard, or so the applicant contends.

[58] I find it very difficult to criticise the arbitrator for not articulating his award against the backdrop of the Constitution, the PSA and the PSR in circumstances where the applicant, in proceedings before him, did not present evidence and lay a foundation for the submissions that it now makes on review.

[59] In this regard, the arbitrator cannot be criticised for approaching the dispute from the perspective of analysing whether or not the first respondent had breached a rule.

[60] Whether that rule is in accordance with the Constitution, PSA, PSR and/or Departmental prescripts.

[61] The applicant raises the provisions of the PSR for the first time, under cross-examination of the first respondent, and refers in particular to regulations 13(b), 13(f), 13(j) and 14(d):

> '[13(b)] Not engage in any transaction or action that is in conflict with or infringes on the execution of his/her official duties.
>
> …
>
> [13(f)] Refrain from favouring relatives and friends in work-related activities and not abuse his or her authority or influence another employee nor be influenced to abuse his or her authority.
>
> …

[2] Proclamation no 103 of 1994.

[13(j)] Deal fairly, professionally and equitably with all other employees or members of the public, irrespective of race, gender, ethnic or social origin, colour, sexual orientation, age, disability, religion, political persuasion, conscience, belief, culture or language.

…

[14(d)] Execute his/her official duties in a professional and competent manner.'

[62] However, no evidentiary foundation for the first respondent's alleged breach of these regulations was set out by the applicant when presenting its case and evidence before the third respondent.

[63] In that context, it is difficult to criticise the arbitrator and in the context of this matter, the third respondent's approach to this matter, with regard to his findings, is unassailable.

[64] There was no evidence of a conflict as envisaged by rule 13(b).

[65] There was no evidence of Madyibi being a relative or a friend of the first respondent and in the context, no favouritism on that basis.

[66] There is no evidence that the first respondent breached the provisions of 13(j), nor is there any evidence that she failed to execute her duties in a professional and competent manner.

[67] To the contrary, the first respondent testified, in addition to the reasons recorded for her refusal to appoint the recommended candidate, that at some stage, she had worked together with Madyibi in Aliwal North and had learnt of Madyibi's strong leadership qualities and that she was needed in Mthatha/Port St Johns area. She further testified that there was inconsistency in the scoring of the candidates that made no sense particularly as Madyibi had 10 years of experience, specific to the museum industry which was far in excess of the little experience of Ngcai.

[68] There were two museums, one that was attended to by a male and as such, she wanted a female for the Port St Johns area. The Department needed a woman who could hit the ground running.

[69] In the first respondent's testimony, she stated that she had cross-referenced the curricula vitae of the shortlisted candidates and found that Ngcai, in comparison to Madyibi, did not have the experience to perform the job. Although he had the requirements, per his curriculum vitae, he did not have the experience that Madyibi had as Madyibi had served for three years as an assistant director whilst Ngcai's limited experience was in an art gallery. Madyibi had specific experience with museums, their management and setup and as Madyibi had acted in the position of assistant director in museums, she could hit the ground running.

[70] Finally, the first respondent testified that she felt accountable for the appointment and had made the deviation and appointed Madyibi as she believed that it had to be in the best interests of the applicant.

[71] In context thus, the applicant presented no material evidence that would warrant a finding that the first respondent was in breach of regulations 13(b), 13(f), 13(j) and 14(d).

[72] Quite to the contrary, the evidence presented by the first respondent evinces that her actions were spirited on by a sense of accountability and what would be in the best interests of the Department.

[73] Thus, from the evidence submitted before the third respondent, there was nothing to point towards any *mala fides* on the part of the first respondent premised upon favouritism, nepotism, cronyism and/or corruption.

[74] Senior counsel for the applicant submitted that the first respondent favoured Madyibi because she knew her.

[75] In the context of appointing employees pursuant to an advertising and recruitment process, there is every chance that an appointing authority may

know one or more of the candidates, especially if internal candidates apply for the position.

[76] This, in itself, is not sufficient to warrant grounds for misconduct.

[77] Knowledge of a candidate/applicant would be intrinsic to the process itself.

[78] To sustain a breach of a rule and thus a charge of misconduct, the applicant was duty-bound to prove something more than just mere knowledge of the candidate.

[79] The arbitrator got it right and reached the conclusion that a reasonable arbitrator could easily have reached in this regard.

> '…Is it unlawful to appoint a candidate that you knew? It would be nepotism to appoint a friend who don't even meet the requirements of the position and you prefer him/her over a person who meet the requirements.'

And that:

> 'In this case, the respondent did not show that the person appointed by the applicant was favoured and that she was placed on the shortlist whilst she did not meet the requirements. Further, the respondent has failed to show that Ms Madyibi was a friend of the applicant. It is for this reason that I find that the applicant did not break any rule.'

[80] These findings are unassailable.

[81] Thirdly, the applicant submits that the arbitrator failed to understand the impact of the failure of the Department to conform to the provisions of the law and the Constitution when the first respondent appointed Ms Madyibi, the third-scored candidate, without any justification or compelling reasons. This was a clear abuse of authority by the first respondent and it put the name of the Department into disrepute.

[82] Again, the applicant did not establish a case on the evidence before the third respondent to the effect that the first respondent had made the appointment without justification or compelling reasons.

[83] Quite to the contrary, the first respondent gave reasons for her decision and in amplification of those reasons; she justified her choice premised on the best interests of the Department, as referred to hereinbefore.

[84] In any event, the applicant could not point out any specific requirement, whether in terms of prescript, the regulations and/or legislation that required the first respondent to supply 'compelling' reasons in exercising her deviation powers.

[85] The prescript and the regulations require the first respondent to record her reasons. She did just that.

[86] In any event, she gave compelling reasons for her decision, as referred to hereinbefore.

[87] Senior counsel for the applicant argued that her decision not to confirm the recommendation of the selection panel was in breach of the Constitution in that her personal knowledge of Madyibi meant that she exercised her decision with 'bias'.

[88] Senior counsel argued that the provisions of section 195 of the Constitution, specifically section 195(1)(d), prohibited her from making the decision, appointing Madyibi and thus deviating from the recommendation of the selection panel.

[89] Firstly, the foundation for this submission was not set out at the arbitration in the form of evidence from the applicant.

[90] Accordingly, it is inappropriate to criticise the arbitrator for not having regard to the provisions of the Constitution, specifically section 195(1)(d) thereof.

[91] Secondly, the provisions of section 195(1)(d) stipulate that:

> 'Services must be provided impartially, fairly, equitably and without bias.'

[92] I do not believe that a recruitment process, culminating in the decision of the appointing authority, constitutes a 'service' as contemplated by section 195(1)(d).

[93] Thirdly, and even if it does, there is an element of inherent bias in any appointment process that may include internal applicants or ex-employees.

[94] Personal knowledge may well play a role.

[95] Senior counsel ultimately conceded that not every case of personal knowledge would constitute actionable bias.

[96] By actionable bias, I mean to say bias that is premised upon an act of *mala fides*. This would be the case of favouritism premised upon nepotism, cronyism and/or corruption.

[97] In context, mere personal knowledge of a candidate is not a bar to an appointment albeit contrary to the recommendations of a selection panel and is certainly not grounds for misconduct, unless and of course, the personal knowledge is accompanied by favouritism premised upon friendship, family and/or corruption.

[98] This is not a closed list but if the appointment is accompanied by *mala fides,* then that would be grounds for misconduct.

[99] In this matter, there is no evidence to support any sinister motive in declining the recommendation and appointing Madyibi. She was authorised to appoint and entitled to deviate from the recommendation and provided reasons therefore. Her knowledge of Madyibi, on its own, is not sufficient to constitute an abuse of authority. Furthermore, the applicant presented no evidence of any financial loss at the arbitration.

[100] The arbitrator's findings in this regard are unassailable.

Grounds of review – charge 2

[101] The essence of the applicant's case with regard to charge 2 is that the first respondent disgraced the Department as the first respondent's 'malpractice' had been reported to the Office of the PSC.

[102] In this regard, the third respondent finds that the applicant failed to prove that its reputation was brought into disrepute or that the first respondent had caused reputational damages to the applicant.

[103] The mere lodging of a complaint by Ncapai at the PSC was not sufficient to establish that the first respondent, in executing the authority to appoint Madyibi, impacted negatively on the reputation of the respondent.

[104] The applicant attacked the respondent's findings on the basis that he failed to appreciate that the PSC is not an internal organisation in the Department and he failed to have regard to the finding on the part of the PSC that was made against the Department to the effect that the Department had failed to treat Mr Ngcai fairly and that it made the appointment contrary to the Constitution, the PSR and the prescripts of the PSA.

[105] The third respondent's reference to the PSC as an internal organisation is an unfortunate referral.

[106] However, it is clear, within the context, that the arbitrator was emphasising the point that the PSC was there, in a sense, like a partner/watchdog to assist the Department in ensuring the accountability of state officials.

[107] Nothing thus turns on the submission and it certainly does not point towards any reviewable act.

[108] The crux of the finding, however, is left very much intact, namely that no evidence was placed before the third respondent to evince that the Department had been disgraced by the actions of the first respondent.

[109] A mere complaint presented to the PSC is not, in itself, sufficient to warrant disgracefulness and/or reputational harm.

[110] Most importantly, the letter penned by the PSC makes no finding, whatsoever, that the appointment was contrary to the Constitution, PSR, PSA or any other prescript.

[111] The high water mark of the letter is that the allegations require investigation by the applicant and that, at worst, the comments by the first respondent give the appearance of defeating the principles of fairness.

[112] The letter is not an indictment on the Department.

[113] The letter does not evince any degree of disgracefulness and/or reputational damage.

[114] It is no more and no less than an invitation to the Department to investigate the issue as, on the face of it, the deviation from the recommendation appears to be unfair.

[115] That is not enough to warrant misconduct on the part of the first respondent and the third respondent's findings that no evidence of reputational harm and disgracefulness was presented, is simply put, unassailable.

[116] In fact, the PSC considered the matter short-lived:

> 'This office is of the view that this case can be disposed of without further delay and as such, your valued input and resolution of the complaint will minimise wastage of resources.'

Grounds of review – charge 3

[117] In relation to charge 3, the third respondent finds, in essence, that it is not unlawful to appoint a candidate that the first respondent knew.

[118] He would have come to a different conclusion had there been a case of nepotism and/or cronyism, in the sense that Madyibi was a friend of the applicant.

[119] He finds that there was no evidence of any such nepotism and/or that Madyibi was a friend of the first respondent.

[120] In context, he also finds that there was no prescript or rule prohibiting the appointment of a candidate that was known to the first respondent, short of the appointment being made on account of favouritism due to nepotism and/or cronyism.

[121] In that context, the third respondent found that the first respondent had not breached any rule.

[122] The applicant submits that the first respondent did not approve the appointment of Madyibi on the selection principles of merit, job-related criteria of fairness, equity and transparency and that she made the appointment on account of favouritism, premised upon her having known Madyibi.

[123] It was submitted that such conduct breached the principles of section 195 of the Constitution as the appointment of Madyibi was based on subjective factors and thus bias prevailed.

[124] It was furthermore submitted that the finding of the third respondent, that the deviation was not a breach of the rule, was not in accordance with the provisions of the PSA, PSR and the Constitution.

[125] Firstly, the provisions of section 195 of the Constitution, specifically 195(d) find no application in this matter.

[126] Secondly, even if they did, personal knowledge does not, in every case, represent a bias.

[127] Thirdly and in any event, it would not represent actionable bias unless *mala fides* accompanied the decision to appoint Madyibi as opposed to the recommended candidate.

[128] *Mala fides* could take the form of favouritism on account of nepotism or account of friendship.

[129] The mere fact that she knew Madyibi does not necessarily equate to bias and even if it did, it is not actionable bias unless the applicant established a case

that the first respondent had acted out of favouritism due to nepotism and/or cronyism and/or corruption and/or any other *mala fide* motive.

[130] No breach of any of the regulations was established and no breach of the recruitment prescript was established by the applicant, for one or more of the following reasons:

130.1 Madyibi was better qualified in terms of experience than Ncapai, with reference to years working in the museum industry and rank achieved therein;

130.2 There was no lack of transparency. The first respondent recorded her reasons, as required by the prescript;

130.3 There were no unfair or unlawful equity considerations;

130.4 Although declining Ncapai as the recommended candidate would have an element of unfairness from his perspective, the first respondent provided reasons that evinced her decision was premised on the best interests of the Department and service delivery in terms thereof;

130.5 There was no evidence that the first respondent acted in conflict with her duties;

130.6 There was no evidence that she acted unprofessionally and incompetently;

130.7 There was no evidence that she acted with unfair discrimination; and

130.8 There was no evidence that she favoured Madyibi on account of nepotism and/or friendship and/or for any *mala fide* reason.

[131] In this regard, the evidence before the third respondent was to the effect that Madyibi was a colleague who worked at a museum and had risen to assistant director level. She had experience specific to museums and she uplifted her working space. The first respondent had no relations with Madyibi and she did not know her on a personal level. The first respondent had heard good things

about Madyibi, concomitant with her promotion to assistant director and that Madyibi had a reputation for turning things around and making things happen. The first respondent had also gleaned this information from reports submitted by Madyibi. Finally, the first respondent did not know Madyibi personally and even if she knew her, that is intrinsic to an appointment process and does not amount to actual bias unless there is evidence of nepotism, cronyism, corruption or *mala fides* of any kind, or which there is none in this matter.

[132] That being the case, the findings of the third respondent that the first respondent was not guilty of charge 3 is unassailable.

The legal test

[133] The accepted test for review was summarised by the Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as amicus curiae)*[3] as:

> 'A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. 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.'

[134] The test has been more clearly defined by the Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*[4] as follows:

> '…(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the

[3] [2013] ZASCA 97; (2013) 34 ILJ 2795 (SCA) at para 25.
[4] [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) at para 20.

arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?'

[135] In *casu*, each of the above-quoted questions must be answered in the affirmative. This is for one or more of the following reasons:

135.1 It was within the authority of the first respondent to deviate from the recommendations of the selection panel;

135.2 The authority is limited by the prescripts and legislation;

135.3 No other restrictions on the authority were advanced by the applicant, either at the arbitration or the hearing of this matter;

135.4 The first respondent exercised her authority consistent with the prescripts and legislation;

135.5 The reasons for deviating from the recommendation were considered and premised on the interests of the Department;

135.6 There is no evidence of any financial loss;

135.7 There is no evidence of abusive authority;

135.8 There is no evidence that, in fact, the applicant was embarrassed by the complaint raised by Ngcai;

135.9 There is no evidence of favouritism premised upon nepotism and/or cronyism and/or corruption and/or any *mala fide* act/mindset;

135.10 The first respondent verified that Madyibi was better for the position albeit, partly premised upon information gleaned from the

documentation and personal knowledge. Her experience alone is incomparable;

135.11 Personal knowledge in a recruitment process incorporating internal or former employees is inherent in the process and not specifically excluded by the relevant prescripts authorising an appointing authority to deviate from a recommendation;

135.12 There is no evidence of *mala fides* on the part of the first respondent;

135.13 The outcome reached in this matter by the arbitrator is both reasonable and rational; and

135.14 The outcome is one that another decision maker could reasonably have arrived at based on the evidence.

[136] There is no scope for a review of this arbitration award.

Costs

[137] I am not inclined to grant costs as there is nothing in equity that persuades me to do so.

Order

1 The late filing of the review application is condoned.

2 The late filing of the answering papers is condoned.

3 The review application is dismissed.

4 There is no order as to costs.

C Jessop

Acting Judge of the Labour Court of South Africa

Appearances:

| | |
|---|---|
| For the Applicant: | The State Attorney |
| Instructed by: | --- |
| For the Respondent: | N M Mafunda |
| Instructed by: | Mgxaji & Co Attorneys |