

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C566/2004

In the matter between:

PETER LOGGENBERG

First Applicant

JOHN JOSEPH JANSEN

Second Applicant

and

THE AREA COMMISSIONER,
CORRECTIONAL SERVICES

First Respondent

THE REGIONAL COMMISSIONER,
CORRECTIONAL SERVICES

Second Respondent

THE MINISTER FOR CORRECTIONAL SERVICES

Third Respondent

J H VAN DER WESTHUIZEN

Fourth Respondent

JUDGMENT

FRANCIS J

Introduction

1. The first and second applicants are Pieter Loggenberg and John Joseph Jansen, both employees of the Department of Correctional Services (“the DCS”). They are based at Pollsmoor. The first respondent is the Area Commissioner of Correctional Services. The second respondent is the Regional Commissioner of Correctional Services. The third respondent is the Minister for Correctional Services. The fourth respondent is J H Van Der Westhuizen, an employee of the DCS.
2. The applicants seek to review a number of decisions which were taken by one or more of the respondents, or functionaries within the DCS. These decisions have been challenged

on a number of grounds.

3. The respondents in turn have raised a number of defences and points *in limine*.

The background facts

4. The applicants are long-serving members of the DCS. Both are currently holding the rank of Deputy-Director, at salary level 12. They are founder members of the Police and Prisons Civil Rights Union (“POPCRU”).
5. During 2003 the first applicant was occupying the position of Head: Management Services, and the second applicant the position of Head of Prison: Admission Centre. They were stationed at Pollsmoor Prison, one of the largest correctional facilities in the country. The first applicant was in overall charge of the management of all personnel, logistics, finance and administration for the entire prison complex, which was staffed by some 1000 officials. The second applicant was in charge of the admissions and custody of unsentenced and awaiting trial male prisoners.
6. On 6 March and 13 June 2002 two collective agreements were concluded in the Public Service Coordinating Bargaining Council (the PSCBC), by and between representatives of the State as an employer, and a number of trade unions representing employees. These agreements were adopted by way of two resolutions, numbers 7 and 8 of 2002. They provided for the redeployment, re-training and placement of employees in accordance with the broader transformation objectives. These resolutions were binding on the DCS, as employer and the trade unions as representatives of DCS employees.

7. The process was to be carried out in various stages. In the first stage every department was to develop a strategic plan in accordance with its vision for the future, and an organisational structure to give effect thereto. This required identifying and defining the posts which it needed to perform its functions. It was then required to develop a human resources plan whereby serving employees would be matched and placed in these posts, on the basis of their profiles, i.e. their qualifications, skills, experience and work history. The various processes were the responsibility of Departmental Task Teams (DTT), functioning in conjunction with a number of other teams that were set up for this purpose. Among these were so-called Management Teams also referred to as Matching and Placement Teams, which were responsible for the actual matching and placement of employees on the ground, and Monitoring Teams (at regional and head office) which were to monitor their work. The second respondent was appointed as the convenor of the Western Cape Management Team (MT). In order that these processes could be carried out guidelines with accompanying time-frames and so-called “Matching and Placement Criteria” were brought out.
8. As a result of the restructuring which the DCS underwent, the posts which applicants occupied were upgraded in rank from Deputy-Director to Director, and from salary level 12 to salary level 13. About the first applicant’s position, the functions of logistics and finance were hived from those of human resource/personnel and administration. The former was now to fall under the aegis of a so-called Area-Co-ordinator: Logistics and Finance, and the latter under a so-called Area Co-ordinator: Corporate Services (“ACCS”). The second applicant’s post was renamed Head of Centre: Admissions

Centre.

9. In April 2003 the applicants were informed in writing that they were to be redeployed. The first applicant was told that he was to take up the position of Vice-Chairman of the Parole Board, and the second applicant was to take up the position of Divisional Head: Operational Support. Their proposed redeployment was to take place as part of a general restructuring and transformation exercise in the public service, which had already commenced the previous year. None of the parties could produce the actual letters but a *pro forma* copy was produced by the respondents. In terms of these letters the applicants were given four days either to confirm their acceptance of the placements, or to make representations to the MT.
10. The applicants instructed a local attorney to object to their placement and to make representations on their behalf. The attorney wrote to the DCS requesting more time. His request was favourably met. On 22 May 2003 he addressed letters to the DCS on behalf of each applicant, in which their objections as to their placements were set out. Both applicants made claims to their upgraded positions. The Matching and Placement Criteria provided that in certain circumstances the incumbents in existing posts, which had been upgraded but not materially changed in terms of job contents, could lay claim to them.
11. On 2 June 2003 the applicants received a response from the second respondent, as convenor of the MT, informing them that the matter was receiving attention and that they would receive a further communication in due course. On 11 June 2003 the attorney addressed a letter to the second respondent informing him that the applicants were

anxious to resolve the matter as soon as possible and requesting him to furnish them with his response.

12. On 2 July 2003 the applicants received a letter from a Ms Malan, the provincial head of Legal Services in the office of the second respondent. The letter informed them that second respondent's office had been responsible for recommending the horizontal matching and placement of all officials below the rank of director.
13. Early in September 2003 the DCS circulated a document on its internal network in terms of which personnel who were desirous of laying claims to positions on the basis that they were upgraded posts, were invited to do so by close of business on 12 September 2003. In response to this invitation the applicants again lodged a formal claim to the upgraded posts in question. At the time both of them were occupying these posts.
14. In September 2003 the first applicant declared a dispute about the DCS's failure to respond to his representations, which he referred to the General Public Sectoral Bargaining Council (the GPSBC) for resolution. Part of his complaint concerned the DCS's failure to recognise a tertiary qualification which he had obtained at the Peninsula Technikon, namely the Certificate in Advanced Business Programme. The second applicant has a similar qualification. According to the Peninsula Technikon this qualification was the equivalent to a matric plus three years of tertiary study.
15. The DCS did not recognise it as being equivalent in status to a RVQ13 qualification, a 3 year post-matric qualification which was required for promotion to the rank of Assistant

Director and higher from the year 2000 onwards.

16. The GPSBC declined to entertain that part of the dispute which was concerned with the failure by the DCS to respond to first applicant's representations, on the grounds that the first applicant's placement was a process which was still underway. The dispute about the first applicant's qualifications was resolved on the basis that the DCS would refer it to the SA Qualifications Authority ("SAQA") for evaluation by 17 June 2004. The DCS has not done so.
17. On 28 July 2004 the first applicant addressed a letter to the first respondent in which he enquired about the claim he had registered, his current status, and his future placement. He did not receive any response.
18. On 20 August 2004 the first applicant again wrote to first respondent enquiring when he could expect some feedback. There was no response. On 31 August 2004 he was formally appointed to act in the position of ACCS, until 30 November 2004, by the Deputy Regional Commissioner Smalberger. This followed on prior appointments.
19. On 15 September 2004 the first applicant lodged a formal grievance about the DCS's failure to reply to his various letters. Following this, the issue of his placement was discussed in two meetings with the first respondent, which were held in September 2004. In the first one he was asked whether he was prepared to be transferred to a position in Worcester. He was not amenable thereto. During the second meeting he was informed that the first respondent wanted to shift him temporarily into the position of Vice-Chairperson of the Parole Board.

20. On 23 September 2004 the first applicant received a letter from the first respondent in which he was asked to choose three posts out of a list of vacant Deputy-Director posts in the Western Cape, in order that the second respondent could make a permanent placement from it. The letter also indicated that, pending his permanent placement, first respondent was contemplating placing him temporarily on the Parole Board in accordance with his letter of restructuring.
21. On 11 October 2004 the first applicant received a letter from the first respondent wherein he was informed that his services were shifted to the position of Vice-Chairperson: Parole Board, and that he was now being placed in his permanent position.
22. On 19 November 2004 the applicants launched this application on an urgent basis which was set down for a hearing on 29 November 2004. A rule *nisi* was granted returnable on 15 February 2005.
23. On 14 February 2005 the applicants gave notice that it intended to apply on 15 February 2005 that the matter be postponed *sine die* or to a date to be determined by this Court. The applicants requested the respondents to furnish them with a record of the proceedings of the deliberations and decisions of the Matching and Placement Committee, during or about April 2003, when the applicants were matched and placed in terms of Resolutions 7 and 8 of the Public Services Co-ordinating Bargaining Council, of 2002; the deliberations and decisions of the Deputy-Regional Commissioner Smalberger, on or about 18 November 2004, whereby first applicant's claim to the post of ACCS and second

applicant's claim to the post of Head: Correctional Centre (Pollsmoor) was rejected and the deliberations and decisions of first and/or second and/or third respondent (as the case may be) when B Van Der Westhuizen, the fourth respondent was appointed to the position of ACCS on or about 9 December 2005.

24. The applicants sought that the respondents be ordered to furnish them with copies of the personnel profile form reflecting the profiles and electronic and/or printed form, of both applicants; the preliminary reports from the relevant management and/or matching and placement teams, in regard to the matching and placement of the applicants; the final recommendation report from the said teams in respect of the applicants; the minutes of any workshops, seminars and/or meetings held by the Matching and Placement teams in regard to, or in connection with, the Matching and Placement of the applicants; and any and all other documents generated, received, drafted, circulated, transmitted, stored and/or distributed, by any of the respondents for the purpose of matching and placement of the applicants.
25. On 15 February 2005 the matter was postponed to 22 April 2005. The respondents were ordered to file the record of the proceedings and decisions of the Matching and Placement Committee on or before 25 February 2005. The issue of costs as well as the hearing of both the application for a postponement, as well as the hearing of the matter on 15 February 2005 stood over for later determination. Mr B Van Der Westhuizen was joined as the fourth respondent. The rule *nisi* was extended pending the hearing of this matter.
26. On 2 March 2005 the applicants filed an amended notice of motion, seeking the following relief:

- 26.1 Reviewing, correcting and/or setting aside the decision of the Matching and Placement Committee in or about April 2003, to appoint first applicant to the position of Vice Chairperson: Parole Board (Pollsmoor);
- 26.2 Reviewing, correcting and/or setting aside the decision of first and/or second respondents to appoint alternatively transfer the first applicant to the position of Vice Chairperson: Parole Board (Pollsmoor) with effect from 8 October 2004;
- 26.3 Reviewing, correcting and/or setting aside the decision of the National Commissioner alternatively the second respondent, as the case may be, to appoint fourth respondent to the position of ACCS;
- 26.4 Reviewing, correcting and/or setting aside the decision of the Deputy-Regional Commissioner J G Smalberger on or about 18 November 2004, in terms of which he rejected first applicant's claim to the position of ACCS;
- 26.5 Directing that first and/or second and/or third respondents, as the case may be, appoint first applicant to the post of ACCS alternatively, directing that first and/or second and/or third respondent, as the case may be, match and place first applicant in accordance with the Matching and Placement Criteria and their Guidelines, read together with the terms of reference for Monitoring Committees, issued by the DCS pursuant to or in terms of Resolution 7 and 8 of 2002;
- 26.6 Reviewing, correcting and/or setting aside the decision of the Matching and Placement Committee in or about April 2003, to appoint second applicant to the position of Divisional Head: Operational Support, Maximum (Pollsmoor);
- 26.7 Reviewing, correcting and/or setting aside the decision of First and/or Second Respondent to appoint and transfer the second applicant to the position of Head of Centre: Correctional Services (Goodwood) with effect from 24 November

2003;

26.8 Reviewing, correcting and/or setting aside the decision of the Deputy-Regional Commissioner J G Smalberger on or about 18 November 2004, in terms of which he rejected second applicant's claim to the position of Head of Centre: admission Centre (Pollsmoor);

26.9 Directing that First and/or Second and/or Third Respondent, as the case may be, to appoint the second applicant to the position of Head of Centre: Admission Centre Pollsmoor) alternatively, directing that first and/or second and/or third respondent, as the case may be, match and place second applicant in accordance with the Matching and Placement Criteria and their Guidelines, read together with the terms of reference for Monitoring Committees, issued by the DRC pursuant to or in terms of Resolution 7 and 8 of 2002;

26.10 Interdicting and/or restraining first and/or second respondent from taking any disciplinary steps against the first applicant in respect of his failure to report for duty in the post of Vice Chairperson: Parole Board (Pollsmoor), pending the outcome of these proceedings.

26.11 Interdicting and/or restraining first and/or second and/or third respondent from appointing any person permanently into the position of ACCS and Head: Correctional Centre (Pollsmoor), pending the outcome of these proceedings.

27. A complete set of pleadings were exchanged between the parties.

Analysis of the facts and arguments raised

28. The applicants seek to review the validity of the following decisions:

- 28.1 the decision of the Matching and Placement Committee of 16 April 2003 in transferring the first applicant to the post of Vice Chairperson: Parole Board (Pollsmoor) and the second applicant to the post of Head: Correctional Services (Goodwood) -, i.e. the horizontal transfer of the applicants to new positions;
 - 28.2 the failure to promote the applicants to the upgraded positions;
 - 28.3 the second respondent's failure to consider the applicants claims to the upgraded positions; and
 - 28.4 the decision of the national commissioner to appoint the fourth respondent.
29. These decisions have been challenged on a number of grounds *inter alia* that the decisions were irregular, *ultra vires*, procedurally and substantively unfair, arbitrary and/or capricious, or were arrived at as a result of a failure to properly apply the mind.
30. The respondents have raised a number of defences and points *in limine*. They allege that this Court lacks jurisdiction to hear the matter; that there has been an unreasonable delay on the part of the applicants; that first applicant has compromised his claim, and that second applicant failed to exhaust his domestic remedies prior to launching the application. In regard to the merits, the respondents aver that the application should fail on the grounds that the applicants lack the necessary qualifications for the posts in dispute, and failed to apply for them after they had been advertised, in accordance with the DCS's requirements. In the final instance they allege that, since the Matching and Placement Committee had no authority to make horizontal placements into positions above the rank of Deputy-Director, the applicants cannot lay claim to the posts in contention.

31. The applicants are founder members and members of POPCRU. In and during 2002 the DCS and the majority trade unions in the public sector, including POPCRU adopted resolutions 7 and 8 of 2002 to provide a framework for the transformation and restructuring of correctional services in South Africa. These resolutions were adopted by agreement as a result of lengthy negotiations that took place at the PSCBC. These resolutions were binding on the DCS, as an employer, and the trade unions as representatives of DCS employees.
32. In the case of the DCS, the implementation of Resolutions 7 and 8 was based on the Public Service Regulations read together with the Public Service Act, the Guidelines and time frames for matching and placement of management teams, the DCS's matching and placement criteria and the lawful instructions issued by the National Commissioner. These documents are common cause and the parties rely on them. Essentially the dispute concerns their interpretation and application.
33. Resolution 7 provides as follows:
- “On the effective date of this Agreement [6 March 2002], departments must endeavour to align the processes, referred to in clause 2.1, to the spirit of this Agreement.*
- This agreement does not affect the validity of restructuring and transformation processes that commenced prior to the signing hereof.”*
34. Clause 10.2 of Resolution 7 states that “ any dispute concerning the general interpretation or application of this agreement must be tabled in the relevant DTT.

35. Clause 9 of Resolution 8 of 2002 of 13 June 2002 provides that:
“If there is a dispute about interpretation or application of this Agreement, any party may refer the matter to the Council for resolution in terms of the dispute resolution procedure of the Council”.
36. Resolutions 7 and 8 afford a grievant party the right to either refer a dispute concerning the general interpretation or application of resolution 7 to either the DTT or the Council i.e. the “PSCBC”.
37. The applicants case in a nutshell is that since they were the incumbents in the upgraded positions and had laid claims to it, they should have been appointed or promoted into the said positions. Both applicants laid claim to the said positions but did not apply for it after the said posts were advertised externally. They are both deputy directors at level 12 and the posts created were directors’ posts at level 13.
38. The Matching and Placing Committee’s mandate were limited to level 12 positions. Employees could therefore only be placed into level 12 positions by the Matching and Placing Committees. The resolutions made specific provision that when it comes to the question of level 13 posts, the management and placement teams could not place persons into those positions. If employees could not be placed in specific positions they had to be redeployed. An employee could make representations before his or her placement. These representations had to be considered by the employer. The DTT consisted of both employer and employee representatives. They could only recommend matching and

placements in the regions and branches for all levels below director. The deadline for doing so was 25 April 2003. Once a placement was made, the management team had to advise the said persons within three days of such recommendation and the said person had four days to make any representations.

39. The contested position namely that of ACCS is a new position. This can be gleaned from the job description filed by the applicants which appears at page 80 of the papers.
40. It is common cause that the new positions that the applicants laid claims to are on director's level. The applicants are of the view that it was not compulsory for the two positions to be advertised externally. The respondents are of the view that the two positions had to be advertised externally. The fact is that whether the posts had to be advertised externally the applicants did not apply. They were of the view that they were entitled to be appointed or promoted into the positions. They were notified in a letter that the positions were going to be advertised and that they could apply for it. They simply did not do so.
41. It is clear from the pleadings that the applicants had made up their minds from an early stage that they were only interested in the upgraded posts and wanted to be appointed or promoted into those posts. This much is clear from their correspondences. This is also clear from the interaction that had taken place. They were offered several positions which were turned down.
42. I now propose to deal with the applicants different claims and the points *in limine* raised

by the respondents.

I. The decision of the Matching and Placement Committee of 16 April 2003 in transferring the applicants to the post of Vice Chairperson: Parole Board (Pollsmoor) and to the post of Head: Correctional Services (Goodwood)

43. The applicants wants this Court to review, correct and/or set aside the decision by the first and second transfer to transfer the applicant to the post of Vice Chairperson: Parole Board (Pollsmoor) and the second applicant to the post of Head: Correctional Services (Goodwood).

44. The applicants contended that the vertical transfer is procedurally flawed for the following reasons:

44.1 The matching and placement committee acted *ultra vires* because it did not have the authority to make the final decision but only the commissioner;

44.2 The four-day period afforded to the applicants to make representations regarding their transfers was unfair;

44.3 With reference to the letter that the applicants received from Ms Malan, the Provincial Head of Legal Services, on 7 July 2003 they understood that their representations were still under consideration.

45. The applicants had been sent letters on 16 April 2003 in terms of which they had to make representations, if any, in regard to their placements within four days. If no representations were received within the said period the placements would be confirmed.

The applicant contended that this was contradicted by what appears in paragraph 6 of the letter where it is stated that the placement was only preliminary and subject to confirmation by the Commissioner, but “must be considered final after 25 April 2003 unless stated otherwise in writing and personally to your good selves”. In the fourth respondent’s letter there was no provision that the placement would become final after 25 April 2003, unless otherwise stated in writing. He had received a letter from first respondent on or about 4 July 2003, whereby he was informed him that his placement was final. The placements were stated to be preliminary and the final decision lay with the Commissioner. The first respondent had to consider the employees representations before making a final decision and the employee had a right to be treated fairly. By allowing the applicants to make representations within four days on the basis of the placement which was only temporary while on the other hand simultaneously providing that irrespective of the outcome of their representations their placement would become final on 25 April 2003 unless otherwise confirmed by him, the applicants contended that the first respondent acted unfairly, irrationally and outside his powers. The applicant had been appointed until 30 November 2004 in an acting position by the Deputy Regional Commissioner, and the first respondent was not at liberty to shift the first applicant to the post of Vice- Chairperson of the Parole Board on 11 October 2004, and in purporting to do so he similarly acted outside his powers and authority. Upon receiving the letter of 11 October the applicants took steps to launch these proceedings. There was no question of any unreasonable delay on their part.

46. The respondents contended that the applicants’ placement became final on 25 April 2003 and because the applicants only launched these proceedings in November 2004 they

should be barred from proceeding on the basis of unreasonable delay. The denied that the respondents committed and reviewable irregularity.

47. It is common cause that the applicants were matched and placed in the new positions by the Matching and Placement Committee. Clause 6.2 of Resolution 7 provides that all staff at departmental level had to be matched and placed according to

“post requirements and employee profiles taking into account, amongst other:

Qualifications:

Current and past experience in relevant and related fields;

Training requirements; and

Other skills and competencies.”

48. The first applicant was redeployed in a letter dated 16 April 2003 from the position of Head: Management Services and matched and placed in the position of Vice-Chairperson of the Parole Board, Pollsmoor. The second applicant was also similarly redeployed in a letter dated 16 April 2003 from the position of Head of Prison: Admissions Centre and matched and placed in the position of Head: Correctional Services (Goodwood). These letters are missing. The parties rely on the *pro forma* letter that states that the details of the applicants personal profile had been intensely studied before they were matched and placed. It is clear from the letter written by attorney Riley on behalf of the applicants that these letters were received by them.

49. It is clear from the facts placed before me that the procedure outlined in clause 6.2 of resolution 7 was followed. The decision of the Matching and Placement Committee was

substantively fair. The applicants were redeployed based on their personal profiles that show their personal information, work experience and qualifications. The first applicant alleges that his vertical transfer was unfair because it constitutes a demotion in his status, authority and responsibility. This ground is baseless both in fact and law in that the new position is equal to rank and salary package. The new position affords the first applicant more autonomy and greater decision-making powers. There is no evidence before this court that there is a demotion.

50. It is further common cause that the letter of 16 April 2003 informed the applicants that they had four days to make representations regarding their placements, failing which, their placements would be confirmed. The four-day period was based on the procedures outlined in the policy document entitled “Guidelines and time frames for matching and placement management teams.”
51. The guidelines furthermore provided that
“presentations on behalf of members should be made by a serving members of the Department of Correctional Services or recognised trade union (PSA,POPCRU and DENOSA)”.
52. The Matching and Placement Committee acted within its mandate by recommending that the applicants be placed in other positions. It is clear from the evidence placed before this court that the matching and placement committee acted *intra vires* within the scope of valid delegated authority that emanated from the National Commissioner.

53. In respect of the four-day period within which representations had to be made, I find strange that the applicants who are senior members of POPCRU are disputing a procedure negotiated between the DCS and recognised trade unions. The applicants were bound by this procedure since it was validly allowed and made in terms of resolution 7 that provides that the DCS had to endeavour to align the processes, referred to in clause 2.1, to the spirit of the Agreement.
54. I have considered the letter written by Malan dated 7 July 2003. The applicants stated that she made them understand that their representations were still under consideration. I fail to understand why the applicants contend that their representations were still under consideration when the contents indicate to the contrary. Their attorney was advised by Malan of the procedure that they should follow regarding the vacant posts, that is, the disputed positions to which they laid claim to. She advised the applicants to apply for these positions once job evaluations had been done and the posts advertised.
55. The applicants have themselves failed to follow the prescribed procedure in that they made representations through their former attorney and not through a serving member of the DCS or recognised trade.” The representation made by their former attorney was hopelessly late. The applicants have failed to substantiate their contention that the decision of the Matching and Placement Committee was irregular, *ultra vires*, procedurally and substantively unfair, arbitrary and/or capricious, or were arrived at as a result of a failure to properly apply the mind.

II. The failure to promote the applicants to the upgraded positions

56. The applicants contended that inasmuch as the posts in dispute were upgraded in terms of salary and rank, their non appointment constituted a non-promotion. Further it was not an absolute requirement for an external advertisement. The D.S. Recruitment and Selection Policy provides that vacant post might be filled without advertising, in terms of an equity programme, in order to rotate or transfer employees to enhance organisational effectiveness and skills or because of the particular skills of an employee. A similar provision is to be found in the Public Service Regulation VII C.2.5 of Chapter 1 of the Public Service Regulations 2001. In addition, regulation's V C.5 and C.6 read together provide that an official may be employed in a post of a higher grading, without advertising it, if the incumbent was actively performing the duties of such post at the time, received a satisfactory rating in his most recent performance assessment, and is remunerated on the lower notch of the salary scale which is applicable to the higher post. The applicants had received a satisfactory performance assessment. On the basis of the categorisation of these posts in terms of the Matching and Placement Criteria, there was no need to advertise them.
57. The applicants contended that the disputed posts are category 2 or category 3 posts, i.e. existing that were upgraded and the contents of which have not changed at all, or posts that were split into two or more posts, the contents of which have not changed by more than 30%. It is expressly stated in the Matching and Placement Criteria that such posts are covered by Regulations V C.5 and C.6 ie they do not need to be advertised. It is only newly developed category 5 posts that were required to be advertised in terms of the Matching and Placement Criteria. A list of all new posts which were created as a result of the restructuring, both at regional (provincial) and local (management area) level, were

sent out by the National Convenor of the Matching and Placement teams. Neither of these posts in issue in this matter is listed thereon. They were clearly not category 5 posts in terms of the Matching and Placement Criteria, and did not need to be advertised.

58. The respondents aver that the applicants cannot succeed in their claims to be appointed to the disputed posts, on two grounds. The first ground it is alleged that the Matching and Placement Committee's authority was limited to making horizontal placements only, in respect of persons occupying the rank of Deputy-Director and higher. The second ground is that the applicants are not qualified for the posts in question.
59. It is common cause that in terms of the restructuring process, the post of Head of Management services: (Pollsmoor) was upgraded in rank from Deputy Director (level 12) to Director (level 13). The post of Head of Admission Centre: Pollsmoor was also upgraded in rank from Deputy-Director (level 12) to Director (level 13). The DCS followed the "Policy and procedure on post advertisements (Filling of promotion posts in the Department of Correctional services with effect from 1 January 2001". This was part of the procedures governing the restructuring preceding the implementation of resolution 7. Because the two posts were above the level of deputy-director, ie level 13, the vacant positions had to be advertised in terms of the aforesaid policy.
60. The two posts were duly advertised in national newspapers respectively on 24 August 2003 and 20 June 2004. The qualification required for the vacant posts was an RQV13, that is, a 3-year degree or 3-year diploma. The applicants do not hold a 3-year degree or 3-year diploma, they do not qualify for the posts. The continued validity of the Policy

referred to above was recognised by resolution 7 which states that “this agreement does not affect the validity of restructuring and transformation processes that commenced prior to the signing hereof. The newspaper advertisements indicated that the minimum qualification for the post was indeed a 3-year degree or 3-year diploma.

61. It is common cause that the applicants failed to apply for these vacant positions, even though they were advised to do so by Malan. The fourth respondent duly applied for the post of ACCS and was appointed after a selection process. The applicants now want this Court to appoint them in the upgraded posts.
62. The applicants have now alleged in their replying affidavit that they possess an Advanced Business Development Programme Certificate (the certificate), which is the equivalent of the RQV13 qualification, and allegedly recognised as such by the Peninsula Technikon. This information was not placed before the Matching and Placement Committee. Their personal profiles revealed at the time when the Matching and Placement Committee took the decision to redeploy them into horizontal positions that they did not possess tertiary qualifications.
63. It is common cause that the first applicant has referred a dispute concerning the non-recognition of the certificate by the DCS to the PSCBC and that the parties at the PSCBC meeting entered into a written agreement of settlement on the basis that the DCS would refer the certificate to the Peninsula Technikon and the South African Qualification Authority (SAQA) seeking their opinion as to whether the certificate was equal in status to a 3-year degree or 3-year diploma. The Rector of the Technikon did not endorse the status of this qualification by signing it but that it was rated as being equivalent to a

matric plus 3 years. He confirmed the correctness and the authenticity of the actual certificates and not the aforesaid rating. The respondents have not referred the certificates to the SAQA.

64. The applicants alleged that they are entitled to be promoted to these positions because it was not an absolute requirement that these positions should be subject to an external advertisement. They relied on the Public Service Regulation VII C.2.5 to support this allegation. I have considered the Regulation. It appears to me that the exceptions provided in Regulation C.2.5 (a) to (d) do not apply to the vacant posts or to the applicants. Exception (a) requires the filling of the posts from the ranks of supernumerary staff of equal grading. Exception (b) requires an employee who was appointed under an affirmative action programme, to meet the post's requirements. Exception (c) requires the laterally rotating or transferring of employees. The vacant positions were upgraded and the applicants did not possess the necessary RVQ13 qualifications. Regulations VC.5 read with C.6 provide a further exception to the requirement that the vacant posts had to be advertised. These regulations are not applicable to the vacant posts because they are applicable to an increase in the salary of a post and not to a post upgraded from one grade to another. The regulations apply to the posts that have not been upgraded from one grade to the other, but situations where the posts remained within a particular grade but where the salary has been increased. Regulation C.2.5 and Regulations VC.5 read with C.6 states that an executing authority may apply these regulations. The executing authority was not excused of the discretionary power in this case.

65. The applicants' contention that they were entitled to a post of higher grading without advertising it, has no substance and should fail.

III. The second respondent's failure to consider the applicants claim to the upgraded positions

66. The applicants contended that their claims to be promoted into the post were not an issue to be determined by the Matching and Placement Committee. It was not clear who had to consider those claims. In the case of the applicants it was considered at Deputy Regional Commissioner level. In the letters to the applicants dated 10 November 2004 Deputy Regional Commissioner Smalberger stated that their claims were unsuccessful because their profiles were found "not to be acceptable". The claims were not rejected on the basis that the posts were not category 2 or 3 posts.
67. The applicants contended that since both applicants had been serving in the posts prior to their upgrade for some 5 to 6 years already, had been rated satisfactorily on their annual performance assessments, and had built up competencies, skills and experience in such posts it is not understood on what basis their profiles were not applicable. Their profiles were merely records of their skills, competencies, experience and work history. Since Smalberger only had account of applicants profiles, he clearly did not consider the job evaluations and work studies done in regard to the scope, competencies, and contents of the posts in question. As a result he failed to properly apply his mind and/or had regard for irrelevant considerations, or failed to consider relevant ones. His decision falls to be set aside.

68. There is no substance in the applicants contentions. No factual and legal basis has been laid for the contention that Smalberger failed to apply his mind in that he had regard to irrelevant factors. Their argument that because they have laid a claim to the vacant positions is equal to them arguing that they are entitled to a promotion. They were not entitled to a promotion since they failed to apply for the vacant positions when they were advertised and did not possess the necessary qualifications for them to be considered for the vacant positions even if they did apply for such positions. No valid reason exists for Smalberger's decision to be set aside.

69. The applicants could not have held a legitimate expectation to be promoted to the vacant positions in that they were at all times advised that the disputed positions would be advertised. At no stage did the respondents make any undertaking or promise that the applicants would not be transferred or be appointed to the disputed positions. The mere fact that the first applicant was appointed in an acting position to disputed position does not confer on him a legitimate expectation in that the respondents informed him in writing that this acting appointment would cease should the post be permanently filled.

IV. The decision of the National Commissioner to appoint the fourth respondent

70. The first applicant is seeking to review the National Commissioner's decision to appoint the fourth respondent in the position that he was appointed to. The applicants contended that the Guidelines for the Matching and Placement Committee, and the Terms of Reference for the Monitoring Teams, were silent how the claims of employees who were serving in posts upgraded, would be dealt with. As a result the DCS issued a directive in September 2003 in which it set out a process for this. The directive provided that a work

study and job evaluation was underway in terms, of which the scope, competencies, and content of the positions to which claims had been laid, on the basis that they were upgrading only, would be determined. The directive further provided that, upon completion of these processes, the department would “respond appropriately to all the representations”. The directive invited all personnel who wished to lay claim to a particular position, on the basis that it was an upgraded (i.e. category 2 or 3) post, to do so in writing by 12 September 2003.

71. The applicants contended that in compliance with this directive the applicants submitted a formal claim in respect of the posts in contention. The respondents did not reply to these claims prior to the launching of these proceedings. In addition before considering the first applicant’s claim to the position of ACCS the National Commissioner appointed the fourth respondent into the position, on a permanent basis. The applicants contended that in so doing the National Commissioner and/or third respondent, as the case may be, failed to properly apply his mind and/or failed to take account of relevant considerations. On this basis the appointment of the fourth respondent falls to be set aside.
72. The applicants contended that the Placement Committee made a recommendation to the National Commissioner about the transfer of the applicants. I am of the view that the National Commissioner is an interested party and has a direct or indirect interest in the proceedings. In this regard see *Public Servants Association v Department of Justice others* (2004) 25 ILJ 692 (LAC). The applicants should have joined him as a party in these proceedings. Their to join him is fatal to the first applicant’s claim relating to the setting aside of the appointment of the fourth respondent.

73. The respondents had raised a number of points in *limine*. I do not deem it necessary to refer to all those points *in limine* raised by the applicants.

First applicant's alleged compromise/settlement of the dispute

74. The respondent contended that, as the first applicant referred a dispute in connection with this matter to the GPSSBC, which made a determination thereon on 17 February 2004, this Court cannot entertain the application.
75. There is no substance in this objection. The first applicant had referred a dispute on 22 September 2003 and a later one on 3 May 2004. In the first referral his complaint the DCS's failure to respond to his attorney's letter about his placement as well as on the basis that the DCS had failed to respond to his application for recognition of his educational qualifications. The GPSSBC declined to entertain the first complaint on the basis that there was a process under way which had not yet been completed, i.e. no final decision as to my placement had yet been made. About the second issue on 17 February 2004 the parties arrived at a settlement in terms of which the DCS undertook to refer the post-matric qualification which the first applicant had obtained at the Peninsula Technikon, namely the Advanced Business Development Programme, to the SA Qualification Authority (SAQA) for evaluation. The DCS was to refer the qualification to SAQA for evaluation on or before 17 June 2004. It has not done so. On 3 May 2004 the first applicant attempted to refer his complaint to the GPSSBC for determination. He made use of the old referral. The GPSSBC declined to entertain the matter.

76. The first applicant did not compromise or settle his dispute with the respondents.

The Court's lack of jurisdiction

77. The respondents contended that, since the applicants have framed their challenges in respect of certain decisions on the basis that these pertain to an (non) appointment, as opposed to a (non) promotion, the Court is barred from adjudicating upon the issue in terms of the decision in the matter of *Department of Justice v CCMA and Others* (2001) 22 ILJ 2439 (LC). The aforesaid decision was overturned by the Labour Appeal Court in *Department of Justice v CCMA* (2004) 25 ILJ 248 (LAC). The court held that the non-appointment of an employee, as in the case of a non-appointment, may constitute an unfair labour practice and is therefore susceptible to review.

78. I accept that under certain circumstances this court has jurisdiction to consider a claim for promotion but that it should not readily interfere with the decision of a decision maker in the selection and appointment process. I agree with the views expressed in *Provincial Administration Western Cape (Department of Health & Social Services) v Bikwani & Others* (2002) 23 ILJ 761 (LC) at page 771 paragraph 29 and page 772 at paragraph 30: “*There is considerable judicial authority supporting the principle that courts and adjudicators will be reluctant, in the absence of good cause clearly shown, to interfere with the managerial prerogative of employers in the employment selection and appointment process.....*”

An employer had a prerogative or a wide discretion as to whom he or she will promote or transfer to another position. Courts should be careful not to intervene too readily in disputes regarding promotion and should regard this as an area where managerial

prerogatives should be respected unless bad faith or improper motive such as discrimination are present.”

79. This Court does have the requisite jurisdiction to consider the application launched by the applicant. Since the applicants had failed to apply for the disputed positions, they cannot allege that their non-appointments to the disputed positions were unfair or that they were not considered for promotion. Their claim should in the circumstances fail.

The unreasonable delay

80. I do not deem it necessary to deal with this point *in limine*. I accept that a review application must be brought within a reasonable period. In this matter the applicants sought to review a number of decisions made by the respondents over different periods of time. Most of these decisions that are being sought to be reviewed are interlinked. I would assume without deciding this that the application was brought within a reasonable period.
81. There was no serious flaw in the placing of the applicants and/or the filling of the disputed positions, nor were the applicants discriminated against. The respondents have not committed an unfair labour practice. The applicants do not have a right to promotion but only to be fairly considered for promotion.
82. For all of the reasons referred to above the *nisi* that was granted stands to be discharged and the application dismissed.

83. Both parties sought costs against the other which included the employment of two counsel. There is no reason why costs should not follow the result. The costs order should include the employment of two counsel.

84. In the circumstances I make the following order:

84.1 The rule *nisi* is discharged.

84.2 The application is dismissed with costs, which costs includes the employment of two counsel.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS : J NEWDIGATE SC WITH ML SHER
INSTRUCTED BY MUSHTAK K PARKER
ATTORNEYS

FOR THE RESPONDENTS : N ARENDSE SC WITH
R NYMAN INSTRUCTED BY
THE STATE ATTORNEY

DATE OF JUDGMENT : 7 NOVEMBER 2005