**REPUBLIC OF SOUTH AFRICA**

# THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

## JUDGMENT



Reportable

**Case no's: P118/2011; P125/2011 and P127/2011**

In the matter between:

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| **NEHAWU** | **First Applicant** |
| **PSA** | **Second Applicant** |
| and | |
| **MEC FOR THE DEPARTMENT OF HEALTH** | **First Respondent** |
| **SUPERINTENDENT-GENERAL** | |
| **OF THE DEPARTMENT OF HEALTH** | **Second Respondent** |
| **PREMIER OF THE EASTERN CAPE PROVINCE** | **Third Respondent** |

**Heard:** **16 August 2012**

**Delivered:** **16 August 2012**

**Summary: Dismissal of an application to extend an interim order. Issue in dispute has become moot by virtue of the fact that the parties have concluded a**

**settlement agreement that constitutes an agreement of compromise of the original issue in dispute.**

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**JUDGMENT**

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AC BASSON J

Introduction

[1] The application for the extension of an interim interdict was dismissed with costs, including the costs of three counsel. Here are brief reasons for my order.

[2] This is an application in terms of section 158(1)(a) of the Labour Relations[1] read together with Rule 11(3) of the Rules by the first and second applicants. The first applicant is NEHAWU and the second applicant is the PSA (hereinafter collectively referred to as the "applicants" except where reference is made to a specific applicant). The applicants seek an order to extend the interim interdict which was first granted on 18 March 2011.

[3] The three respondents are the MEC for the Department of Health, the Health Superintendent – General of the Department of Health and the Premier of the Eastern Cape Province. (I will collectively refer to the three respondents as "the respondents" except where reference is made to a specific respondent. I will refer to the Department of Health as "the Department".)

[4] The respondents oppose the application on the following grounds:

(i) Notwithstanding the respondents' agreement to the interim interdict and its extension from time to time, there were as a matter of law, no good grounds for its granting in the first place.

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[1] Act 66 of 1995

(ii) The issues which gave rise to the original application are now moot as they are the subject of an agreement of compromise. Even if a *causa* for the interim interdict had existed in the first place, that *causa* no longer exists.

(iii) A court may not and will not extend an interim interdict to serve a purpose (that is, allegedly to support the 2012 Settlement Agreement) for which it was not granted in the first place.

(iv) To the extent that an interim interdict is sought (and may be granted) on new grounds, the requirements for an interim interdict are entirely absent. In particular, there is no clear substantive right supporting the need for an interim interdict; the balance of convenience now clearly favours the Department of Health ("the Department") and if the interim interdict is extended, the Department will suffer substantial and irreparable harm.

(v) Lastly it was submitted that the applicants' founding affidavits are entirely lacking in the allegations necessary to found an interim interdict.

<u>Background facts</u>

[5] This matter has a long history and I do not intend for purposes of this judgment to set out the history in great detail. What is, however, of more importance is the history of the matter as from early 2011 when this matter served before this Court for the first time.

[6] This dispute dates back to 1994 when it became necessary to incorporate the former Ciskei and Transkei into the Easter Cape Province. This incorporation necessitated the rationalisation of the Ciskeian and Transkeian Public Services with the Eastern Cape Public Service. Shortly before this rationalisation, and in the expectation of incorporation, many irregular promotions were effected. This resulted in inflated salaries of many public servants of the former Transkei and Ciskei.

[7] A dispute arose in respect of the lawfulness of these promotions. The President of South Africa appointed in terms of his constitutional powers the so called "White

Commission" to investigate the lawfulness of these *en masse* promotions . The brief of the White Commission was to review, *inter alia,* promotions which had occurred between 27 April 1993 and 30 September 1994 in respect of persons employed (*inter alia*) in the former Transkei and Ciskei. In November 1998, the White Commission declared 16 650 promotions to be irregular.

[8] Pursuant to a circular issued in July 1999, the National Treasury directed that officials whose promotions had been set aside by the White Commission had to repay monies wrongly received as a result of the irregular promotions. Some of these findings were successfully challenged by the High Court whilst others were not and therefore remained unchallenged. The accumulated debt as a result of overpayments that were not recovered from these employees were eventually written off by the Eastern Cape after the Executive Council ('EXCO') of the Eastern Cape Province resolved on 4 October 2006 that the total balance of R73 174 000, 00 owed by 2 558 employees in nine departments pursuant to the findings of the White Commission be written off ('the 2006 EXCO Resolution").

[9] The Resolution further authorised Heads of Departments to consider the promotion of those employees who were adversely affected by the findings of the White Commission who were deserving of such promotions. According to the respondents this Resolution did not, however, authorise Departments to ignore treasury regulations which require that the Head of the Provincial Treasury not approve expenditure not budgeted for. Furthermore, according to the respondents this Resolution did not authorise the promotion of categories of employees (specified in the Resolution) without regard to the applicable regulatory framework. The Department set up a task team (the Special Departmental HROPT Task Team – hereinafter referred to as 'the Task Team') to give effect to the 2006 EXCO resolution. According to the respondents the Task Team recommended promotion and increases to categories of employees some of whom were promoted without regard to the relevant regulatory framework and without consideration of individual qualifications. According to the respondents payment by the MEC was made even though no funds had been budgeted and allocated for the *en masse* promotions.

The respondents further submitted that this resulted in the incurring of unauthorised expenditure amounting to millions of rands.

[10] On 2 September 2009, the EXCO resolved that departments immediately stop all further payments made or to be made in terms of the 2006 EXCO Resolution (dated 4 October 2006), pending the outcome of an independent audit to be conducted by each Department. Independent Chartered Accountants were appointed to conduct the audit. An interim report was submitted on 1 November 2010 and the final report on 1 January 2011. Both reports found that the promotion of the affected employees had been irregular. In respect of some employees it was found that they were entitled to lawful promotions and increases. The report further found that some employees had been awarded incorrect salaries, incorrect salary levels and incorrect salary scales and had been overpaid and received benefits not due to them. The report was made available to all the relevant trade union representatives.

[11] Upon receipt of these reports the Department resolved to reverse the promotions and salary increases in accordance with the provisions of section 38 of the Public Service Act[2]. This section imposes the duty on the executive authority to correct an incorrect salary and to recover amounts overpaid.[3]

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[2] Proclamation 103 of 1994

[3] '38. Wrongly granted remuneration.—(1) (*a*) If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it with effect from the date on which it commenced.

(*b*) Paragraph (*a*) shall apply notwithstanding the fact that the employee concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary.

(2) If an employee contemplated in subsection (1) has in respect of his or her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his or her basic salary or salary scale or awarded to him or her by reason of his or her basic salary—

(*a*) been underpaid, an amount equal to the amount of the underpayment shall be paid to him or her, and that other benefit which he or she did not receive, shall be awarded to him or her as from a current date; or

(*b*) been overpaid or received any such other benefit not due to him or her—

(i) an amount equal to the amount of the overpayment shall be recovered from him or her by way of the deduction from his or her salary of such instalments as the relevant accounting officer may determine if he or she is in the service of the State, or, if he or she is not so in service, by way of deduction from any moneys owing to him or her by

[12] Those employees who were adversely affected by the aforementioned decision were informed of the findings of independent auditors and were afforded an opportunity to make representations in regard to why the Department should not reverse their promotions.[4] Trade unions were also furnished with the report and were informed of the Department's intention to give effect to the findings of the report. Some employees took up the invitation and made representations. Those employees who made representations were informed of the decision that the Department will reverse their salaries with effect from 1 March 2011 to the salary position which the employee held prior to 1 April 2009.[5] Those who did not make any representations were likewise informed of the intention to revert to the employee's salary position applicable prior to 1 April 2009.

Proceedings before this Court

[13] When the Department sought to reverse the promotions, the applicants launched an application which was followed by various further orders of the Labour Court and agreements between the parties, some of which were made orders of this Court to

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the State, or by way of legal proceedings, or partly in the former manner and partly in the latter manner;

(ii)

that other benefit shall be discontinued or withdrawn as from a current date, but the employee concerned shall have the right to be compensated by the State for any patrimonial loss which he or she has suffered or will suffer as a result of that discontinuation or withdrawal.

(3) The accounting officer of the relevant department may remit the amount of an overpayment to be recovered in terms of subsection (2) (*b*) in whole or in part."

[4] "2. *I regret to advise you that your rank promotion due to the findings of the Auditors were found to be irregular since the Auditor was unable to trace any valid documentation to substantiate the promotion and the back pay.*

*3. Due to this finding and in support of the Executive Council resolution, the Department will be implementing the following:*

*3.1 Incorrect Notch and Rank Reversal*

*a) Reversal of your current notch and rank back to the original position (see table 1 below).*

*b) This will be implemented with effect from the 1 February 2011.*

c) *If you disagree with this action, you are hereby requested to indicate within 7 days of receipt of this letter why your salary and position should not be changed as indicated in Table 1 below."*

[5] "*After careful consideration of your written representation, it is the department's firm view that despite your submission, your promotion remains irregular and shall be reversed. Please refer to the relevant PAS Code available at your local HR office, for reference.*

*Please note that the department will, with effect from 01 March 2011 – reverse your salary position to the one you held prior to 01 April 2009."*

prevent what the applicants referred to as the first and second respondents' decision to proceed with the demotion and reversal of the promotion of a large number of employees of the Department of the Eastern Cape. In essence what the applicants sought was an order restraining the Department from implementing its decision to reverse the promotion and salary increases of the employees made by the Department during 2009 and restraining the Department from deducting monies from the employees' salaries pursuant to such reversal. These orders were sought pending a dispute to be referred to the Public Health and Social Development Bargaining Council ("PHSDBC") and possibly the launching of proceedings before the Constitutional Court in terms of which section 38 of the Public Service Act, 1994 would be challenged as being unconstitutional.

<u>The first Court order – 18 March 2011</u>

[14] On 18 March 2011 Van Niekerk, J granted an order by consent pending the final determination of the hearing on 30 May 2011. Paragraphs 1 and 5 of the order reads as follows:

> *'1. The matters under case numbers 118/2011; 125/2011 and 127/2011 are consolidated and postponed for hearing on 30th May 2011.*
>
> *….*
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> *5. Pending the final determination of the hearing on 30th May 2011, the respondents are to restore the status quo ante in respect of all the affected applicants in case number 118/2011 and members of the applicants', such as to ensure that the salaries to be paid on 15th April 2011 reflect the salary scales of such employees as they existed prior to the reductions in salaries effected on 15th March 2011, and such restoration to include repayments of the reductions which were effected on 15th March 2011.'*

[15] The Department was therefore prevented from implementing the 2009 EXCO Resolution in terms of which the promotions *en masse* would be reversed and

the salary position of employees reversed to the position which existed prior to 1 April 2009.

[16] The matter again served before Van Niekerk, J on 30 May 2011. The application was postponed by agreement to 15 August 2011.

[17] The parties thereafter concluded an agreement to refer the main dispute to private arbitration. This agreement was made an order of Court (hereinafter referred to as the "2011 arbitration order"). The parties agreed that the principal issue that was to be decided by the arbitrator was whether the decision taken by the Department pursuant to the findings contained in the report by the chartered accountants was in accordance with their terms of reference.

[18] The Court order further stipulated that *"[i]n the light of the agreement . . .and subject to the successful conclusion of the process set out herein, the constitutional challenge to section 38 of the Public Service Act and the referrals to the Bargaining Council are withdrawn*".

<u>Interlocutory application (dated 10 August 2011) and the Court order dated 15 August 2011.</u>

[19] On 10 August 2011 the Department filed an interlocutory application requesting the Labour Court to appoint an arbitrator as the parties were unable to reach consensus on who should be appointment. The application was set down for 15 August 2011.

[20] On 15 August the parties reached an agreement that Mr. Floors Brand be appointed as the arbitrator. This agreement was made an order of Court. In terms of this order the arbitrator was given powers to determine whether each individual adversely affected by the reversal process had been provided with adequate information in relation thereto. This latter issue was, in terms of the Court order, to be finally determined at the commencement of the arbitration process which was set down for 12 and 13 October 2011. The *interim* interdict was also further extended to 8 November 2011.

[21] The parties convened on 12 October 2011 but the arbitration did not proceed. Instead the parties concluded a "procedural agreement" which provided for a comprehensive "road-show" throughout the Eastern Cape in terms of which each individual employee would be interviewed and provided with a bundle of information relating to the contemplated reversal process. The said road-show did in fact take place and was supervised by the arbitrator. Affected employees were represented by their trade unions during the process.

[22] On 8 November 2011 the interim order was extended to 15 February 2012.

<u>The settlement agreement dated 26 January 2012 and made a Court order on 15 February 2012</u>

[23] The arbitration hearing was set down for 26 January 2012. During the deliberations the parties reached a settlement agreement. This settlement agreement was made an order of Court on 15 February 2012. The settlement agreement reads as follows:

> *'1.The parties hereto withdraw this dispute from arbitration, subject to the agreement set out hereunder.*
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> *2.Subject to the provisions of clause 4,* ***the promotion of the employees of the Department of Health whose names are set out in Annexure "A" hereto is hereby reversed with the result that the employees shall revert to the pre-May 2009 ranks / grades / levels held as at that time and shall be paid the salaries and/or remuneration commensurate with those ranks / grades / levels***
>
> *3.* ***The reversal of the promotion shall take effect on 31 March 2012****.*
>
> *4.The affected employees shall be considered for whatever promotion that has, in the course of time, become lawfully due, regard being had to the relevant instruments, namely*
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> *4.1 the Public Service Act, 1994 (Proclamation 103 of 1994);*
>
> *4.2 the Public Service Regulations; and*

*4.3 any and all Collective Agreements, Circulars, Resolutions, Directives, Arbitration awards, Court orders and the applicable PAS documents duly issued during the period 1994 to the date when the employees concerned are considered for promotion in terms of this agreement.*

*NB: for the sake of certainty, a list of the regulatory instruments contemplated in paragraph 4.3 above shall be provided by 3 February 2012.*

*5.The promotion process (referred to in clause 4 above) shall be conducted by the Arbitrator, Mr. Floors Brand, and shall take place from 6 February 2012 to 31 March 2012. The parties agree that the arbitrator's terms of reference shall be those set out in annexure "B" hereto.*

*6.The parties pledge and undertake to give their full co-operation and support to the process and the arbitrator with a view to concluding the process on an expedited basis.*

*7.For those persons whose assessment in terms of clause 4 takes place after 31 March 2012, any salary adjustment will be made retrospective to 31 March 2012. Where the process referred to in clause 4 above results in an employee being promoted before 31 March 2012, the promotion contemplated in clause 4 above shall be implemented on 31 March 2012.*

*8.* ***All affected employees shall be liable to repay arrear salaries and/or remuneration, if any, resulting from the reversal process at the rate of R100.00 (One Hundred Rand), per month, which shall be deducted from the employees' monthly salaries with effect from the date contemplated in paragraph 3 above****.*

*9.The liability of an employee to repay arrear salaries and/or remuneration shall only lapse upon –*

*9.1 ordinary or early retirement from the Public Service at the prescribed age;*

*9.2 medical boarding from the Public Service;*

*9.3 death;*

*9.4 retrenchment from the Public Service; and*

*9.5 transfer to an entity outside the Public Service.*

*10. Notwithstanding clause 9 above –*

*10.1 the obligation to pay the full outstanding debt consequent upon the reversal of the promotion of the affected employee(s) shall continue where the employee is dismissed or resigns; and*

*10.2 in the event of an employee's transfer within the public service, such employee shall be liable to continue remitting the debt in monthly installments of R100.00.*

*11. This agreement shall, upon its conclusion, be made an order of Court on 15 February 2012, with the Rule Nisi being extended and the interim relief granted on 30 May 2011 extended until 30 March 2012.*

*12. This agreement is subject to the parties obtaining a final mandate from their respective clients by no later than 03 February 2012. In the event of the parties not agreeing to the terms proposed herein, the arbitration shall be reinstated and shall resume on 19 to 20 March 2012 and 7 May to 11 May 2012.'*[6]

[24] The two annexures to the settlement agreement provided for the arbitrator to sit at various venues and the dates at which the arbitrator would be sitting at these various venues. Pursuant to this agreement the parties each submitted lists of legal instruments relied on.

[25] On 15 February 2012 the interim interdict was extended to 19 March 2012.

<u>Arbitration hearing dated 1 March 2012</u>

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[6] Court's own emphasis.

[26] The parties attended the arbitration hearing on 1 March 2012 principally to argue the issue of the applicability of the legal instruments of the various parties. The arbitration hearing was postponed to 20 March 2012 at the instance of the unions.

Application heard on 19 March 2012 to extend the interim order before Lallie, J

[27] On 12 March 2012 the applicants filed a further application to extend the interim order. On 30 March 2012 the application was argued before Lallie, J. The Court ordered that the application be postponed to 31 May 2012 and that the interim order and the Rule *Nisi* granted on 18 March 2011 be extended to 31 May 2012.

[28] I am in agreement with the submission that the effect of this order was that the Department was effectively prevented from reversing the promotions on 31 March 2012 as was purportedly agreed upon in terms of the settlement agreement dated 26 January 2012 (and made and order of court on 15 February 2012) and from recovering the amounts owed to the department. (I will return to this point herein below.)

[29] Despite this order the remainder of the settlement agreement remained in place.

Arbitration proceedings dated 11 April 2012

[30] The parties appeared at the arbitration on 11 April 2012. The parties were in dispute in respect of the validity of certain legal instruments relied upon by the respective parties. The parties argued that the arbitrator should exercise its discretion and refer the issue of the validity of the regulatory instruments to the Labour Court. The arbitrator acceded to the request and on 17 April 2012 referred the issue to the Labour Court. The roads show was stayed pending the outcome of the proceedings referred to the Labour Court. This application was filed on 24 April 2012.

The present application

[31] The present application was preceded by a request sent by the PSA to the Department to consent to the further extension of the interim interdict. The Department refused to consent to a further extension of the interim interdict and

indicated that it reserved its right to apply to this Court for the setting aside of the January 2012 settlement agreement depending on the outcome of the proceedings of 31 May 2012. The applicants filed this application on 25 May 2012.

[32] The PSA and NEHAWU rely on essentially the same grounds for seeking an extension of the interim interdict. The PSA however, now also relies on an alleged collective agreement purportedly entered into between NEHAWU and the Department. In respect of this collective agreement the respondents submitted that this agreement is unsigned and only concluded between NEHAWU and the Department.

[33] As already pointed out, the respondents are opposing this application on various grounds.[7] Of importance in my view is the submission that the issues which gave rise to the original application are now moot. I am in agreement with this submission. The settlement agreement dated 26 January 2012 - which was made an order of Court by agreement on 15 February 2012 – is valid and binding on the parties. This agreement effectively settled the issue in dispute between the parties. In this regard I am in agreement that the settlement agreement constitutes an agreement of compromise if regard is had to the history of this matter and to the contents of the agreement.

[34] An agreement of comprise is described by Christie[8] as follows:

> 'Compromise, or transaction, is the settlement by agreement of disputed obligations, whether contractual or otherwise… it is a form of novation differing from ordinary novation in that the obligations novated by the compromise must previously have been disputed or uncertain, the essence of compromise being the final settlement of the dispute or uncertainty.'

The effect of a compromise is further described by Christie as follows:

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[7] *Supra* ad para 4.
[8] Christie and Bradfield, Christie's The Law of Contract in South Africa, 6th edition, at page 473.

> '…. The effect of a compromise is the same as res iudicata on a judgment given by consent. That is to say it is an absolute bar to action on the cause of action compromised …..'[9]

[35] In light of the above it can, in my view, be concluded that the settlement agreement resulted in a compromise: If regard is had to the provisions of the settlement agreement it is in my view clear that the parties have in fact agreed to settle the unions' claim namely that the reversals may not lawfully take place. In this regard paragraph 2 and 3 of the 26 January 2012 settlement agreement is clear: The parties agree that the Department is entitled to reverse the promotions with effect 31 March 2012. Paragraph [8] of the said agreement further provides that the affected employees shall be liable to repay arrear salaries resulting from the reversal process at a rate of R 100.00 (one hundred rand) per month which will be deducted from their salaries with effect from 31 March 2012. Moreover, and most importantly, in place of the original claim namely that the Department may not reverse the promotion, the parties have agreed that the Department may reverse the promotion but that the affected employees shall be considered for whatever promotion that has in the course of time became lawfully due with regard to certain instruments. The agreement further provides for the procedure that will be followed in this regard. (See paragraphs [4] – [7] of the settlement agreement.)

[36] I am in agreement with Mr Pretorius that what is clear from this agreement is that the parties have agreed on an arbitration process to determine *another* claim which is different from the claim that the Department may not reverse the promotion and repay arrear salaries (which was the subject matter of the proceedings before this Court when it first served before Van Niekerk, J). The claim that is now before the arbitrator is the claim as set out in the settlement agreement which is entirely different from the claim that served before the Court and which gave rise to the interim interdict. The parties have since (as already pointed out) agreed that the Department may reverse the promotions and require that the said employees repay arrear salaries resulting from the reversal. I am further in agreement with Mr.

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[9] *Ibid* at 478.

Pretorius that the parties have entered into an agreement of compromise of disputed rights and that they are bond to pursue their rights set out in the agreement of compromise. There is therefore is no longer a cause for an interim interdict or for its extension as the claim for effective enforcement (by preventing the reversals) of the May 2009 promotions and increases has been compromised. In these circumstances there can, according to Christie, be 'no question of returning to the original contract. Action must be brought on the compromise. If the compromise of an action is not fully complied with, the remedy is not to continue with the previous action but to institute a new action on the compromise'.[10] Because the parties have entered into an agreement of compromise of disputed rights, the parties would therefore, in my view, be bound to pursue their rights set out in the agreement of compromise. The January 2012 agreement still exists and has not been set aside. This agreement has created new rights and obligations for the parties and any redress that the applicants may seek must be founded in the terms of this agreement.

[37] It is therefore concluded that in light of the fact that the issues relating to the underlying *causa* for interim relief are moot and the subject of the compromise agreement, final relief cannot ever be granted and it also follows that an interim interdict cannot now be extended.  Interim relief can only be sought pending final relief. The final relief contemplated when the original interim interdict was granted is no longer contemplated.[11] Lastly, the applicants have not met the requirements to obtain the interim interdict. I am not persuaded that the applicants had furnished proof which if contradicted and believed at the trial would establish their rights.[12] I

[10] Ibid 478 to 479.

[11] See in this regard *Singh v Adam* (2006) 27 ILJ 385 (LC) at para [16] where an application for an interim interdict *pendente lite* was dismissed on the basis that there was no suit *pendente lite*: *"Before an interim interdict pendent lite can be granted there must be a pending lis . . . On that basis alone the grant of an interim interdict is incompetent as there is no suit pendente lite."*

[12] *See* Webster v Mitchell *1948 (1) SA 1186 (W)at 1189 – 1190 the court held that:* ". . . the first question for the Court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having

am satisfied that the relevant issues are now moot because the applicants have effectively abandoned their claim in respect of the unlawful increases when the settlement agreement had been concluded in January 2012. In addition, the claim has now furthermore been substituted with different claims namely that of the right to apply for a lawful increase. Furthermore, the initial claim was that the individual employees must be heard in relation to the reversal of the unlawful promotions and increases. The claim was not that the lawful increases had not been considered. The claim now is that lawful increases must be considered. The applicants have therefore failed to prove a *prima facie* right. The applicants have likewise not alleged that any right in the 2012 settlement agreement has been infringed unlawfully nor that they will suffer irreparable harm:[13] In respect of the granting of the interdict in 2011, the applicants alleged that irreparable harm would result in them not being heard prior to the deductions being effected. This claim has now been compromised and rendered moot. I am also not persuaded that the applicants will suffer irreparable harm in that their salaries will decrease whereas the prejudice that the Department will suffer will be irreparable. In this regard the evidence before this Court was that the amount incorrectly paid as a result of the unlawful promotions and increases is more than R 420 million. This amount will only increase if the unlawful promotions are not reversed with no prospect of ever

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regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'." *See also Manong and Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 at para [22]: "The requirements for the grant of an interim interdict are well settled. I will limit myself solely to a consideration of the first - a prima facie right - as in my view the application had to fail at that preliminary hurdle. It is thus unnecessary to range beyond that to a consideration of the other requirements."

[13] See *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] 4 All SA 225 (SCA); "The test in regard to the second requirement is objective and the question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm. The following explanation of the meaning of 'reasonable apprehension' was quoted with approval in Minister of Law and Order v Nordien:

> 'A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result. However the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.'"

recovering this amount. In respect of the balance of convenience I am likewise persuaded that the balance of convenience favours the respondents.[14] I am therefore persuaded that the inconvenience to be suffered by the respondents is irreparable and irrecoverable even in those circumstances where the settlement agreements provides that the employees must make repayments at a rate of R 100.00 per month. This amount is negligible in light of the immense amounts spent by the Department on the unlawful promotions. In respect of an alternative remedy, the applicant has such a remedy and that is to enforce the settlement agreement. Lastly, this Court maintains a discretion whether to grant the interim interdict. I am persuaded that this Court should exercise its discretion not to grant the extension of the interim interdict particularly in light of the fact that the extension of the interdict will destroy the effect of the 2012 settlement agreement and will allow unlawful promotions to continue.[15] The settlement agreement allows for employees to claim justifiable promotions and increases. This process should be allowed to continue. It is apparent from the settlement agreement that it now

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[14] See *Webster v Mitchell supra* at 1192 – 1193: *"Normally the Court acts on the balance of convenience. If there is greater possible prejudice to the respondent an interim interdict will be refused. . . . if, though there is prejudice to the respondent, that prejudice is less than that of the applicant the interdict will be granted, subject, if they can be imposed, to conditions which will protect the respondent*."

[15]*See: Limbada v Dwarka* 1957 (3) SA 60 (N) at p 62:

*'Well now, what is the Court to do about all this? The applicant's counsel, with creditable detachment, urges simply that all the requisites for an interdict are present, in that:*

*a. The applicant has, at the least, a prima facie case;*

*b. the balance of convenience favours him;*

*c. his claim falls within the principles governing vindicatory actions, on the authority of Ncongwane v Morolane, 1941 OPD 125, or alternatively;*

*d. he will suffer irreparable harm.*

*I shall assume, without deciding, in favour of the applicant, that counsel's submissions are correct. But that does not end the matter, for the Court always has a discretion whether to grant or refuse the extraordinary remedy of an interdict. The decisions are fairly unanimous on this point, from Setlogelo v Setlogelo, 1914 AD 221, down to Olympic Passenger Service (Pty.) Ltd v Ramlagan,* 1957 (2) SA 382 (N)*. This means that an applicant who establishes the requisites for an interdict is not necessarily entitled to that relief. I do not think that that proposition needs any authority, but as a matter of interest I quote with respectful agreement the following obiter dicta by BROOME, J. (as he was then), in Yusuf v Abboobaker and Pietermaritzburg Local Road Transportation Board, 1943 NPD 244 at p. 247. After referring to three different sets of circumstances which afford grounds for an interdict, the learned Judge said:*

> 'And I ought to add that the cases make it clear that an applicant who establishes one of the three propositions I have quoted above is not necessarily entitled to an interdict. The grant of an interdict is always in the discretion of the Court. Quite apart from the applicant's inability to establish any of the three propositions, I am not satisfied, for reasons which it would be undesirable to set out in view of the probability of this litigation going further, that the discretionary remedy of an interdict ought to be granted.'"

allows for a new process to resolve this on-going dispute between the parties. For this purpose an arbitrator has been appointed to consider legitimate claims for promotion.

[38] For the reasons set out above, the application is dismissed.

[39] In respect of costs I am of the view that costs should follow the result. The costs include the costs of three counsel.

A.C Basson J

Judge of the Labour Court

APPEARANCES:

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|---|---|
| For Applicant: | Advocate A Beyleveld SC, Advocate C Mey and Advocate M Elijah |
| Instructed by: | Brown Braude & Vlok Incorporated |
| For Respondent: | Advocate Pretorius SC. Advocate Mbenenge SC and Advocate De Vos |
| Instructed by: | The State Attorney |