



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2387/2011

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

First Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING
COUNCIL ('SALGBC')**

First Respondent

MARI BEÄN

Second Respondent

DANIEL JACOBUS DE JAGER & 33 OTHERS

**Third and Further
Respondents**

Heard: 5 September 2013

Delivered: 11 June 2014

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant (Municipality) seeks condonation for the late service and filing of the review application. In the event that condonation is granted, the Municipality further seeks to review and set aside the arbitration award issued by the Second Respondent (The Arbitrator) on 25 August 2010 under case

number GPD080708, which arbitration was heard under the auspices of the First Respondent (SALGBC). Both applications are opposed by the Third to Further Respondents (The Employees). The Municipality's late filing of its written heads of arguments was condoned.

Background:

- [2] The Employees were all employed by the now defunct Kungweni Local Municipality which has since been incorporated into the Municipality with effect from 19 May 2011. On 26 July 2007 they referred a dispute to SALGBC pertaining to three main issues, viz, interpretation/application of a collective agreement; unfair labour practice and mutual interests. The Employees complained that the Municipality had *'unilaterally upgraded all employees on job level 15 and 14 to level 13, effectively doing away with job levels 14 and 15'*.
- [3] The matter was initially set-down for a con/arb process on 27 November 2007. The same Arbitrator had heard the matter in default and made a finding on 11 December 2007 that the Municipality had committed an unfair labour practice, and had ordered that the employees be promoted. Following a successful rescission application and various postponements, the Arbitrator again heard the matter in the presence of all the parties and issued an award on 25 August 2010. In her award, the Arbitrator found that;
- a) *The Respondent's (Municipality) conduct was an unfair labour practice.*
 - b) *That the resolution dated 22/02/2007 should be cascaded to all the employees who were excluded from promotion.*
 - c) *The employees be promoted from their current levels to one level up as per the resolution.*
 - d) *The promotion of the employees be implemented with retrospective effect from 1 July 2007.*
 - e) *The applicant (Municipality) to pay the costs for 21 June 2010 as its 'defence and its conduct during the proceedings were clearly vexatious and frivolous'.*

The application for condonation:

- [4] In terms of the provisions of section 145 (1) (a) of the Labour Relations Act (The LRA), the review application ought to have been filed within six weeks of the date that the award was received. The applicant for review was filed some 11 months and one week outside the 6 weeks period.
- [5] Section 145 (1A) of the LRA provides that the Court may on 'good cause' shown, condone the late filing of an application in terms of subsection 1. The Court has a discretion whether to grant condonation or not, and in exercising that discretion, the Court will take into account the principles and factors enunciated in *Melane v Santam Insurance Company Ltd*¹, being the degree of lateness; the explanation for non-compliance with the time frame; the prospects of success; and the importance of the case.
- [6] Other considerations which other Courts have alluded to include the convenience of the court and the avoidance of unnecessary delays in the administration of justice². It is also accepted that these factors are not individually decisive but are interrelated and must be weighed against each other. In *Brummer v Gorfil Brothers Investments (Pty) Ltd*³, Jacob J stated that the interests of justice should be an overall consideration when dealing with such applications.
- [7] In weighing these factors against each other, and further in exercising its discretion, the Labour Appeal Court in *NUM v Council for Mineral Technology*⁴ held that the court must do so judicially upon a consideration of all the facts of the case. The Labour Appeal Court further added that:

"A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial,

¹ 1962 (4) SA 531 (A).

² *Foster v Stewart Scott Inc* (1997) 18 ILJ 367(LAC)

³ [2000] (2) SA 837 (CC) at 839 F

⁴ [1999] 3 BLLR 209 (LAC) at para 10.

and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused”

- [8] Where condonation is sought within the context of an application for a review, the Labour Appeal Court in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*⁵ with reference to *Queenstown Fuel Distributors CC v Labuschagne NO and Others*⁶ held that:

‘The principles laid down in that case included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words the excuse for non-compliance with the six-week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, ie of the kind that resulted in a miscarriage of justice.’

The extent of the delay and explanation:

- [9] The review application was filed some 11 months out of time. Whichever way the Municipality wishes to look at it, the delay is indeed excessive in the extreme, and requires a compelling explanation.
- [10] In explaining the delay, it was contended that after the incorporation of Kungweni, on 19 May 2011, the Municipality had inherited the arbitration award issued on 25 August 2010, together with a review application brought under JR418/2011 in respect of that award. A Mr. Dalamo, the then Acting Senior Manager Corporate and Legal Services of Kungweni had deposed to the founding and supplementary affidavits in respect of that review application. At that stage, the Municipality was represented by Mateme-Makgahlele Attorneys. That application was opposed by the Employees.
- [11] The Municipality's current attorneys of record came on board on 7 July 2011, and were instructed to take over the review application under JR418/2011, together with a contempt application under case number J343/2011. The Municipality's attorneys of record had at some point established that the

⁵ (2002) 23 ILJ 1229 (LAC) at 1231C

⁶ (2000) 21 ILJ 166 (LAC).

review application under JR418/2011 was a nullity on account of a lack of a mandate on the part of Dalamo to depose to any affidavits in that regard. A decision was then taken to withdraw that application, following negotiations with the employees' attorneys of record.

- [12] The Municipality contends that the Employees' attorneys of record had given it two days to draft and finalise the fresh review application, to which the Municipality had complied. It further contended that the parties were in agreement that the review application under JR418/2011 was a nullity as the deponent to the founding and replying affidavits had acted *ultra vires*.
- [13] The Municipality further contended that part of the delay was attributable to Mateme-Makgahlele Attorneys, who were not helpful in furnishing it with the file pertaining to this matter, and had refused to hand over the file to the Municipality's attorneys of record as there was an outstanding account for services rendered. Mr Da Silva of the Municipality's attorneys of record had ultimately secured a copy of the Bargaining Council's case file under case number GPD080708, which did not contain the evidentiary bundle used by the Employees in the arbitration proceedings.
- [14] It was also submitted that further difficulties were encountered by the Municipality in obtaining the necessary and accurate information about the history of the dispute that resulted in the arbitration proceedings, more so in view of the fact that Kungweni was placed under administration prior to its incorporation.
- [15] The Employees' contention is that there exists no plausible explanation for the late filing of the review application, and further that the delay is excessive. In addressing the period of lateness, the employees made reference to various Kungweni Council meetings between October 2010 and January 2011, and various memoranda issued by officials of Kungweni, where the Council or its officials had either recommended that the award of the Arbitrator be implemented, or that the Employees be promoted. Reference was also made to correspondence from Mateme-Makgalele Attorneys, who had

acknowledged and accepted the award, and expressed intention not to review the award.

- [16] Based on the above, it was contended that the Municipality had consistently and intentionally decided not to review the arbitration award, and had intentionally done nothing in terms of that award. It was further submitted that it was only after contempt proceedings were launched that the Municipality had filed the review application under JR418/2011, and that no explanation was proffered for the lengthy delay in launching that application. The Employees had conceded that there was an agreement between the parties' attorneys of record that the Municipality would launch a fresh review application. They however denied that they had agreed that condonation should be granted in respect of the late launching of the review application as it was always their intention to vigorously oppose any such application.
- [17] What appears to come out of the reasons proffered by the Municipality and opposition to the application is that upon incorporation on 19 May 2011, the Municipality had inherited the arbitration award issued on 25 August 2010. It further came to its attention that a review application had been filed around February 2011, *albeit* that application had turned out to be a nullity on account of the deponent to its founding affidavit having acted *ultra vires*. That review application was filed some four months out of time and it had incorporated an application for condonation.
- [18] The difficulties and problems associated with the placing of small local municipalities under administration, or their incorporation into other larger metros, are factors which this court cannot brush aside under the pretext that they are not real. Given the constraints when the Municipality took over Kungweni, it is noted that the latter had at that time, launched an application to review the award in question. Granted that the application was a nullity and out of time, it is my view that it cannot be correct that Kungweni had at all material times, evinced an intention to comply with the award. The resolutions of that Council, or memorandums from its officials, let alone correspondence from Mateme-Makgalele Attorneys cannot in the light of the fact that such an application was launched, indicate a clear intention to abide by the award.

[19] Furthermore, it has always been the contention of the Municipality that there was no agreement or resolution by Kungweni that the award should be implemented. The averments of Mpho Kekana, the then Kungweni Acting Municipal manager in the replying affidavit also indicated that there was never an intention to abide by the award. It thus follows that the principles relating to peremption as argued on behalf of the Employees cannot find application in this case, as no positive act was evinced from the conduct of the Municipality that it would comply with the award.

[20] It is further acknowledged that the Municipality has not accounted in detail for each and every instance of the delay after incorporation of Kungweni in May 2011. What is of relevance is that a replying affidavit in the withdrawn review application was deposed to also in May 2011 after incorporation. Thereafter, and following a contempt application brought by the Employees, and further in an effort to ascertain the status of the withdrawn application, correspondence and engagement was entered into between the Municipality's current attorneys of record and the Employees' attorneys of record from May 2011. The Municipality's problems were further compounded by a lack of cooperation from Mateme-Makgalele attorneys who declined to hand over the file in respect of the withdrawn application. It is accepted that the Municipality's current attorneys of record could have done more than merely requesting the file from Mateme-Makgalele attorneys. However on the whole, the difficulties the Municipality had encountered upon the incorporation of Kungweni cannot be overlooked. To this end, I am satisfied that given these constraints, and subsequent endeavours by the Municipality in dealing with matters it had inherited, a compelling explanation for the delay in launching the main application has been proffered.

Prospects of success:

[21] In regards to the approach in dealing with the aspect of prospects of success, this Court in *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*⁷ stated the following:

⁷ 2009 30 ILJ 347 (LC) at para 27.

'The prospects of success or bona fide defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. See *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 (A-C).'

- [22] The Municipality submitted that its prospects of success compensates for the protracted delay in bringing this application. In this regard, it was contended that the award of the Arbitrator was reviewable for reasons set out in the review application, which were incorporated in this application. For the sake of convenience, and in order not to burden this judgment with repetition, the considerations surrounding the parties' prospects of success will be dealt with in detail within the context of the review application itself. For now, it is sufficient to indicate that a reading of the pleadings indicates that the Municipality has established prospects of success in the main application, and this factor in my view, compensates for the extreme delay as discussed above.

Prejudice and other considerations:

- [23] The Labour Appeal Court in *Kerradam Properties (PTY) LTD t/a Cabanga Conference Centre v Sonica Matthee*⁸ further emphasised that the factor of prejudice plays a role only when the delay is substantial. The Employees' contention was that if the award was not implemented, they will be deprived of their right to promotion in terms of the award to a higher level, and as a result, will be denied the salary increases and increase in pension benefits which are attached to the post. It was further submitted that some of the Employees would have been entitled to travel allowances.
- [24] The Municipality's contention was that it stood to suffer prejudice should condonation not be granted, since it would be forced to compensate the Employees in the amount of millions of rands in retrospective salary increases based on promotions that they were not entitled to, together with millions of rands in future earnings calculated on their respective salaries. It was

⁸ Case no: JA 72/2010 at para 5

submitted that ultimately, it would be the ratepayers of the Municipality that will be footing this bill.

- [25] It cannot be doubted that the Employees having referred a dispute, are entitled to a speedy resolution of that matter. In their view, that matter was resolved with the delivery of an award which was in their favour. It is accepted that the delay was indeed prejudicial to them in that they were deprived of a speedy resolution of the dispute. However, once that award was taken on review, any rights emanating from that award remained in abeyance, and the Employees cannot claim to be prejudiced simply on account of the award not being implemented as they had expected. They cannot lay claim to rights and privileges emanating from an award which is still the subject matter of litigation.
- [26] On the other hand, the prejudice to the Municipality is real and substantial if condonation is not granted. If the application fails, the Employees would then be entitled to promotions and the consequent monetary benefits that accompany those promotions. As it is apparent from their submissions, the prejudice to them is more in respect of the financial benefits emanating from, and expectations which the award created.
- [27] The financial implications of the award are clearly far-reaching, and for all intents and purposes, the issue remains whether the Employees are indeed entitled to the relief obtained. This question can only be answered within the context of determining the review application. Thus the interests of justice in the circumstances, more particularly in view of the financial implications of the award sought to be reviewed, require that the Municipality be afforded an opportunity to state its case in respect of the review application. As was correctly pointed out on behalf of the Municipality, any prejudice suffered by the Employees will be cured by an unsuccessful review application, with the consequent retrospective back pay and other benefits pertaining to their promotion. In the light of these and other factors as stated in consideration of this application, it is determined that the Municipality has shown good cause, and that its late filing of the review application should be condoned.

The review application:

- [28] The Municipality contended that the Arbitrator's award was reviewable on at least 21 (twenty one grounds). It is accepted that the role of the reviewing court is limited to deciding issues that are raised in the review proceedings, and that the court may not on its own raise issues which were not raised by the party who seeks to review an arbitral award⁹. It is common cause that the award sought to be reviewed was issued against Kungweni Local Municipality whilst the Employees were employed by that Municipality. In obtaining that award, the Employees' main contention was that Kungweni had unilaterally upgraded all employees on job levels 14 and 15 to job level 13. In the Employees' view, job levels 14 and 15 were phased out and as a result thereof, they should have been promoted and renumerated accordingly.
- [29] The Employees' contentions were premised on the Resolution passed by Kungweni on 22 February 2007 prior to incorporation to the effect that '*....the starting Post level for the Kungweni Local Municipality employees will be post level 13 as from 1 July 2007 and all employees will enjoy the benefits of housing and medical aid, with effect from 1 July 2007*'. In their answering affidavit in respect of the review application, the Employees denied that they wanted to be cascaded to a higher job level, and contended that their main dispute pertained to 'promotion'. Their concern was that they were not given reasons why they were excluded from the promotions as a result of the passing of that resolution. The Municipality had submitted that although none of the Employees were on post levels 14 and 15 when the resolution was passed, the Arbitrator had nevertheless found that they should be promoted from their current levels to one level up as per that resolution.
- [30] It was further contended on behalf of the Municipality that the wording and clear intention of the resolution was to abolish post levels 14 and 15. Thus all the employees that occupied those post levels when the resolution took effect, were to be automatically elevated to post level 13 for the purposes of enjoying housing and medical aid benefits. In the light of the dispute referred by the Employees, and the effect of the Resolution, the main issue in considering the

⁹ CUSA v Tao Ying Metal Industries and Others 2009 (2) SA 204 (CC) at para 66

review of the award is whether the Arbitrator, in the light of the material placed before her, or in respect of the issues she was required to determine, misconceived the nature of the enquiry or arrived at an unreasonable result.

The award:

- [31] In her award, the Arbitrator referred to the resolution and pointed out that those employees on levels 14 and 15 were promoted to level 13 except the Employees. On that basis, she had to determine whether the Municipality had committed an unfair labour practice. The Arbitrator however went further and stated that the issue for determination was whether the failure and/or refusal by the Municipality to effect promotion had *prejudiced* the Employees. This second part of the enquiry was clearly not a matter before her, ^{moreso} since by its nature it is not an arbitrable issue. On this issue alone, the Arbitrator clearly misconceived the nature of the enquiry, and this issue will be addressed later in the judgment.
- [32] The Arbitrator did not deem it necessary to traverse the evidence except for what she deemed to be key issues adduced by the witness 'on behalf of the other applicants'. She referred to the resolution, the promotion of other employees to level 13; the fact that there was a list of employees that were to be promoted; the financial implications thereof, and the fact that the Employees in *casu* were not informed why they were excluded.
- [33] In the light of that summary, the Arbitrator under the heading "Legal Position" then proceeded to state that there was no substantive reason given by the Municipality for *excluding* the Employees, and that the documents presented by IMATU were unchallenged or undisputed. In this regard, the Arbitrator proceeded to refer to various authorities in regards to the failure to dispute evidence. She further stated that '*honesty was never an issue throughout cross-examination*' even though it was not clear in what context the issue of 'honesty' came about, and further since the sole witness called by the Employees was hardly cross-examined, let alone on the issue of 'dishonesty'. The Arbitrator further pointed out that the Municipality did not call witnesses and had not produced any documents. She further attacked the Municipality's representative for merely presenting hearsay evidence which she had

rejected, and concluded that it had failed to justify the *exclusion* of the Employees.

[34] It is accepted that the provisions of section 138 (7) (a) of the LRA require a commissioner to issue an arbitration award with brief reasons. 'Brief reasons' in my view does not imply scant reference to evidence presented or material referred to. It requires at least an attempt by the arbitrator to deal with the substantive merits of the matter by setting out in his/her award, the issues for determination in clear terms, a concise summary of the evidence led by identified witnesses, a coherent analysis of that evidence, the conclusions reached based on that evidence, a consideration and justification of relief ordered if any, and conclusions in this regard. In many respects, the award is found wanting in this regard.

[35] From the Arbitrator's summation of the evidence and conclusions reached in the award, it is difficult to discern what had transpired in the arbitration hearing, what evidence if any, was led, which documents were presented and not disputed, and further the basis upon which a conclusion was reached that the Employees were unfairly excluded from the list for the purposes of the issues that were to be determined. There was further no basis laid for the relief granted or the justification thereof. This omission necessitates an examination of the entire record of the arbitration proceedings.

The arbitration proceedings as gleaned from the record;

[36] At the commencement of the proceedings, the Municipality's representative, Mr. Kekana had requested a bundle of documents from the Employee's representative, Mr. Modisha. In his opening address, Mr. Modisha had identified the issue for determination as relating to the failure of the Municipality to promote the Employees in the light of the promotion of other employees to level 13, which he considered to be unfair in that the decision (resolution) was cascaded to all employees. In the light of what Mr. Modisha had proclaimed to be what the Employees' case was at the time, I fail to appreciate the reason they would deny in their answering affidavit for the purposes of this application that their case was never about being cascaded.

Flowing upon what Mr. Modisha had said, the Arbitrator had curiously asked him the number of the employees involved and whether they were 'misled', to which Mr. Modisha responded in the affirmative. It is not clear from the record as to in what material respects the Employees were 'misled', or the purpose the Arbitrator had asked that leading question.

- [37] Mr. Kekana on behalf of the Municipality had commenced his opening address by saying that he conceded to what Mr. Modisha had said, and went on to explain the purpose of the resolution, which was to bring the basic salary level acceptable to all employees and to comply with the provisions of SALGA. He had further stated that the effect of the resolution was not to promote employees and that the Employees were not excluded from that process.
- [38] Mr. Modisha had then proceeded to present his case on the basis of documents, and had referred to the composition of the "Personnel Local Labour Forum" as per clause 2.8.1 which provides that *"At every employer, a local labour forum shall be established with equal representation from trade unions and the employer..."*. It is not clear from the record as to which document these provisions are to be found. Be that as it may, flowing from these provisions, Mr. Modisha submitted that the resolution was taken and implemented without IMATU being informed, more specifically in respect of its 38 members who were excluded. In the light of not being informed of that decision and its implementation, IMATU held the view that the exclusion of its members was unfair. To that end, Mr. Modisha had submitted that all 38 members were excluded and prejudiced as they should have been promoted (cascaded) to a level up in terms of that resolution.
- [39] Mr. Modisha had then proceeded to call one witness, Mr. Daniel Jacobus De Jager, the Third Respondent and the Chairperson of IMATU at Kungweni. It is not clear from the record as to what the testimony of this witness was all about as that part of the record was indistinct. It however appears that he testified on the issue of salaries and adjustments even though it is not clear in what context the issue was raised.

- [40] When it was Mr. Kekana's turn to cross-examine Mr. De Jager about his participation in the LLF, an objection was raised by Mr. Modisha. This question was pertinent since Mr. Modisha had complained that IMATU was excluded from the decisions taken at the level of the LLF and the implementation of those decisions. It was further relevant since Mr. Kekana had in his opening address, denied that the Employees were excluded from the process surrounding the decision to abolish levels 14 and 15. Even more pertinent was that the witness as an IMATU representative, and he was in a position to respond to that question.
- [41] The Arbitrator had however prevented Mr. Kekana from asking that pertinent question, on the basis that Mr. Modisha had called that witness solely to testify on the issue of salaries. Mr. Modisha had then closed his case by submitting that the decision of the Municipality to promote employees at level 14 and 15 to level 13 had excluded the 38 IMATU members, which was unfair. He had submitted that the Employees should thus be 'promoted in terms of the resolution'.
- [42] Mr. Kekana on behalf of the Municipality submitted that levels 14 and 15 were abolished through the resolution on the basis that employees at those levels did not qualify for benefits such as housing and medical aid. Those employees were then moved to level 13 in order to enjoy these benefits. That decision or resolution was taken through the LLF structure in terms of the collective agreement where both the unions and management sat in equal representation. The intention of the resolution was to focus on housing and medical aid benefits, and the Employees in the dispute had already qualified for those benefits by virtue of their positions and levels as managers. Mr. Kekana had pointed out that IMATU was part of that process, and it was wrong and misleading for IMATU to contend that it was not consulted.
- [43] Notwithstanding the fact that the parties had closed their respective cases and presented arguments, the Arbitrator had then specifically asked Mr. Modisha to set out the relief that the Employees seek in writing and to e-mail her a '*few lines*'. The significance of this request will be highlighted later. Mr. Modisha had responded that he will do so as part of his closing arguments. Mr. Kekana

had objected that the request was unprocedural as the parties had closed their respective cases. Mr. Modisha had nevertheless undertaken to provide the nature of the relief the Employees seek in writing. The Municipality in its founding papers contended that the Arbitrator when considering relief had merely cut and pasted into her award, what Mr. Modisha had sent her. This issue will be dealt with later in this judgment.

The legal framework surrounding review applications:

- [44] It is now settled law that an award of a commissioner would not be reviewed and set aside if it is one which a reasonable commissioner would have made¹⁰. A recent and more decisive explication of the review test as enunciated in *Sidumo* and as applicable to awards was given in *Herholdt v Nedbank Ltd*¹¹, where the Supreme Court of Appeal, *per* Cachalia JA summarized it as follows:

‘A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 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 the effect is to render the outcome unreasonable.’

- [44] In *Goldfields Mining South Africa (Pty) Ltd v CCMA and Others*¹² the Labour Appeal Court confirmed that the applicable test does not admit what has been referred to as a “process-related review”. Thus it is no longer open to a reviewing court to set aside an arbitration award only on account of a process-related irregularity on the part of the arbitrator. Pertinent questions to be asked by the reviewing court were spelt out as follows:

¹⁰ *Sidumo and Another v Rustenburg Platinum Mines and Others Ltd* 2008 (2) SA 24 (CC)

¹¹ [2013] 11 BLLR 1074 (SCA) par 25 at 1084.

¹² 2014] 1 BLLR 20 (LAC)

'The questions to ask are these: (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 employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he 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? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'¹³

And

'Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork.'¹⁴

The grounds for review and analysis:

[45] Section 138 (1) of the LRA provides that:

'A commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities'

¹³ At para 20

¹⁴ At para 21

In *CUSA*¹⁵, Ngcobo J having considered the above provisions had stated the following;

‘Consistent with the objectives of the LRA, commissioners are required to “deal with the substantial merits of the dispute with the minimum of legal formalities (Citation omitted). This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to “conduct the arbitration in a manner that the commissioner considers appropriate”. (Citation omitted) But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do. (Citation omitted)’¹⁶

And,

‘A commissioner must, as the LRA requires, “deal with the substantial merits of the dispute”. This can only be done by ascertaining the real dispute between the parties. (Citation omitted) In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a

¹⁵ 2009 (2) SA 204 (CC)

¹⁶ At para 62

consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.¹⁷

- [46] In applying the above principles to the facts of this case, and further having taken regard to those enunciated in *Herholdt* and *Goldfields*, which are in effect on all fours with what Ncgobo J stated in *CUSA*, the issue is whether firstly, the Arbitrator within the powers conferred on her in terms of the provisions of s138 (1) of the LRA, had identified and determined what the real dispute between the parties was. It follows that if she did not, the outcome she had arrived at would not be a reasonable one.
- [47] The identification of the real dispute between the parties can obviously not be determined from the certificate of outcome or the referral forms alone. It is not uncommon for the applicant parties in their referral forms to make allegations as to the nature of their dispute, and yet during the arbitration process, their claim turns out to be something completely different. In such instances, the process of narrowing down of issues ultimately assists the arbitrator in properly identifying the nature of the dispute, and it is incumbent upon the arbitrator to properly record what the dispute is understood to be and to confirm that it is indeed that particular dispute that is being pursued, which should be the subject of determination.
- [48] The nature of the Employees' claim as per their referral took three forms, viz, interpretation or application of a collective agreement, matters of mutual interests, and an alleged unfair labour practice. Once Mr. Modisha on behalf of the Employees had identified the Employees' dispute as pertaining to 'promotion', the Arbitrator was compelled to determine whether indeed the dispute pertained to promotion and then applied the relevant principles applicable to unfair labour practice relating to promotion. In essence, what was required of the Arbitrator was a determination as to whether any conduct on the part of the Municipality constituted an unfair labour practice relating to promotion as contemplated in section 186 (2) (a) of the LRA.

¹⁷ At para 63

- [49] The Municipality's main contention was that the Arbitrator had misconstrued what was required of her in finding that the Employees were excluded from promotion for no apparent reason. The Employees' contention on the other hand was that the Arbitrator had relied on undisputed and unchallenged evidence that was before her in coming to her conclusion.
- [50] From the record of proceedings, it is apparent that what the Employees had placed before the Arbitrator in arguing that they were entitled to a promotion or be cascaded to the next level was the resolution and the evidence of Mr. De Jager. The resolution merely abolished levels 14 and 15 and all employees below those levels automatically moved to level 13. The wording and interpretation of the resolution was to enable employees below level 13 to qualify for medical aid and housing benefits. It follows then that in order for the Employees to be granted any mobility upwards or promoted in terms of the resolution, or to have been entitled to the benefits of medical aid and housing in terms of that resolution, they ought to have occupied positions below levels 14 and 15. The Employees in their answering affidavit did not dispute the Municipality's contentions that none of them occupied levels below 14 and 15. The resolution did not make any reference to cascading of employees at other levels, and to this end, since the Employees already occupied levels where they were entitled to the benefits which the resolution intended to address in respect of other low level employees, it follows that there could not have been a 'promotion' in the true sense.
- [51] In typical promotion disputes, it is trite that it is not the task of an arbitrator when considering such dispute to decide who should be promoted. The role of the arbitrator within his or her powers as envisaged in section 138 (1) of the LRA is to oversee that the employer did not act unfairly towards the employee complaining of not being promoted. In that role, the arbitrator is required to determine whether the employee was given a fair hearing or opportunity to be promoted, in relation to the requirements of the post.

- [52] In *De Nysschen v General Public Service Sectoral Bargaining Council & Others*¹⁸, this Court confirmed the principle that an employee does not have an automatic right to promotion. In this case however, the Employees and the Arbitrator based the right to automatic promotion on a clearly incorrect reading and interpretation of the resolution. The Employees' case in essence is that whether anyone of them deserves it not, by virtue of the resolution passed by Kungweni, they should automatically be cascaded or pushed a level up. The Arbitrator incorrectly agreed with the Employees' proposition when there was clearly no basis or reasoning to do so. By misconceiving the nature of the enquiry, it follows that she failed to properly determine the dispute that was before her. As a consequence, the Arbitrator failed to deal with the substantial merits of the dispute, and her decision was not one that another decision-maker could reasonably have arrived at based on the material before her.
- [53] The Municipality had also lamented the fact that Mr. Kekana was prevented from cross-examining Mr. De Jager. The relevance of the question surrounding Mr. De Jager's participation in the LLF has been pointed out. The Arbitrator's conduct in this regard clearly constituted misconduct in relation to her duties as she was obliged to deal with the objection to the question and then determine whether the question was relevant or not. She committed a gross irregularity in the conduct of the proceedings by merely agreeing with Mr. Modisha that the witness could not be asked questions outside the scope of those asked in examination in chief. The process that the Arbitrator employed clearly did not give the Municipality a full opportunity to have its say in respect of the dispute, as it was important for Mr. De Jager to confirm or deny whether he was part of the forum where the resolution was taken since the Employees had complained about not being consulted. A core principle of cross-examination is that the cross-examiner should be afforded an opportunity to put questions to a witness, put a version to that witness and be afforded latitude with that witness, irrespective of the purpose for which that witness was called. In this case, the Arbitrator deprived Mr. Kekana of this right, thus depriving him of a fair hearing.

¹⁸ [2007] 5 BLLR 461 (LC)

- [54] The Municipality had contended that despite the fact that the parties at arbitration had agreed that the matter would be argued with reference to documentation, and the calling of the one witness, the Arbitrator attached much weight to the Municipality's alleged failure to challenge the evidence of the Employees. As already pointed out from the record, the only oral evidence presented was by Mr. De Jager on behalf of the Employees. His testimony appeared to be in respect of adjustment of salaries. The Employees' contention was that even if a matter is argued on the papers, there was still a duty on a party to introduce evidence in order to prove its case or to dispute the other party's case. On the grounds that Mr. Kekana had not produced any documentary evidence of his own, it was contended the Arbitrator had no option but to rely on the evidence of the Employees.
- [55] It is trite that in any legal proceedings, the only evidence led or presented may not necessarily be the most probable or determinative. It is not clear from the Arbitrator's reasoning, if any, in what material respects any evidence was not challenged by the Municipality. This also appeared to the Employees' main contention throughout their opposition to the review application. In my view, and as gleaned from the record, the only relevant evidence before the Arbitrator, and upon which she was required to determine the dispute was the resolution passed by Kungweni and the submissions and arguments of the representatives. In the light of the conclusions made in regards to Mr. De Jager's evidence and its relevance to the issues to be determined, it follows that a determination had to be based on the resolution itself and the arguments and submissions made on behalf of the parties.
- [56] In my view, there is no basis for a conclusion to be reached that there was other relevant evidence, which the Municipality failed to dispute or challenge. Thus, to the extent that no evidence was led in regard to the alleged 'exclusion' of the Employees, as Mr. De Jager did not give testimony in that regard, there was no basis for the Arbitrator to conclude that the Employees were excluded from any process relating to the resolution or its implementation. Furthermore, even if there was merit in the Employees' contention that they were excluded from the process, it is my view that since

there is no automatic right, to let alone an entitlement to a promotion, an exclusion from a decision making process relating to the taking of a municipality resolution cannot give rise to an automatic right to a promotion as the Arbitrator had found.

- [57] It was further contended that the Arbitrator was unable to grasp what was required of her during the arbitration process. In this regard, an example was made of her reference to section 186 (2) (b) of the LRA which had nothing to do with the matter. In my view, nothing much turned on this submission, even though the Arbitrator had made reference to an incorrect provision of the LRA in the light of the issue she had to determine.
- [58] Furthermore, it was contended that the Arbitrator went down the wrong path by stating that what she had to decide was whether the failure and/or refusal by the Municipality to effect promotion had *prejudiced* the Employees. Within the context of section 186 (2) (a) of the LRA, the issue for consideration was whether there was an unfair labour practice committed by the Municipality. Prejudice as correctly pointed out on behalf of the Municipality is not an arbitrable issue. As also correctly pointed out on behalf of the Employees, prejudice is merely a consequence of unfairness, where it is proven. Even though the Arbitrator did not specifically mention the issue of prejudice in her remedy, to have nevertheless identified it as an issue for determination was clearly to misconceive her mandate.
- [59] The Municipality had also contended that the relief granted by the Arbitrator as stated in the award, was merely a cut and paste of the submissions made by Mr. Modisha in writing as requested by the Arbitrator, without applying her mind to the issue. Firstly, the Arbitrator found that the Municipality's conduct constituted an unfair labour practice. As already indicated elsewhere in this judgment, there was no basis for this conclusion to be reached. Secondly, the Arbitrator had found that the resolution should be cascaded to all the Employees who were excluded from promotion. A conclusion has also been made that there is no basis for that finding to be made as the resolution did not make reference to cascading of employees, and furthermore, the

Employees had already in any event, benefitted from medical aid and housing benefits, which benefits employees below levels 14 and 15 had not enjoyed.

[60] Even more curious from the award was a cost order made against the Municipality on the basis that its conduct was 'clearly vexatious and frivolous'. It is trite that costs generally pertain to legal costs. Where costs are ordered on account of a party's unacceptable conduct, including vexatiousness and frivolity, such conduct must be identified and specified in the award in clear terms rather than a mere general statement being made. In this case, there is no indication as to how the Arbitrator arrived at a conclusion that the Municipality had conducted itself in a frivolous or vexatious manner. In the absence of a basis for that conclusion, it follows that the order of Arbitrator constitutes gross irregularity.

[61] Furthermore, IMATU, which represented the Employees in the Arbitration proceedings, is not entitled to costs in the ordinary sense. Any reference to costs in arbitration proceedings held under the auspices of the Bargaining Council could only have been arbitration costs determined by the Council's own rules, and which costs would ordinarily be payable to that Council. If ever there was anything payable to IMATU, it would purely have been limited to disbursements, which even then had to be quantified. To this end, it is found that there was no basis for the Arbitrator to make a cost order against the Municipality.

Conclusions:

[62] In the light of the conclusions reached that the Arbitrator's decision was not one that another decision-maker could reasonably have arrived at based on the material before her, the only issues to be determined pertain to the appropriate relief and the costs of this application. The Municipality's contention was that this Court was in a position to adjudicate on the merits of the matter, and in the interests of justice, to hold that the Employees are not entitled to promotion, rather than remitting the matter back to the Bargaining Council for arbitration *de novo*, taking into account the protracted history of the matter.

[63] The Arbitrator came to a decision, which a reasonable arbitrator would not have come to in the light of the material placed before her. That material has been gleaned from the record, and since the award must be reviewed and set aside, and little purpose would be served by remitting the matter back to the First Respondent (Council) in the light of the conclusions reached by this court.

[64] In regards to costs, section 162 of the LRA enjoins the court with a discretion to order costs having had regard to considerations of law and fairness. Given the protracted history of this matter, and the fact that most of the Employees are still employed by the Municipality, it is not deemed to be in the interests of fairness to make any cost order.

Order:

- i. The Applicant's late filing of the review application is condoned
- ii. The arbitration award issued by the Second Respondent under case number GPD080708, and acting under the auspices of the First Respondent is reviewed and set aside.
- iii. The award is substituted with one that reads:
 - a) "The Employees' referral of an alleged unfair labour practice relating to promotion is dismissed.
 - b) There is no order as to costs"
- iv. There is no order as to costs.

TLHOTLHALEMAJE, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

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Adv. F Venter

Instructed by:

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LABOUR COURT