IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR868/16

In the matter between:

PELINDABA WORKERS UNION obo MEMBERS **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION (CCMA) **First Respondent**

RICHARD BYRNE *N.O.* **Second Respondent**

NECSA **Third Respondent**

Heard: 14 July 2017

Delivered: 21 February 2018

JUDGMENT

SHONGWE. AJ

[1] Applicant had launched a review application in terms of Section 145 of the Labour Relations Act[1] (the LRA) seeking an order as follows:

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[1] Act 66 of 1995 as amended.

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1.1. Correcting, reviewing and setting aside the arbitration award of Commissioner Richard Byrne under case number GATW2534-2015 issued on March the 30th 2016;

1.2. That the award of Commissioner Byrne be substituted with the following in respect of the dispute under case number GATW2534-2015

1.2.1. Salary adjustments/increase for all the First Applicant’s members (listed in annexure ‘H” to the pre-arbitration conference minutes) and for the Second through twelfth Applicants (before the CCMA) for the relevant period be recalculated and implemented based on the same costs of living arguments/adjustments that applied for the D salary bands; ALTERNATIVELY, across the board salary adjustments/increases for all the First Applicants members and for the Second through Twelve Applicants for the relevant period of 6.5% as approved by the NECSA Board of Directors. FURTHER ALTERNATIVELY, salary adjustments/increase for the First Applicant’s members and for the Second through twelfth Applicants (before the First Respondent) for the relevant period to be recalculated based on an approach that assigned a cost of living adjustment related to economic variables (such as CPI) for all E Bands employees that performed as expected by performance contract (score value 3) and that higher performance receive an additional percentage in a pro rata manner with the average total E Bank increase not exceeding the 6,5% as approved by the Board of Directors.

1.2.2. The payment of corrections due to these readjusted increases be backdated to the 1st of July 2015;

1.2.3. The Third Respondent to adjust the remuneration scales of E Bands to be closer to market values in a manner consistent with what was done for others bands and adjust the remuneration of all E bands staff, who are below the minimum of the new scales, to at least minimum of the new scales with effect from 1st July 2014;

1.2.4. The letters stating that Ben Blom, Isabel Steyn, Frans Mashilo and Alick Chinake allegedly neglected their duties resulting in a 0% increase be withdrawn and that new letters be issued.

1.2.5. FURTHER ALTERNATIVELY that the First through Twelfth Applicants dispute against the Third Respondent under case number GATW2534-2015 be determined by this court in a manner which it deems appropriate.

1.3. That the award of the Second Respondent be substituted with the following in respect of the dispute under case number GATW1555-2015.

1.3.1. Salary adjustment/increase for all the Applicants members (First Applicant in this matter) (as per the list "A" bundle A page 73 before the CCMA) for the relevant period be recalculated and implemented backdated to July 1st 2015 based on the same costs of living arguments/adjustments that applied for the other salary bands who received an across the board cost of living salary adjustment of 5.5%.

1.3.2. ALTERNATIVELY that Applicants (First Applicant in this matter) dispute against Third Respondent under case number GATW1555-2015 be determined by this honourable court in a manner which it deems appropriate;

1.4. In the alternative to prayers 1.2 and 1.3 above, that this honourable court refer the dispute under case number GATW2534-2015 (which was consolidated with case number GATW1555-2015) back to the First respondent to be determined by a Commissioner other than the Second Respondent;

1.5. Costs if opposed;

1.6. Further and/or alternative relief.'

<u>Applicant's Submissions</u>

[2] The Applicant submitted that:

2.1 The Second Respondent committed misconduct in relation to the duties of a commissioner and/or committed gross irregularities in the conduct of the arbitration proceedings and/or failing to decide the matter and/or misconstrued the evidence and/or law and/or logic and/or conclusions not sustained by the evidence and/or no reasonable decision-maker would have reached and that his award is one that a reasonable decision-maker would not have reached in that:

2.1.1 The Second Respondent stated in paragraph 3 of the award in respect of the Remuneration Policy of the Third Respondent that "*The Applicant party argues that this amounts to a collective agreement"*. Applicants never argued that the Remuneration Policy amounts to a collective agreement;

2.1.2 The Second Respondent stated in paragraph 4 of the award that "*On this occasion though, the CEO moderated the score ratings himself, and downgraded all the Applicants scores such that they obtained either a very low or no increase"*. The agreed performance rating scores and moderated scores of the First Applicant's members and the Second through twelfth Applicants (before the First Respondent) are as set out in Annexure "A" to the Pre – Arbitration minutes concluded between the parties and reflects some employees scores were moderated upwards, some downwards and some were left unchanged;

2.1.3 The Second Respondent stated in paragraph 4 of the award that *"The Applicants were not given any information as to the methodology used in the moderation of their scores, save that the CEO indicated to them the areas in which their performance(s) were lacking".* The record will reflect that the CEO only indicated to Ben Blom (a member of the First Applicant), Isabel Steyn (a member of the First Applicant), Frans Mashilo (the Eighth Applicant) and Alick Chinake (the Fifth Applicant) (before the First Respondent) the areas in which in their performance(s) were allegedly lacking but not to the remainder of the First Applicant's members and other Applicants whose scores were moderated downwards.

2.1.4 The Second Respondent stated in paragraph 7 of the award under the heading: "ISSUES TO BE DECIDED" that "The Respondent party has argued that the Commission for Conciliation, Mediation and Arbitration (CCMA) does not have jurisdiction to arbitrate this matter as the Applicants are seeking salary increases, which is a matter of mutual interest. It argues that the Applicant should embark on collective bargaining or power play in order to deal with this matter, and that wage increases cannot amount to benefits or to be arbitrated upon". This argument was raised by the Respondent *in limine* prior to the commencement of the arbitration and the Second Respondent, on 20 January 2016 made *inter-alia,* a verbal ruling that the initial dispute referred by the Applicants constitutes a dispute of rights which falls within the unfair labour practice jurisdiction of the LRA and that the CCMA has jurisdiction to arbitrate this dispute.

2.1.5 The Second Respondent stated in paragraph 13 of the award that "In my view, the employer's action in sending out a letter stating that they would only afford salary increases on the basis of performance for Band E staff, amounted to a unilateral change to a right that the employees had by virtue of the Remuneration Policy, and which could also be argued to have been a collective agreement. Unilateral changes to terms and conditions of employment are not subject to arbitration by the CCMA…" and "As such, in my view the CCMA does not have jurisdiction to arbitrate the action of the employer in this regard under the Unfair Labour Practice jurisdiction". This conclusion constitutes a variation and/or an alteration of the Second Respondent's previous *in limine* verbal ruling that the initial dispute referred by the Applicants constitutes a dispute of rights which falls within the Unfair Labour Practice jurisdiction of the LRA that the CCMA has jurisdiction to arbitrate this dispute.

2.1.6 The Applicants never argued that the Remuneration Policy amounts to a collective agreement. The Third Respondent persisted with its argument during arbitration, which it also raised *in limine* that the CCMA does not have jurisdiction to arbitrate this matter as the Applicants are seeking salary increases, which is a matter of mutual interest and that the Applicants should embark on collective bargaining or power play in order to deal with this matter, and that wage increase cannot amount to benefits or be arbitrated upon. The Third Respondent also did not argue that its Remuneration Policy amounts to a collective agreement;

2.1.7 The Second Respondent did not inform the Applicants and/or the Third Respondent during the arbitration or prior to issuing his award, that he was considering, alternatively reconsidering the issue of jurisdiction afresh, on a different or alternative basis than previously challenged by the Third Respondent and on which his initial verbal ruling was based. The Second Respondent also did not invite the Applicants and/or the Third Respondent to make representations in this regard and/or did not afford them an opportunity to be heard on the matter and/or consult with them prior to issuing the award.

2.2 The Second Respondent stated in paragraph 13 of the award under the heading "ANALYSIS OF EVIDENCE AND ARGUMENT" that "In my view, the employer's action in sending out a letter stating that they would only afford salary increase on the basis of performance for Band E staff amounted to a unilateral change to a right that the employees had by virtue of the Remuneration Policy, and which could also be argued to have been a collective agreement" and concluded that this amounts to a unilateral change to the terms and conditions of employment.

2.3 The Second Respondent's conclusion that the sending of the letter amounted to a unilateral change to a right that the employees had by virtue of the Remuneration Policy and the further conclusion that the action of the employer amounts to a unilateral change to terms and conditions of employment constitutes an error in fact and/or in law and/or in logic, is not sustained by the evidence and is not a reasonable conclusion. The Second Respondent does not state which "right" the employees had by virtue of the Remuneration Policy and which was changed unilaterally. It can only refer to the right to a "cost-of-living salary adjustment related to economic variables" as part of the Third Respondent's annual salary increase. The actual percentage increase (if any) is still the subject of discretion exercised by management of the Third Respondent in which case it would fall squarely with the CCMA's Unfair Labour Practice jurisdiction. Accordingly, this "right" cannot amount to a term and condition of employment.

2.4 The Second Respondent's conclusion that the Third Respondent's Remuneration Policy could be argued to have been a collective agreement constitutes an error in fact and/or law and/or in logic, is not sustained by the evidence and is not a reasonable conclusion. The Third Respondent's Remuneration Policy is not a collective agreement for *inter alia*, but not limited to, the following reasons which the Second Respondent failed to appreciate:

2.4.1 Third Respondent's Remuneration Policy did not arise as a result of the consent or meeting of the minds of all the parties thereto. Organized Labour was merely consulted during the process of formulating the Remuneration Policy, put forward certain proposals and accepted the final version on behalf of First Applicant; and/or

2.4.2 That the Remuneration Policy provides for and was subject to the approval by the CEO of the Third Respondent; RM Adams; and/or

2.4.3 Section 23 *of the* LRA*, which deals with the legal effect of collective agreements, inter alia,* states that a collective agreement binds-

> '…(d) employees who are not members of the registered trade union or trade unions party to the agreement if-
>
> (i) The employees are identified in the agreement;
>
> (ii) The agreement expressly binds the employees; and
>
> (iii) That trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.'

The Remuneration Policy, if it was a collective agreement, does not identify employees who are not members of the registered trade union or trade unions party to the agreement and does not expressly bind these employees. As a result, the Third Respondent's Remuneration Policy, if it was a collective agreement, only binds the unions who are parties to the agreement (The First Applicant and Solidarity) and their members, but not the remaining employees of the Second Respondent who are not members of the union parties. This is an untenable interpretation. From the content of the Remuneration Policy it is clear that it is the intention of the Policy that it applies to all employees of the Third Respondent.

2.4.4 The Remuneration Policy, if it is a collective agreement neither stipulates the period for which the Policy is valid and in force nor does it contain a cancellation clause and is therefore concluded for an indefinite period. As a result, the legal effect is that any party of the Remuneration Policy (which according to Second Respondent is a collective agreement) may terminate same by giving reasonable notice in writing to the other party/ies as contemplated in Section 23(4) of the LRA. It would be untenable if either the First Applicant or Solidarity could cancel the Third Respondent's Remuneration Policy by giving reasonable notice.

2.5 Even if the conclusion of the Second Respondent that the sending out of the letter amounted to a unilateral change to a right that the employees had by virtue of the Remuneration Policy, which Policy could be argued to have been a collective agreement was correct, the Second Respondent failed to appreciate and lost sight of the fact that:

2.5.1 An employer's conduct is subject to scrutiny by the CCMA in terms of Section 186 (2) (a) when an employee's claim concerns failure by an employer to comply with an obligation arising *ex contractu* or *ex lege*, as well as the unfair exercise of the employer's discretion in terms of a policy or practice relating to the provision of benefits; and/or

2.5.2 Where conduct amounts to a unilateral change to terms and conditions of employment or constitutes a dispute of interest, the employee can elect to arbitrate the matter or to strike if the conduct of an employer also falls within the ambit of an unfair labour practice and/or

2.5.3 It is the functions and duty of the Second Respondent during arbitration proceedings to determine the real nature of the dispute between parties on consideration of all facts and that the Second Respondent could have adjudicated this dispute as a dispute about the interpretation or application of a collective agreement as provided for in terms of the provisions of section 24 (2) of the LRA.

2.6 The Second Respondent, concluding in paragraph 15 of the award, that *"there was insufficient evidence before me as to how or why this action by the CEO was unfair. As such, I am not making a determination as to whether or not it was an unfair act, but am simply dismissing the matter. As stated above, my ruling is that the CCMA does not have jurisdiction to arbitrate this leg of unfair labour practice dispute"* effectively amounts to an order of absolution from the instance inferring the notion that the Applicants may reopen their case on this point.

2.7 The Second Respondent, in concluding as he did as set out above, failed to appreciate and lost sight of the fact that:

2.7.1 Commissioners are enjoined by virtue of the provisions of Section 138(1) of the LRA to determine disputes fairly and quickly and must deal with the substantial merits of the dispute and therefore the Second Respondent's failure to make a determination, which effectively amounts to an order of absolution from the instance, is not a competent order of the CCMA; and/or

2.7.2 The effect of an arbitration award in terms of section 143 of the LRA is final and binding. By dismissing the matter, the Second Respondent has effectively nominally determined the matter but failed to deal with the substantial merits of the matter.

2.8 The Second Respondent, in concluding in paragraph 15 of the award, that "*there was little evidence before me as to how the discretion exercised by* *the CEO had been unfair"* failed to appreciate and lost sight of the evidence presented on behalf of the Applicants, in particular:

2.8.1 The common cause facts contained in the addendum to the Pre – Arbitration Conference Minutes;

2.8.2 The evidence of how moderation is supposed to be done and that moderation should not disturb the individual scores of the Group Executive (GE) for their individual subordinates;

2.8.3 The evidence that the moderation was done arbitrary in that some of the scores of the Applicants reporting to the same GE were moderated up and others down by the CEO who did not contract with the individuals. Accordingly, the CEO could not interfere with the performance scores of the individuals.

2.8.4 The evidence that according to the Remuneration Policy, shortcomings of the individuals who are evaluated should be addressed during the year so that they could address such and be par at the end of the year and that the CEO could not do this.

2.8.5 The evidence that when the moderated scores were considered, no formula or methodology was applied as some were moderated up and others down and that the First Applicant requested the reason(s) for the moderation by the CEO but to date of the arbitration no reason/s had been provided.

2.8.6 The fact that the Third Respondent's Remuneration Policy which regulates Pay for Performance does not provide for moderation of performance scores.

2.8.7 The fact that other than Ben Blom (a member of the First Applicant), Isabel Steyn (a member of the First Applicant), Frans Mashilo (the Eighth Applicant) and Alick Chinake (The Fifth Applicant) (before the First

Respondent) who were informed by the CEO in which areas their performance(s) were allegedly lacking, the remainder of the First Applicant's members and other Applicants who were moderated downwards, were not informed of such areas in which their performance(s) were allegedly lacking.

2.8.8 The evidence of Ben Blom, Isabel Steyn , Frans Mashilo and Alick Chinake (The Fifth Applicant) in general, but specifically that even after they sought clarity and/or engaged with the CEO and/or clarified with the CEO why their duties were allegedly visibly neglected, and not accurate, they had received no clarification or explanation from the CEO.

2.8.9 The fact that the CEO was in moderating some of the scores for the Applicant's downwards have interfered and/or overruled the contractual performance agreement and assessment between the Applicants and their GE's under the circumstance where there could not have been any basis to do so.

2.8.10 It is clear from the evidence that the CEO did not recalculate Blom, Steyn, Mashilo and Chinake's individual performance scorecards and afford them each item, about which he had a complaint. What the CEO did is to simply deny these Applicants increases without any recalculation thereby totally bypassing the performance contracts and calculations. Chinake for instance scored a 3.5 or 3.6 according to his scorecard and his score was simply downgraded to 3.0. Mashilo scored 4.1 and his score was also downgraded to 3.0 Steyn and Blom were downgraded from 3.2 to 3.0.

2.8.11 The CEO's actions in this regard violate various fundamental principles which the Respondent undertook to maintain in its Remuneration Policy. These include a lack of "***transparent communication*** regarding the organisation's reward practices that enable individuals to have an informed opinion" remuneration differentiation between individuals which is not based on criteria that are fair and objective, deviation from the agreements on how their performance will be measured, deviation from what is required of them in terms of standards of performance as derived from their annual KPA's, a deviation from the agreement on how they are to be measured regarding performance, a unilateral amendment on which targets they must achieve and a total lack of objective feedback about their performance during the year of assessment.

2.8.12 The fact that the CEO meted out differential treatment in moderating some of the Applicants' performance scores and/or the *ex facie* the evidence this was done on an arbitrary and/or inconsistent basis and that thus in itself constitute unfair conduct and that the Respondent failed to lead any evidence and /or to call the CEO as a witness to justify the moderation.

2.9 The ninth and tenth issues in dispute, as per the pre-arbitration minutes are not issues in dispute in the alternative to any of the previous issues in dispute whether or not the Commissioner finds that the Respondent was entitled to base the salary increase on performance or not.

2.10 The ninth issue in dispute is whether the fact that E Bands' salary bands have not been adjusted to the 50th and 75th percentile of the market for the relevant period as provided for in the Remuneration Policy is contrary to the provisions of the Third Respondent's Remuneration Policy, is accordingly unfair and whether it constitutes an unfair labour practice as defined in the LRA.

2.11 The tenth issue in dispute is in the alternative to the ninth issue in dispute and it is whether the fact that the E Bands salary bands were not adjusted for the relevant period, which is a deviation from the practice historically followed by the Third Respondent, whilst C and D bands' salary bands were adjusted for the relevant period, is unfair and whether it constitutes an unfair labour practice as defined in the LRA.

2.12 The Second Respondent is enjoined by virtue of the provisions of section 138 (1) of the LRA to determine disputes fairly and quickly and must deal with the substantial merits of the dispute. The Second Respondent failed to determine the ninth and tenth issues in dispute and failed to deal with the substantial merits of these disputes and/or failed to consider the evidence tendered by the Applicants in this regard.

<u>Third Respondent's Submissions</u>:

[3] The Third Respondent submitted that:

3.1 The arbitration award rendered by the Second Respondent is rational and one that another decision maker could have arrived at. There is no legal basis for it to be reviewed and set aside.

3.2 The first finding made by the Second Respondent is that the decision to use performance, as opposed to CPI, as a basis for effecting salary increases constitutes a unilateral change to the terms and conditions of employment and cannot be arbitrated by the CCMA. It was always the Third Respondent's contention that the entire dispute referred to the CCMA by the Applicants concerned the issue of remuneration increases and that was not arbitrable. The finding by the Second Respondent that this is indeed the case is reasonable, rational and correct. There is no legal basis to interfere with the finding.

3.3 The second finding by the Second Respondent was that the decision by the Third Respondent to depart from the use of CPI to performance to determine salary increases amounted to the exercise of discretion and could potentially constitute an Unfair Labour Practice. On the basis, he found that the CCMA had jurisdiction to arbitrate the matter. Although the Third Respondent does not accept this finding, in the light of the ultimate conclusion arrived at by the Second Respondent, it is not necessary for the Third Respondent to deal with this issue any further. The Third Respondent will, should the review be successful, and the dispute be referred back to the CCMA, deal with this issue in that forum.

3.4 The third finding by the Second Respondent is that the Applicants failed to adduce sufficient evidence to prove that the Third Respondent's CEO had acted unfairly in moderating the Applicants' scores, which determined what increase, if any, they would get. The Second Respondent then proceeded to dismiss the referral. The Third Respondent submits that as the Applicants bore the onus to prove that the Third Respondent had committed and Unfair Labour Practice, the Second Respondent correctly dismissed the referral.

3.5 It is clear that what the Second respondent did was to effectively grant the Third Respondent absolution, in circumstances where the Applicants had failed to lay any evidentiary basis that required any response from the Third Respondent .The Second Respondent was entitled to make such a finding as section 193(4) of the LRA requires him to resolve an alleged Unfair Labour Practice dispute on terms that he deemed to be reasonable. Dismissing a referral is one of the findings that a Commissioner in these circumstances can make. The Third respondent accordingly submits that the award by the Second Respondent is not reviewable.

3.6 As pointed out already, the first finding by the Second Respondent was that the change from a CPI based salary increases to a performance based one gave rise to a dispute about unilateral changes to terms and conditions of employment. This finding is correct in the sense that the dispute was and had always been about salary increases and was never about the provisions of benefits. The Second Respondent's finding that he did not have jurisdiction is legally correct.

3.7 It is common cause that in so far as a jurisdictional finding is concerned, the basis for its review is whether or not it is legally correct. In *casu*, the Third Respondent submits that the ruling by the Second Respondent is indeed legally correct. The evidence before the Second Respondent was clear what the Applicants wanted was a salary increase, and not benefits.

3.8 The Applicants claim that the Third Respondent did not amend the Remuneration Policy but deviated from it. The Third Respondent contends that its decision to base salary increases for senior managers on their performance does not constitute a departure from the Policy but is inconsistent with it. In any event, the Third Respondent submits that the fact that remuneration is dealt with in a Policy does not make it a benefit issue subject to arbitration at the CCMA.

3.9 The Third Respondent did not exercise discretion in respect of the decision to increase or not increase salaries of the Applicants. Increases were granted or not granted based on actual performance. This does not render the decision discretionary.

3.10 In so far as the time periods between when the Third Respondent took the decision to change to a performance based remuneration increase approach is concerned, this does not constitute a dispute that can separately be referred and is not one that the Second Respondent was required to determine. The issue was whether the decision was a dispute concerning the provision of benefits. It was not.

Court's Evaluation

[4] The Commissioner had ruled at the start of the arbitration proceedings that the dispute 'finds itself within the definition of Unfair Labour Practice. The CCMA does have jurisdiction that falls under the definition of Unfair Labour Practice…' It is my view that this was in error because the evidence led later on during the arbitration hearing was very clear that this was no ordinary provision of benefits dispute but one of mutual interest as clearly shown below (evidence of Coetzee in cross examination). The Commissioner cannot be faulted for having deviated from his earlier ruling that the matter was one relating to Unfair Labour Practice. The Applicant's complaint therefore cannot amount to any significant ground for review that can impact on the overall content of the arbitration award.

[5] It was argued that all senior managers like the Applicants had performance agreements entered into between 2008 to 2013. Before 2013 all senior managers got cost of living increases.

[6] The salary increases at the employer is handled in collective bargaining for certain categories of employees. Those who are outside of the bargaining unit normally receive salary increases based on the outcome of the salary negotiations. Mr Coetzee testifying for the employees indicated[2] that "the NECSA Board in its meeting held in May 2013 decided that with effect from July 2014…salary increases for managers will be based on performance". However, during the period in question the employer handled it differently for senior managers falling outside of the bargaining unit. Once the Departments' Heads had evaluated and assessed the relevant managers, the CEO moderated the final results which produced the results for getting or not getting salary increase. The Commissioner after hearing evidence decided to dismiss the referral on the strength of the fact that there was no sufficient evidence before him suggesting that the CEO acted unfairly in moderating. I am of the view that the Commissioner's award in this regard cannot be faulted. This ground of review cannot therefore be sustained.

[7] Sections 64(4) and (5) of the LRA provides that:

> "(4) Any employee who or any trade union that refers a dispute about a ***unilateral change to terms and conditions of employment*** to a council or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a) -(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change. (5) The employer must comply with a

[2] See page 85 lines 11 – 13 and page 86 lines 17 – 19 transcript of 8/3/2016: Record of Proceedings.

requirement in terms of subsection (4) within 48 hours of service of the referral on the employer".

[8] Unequivocally the Commissioner took a clear stance that "in my view, the employer's action in sending out a letter stating that they would only afford salary increases on the basis of performance for band E staff amounted to a unilateral change to a right that the employees had by virtue of the Remuneration Policy… Unilateral changes to terms and conditions of employment are not subject to arbitration by the CCMA, but can rather be pursued by aggrieved employees through strike action and/or application to the Labour Court"[3].

[9] The Applicants' Mr Coetzee was given a version[4] to comment on and he answered in the affirmative. "The applicant seeks the following relief, salary adjustment increases for all the applicant's members… You were asking for the CCMA to order that NECSA must give you a salary increase of 7%?..." – Answer: "YES". The attack to the Commissioner's award that it should be reviewed for having ruled that the matter before him was not arbitrable is unjustified. Seeing that the employer had deviated from the normal way of granting salary increase – instead of the bargaining forum and the extension of the agreed percentage, the employer opted for a performance based increase, the employer changed the terms and conditions of employment without the other parties imputs. This in our law is called unilateral change to the terms and conditions of employment and therefore not arbitrable. There is nothing reviewable in this finding – it is neither misconduct, gross irregularity nor exceeding of one's powers. It is a finding that any other commissioner could make. It is an award justifiable in the circumstances of this case. In fact, the employer's contention that a dispute about salary increase falls outside of the CCMA's jurisdiction and therefore not arbitrable is legally correct.

[3] See paragraph 13 of the arbitration award.
[4] See page 90 lines 16 – 25 of the transcript Record of Proceedings.

[10] In an arbitration hearing regarding an alleged Unfair Labour Practice, the applicant employee would commence to lead evidence. The same happened in this matter. The Commissioner said[5] "okay, can you confirm Mr Du Bruyn, is that the case of the Applicant party", to which Mr De Bruyn answered[6] – "That is correct Mr Commissioner". The Commissioner turned to the Employer's representative Mr Maserumule, "alright, are you ready with the respondent's case"[7]. Mr Maserumule responded[8] "Formally we are not calling any witnesses". This I think was done having realized that the employees had failed to make any case to the Commissioner, even on their own version. The Commissioner assessed all the evidence and the concluding submissions by the parties and came to a clear conclusion that no case was made by the employees for Unfair Labour Practice and that the alleged Unfair Labour Practice is in fact a unilateral change to the terms and conditions of employment which falls outside the CCMA's jurisdiction to arbitrate. The Commissioner did not say he is granting absolution as none was requested.

[11] Again the Applicants' case seems to have been convoluted to an extent that it is not one issue that they seek relief for, thus making it untenable. On the one hand they want increase based on the Remuneration Policy or the wage negotiations outcome. On the other hand, Steyn testified[9] that she was informed that she had not performed well and thus got no increase. She is challenging the employer's assertion that she is not performing and thus not entitled to any salary increase. But this was a dispute that she was supposed to have lodged outside of the complaint that the employer had introduced performance based salary increase. She seeks relief on the basis of the performance, whilst others question the Policy introduced by the letter. This is not right. It is my view that considering her individual case with its own merits, she would have made a better case and it would have fallen within the jurisdiction of the CCMA.

[5] See page 187 lines 9 – 10 transcript.
[6] See page 187 line 11 transcript.
[7] See page 187 lines 13 – 14 transcript.
[8] See page 187 line 15 transcript
[9] See page 103 lines 1 – 25 transcript.

[12] It is worth mentioning in passing and as a general observation in this matter, that there seems to develop a habit in the South African workforce that employees would want to be highly paid no matter what the consequences – whether they are productive or not. In this case it seems to me that the employer had brought about a relatively objective system in order to facilitate performance and to use same for evaluating employees' work performance to determine if an increase in salary is justified. This seems to correct the injustices that are created by the Remuneration Policy. The Applicants are opposed to this performance based salary increment and they want to be paid increase following outcome from negotiations and whatever else as a method of calculating cost of living and the CPI. That is unacceptable if we want to be a productive and cost effective country. Employees at the level where the Applicants are need to understand this better. To demand for a high salary and not wanting the same benchmarked and gauged against one's work performance is wrong.

[13] In the final analysis and for the aforegoing reasons, I make the following order:

<u>Order</u>

1. The review application is dismissed with costs.

IM Shongwe

Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr. De Bruyn, an attorney

Instructed by: Deon De Bruyn Attorneys

For the Respondent: Mr. Maserumule, an attorney

Instructed by: Maserumule Attorneys