IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR963/2016

In the matter between:

SA NUCLEAR ENERGY CORPORATION	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
LEN DEKKER N.O.	**Second Respondent**
PELINDABA WORKERS UNION	**Third Respondent**

Heard: 14 July 2018

Delivered: 15 March 2018

JUDGMENT

SHONGWE, AJ

[1] The Applicant brought an application in terms of Section 145 of the Labour Relations Act[1]in which it seeks an order:

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[1]Act 66 of 1995 as amended.

1.1 Reviewing and setting aside the arbitration award issued by the Second Respondent dated 01 April 2016;

1.2 Substituting the award with an order that the CCMA did not have jurisdiction to arbitrate the dispute, alternatively that applicant did not commit an unfair labour practice arising from the implementation of salary increases for the financial year 2015/2016, alternatively;

1.3 Remitting the matter to the CCMA for a hearing de novo before a Commissioner other than the Second Respondent;

1.4. Costs if opposed.

[2] It was argued on behalf of the Applicant that:

2.1 The dispute is about an alleged unfair labour practice relating to the provision of benefits. The Commission for Conciliation, Mediation and Arbitration (CCMA) issued a number of arbitration awards as obtained in the CCMA file.

2.2 Commissioner Dekker issued an award which has nine pages in Respondent's favour. The other two found in the Applicant's favour. The commissioner deposed to an affidavit in attempt to clarify the matter, among others, as follows –

> "…on Friday 1 April 2016 I issued an award…and sent it to the CCMA by email…On Monday 4 April 2016 …I received an email from…an official of the CCMA, where certain issues were raised…it is an internal process at the CCMA that all arbitration awards are internally scrutinized/perused by a different commissioner before it is sent out to the parties with a watermark of the CCMA. It is such a perusal by commissioner Blignaut that required me to again relook at the arbitration award. Taking into account the inputs received due to the perusal, an amended second award was sent to the CCMA..."

2.3 It was not shown in what respect he had to relook at the award. The only thing shown by the CCMA checklist is that the Commissioner was asked if he intended duplicating the heads of arguments from the parties. In answer to this specific question the Commissioner simply deleted some of the heads.

2.4 Reliance on the *SAMWU v Syntell (Pty) Ltd*[2]is unnecessarily technical as this case is irrelevant as it dealt with determination of a demarcation. The award cannot therefore to stand following the gross irregularities.

2.5 All the awards are signed by the commissioner. The Commissioner seemed to have lacked impartiality in that he removed the Applicant's submissions.

2.6 There is a recognition agreement whereat salary increases are negotiated. Though the Respondent's trade union (Pelindaba Workers Union) is not recognized, the Applicant extended negotiated salary increase to all. The employer had a Remuneration Policy.

2.7 Salary increase is not a benefit as contemplated in the LRA definition of unfair labour practice.

2.8 It is wrong for the Commissioner to say that the employees must get 7.5%. There is section 164 of the LRA 1995 where there is a demand for salary increase, providing of a process to be followed when parties disagree. They can strike or embark on a lockout.

2.9 A decision must be made that there was grave irregularity in this matter; that this was not a benefit arbitrable by the CCMA, and that the award is irrational.

[3] In turn it was argued on behalf of the Respondent that:

3.1 On the 7th October 2016 the Registrar of this court informed the Applicant that the record had been filed needing to be collected within seven days.

[2](2013) 34 ILJ 1263 (LC).

3.2 The commissioner filed an affidavit explaining which award is the valid one and why there were more than one awards. Commissioner Blignaut who quality checked the award had approved it except for duplication of closing submissions. On reading the award and perusing the quality check sheet there is no influence shown. Commissioner Dekker indicated that he was asked to relook at the award. The wording in paragraph 4 at page 64 of his affidavit is very unfortunate. The Commissioner does not say why he changed the award.

3.3 Once an award is served to parties it is final even if it has no signature. The commissioner becomes *functus officio*. Two of the six awards have a watermark despite all having the commissioner's signature

3.4 The commissioner changed his view on the matter.

3.5 It is clear that the Commissioner did not ignore any of the parties' submissions. The exclusion of one in the award is unfortunate.

3.6 Despite the seeming irregularity as envisaged by the case of *Shoprite Checkers (Pty) Limited v Ramdaw N.O and Others*[3] both parties had had their cases fully and fairly ventilated during the hearing. It will be unfair to punish one party for the administrative errors of the CCMA. It is mere speculation that Commissioner Blignaut interfered with the award because she was removed in another matter involving the same parties. There is no evidence that she unduly influenced the outcome of the award by Commissioner Dekker.

3.7 The employer negotiates salary increases with NEHAWU for a group of employees excluding C4 band. Mr Coetzee testified that the wage agreement had not been partially extended. The extension was done in full.

[3] (2000) 7 BLLR 835 (LC).

3.8 This was not a matter of collective agreement or bargaining, instead it is a matter of the Remuneration policy that management had to exercise. The employees had following the *Apollo Tyres South Africa v Commission for Conciliation, Mediation and Arbitration and Others* [4] matter elected to come to adjudication instead of striking.

3.9 It was unfair of the Commissioner ordering that the employer had to pay one employee and leave others out, and this has a potential to expose the employer to being sued for discrimination. These increases were budgeted for at R38-million.

3.10 The award cannot be reviewed.

<u>Evaluation</u>

[4] Sec 145 (1)[5] states that

> "any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an o rder setting aside the arbitration award".

The Section also set out the time limits for the applicationfor review. Section145 (2) g ives limited grounds of review. Sec 145 (2)
states that a defect referred to in subsection (1), means***:***

> "(a) that the Commissioner
> (i) committed <u>misconduct</u> in relation to the duties of the commissioner as an a rbitrator;(ii)
> committed <u>gross irregularity</u> in the conduct of the arbitration proceedings; or
> (iii) <u>exceeded commissioner's powers</u>; or (b)
> that an award has been improperly obtained."[6]

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4 [2013] 5 BLLR 434 (LAC); (2013) 34 ILJ 1120 (LAC).

5 Labour Relations Act 66 of 1995 as amended

6 Underlining for own emphasis

[5] Justice Steenkamp in the matter between *Transnet Freight Rail v Transnet Bargaining Council and Others,*[7]dealt with a review and briefly considered the various grounds by referring to court decisions as follows:

"Misconduct, Gross Irregularity and Acting in Excess of Powers

4. Matters may be taken on review in terms of Section 145(2)(a) of the LRA on the grounds of the arbitrator committing misconduct, gross irregularity and/or acting in excess of the powers conferred.

9. This court, in the case of *Woolworths (Pty) Ltd v CCMA & others* [2010] 5 BLLR 577 (LC) at paragraphs [19] to [23], in considering the test for review, stated the following:

"In the unreported case of *Reliant Retail Limited t/a Bears Furnishers v Commission for Conciliation, Mediation & Arbitration & others* (case number JR2841/06) [reported at [2009] JOL 24327 (LC) – Ed], this Court held that the function of the court in considering whether or not to interfere with the arbitration award on review is limited to those grounds provided for in terms of section 145 of the Labour Relations Act 66 of 1995, as suffused by the constitutional standard of reasonableness. The reasonable standard entails the applicant having to show that the decision reached by the arbitrator under the statutory arbitration system is one which a reasonable decision-maker could not reach (see *Bato Star Fishing (Pty) v Minister of Environmental Affairs & Tourism* 2004 (7) BCLR 687 (CC); *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) [also reported at [2007] 12 BLLR 1097 (CC) – Ed]). In order to succeed in relying on the grounds set out in section 145 the applicant must show that the commissioner:

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers.

[7][2011] 6 BLLR 594 (LC).

[20]The court further held in that case that the issue of whether or not the commissioner committed a gross irregularity or failed to apply his or her mind entails a determination as to whether or not the complaining party was accorded a full and fair hearing by the commissioner. A fair and full hearing entails a determination of all the issues which were placed before the arbitrator during the arbitration proceedings. The inquiry in this respect focuses on the method or conduct of the decision-maker and does not concern itself with the correctness of the decision reached by the arbitrator (see *Sidumo* at 1179A–C and 1180A–C). There is however authority that it is not every irregularity that would constitute gross irregularity.

[21]In the Bears Furnishers case, supra, the court held that the judicial review powers given to the Labour Court is not for the purpose of necessarily weighing evidence which was presented during the arbitration hearing, upon which the commissioner acted upon in arriving at his or her conclusion. The enquiry which the court needs to conduct is whether or not there is the evidentiary basis for the conclusion reached by the commissioner. In other words, the duty of the court in review is to determine whether the conclusion reached by the commissioner has its support in substantial and credible evidence including consideration and appreciation of the issues arising from the dispute and the facts...

[22]In addition… the general rule, as I understand it, is that the function of a reviewing court in dealing with the complaint of gross irregularity is limited to determining whether or not a commissioner in exercising the powers given to him or her by the Labour Relations Act did so within the appropriate sphere of those powers and whether the conclusions reached in the exercise of those powers are grounded on the relevant principle of law and supported by all the evidence and the material facts which were presented during the arbitration proceedings. I may hasten to also say if there is a deviation from the facts or the law it must be of such a material nature, that it would amount to a denial of a fair hearing to the affected party, for that to warrant interference with the award by the court.

[23] The question that arises from the above is whether the conclusion reached by the commissioner falls outside the range of reasonableness so as to attract interference with the award by the court... The question to ask in considering the reasonableness or otherwise of an award is to determine whether the conclusion of the commissioner is one which a reasonable decision-maker could not reach (see *Sidumo & another v Rustenburg Platinum Mines Limited & others* [2007] 12 BLLR 1097 (CC))."

10. Ngcobo J, in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*, *supra*, considered the duty of commissioners to consider all the material facts and stated as follows:

"It is plain … that CCMA arbitration proceedings should be conducted in a fair manner…Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason….

It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate…This constitutes a gross irregularity in the conduct of the arbitration proceedings … And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings." As he then was Paras [267] – [268]

11. When considering how to determine whether a commissioner exceeded his or her powers the Constitutional Court in that case set out the relevant legislation as follows: "The question whether a commissioner has exceeded his or her powers within the meaning of s 145(2)(a) (iii) must be determined in the light of the powers conferred on the commissioners

under the LRA. In terms of s 188(1)(a) a commissioner is required to determine whether the reason for dismissal is a fair reason. In terms of s 188(2), a commissioner is required to take into account the code in considering whether or not the reason for dismissal is a fair reason. Schedule 8 to the LRA contains the code in relation to dismissal. Item 1(3) declares that - '[t]he key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees'. Item 2(1), in turn, provides that '[w]hether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty'. Item 7 in turn provides that… [The arbitrator in] determining whether a dismissal for misconduct is unfair should consider the factors set out in item 7(a) and (b). All these provisions must be understood in the context of the right to fair labour practices in s 23 of the Constitution and the obligation imposed on a commissioner 'to determine the dispute fairly and quickly'. In NEHAWU [the Constitutional Court]… concluded: '[T]he focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to [the right to fair labour practices], it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.'"

12. The Constitutional Court went on to conclude as follows: "… [T]he award which a commissioner ultimately makes, must be fair to both the employer and the employee. The LRA regulates unfair dismissals in express and detailed terms and provides a code that should be taken into account by commissioners. And this defines the powers of the commissioner in relation to awards that they may make under the LRA. It follows from this that where a commissioner makes an award which is

manifestly unfair either to the employer or the employee, the commissioner exceeds his or her powers under the LRA. Such an award falls to be reviewed and set aside under s 145(2)(a) (iii) of the LRA."

13. The crucial enquiry is whether the conduct of the decision maker complained of prevented a fair trial of issues. *Ellis v Morgan* 1909 TS 576 *Goldfield Investments Limited and Another v City Council of Johannesburg and Another* 1938 TPD 560 *Sidumo and Another v Rustenburg Platinum Mines Limited and Others supra Telcordia Technologies Inc v Telkom SA Limited* (2007) 3 SA 266 (SCA)

14. Further, Navsa AJ stated the following in Sidumo and Another v Rustenburg Platinum Mines Limited and Others, supra: "To sum up, in terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances." Paras [269] – [271] 7 Paras [272] – [275]

15. As set out above, our courts have recognised that a latent gross irregularity in the conduct of the arbitration proceedings may occur to the extent that an arbitrator may mistake or misunderstand the point in issue thereby failing to afford the parties a fair trial by virtue of the arbitrator misconceiving the whole nature of the enquiry or of his duties in connection with that process. From the judgments referred to above, the duties of an arbitrator in respect of process may be summarized as follows: 15.1. To apply the law of evidence; 15.2. To apply the substantive law of dismissal; 15.3. To apply his or her mind to all materially relevant factors; 15.4. To disregard materially irrelevant factors; and 15.5. To weigh up all the materially relevant factors and issues.

16. In addition, the judgments referred to above establish that to the extent that an arbitrator deviates from complying with those duties, such

> deviation must not be of such a nature that it materially deprives a party of a fair hearing."

[6] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[8] the Constitutional Court held that the test to be used when determining whether an arbitration award would be unreasonable, and, therefore, reviewable, is whether the decision of the arbitrator is a decision "that a reasonable decision maker could not reach. In that case, the Constitutional Court found that for a review to be successful, it must be established by the Applicant that the result of the arbitration award falls outside of a "range of reasonableness".

[7] The Supreme Court of Appeal upheld the latter decision of the Labour Appeal Court in *Herholdt v Nedbank Ltd*[9]. In this judgment, the LAC had found that:

> "Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision, and if a decision maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable".

[9] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[10]. When specifically interpreting the *Sidumo* test, the Court held as follows:

> "To this end, a CCMA arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside."

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[8](2007) 28 ILJ 2405 (CC).
[9](2012) 33 ILJ 1789 (LAC) at para 36.
[10](2008) 29 ILJ 964 (LAC) at para 92.

[10] In *CUSA v Tao Ying Metal Industries and Others*[11] O' Regan J held:

> "It is clear... that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice".

[11] In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[12], it was held as follows:

> "In summary, section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification".

[12]In the matter of *Goldfields Investments LTD Limited and Another v City Council Johannesburg and Another*[13] Schreiner J said:

> "It seems to me that gross irregularities fall broadly into two classes, those that take place openly,as part of conduct of trial -
> they might be called patent irregularities -
> and those that take place insidethe mind of judicial officer, which are only ascertainable from the reasons given by him and whichmight be called latent. Of course, even the first class are only material inamuch as they prevent, orare deemed to prevent, the magistrate's mind of being properly prepared for the gi

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[11](2008) 29 ILJ 2461 (CC) at para 84.
[12](2010) 31 ILJ 452 (LC) at para 17.
[13]1938 TPD 551at 560.

ving of thecorrect decision. But unlike the second they admit of objective treat ment, according to the nature ofthe conduct. Neither in the case of latent nor i n the case of patent irregularities need there may beany intentional arbitrarine ss of conduct or any conscious denial of justice.

The law, as stated in *Ellis v Morgan; Ellis v Desai* 1909 TS 576 at 5 has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is conduct which is described as a gross irregularity; behaviour which is perfect well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of issues. If it did prevent a fair trial of issues, then it will amount to a gross irregularity. Many patent irregularities have this defect. And if from the magistrate's reasons it appears his mind was not in state to enable him to try the case fairly this will amount to a latent gross irregularity."

[13] The general principle is that a 'gross irregularity' concerns the conduct of the proceedings rather than the merits of the decision. A qualification to that principle is that a 'gross irregularity' is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry. Where the arbitrator's mandate is conferred by statute then, subject to any limitations imposed by the statute, they exercise exclusive jurisdiction over questions of fact and law[14].

[14] The CCMA Commissioners are governed not only by the LRA but most importantly they are regulated by and it is expected that they comply with their code of conduct[15] which provides for ethical conduct of Commissioners at all times, in pursuit of conduct that beyond reproach.

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[14] See para 10 of *Herholdt v Nedbank Ltd (701/2012)* (2013) 34 ILJ 2795 (SCA).

[15] See section 117(6) of the LRA 1995.

[15] The general obligations of Commissioners[16] of the CCMA is *inter alia,* to ensure that all processes which Commissioners conduct are seen to be fair, impartial, independent and ensure that they promote the principles of equity and social justice in order to maintain the confidence of the public, and all CCMA users. They must act with honesty, impartiality, due diligence and independently of any outside pressure in the discharge of their functions; they must conduct themselves in a manner that is fair to all CCMA users and the public at large; they must not be swayed by fear of criticism or by self-interest.

[16] The CCMA in this matter had not conducted itself as expected – that is, impartial and independent. A Commissioner has to hear parties and independently render an award. The Applicant's apprehension of bias is well grounded on various grounds. For example, the Commissioner was able to capture the employees' submissions and never did the employer's version. The perception is that he did not bother reading the employer's case, if he did, he did not understand it. In an award it is key that a party is given reasons why his/her version is not accepted. There is a saying that an arbitration award must address the losing party. This award fails to do that if that party's case is not well captured and/or summarised.

[17] The Commissioner, in paragraph 11 of the award, at page 20 of bundle A Pleadings, emphatically wrote:

> "the legal principles set out in these cases quoted above by the applicant's representative will be considered in the evaluation and analysis of the dispute. The conclusion reached is set out in paragraphs 19 and 20 of this award".

He then at para 19 of the award says:

> "In terms of the case law extensively quoted by the applicant's representative… there is a legal answer to the respondent's submission that

[16] See clause 3 of the CCMA Commissioners Code of Conduct, more particularly sub-clauses 3.1 – 3.3.

> the dispute in question is a ‘matter of mutual concern’ not capable of being arbitrated.”

The said respondent’s submission is not within the body of the award nor is same made reference to by the Commissioner[17].

[18] At paragraph 12 of the award the Commissioner indicated that “*regarding the evaluation the respondent made the submission in paragraphs 5 to 16 of its heads of argument quoted in paragraph 6 above*”. It is common cause that this purported quoted heads is not in the heads. We now know they were removed at Commissioner Blignaut’s recommendation. Unfortunately for both Commissioners they never went back to re-read and edit the award, hence these discrepancies. They are indeed unfathomable coming from Senior commissioners.

[19] It is unclear why the CCMA introduced this so-called quality check if this leads to one’s decision being second guessed by another and finally influenced to change. That does not become that commissioner’s award as issued, but someone else’s award who did the quality checking – or two persons award, one heard the evidence and the other read the former’s award and made his/her contribution. The only instance an award need quality checking is as far as format, language and research are concerned and not the substantive merit part of the award.

[20] Commissioner Blignaut was once involved with the same parties’ representatives in another matter. They had quarrels regarding times of sitting and not attending and being, etc. Though we have no evidence before us, it is clear that Commissioner Blignaut should not have been involved in this matter, as a quality controller. She knew she had dealt with these parties before and their engagement ended in unhappiness. From the perusal of the quality check document there is no indication there as to whether there was a

[17] PELINDABA admits the commissioner’s omission in this regard – see pages 40 – 43 Pleadings Bundle A, para 16.1 – 16.15

quality check. Clearly it seems to me there was more than we can see that happened between the two Commissioners. Chances are that they telephonically spoke or they even met in the corridors at which the matter was canvassed. It is unexplained why the sudden change of the award's contents if Commissioner Blignaut had not pointed out same. It is unlikely that she only raised the issue of duplication of heads/closing submissions. Interestingly, Commissioner Blignaut never picked up in the last award that there was captured one party's version and not the other party's. Surely if this was about quality checking Commissioner Blignaut was supposed to approve the final product, which it seems she did not do. On this ground alone the award cannot stand. It is reviewed and set aside.

[21] On 11 November 2015 the union referred a dispute to the CCMA regarding unfair labour practice that "NECSA employees on the D salary bands only received a 5.5% cost of living increase from 1 July 2015 compared to the employees on the C salary bands who received a 7.5% cost of living increase for this period. Salary bands have also not been adjusted for the relevant period as provided for in the NECSA Remuneration Policy". As an outcome they require, the trade union recorded, "*to be treated the same as the employees on the C salary bands".*

[22] On 4 December 2015 the matter remained unresolved and an outcome certificate was duly issued.

[23] The matter was arbitrated in favour of the trade union and its members. It is the arbitration outcome that is being reviewed.

[24] I do not agree with the union and the Commissioner's conclusion that the dispute fell within the jurisdiction of the CCMA – "that the decision was taken by the employer in terms of its own remuneration policy and thus it amounted to 'benefits' to which the employees lay claim … as opposed to a right created in terms of collective bargaining…".

[25] There were wage negotiations at which the trade union herein was not a participant due to low membership thus not qualifying to be at the bargaining table. The deal struck between management and NEHAWU was such that "salary bands B1 – C4 received an across the board salary increase of 7.5% and salary bands D1 – D4 received an across the board salary increase of 5.5% of their respective total remuneration packages…"

[26] At the arbitration the trade union Pelindaba contended that NEHAWU was not entitled to negotiate and agree with the employer on the salary increase for salary band C4 because salary band C4 does not fall within bargaining unit A.

[27] I cannot understand how can the trade unionPelindaba wants to be winners even in a game they had not participated in. As far as I am concerned they were lucky that the employer even gave them 5.5% increase. It will be senseless to have a majority trade union negotiating a deal for its members and those outside demand parity with the majority. The Remuneration Policy is then misunderstood if it will downplay the bargaining chamber process and the outcome thereof.

[28] This leads to the issue of whether or not there was jurisdiction for the CCMA to arbitrate the matter.

[29] It is my considered view that the CCMA lacked jurisdiction to arbitrate the matter. The Commissioner misconstrued the case before him when he concluded that "the CCMA had jurisdiction to arbitrate the dispute". The employer's representative had clearly made a case to the Commissioner by way of asking a question;

> "does the CCMA have jurisdiction to award that the employer should actually give the employee a certain percentage increase? Where this percentage increase is a subject of collective bargaining[18]…All we are saying is that this dispute falls within the dispute of interest it is not a dispute of right[19]".

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[18] See lines 12 – 17 of the transcript page 8.
[19] See page 9 lines 23 – 24 of the transcript.

The Commissioner immediately intercepted:

> "But you have just told me it is not a subject of collective bargaining…"

[30] In response Mr de Bruyn argued that:

> "there was no negotiation, if the unions, if there is no majority union in bargaining unit B, then there was no negotiations, and if the employer then unilaterally implemented then it is difficult to see how you can say well this is a dispute of interest dispute".

[31] It is wrong both in fact and law of the Commissioner to have concluded that the decision to grant 5.5% salary increase to D band managers was made after consultation with NEHAWU and to the exclusion of Pelindaba and Solidarity, that it was a managerial decision made in terms of the Remuneration Policy and therefore constituted an exercise of a discretion and rendered the decision one relating to the provision of benefits. The Commissioner was wrong to say that the decision was unfair because the increases for band D managers was less than that of the bargaining unit employees and C4 band employees.

[32] It is not unfair to have awarded the senior managers lower percentage of increase as opposed to the lower ranking employees whose percentage increase emanated from wage negotiations process. This in my view will help close the gap between the various levels. It makes sense that the lowest paid are given a good increase. After all senior managers also get performance based increases.

[33] In the final analysis and for the aforegoing reasons, I make an order as follows:

<u>Order</u>

1. The award is reviewed and set aside;
2. The CCMA did not have jurisdiction to arbitrate the dispute;

3. The Applicant did not commit an unfair labour practice when implementing salary increases for the financial year 2015/2016;
4. Third Respondent must pay the Applicant's costs.

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IM Shongwe

Acting Judge of the Labour Court

<u>Appearances:</u>

For the Applicant: Mr. P Maserumule

Instructed by: Maserumule Attorneys

For the Third Respondent: Mr. D de Bryn

Instructed by Deon de Bryn Attorneys