



Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case no: C 302/2023

In the matter between:

**The Department of Education
Northern Cape Province**

Applicant

and

**Ruben Forbes Crow
Education Labour Relations Council
Solong Mosoma N.O
Sylvie Mariana Walker**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

Date of Hearing: 1 July 2025

Date of Judgment: 24 July 2025

Summary: Review of determination of arbitrator in ELRC in respect of unfair labour practice claim pertaining to promotion

JUDGMENT

STELZNER AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 (LRA) to review and set aside the arbitration award issued by the Third Respondent (the Arbitrator) under the auspices of the Second Respondent, the Education Labour Relations Council (ELRC), case number ELRC712-21/22NC dated 29 May 2023.
- [2] In terms of the award the appointment of the above named Fourth Respondent, Ms Walker, who was joined as Second Respondent in the arbitration proceedings but did not participate therein and has not participated in these review proceedings either, was set aside. Applicant (more specifically its Head of Department (HOD)) was directed to promote First Respondent with retrospective effect to the position of school principal at Carlton Van Heerden High School.¹
- [3] The Applicant seeks to have the award reviewed on various grounds.
- [4] It contends firstly that the ELRC had no jurisdiction to decide the dispute before it which was submitted as an unfair labour practice relating to promotion, making the determination which was made and granting the relief which was granted, arguing that the First Respondent should rather have sought to have the promotion of the Fourth Respondent set aside under PAJA than approach the ELRC. The “four crisp issues” identified in the Applicant’s practice note fall under this rubric.

The jurisdiction of the ELRC over the dispute

- [5] The unreported decision of LAC in the matter of *Education Labour Relations Council and Department Education: Gauteng* under Case

¹ The parties are referred to herein in the manner in which they have been cited in these review proceedings. First Respondent was the Applicant in the arbitration, the Department the First Respondent and Ms Walker the Second Respondent in those proceedings.

no: JA72/2022, heard on 23 May 2024 in which the judgment was delivered on 12 June 2024, provides the complete answer to this first ground of review.

- [6] In that matter the Labour Court had reviewed and set aside an arbitral award, made by an arbitrator, under the auspices of the Education Labour Relations Council (ELRC). The award was set aside pursuant to the Labour Court's finding that the Commissioner lacked jurisdiction to arbitrate the dispute.
- [7] The dispute there was between a Mr Betane and a Ms Motoma who had scored 92 and 90 points respectively in their interviews before a selection panel. The selection panel recommended to the School Governing Body (SGB) that Mr Betane be recommended for appointment by the Department of Education (DoE). The SGB ratified the decision and recommended Mr Betane for appointment to the post.
- [8] The DoE decided not to follow the SGB's recommendation and appointed Ms Motoma. The primary reason for rejecting the SGB's recommendation was that it overlooked the gender imbalance at the school. Having considered the gender imbalance at the school it decided to appoint a female.
- [9] Dissatisfied with the DoE's decision, Mr Betane referred an unfair labour practice dispute to the ELRC, in terms of section 186(2)(a) of the Labour Relations Act (LRA).²
- [10] At the arbitration, the arbitrator found that the conduct of the DoE constituted an unfair labour practice with regard to the promotion of Mr Betane. He ordered the DoE to appoint Mr Betane to the post, and set aside Ms Motoma's appointment.

² Section 186(2)(a) of the Labour Relations Act, 66 of 1995, as amended (LRA) provides:
 "Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving –
 (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee..."

- [11] Aggrieved by the arbitral award, the DoE launched a review application in the Labour Court. The Labour Court found that the conduct of the DoE constituted administrative action as defined in s1 of the Promotion of Administrative Justice Act (PAJA). It stated that administrative action may only be reviewed by a Court or tribunal, and, concluded that since the ELRC is neither a Court nor a tribunal, it had no jurisdiction to arbitrate the dispute.
- [12] The Labour Court relied on *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others*³ (*Point High School*) as authority for its conclusion.
- [13] With reference to the decisions in *inter alia Chirwa v Transnet Ltd & Others*⁴ and *Gcaba v Minister of Safety and Security and Others*,⁵ the LAC concluded that: The Applicant's complaint was essentially rooted in the LRA, as it was based on conduct of an employer towards an employee which may have violated the right to fair labour practices. It was not based on administrative action.⁶
- [14] The LAC held that ELRC is a bargaining council established in terms of the LRA for the education sector and followed *Mthashana FET College v Education Labour Relations Council and Others*⁷, in which the LAC said: "The primary function of bargaining councils is to regulate relations between management and labour in the sectors over which they have jurisdiction by concluding collective agreements. The bargaining councils are also entrusted with the responsibility to settle disputes between parties falling within their registered scope. A Constitution of a bargaining council should capture a set of fundamental principles which governs it. A bargaining council derives

³ [2008] ZASCA 48; 2008 (5) SA 18 (SCA); [2008] 3 All SA 35 (SCA).

⁴ [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); (2008) ILJ 73 (CC).

⁵ [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC).

⁶ Ibid at para 76.

⁷ [2020] ZALAC 35; (2020) 41 ILJ 2594 (LAC); [2020] 11 BLLR 1116 (LAC)

its jurisdictional mandate, to resolve and/or [determine] disputes referred to it, from its Constitution.’⁸

- [15] The LAC referenced, *inter alia*, the ELRC Collective Agreement 3 of 2016 (ELRC Guidelines: Promotion Arbitrations). This collective agreement specifically states that its purpose is to “*ensure that parties and panellists understand what is expected of them in relation to unfair labour practice disputes concerning promotions*”. The parties to whom this agreement applies bestowed the power to determine promotion disputes in the education sector on the ELRC.⁹
- [16] Based *inter alia* on this the LAC concluded the ELRC had jurisdiction to arbitrate the dispute between Mr Betane and the Gauteng Provincial Education Department. The order of the Labour Court was set aside and the matter referred back to that Court for the proper adjudication of the review application.
- [17] It has therefore been authoritatively decided that the ELRC has jurisdiction over a dispute such as the one now before this Court and that this Court can adjudicate a review of that decision, having regard *inter alia* to the Education Labour Relations Council Collective Agreement No. 3 of 2016 which contains ELRC Guidelines for dealing with Promotion Arbitrations.
- [18] Given that the jurisdictional challenge of the Applicant cannot be sustained, what remains is the review of the decision of the arbitrator on the grounds that it was so unreasonable that no reasonable arbitrator could have come to the conclusion which the arbitrator reached in this matter, both as to the finding of substantive unfairness and as to the remedy which the arbitrator granted the First Respondent.

⁸ *Ibid* at para 14

⁹ In terms of section 191(1)(a)(i) of the LRA an employee alleging an unfair labour practice may refer the dispute to a bargaining council if the parties fall within the registered scope of the bargaining council.

The powers of the arbitrator

- [19] Section 193(4) of the LRA provides that “An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, *on terms that the arbitrator deems reasonable*, which may include ordering reinstatement, re-employment or compensation.”
- [20] The Third Respondent ordered that the First Respondent be employed with retrospective effect in the post which the First Respondent claimed he was unfairly not promoted into. Whilst not the same as reinstatement of a dismissed employee into his or her original post, from which he or she was dismissed, the wide powers of the arbitrator, as long as reasonably exercised, would include that which the Third Respondent in this matter directed be done.
- [21] In addition regard can also be had to the ELRC Collective Agreement No. 3 of 2016 (CA) which bound both employer and employee and panellists of the ELRC in determining whether the Third Respondent had the power to determine what he did and grant the remedy which he granted.
- [22] Third Respondent as arbitrator entrusted with the task of determining the dispute was enjoined under the CA to have regard to the principles and the law as summarised therein in reaching his decision. This is because the CA is binding on the parties thereto and the LRA recognises the primacy of collective agreements.¹⁰
- [23] The purpose of this collective agreement (CA) is stated in the CA itself to be to “*ensure that parties and panellists understand what is expected of them in relation to unfair labour practice disputes concerning promotions and to promote consistent decision-making in arbitrations dealing with promotion disputes.*”

¹⁰

National Union of Metalworkers of SA v Motor Industry Staff Association & others (2025) 46 ILJ 109 (LAC) 111A albeit in the context of disputes about the interpretation and application of collective agreements

- [24] Clause 4 thereof recorded that parties had agreed *“To issue (the) Guidelines contained in Annexure A as an accessible source of reference for Panellists and parties on how to deal with substantive and procedural aspects of an arbitration process concerning an unfair labour practice related to promotions.”*
- [25] Elsewhere the CA provides that *“To the extent that these guidelines concern issues that cannot be regarded as the law, but purely as policy issues, that is the official policy of the ELRC and panellists are expected to follow that policy.”*
- [26] It also records that *“It is beyond the scope of these guidelines to record and summarise all the relevant provisions of all the applicable legislation, collective agreements, PAM regulations and case law. Panellists who arbitrate promotion disputes for the ELRC must ensure that they are familiar with all the relevant legislation, regulations, collective agreements and jurisprudence.”*
- [27] The CA nevertheless makes a valiant attempt to summarise the law on unfair promotions and determines that *“To the extent that these guidelines advance an interpretation of the law, it is the policy of the ELRC and should be applied unless the arbitrator has good reason for favouring a different interpretation. An arbitrator who adopts a different approach must set out the reasons for doing so in the relevant award.”*
- [28] The CA recorded that the *“ELRC had developed the guidelines in the CA in accordance with judgments that are binding on it”*. It states further that *“These guidelines are by their nature general in their application and cannot cover the full range of issues that may confront arbitrators in promotion arbitrations. An arbitrator must make decisions that are fair and reasonable in the light of the specific circumstances of the case.”*
- [29] With extensive reference to relevant case law ¹¹ the CA advises arbitrators on *“how to approach substantive unfairness”* and *“what*

¹¹ Reference is made to decisions such as *National Commissioner of the SA Police Service v Safety & Security Bargaining Council & others* (2005) 26 ILJ 903 (LC), *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) para 24 per Zondo AJP; *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC) para 35; *Minister*

remedies (can be awarded) for substantive unfairness”, and in what circumstances this can be done.

[30] Thus, *“only where an employee has proved that he / she was the best of all the candidates who applied for the post and that he / she would therefore have been appointed, had it not been for unfair conduct of the employer, will there be substantive unfairness”*. *“Once the Applicant has proved that he was the best of all the candidates who applied for the post, the arbitrator is entitled to appoint him or her to the post. It is a gross irregularity for an arbitrator to appoint an Applicant in a promotion dispute where the Applicant has not proved that he was the best of all the candidates who applied for the post and that he would in fact have been appointed had it not been for unfair conduct by the employer.”*

[31] *“In cases where affirmative action was applied, and where a weaker candidate was appointed by the employer, it is not necessarily sufficient that the Applicant proves that he was the best of all the candidates. In such cases the legislation and jurisprudence governing affirmative action and employment equity will determine whether or not the Applicant is entitled to appointment.”*

[32] The CA also deals with *“Setting aside the appointment of the successful candidate” – “Provided that the successful candidate has been joined as second respondent, the arbitrator has the discretion,*

of Safety and Security & others v Jansen NO (2004) 25 ILJ 708 (LC) para 27; KwaDukuza Municipality v SALGBC [2008] 11 BUR 1057 (LC). Minister of Home Affairs v General Public Service Sectoral Bargaining Council and Others (JR 1128/07) [2008] ZALC 35 (26 March 2008); Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others (2010) 31 ILJ 2680 (LC) National Commissioner of the SA Police Service v Safety & Security Bargaining Council & others (2005) 26 ILJ 903 (LC); Woolworths (Pty) Ltd v Whitehead (2000) 21 ILJ 571 (LAC) para 24 per Zondo AJP; University of Cape Town v Auf der Heyde (2001) 22 ILJ 2647 (LAC) para 35; Minister of Safety and Security & others v Jansen NO (2004) 25 ILJ 708 (LC) para 27; KwaDukuza Municipality v SALGBC [2008] 11 BLLR 1057 (LC). Gordon v Department of Health, KwaZulu-Natal (2008) 29 ILJ 2535 (SCA) South African Police Services v Inspector Zandberg and others (2010) 31 ILJ 1230 (LC) and Manana v Department of Labour and Others [2010] 6 BLLR 664 (LC).

irrespective of the relief requested by the Applicant, to set aside the appointment of the successful candidate”.

[33] It is therefore clear from the foregoing that the arbitrator (Third Respondent) had the power to make the award which was made.

[34] The Third Respondent did not seek to exercise a power which “only vests with the Head of Department in terms of the Employment of Educators Act”. He exercised a power which was vested in him in terms of the LRA (section 193(4)). Section 209 of the LRA provides further that *“this Act binds the State”* and in terms of section 210(1) *“If any conflict, relating to the matters dealt with in this Act (the LRA), arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail”*.

Claimed reviewable irregularities in the arbitration award itself

[35] The next question is whether in the exercise of that power the Third Respondent committed a reviewable irregularity.

[36] That issue too is to be considered in the light of the law referred to above and the CA, providing as it does the framework within which the power is to be exercised, identifying relevant factors to be considered in deciding whether there was an unfair labour practice and what an appropriate remedy would be and applying to the parties and appointment panellists alike.

[37] In this regard it was common cause (before the ELRC) that the jurisdictional facts giving the ELRC jurisdiction over the dispute existed.

[38] In this case the jurisdictional facts necessary would be 'an unfair act or omission that arises between an employer and an employee' relating 'to promotion'.

[39] The *onus* of proving the jurisdictional facts rested on First Respondent. He was required to prove that he was an existing employee of the Applicant and that his appointment would have resulted in some advancement or elevation in rank or rise in status. That was common

cause. He had acted as Head of the Maths Department of the school to which he wished to be appointed as principal. He had attended an interview of the School Governing Body, which interview had also been attended by union representatives and a representative of the Department of Education, and the outcome of which had been validated by the Department's Circuit and Provincial HR Practices and Administration offices.

- [40] What was in dispute was whether the Applicant (the Head of the Department of Education) had acted unfairly in not promoting him in circumstances where in essence the SGB of the school at which he was already employed in a lower post had recommended his promotion, given him the best score above the other two candidates who had been found to be suitable, only for the HOD to promote the Fourth Respondent, to the post of principal.
- [41] The essential ground of review relied on by the Applicant under this heading is that it was unreasonable for the Third Respondent to have found for the First Respondent in respect of his claim that he had been unfairly overlooked for promotion by the HOD.
- [42] Apart from the jurisdictional points taken in this review (as set out above) the Applicant claimed the arbitrator / panellist (the Third Respondent) was unreasonable in concluding that the non – promotion of the First Respondent was unfair.
- [43] It was submitted on behalf of the Applicant that in reaching this conclusion it was grossly unreasonable for the Third Respondent:
- 43.1 to have attached importance to the fact that the HOD herself did not give evidence in support of her decision not to promote the First Respondent and instead promote / appoint Ms Walker to the post,
 - 43.2 to have attached importance to the fact that no written reasons had been provided to the First Respondent for his non – appointment when he requested same,

43.3 to not have properly understood the provision in the Employment of Educators Act which provided that the HOD was not obliged to give effect to the SGB's order of preference in its recommendations.

[44] It was further submitted on behalf of the Applicant that in reaching this conclusion it was grossly unreasonable for the Third Respondent to not have properly considered that:

44.1 the recommendation to appoint the Fourth Respondent had been made to her by staff in the Provincial HR department which was entrusted with that task,

44.2 Mr Mothelezi, Director in the Provincial Human Resources Practices and Administration Department was called to give evidence in this regard,

44.3 that there was sufficient evidence before the First Respondent to show that the appointment / promotion of Ms Walker had been in order to advance gender representativity,

44.4 that that was a valid consideration in not following the SGB's preferences and scoring,

44.5 that the promotion of gender representativity had indeed been one of the requirements identified in the circular advertising the post,

44.6 there were other substantively good reasons for promoting her above the First Respondent, namely that she had acted as Principal of the school in the past, she was the Deputy Principal at the time of applying, she had better academic qualifications,

44.7 the HOD was in any event not bound by the order in which applicants' appointment was recommended, the scoring of the SGB or its preferences – the Employment of Educators Act specifically provided for this,

44.8 the HOD could not be *subpoenaed* in terms of a directive issued by the HOD, with the result that her failure to give evidence notwithstanding attempts by the First Respondent to have her *subpoenaed* was of no significance,

44.9 that the advertisement for the post (or at least the circular of the Department in terms of which the post was advertised) made it clear that affirmative action considerations would be taken into account in the appointment of a suitable candidate (and that the First Respondent was mistaken in holding that the advertisement for the post made no mention of this).

[45] It is important to note that the present application is a review, not an appeal, and although unreasonableness as ground of review requires consideration to be given to the facts which were established in evidence before the arbitration hearing and the arbitrator's evaluation of those facts in a manner which comes close to deciding whether the arbitrator was correct in his approach to and evaluation of the facts, the distinction between appeal and review still exists and needs to be appreciated.

[46] As explained in *Head of Department of Education v Mofokeng & others* (2015) 36 ILJ 2802 (LAC) at para [32] – “..... sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to 'defects' as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent

*irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.”*¹²

- [47] It was not in dispute that had First Respondent been appointed to the position of principal of the school this would have amounted to a promotion for him. He was employed by the school, had been employed by the school for many years and had achieved the highest score in his interview before the SGB's selection panel. He had acted as Head of the Maths Department in the past and his achievements and credentials as an educationist with some thirty three years of teaching experience in at least two important curriculum areas, together with his strength in the interview itself, were among the reasons that the SGB awarded a score of 85,9 points to the First Respondent, and 79,4 to the Third Respondent. In that scoring process the SGB would, it is understood, also have taken the gender and race of the applicants into account, together with their academic qualifications and other abilities and areas of expertise. What was of particular importance for the SGB was also the specific requirements

¹²

See also paras [30] ff in *Mofokeng* and the references therein to *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA), *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC) which held that before an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome. The LAC further relied on *Commercial Workers Union of SA v Tao Ying Metal Industries & others* 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC); [2009] 1 BLLR 1 (CC) at paras 76 and 134 where the Constitutional Court held that it is now axiomatic that a commissioner of the CCMA (or an arbitrator of a bargaining council) is required to apply his or her mind to the issues before him or her and that failure to do so may result in the ensuing award being reviewed and set aside. The irregularity must however result in an unreasonable outcome or misconception of the true enquiry resulting in no fair trial of the issues. See also *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)

of the school, ranging from addressing poor morale issues and improving facilities. The First Respondent's additional qualifications and extramural work as a lay pastor was mentioned in his CV in addition to his academic achievements.

[48] The Third Respondent referred to the interviewing, assessment and scoring process, which preceded the recommendations of the SGB, of which detailed evidence had been given, in his award.

[49] He also referred to the provisions of sections 6(3) and 7(1) of the Employment of Educators Act 76 of 1998 as being the fundamental prescriptions for both the governing body of the school and the Head of Department in respect of the selection and appointment of candidates. Sub sections 6(3)(a) – (f) were quoted by him in part. The sub-section is quoted in full below.

[50] Section 6(3) provides more fully as follows:

- (a) Subject to paragraph (m), any appointment, promotion or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school
- (b) In considering the applications, the governing body or the council, as the case may be, must ensure that the principles of equity, redress and representivity are complied with and the governing body or council, as the case may be, must adhere to -
 - (i) the democratic values and principles referred to in section 7 (1);
 - (ii) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;¹³
 - (iii) any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators which the candidate must meet;¹⁴
 - (iv) a procedure whereby it is established that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators; and
 - (v) procedures that would ensure that the recommendation is not obtained through undue influence on the members of the governing body.

¹³ This subsection lends further support to the finding above as to the primacy of the CA.

¹⁴ This subsection lends further support to the finding above as to the primacy of the CA.

- (c) The governing body must submit, in order of preference to the Head of Department, a list of-
 - (i) at least three names of recommended candidates; or
 - (ii) fewer than three candidates in consultation with the Head of Department.
- (d) When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment, ensure that the governing body has met the requirements in paragraph (b).
- (e) If the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation.
- (f) Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list.
- (g) If the Head of Department declines a recommendation, he or she must-
 - (i) consider all the applications submitted for that post;
 - (ii) apply the requirements in paragraph (b) (i) to (iv); and
 - (iii) despite paragraph (a), appoint a suitable candidate temporarily or re-advertise the post.
- (h) The governing body may appeal to the Member of the Executive Council against the decision of the Head of Department regarding the temporary appointment contemplated in paragraph (g).
- (i) The appeal contemplated in paragraph (h) must be lodged within 14 days of receiving the notice of appointment.
- (j) The appeal must be finalised by the Member of the Executive Council within 30 days.
- (k) If no appeal is lodged within 14 days, the Head of Department may convert the temporary appointment into a permanent appointment as contemplated in section 6B.
- (l) A recommendation contemplated in paragraph (a) shall be made within two months from the date on which a governing body was requested to make a recommendation, failing which the Head of Department may, subject to paragraph (g), make an appointment without such recommendation.
- (m) Until the relevant governing body is established, the appointment, promotion or transfer in a temporary capacity to any post on the educator establishment must be made by the Head of Department where a -
 - (i) new public school is established in terms of the South African Schools Act, 1996, and any applicable provincial law;
 - (ii)
 - (iii) new public adult learning centre is established in terms of the Adult Basic Education and Training Act, 2000, and any applicable provincial law.

- [51] As set out above not the full subsection was quoted by the arbitrator in his award.
- [52] The full subsection as quoted above identifies the importance of the SGB's role in the process, the value of its recommendations, whilst at the same time providing that these recommendations are not binding on the Head of Department, and that the HOD can depart from the recommendations in certain circumstances.
- [53] It also identifies the need for evidence to be presented by the applicant educator before the ELRC in support of the unfair labour practice claim, and for the employer to rebut whatever evidence is presented by the employee in support of his or her claim, where there is a need to be rebut same.
- [54] In an unfair labour practice dispute relating to promotion the *onus* is on the employee to show that a higher post existed for which he or she was a contender / qualified and that the employer refused or failed to promote the employee to the post for an unfair reason.¹⁵
- [55] A rebuttal from the employer is required (and only required) where the employee has established a *prima facie* case of unfairness, in other words, where the employee has made all relevant allegations and has fleshed out the allegations with evidence to a degree that his or her version requires an answer or rebuttal.¹⁶

¹⁵ Member of the Executive Council, Department of Sport, Recreation, Arts & Culture, Eastern Cape v General Public Service Sectoral Bargaining Council & Others (2015) 36 ILJ 2893 (LC),

¹⁶ *eThekweni Municipality v SA Local Government Bargaining Council & others* (2022) 43 ILJ 2781 (LC) This is the *onus* or burden of proof and does not shift. The *onus* of proof must be distinguished from the evidentiary burden which is 'the duty cast on a particular litigant to adduce evidence in order to combat a *prima facie* case made by his opponent'. *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548 As for the failure to testify in circumstances where testimony is required to rebut an inference which can otherwise be drawn, or where a *prima facie* case becomes conclusive because of the absence of rebutting evidence see *inter alia* *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) at 749; *Gleneagles Farm Dairy v Schoombee* 1949 (1) SA 830 (A); *S v Teixeira* 1980 (3) SA 755 (A); *Brand v Minister of Justice & another* 1959 (4) SA 712 (A); *SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 (Nm); *General Food Industries Ltd v Food & Allied Workers Union* (2004) 25 ILJ 1260 (LAC) at para 46; *Simelane & others v Letamo Estate* (2007) 28 ILJ 2053 (LC); *Raliphaswa v Mugivhi & others* 2008 (4) SA 154 (SCA) at para 15

[56] Section 7(1) repeats that which is contained in section 6(3) above namely that:

- (1) In the making of any appointment, in any promotion, and in the filling of any post on any educator establishment under this Act, due regard shall be had to equality, equity and the other democratic values and principles which are contemplated in section 195 (1) of the Constitution of the Republic of South Africa, 1996, and which include the following factors:
 - (a) the ability of the candidate; and
 - (b) the need to redress the imbalances of the past in order to achieve broad representation.

[57] Section 195(1) of the Constitution provides that

195 Basic values and principles governing public administration

- (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
 - (a) A high standard of professional ethics must be promoted and maintained.
 - (b) Efficient, economic and effective use of resources must be promoted.
 - (c) Public administration must be development-oriented.
 - (d) Services must be provided impartially, fairly, equitably and without bias.
 - (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
 - (f) Public administration must be accountable.
 - (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
 - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

[58] The Third Respondent held that given the fact that the SGB, on the evidence before him, had complied with the requirements of section 6 of the Employment of Educators Act, it was incumbent on the HOD to

have “attached or attributed substantial weight to (its) recommendations”.

[59] Put differently, what the arbitrator identified in his award was that the HOD needed to present evidence to rebut the inference of unfairness which could otherwise be drawn on a *prima facie* basis from First Respondent’s evidence.

[60] The award of the Third Respondent is premised essentially on a finding that no evidence as to her reasons for appointing the Fourth Respondent was presented to him, not by the HOD specifically, and not by anyone who was able to give satisfactory evidence as to why and on what grounds the decision not to promote the First Respondent was taken.

[61] He held that “The purported reasons provided were those of Mr Mothelesi (in the personnel office who had made the recommendation to the HOD in this regard) not the Head of Department as the accounting officer.”

[62] He held further that the evidence submitted on behalf of the Applicant (in this review) in the arbitration before him as to the reasons for the appointment of Fourth Respondent revealed that the HOD “did not exercise any discretion at all”.

[63] Based on the evidence of Mr Mothelesi and the absence of evidence from the HOD (and the absence of written reasons for her decision before that) he concluded that “the decision (to appoint Ms Walker) was arbitrary and capriciously made by the Head of Department”.

[64] At the same time he recognised that it was “the employer’s prerogative ... to make appointments” but held further that the exercise of the prerogative was “not immune from scrutiny”.

[65] He found “There is no evidence on record about the reasons ... of the HOD on how she arrived at the decision to appoint the (Fourth) Respondent”. He referred to the reasons proffered by Mr Mothelesi at the arbitration, but doubted that the HOD had in fact applied her mind to these and had made her decision based thereon because:

- 65.1 The HOD herself did not give evidence at the arbitration
- 65.2 No reasons had been provided when they were requested by the First Respondent prior to the arbitration
- 65.3 Mr Mothelesi was “somewhat evasive” in his evidence as to the reasons
- 65.4 The reasons which were presented for the decision to appoint Fourth Respondent were presented at the arbitration for the first time.

[66] Put differently, it appears the Third Respondent held that whilst the reasons which were offered at the arbitration for the non – promotion of the First Respondent in preference for the Fourth Respondent may on the face of them have justified her appointment, he was not satisfied that those were indeed the reasons because of his evaluation of the witness who was called to give evidence thereof. That evidence did not explain what the HOD did, when she did this and why she did this. The evidence was essentially about the processes which are generally followed by the Department, and Mr Mothelezi himself was unable to provide sufficient evidence to rebut the *prima facie* case of unfairness. Indeed, this failure on the part of the Department / HOD, and the Department’s refusal to provide reasons to the First Respondent for his not being promoted, lent further support to the *prima facie* finding of unfairness, both procedurally and substantively.

[67] In addition he in effect held that the department failed to discharge the evidentiary burden that had shifted to it to justify the HOD’s departure from the recommendations of the SGB, attaching value further to a finding that the advertisement for the post itself was “silent on the issue of employment equity requirements to be applied”.

[68] He may have been mistaken in this regard, since the circular and statutory imperatives would have made it clear that representativity was also a factor to be taken into account when promoting someone to the post of principal, the point remains that if the gender of the

Fourth Respondent was a factor, or even the decisive factor, in her being promoted, it was necessary for someone from the Applicant to have placed that evidence before the Third Respondent, and there was a complete absence of any such evidence, whether oral or in writing, whether direct or hearsay. Mr Mothelezi conceded at the end of his cross examination that he could not speak on behalf of the HOD in explaining to the Third Respondent the reasons for her decision to appoint the Fourth Respondent above the First Respondent. Even in chief, and a detailed analysis of his evidence in that regard, was provided by his counsel, Mr Tshabalala, in the heads of argument filed on his behalf, was insufficient to show what the grounds and reasons for the decision not to promote the First Respondent and appoint Third Respondent in his stead were.

- [69] In a review conducted under s 145(2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors, and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award.
- [70] This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.
- [71] The Third Respondent ultimately and in effect held that in the absence of evidence from the HOD herself and satisfactory evidence on her behalf, the Applicant failed to justify her decision not to promote the First Respondent.
- [72] The arbitrator's conclusion to the effect that First Respondent discharged the *onus* of presenting *prima facie* proof of his unfair labour practice claim and that the Applicant / Department failed to present acceptable evidence rebutting same, cannot be set aside on review.
- [73] In this regard it can be pointed out that the affidavits in the review application itself were deposed to by the Acting Director Legal

Services of the Department with confirmatory affidavits by the Chief Education Specialist in the Employee Relations and People Management Division and their attorney. Neither the HOD nor Mr Mothelesi deposed to affidavits in the review application.

- [74] The First Respondent had relied on his having scored the highest points, his having been recommended by the SGB for appointment and his having had thirty three years of teaching experience as some of the grounds for submitting that in the absence of reasons / justification for his not being appointed his appointment being unfair.
- [75] No such written reasons were provided to him before the arbitration.
- [76] The evidence of Mr Mothelesi in the arbitration was described by the First Respondent's counsel as having been "long winded" and inconsequential.
- [77] Having considered the evidence which was given, even if it was intended to be evidence of that which was recommended to the HOD, the evidence was indeed unhelpful and inadequate.
- [78] On a number of occasions Mr Mothelesi conceded that his department dealt with more than 300 / 400 appointments, the clear suggestion being that he too did not have any direct knowledge of the reasons for the Fourth Respondent's promotion having been preferred above that of the First Respondent.
- [79] The arbitrator, Third Respondent, cannot be faulted for concluding that there was no real evidence, whether direct or hearsay, as to the basis on which the HOD in fact made her decision to appoint the Fourth Respondent.
- [80] The fact that the HOD provided no reasons when requested to provide these for her decision, the fact that she was not called to give evidence and the fact that she did not respond to the subpoena to give evidence, ostensibly it appears from an internal directive that she could not be subpoenaed, did not undermine the reasoning of the arbitrator that in the absence of evidence of the grounds for her decision there was no

evidence before him to justify the decision not to promote First Respondent.

[81] The First Respondent can also not be faulted for not calling the HOD, even though his representatives could have insisted on a subpoena being issued for her attendance at the hearing notwithstanding the terms of the Departmental Directive.

[82] In terms of section 142(1) of the LRA a commissioner who has been appointed to attempt to resolve a dispute may

- (a) subpoena for questioning any person who may be able to give
- (b) information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute
- (c) subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the commissioner to be questioned or to produce that book, document or object;

[83] For the reasons mentioned above a directive from the HOD to opposite effect cannot override these powers of the commissioner.

[84] In the circumstances the HOD could have been compelled to give evidence and should have given evidence in order to justify her decision to not appoint the First Respondent.

[85] The First Respondent cannot be faulted for doing all that he could do to try and have the HOD give evidence of her reasons for not promoting him.

[86] The First Respondent can also not be faulted for ultimately not calling members of the SGB to explain their recommendations. The outcome of the interviews, the report from the SGB, the scoring of the candidates appear to have been placed before the arbitration by agreement between the parties.

[87] In any event once he had established a *prima facie* case of unfairness, which he did, even without calling members of the SGB, it was incumbent on the HOD to present evidence in rebuttal. This was not done.

- [88] The Third Respondent was therefore justified in concluding that in the absence of evidence from to justify her decision there were no grounds on which he could find that the decision not to promote the First Respondent was unfair.
- [89] I find support for this finding in the decision of the *Department of Education, Northern Cape v Education Labour Relations Bargaining Council and Others* (PR229/18) [2023] ZALCPE 18 (15 August 2023), notwithstanding what may have been an important factual difference had the HOD been called, being the fact that there was evidence from the SGB in that matter.
- [90] In that case too the HOD did not testify at the arbitration. The Labour Court on review held that the commissioner has “never had the benefit of being addressed on how the HOD exercised his discretion”.
- [91] In dealing with the issue before him, the commissioner relied on the testimony of the only witness who testified on behalf of the applicant in that matter (a Mr Buthelezi, the applicant’s director of human resources who was submitted in argument before this Court was the same Mr Mothelesi who gave evidence before the ELRC in this arbitration).
- [92] The Court held that “*In his testimony, Mr Buthelezi had conceded that the HOD may only deviate from the recommendations of the SGB if there is no compliance with the provisions of section 6(3) of the EEA. Therefore, there is nothing unreasonable with the commissioner’s conclusion that the HOD had not justified reasons to deviate from SGB’s recommendation.*”
- [93] There too the respondent tried to solicit the reasons for the decision of the HOD but his attempts failed.
- [94] The Court held further as follows – “*Furthermore, both the SGB and the respondent gave testimony in the commission. The SGB explained how it came to its recommendations and the respondent explained how he felt that he was unfairly overlooked by the department through the HOD. After the respondent adduced evidence and challenged the manner in which the HOD dealt with the*

recommendations of the SGB, the burden shifted to the applicant. In the absence of the HOD or a witness that could explain why the recommendation of the SGB was not accepted, the respondent's evidence was not refuted. The evidence of the Head of Human Resources did not pass muster."

Conclusion

[95] In the result the application for the review of the award issued by the ELRC number ELRC712-21/22NC dated 29 May 2023 is dismissed.

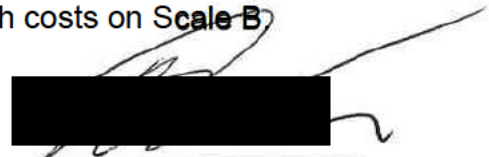
[96] In a situation where there is an ongoing employment relationship between the parties, such as the present, the court would be slow to make costs orders against any of them.

[97] However, in this case, given *inter alia* the Applicant's failure originally to provide reasons to the First Respondent for the decision of the HOD, the failure of the HOD to present the arbitrator with the necessary evidence justifying her decision at the time of the arbitration, and the various grounds of review raised in the present application, none of which has been found to have merit on the clear authority of the decisions of the LAC, this Court and the CA referred to above, I am satisfied that the requirements of law and fairness dictate that the costs should follow the result of this review. I am further satisfied that given the medium level of complexity of the matter a costs order on Scale B would be appropriate.

[98] In the premises, I make the following order:

Order:

1. The application is accordingly dismissed with costs on Scale B



Stelzner AJ
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. RC Mathevula

Instructed by: Mjila & Partners Inc.

For the First Respondent: Adv. MS Tshabalala

Instructed by: MSM & Associates

LABOUR COURT