THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No: C533/2022

In the matter between:

CHARLES HENRY HENDRICKS	**Applicant**
and	
COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
HENDRIK OLIPHANT	**Second Respondent**
NORTHERN CAPE GAMBLING BOARD	**Third Respondent**
B BODIGELO	**Fourth Respondent**
L SELOMI	**Fifth Respondent**
I TONGWANE	**Sixth Respondent**
G MOTLHABANE	**Seventh Respondent**
N B SMITH	**Eighth Respondent**

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Heard: **7 August 2025**

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 11 August 2025.

JUDGMENT

DE KOCK, AJ

Introduction

[1] This matter came before the court as an application to review the arbitration award issued by the second respondent. The applicant raised various grounds of review alleging that the second respondent committed various irregularities and arrived at a decision that a reasonable decision maker could not reach. The outcome of the award is that the applicant failed to prove that the third respondent committed an unfair labour practice.

Background

[2] The applicant was employed as a messenger/driver when he applied for the post of compliance inspector. The post was advertised during December 2015, and the applicant was one of 30 candidates invited for the interviews. The interviews were held on 28 January 2016.

[3] The interview panel consisted of six panelists. The chairperson of the interview panel recused himself as a panelist when it came to the applicant's interview, as he knew the applicant personally. The panel proceeded with the interview with only five panelists. As a direct result of the recusal of the chairperson on the interview panel, the applicant was given a score of 1.2 out of the maximum of 25 points of the sixth panelist who recused himself.

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[4] There were two other candidates who similarly were scored 1.2 out of a possible 25 points, being M Thabe and T Diamond, due to a panelist having to recuse themselves from their interviews. The applicant, taking into consideration the score of 1.2 for the panelist who recused himself, scored a total of 99 points. The 5 panelists gave scores of 18, 20, 22, 20, and 18. The average score for the five panelists was 19.6. Adding the 1.2 from the sixth panelist who recused himself, the average score of six panelists was 16.5, which is substantially lower than the average score of the 5 panelists that interviewed the applicant.

[5] The third respondent's explanation for the score of 1.2 for the sixth panelist who recused himself is that they used the total number of panelists, i.e., six panelists and divided that number with the number of panelists who interviewed the applicant, i.e., five panelists. The total of 1.2 was then added as the sixth score. The same allocation of points was applied to Thabe and Diamond.

[6] Six candidates were recommended for appointments, and five were appointed. Of the six recommended, two candidates received a total score of 104, and one of these candidates was then appointed with the other four candidates who scored more than 104 points. Not one of the six recommended candidates had a panelist recusing them from the interviews, and their scores were based on the scores of six panelists. The six recommended candidates, based on scores by six panelists, scored as follows:

BE Bodigelo – 14, 17, 20, 22, 25, and 21 with a total score of 119

G Motlhabane – 23, 15, 20, 18, 20, and 18 with a total score of 114

I Tongwane – 21, 22, 22, 17, 15, and 13 with a total score of 110

S Barnado Smith – 14, 20, 18, 19, 19, and 17 with a total score of 107

L Selomi – 17, 21, 17, 17, 15, and 17 with a total score of 104

B Moses – 18, 14, 18, 17, 20, and 17 with a total score of 104

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[7] The scores allocated to candidates who were not recommended for appointments ranged from 33 to 100 points. Amongst these remaining candidates, everyone was allocated scores by six panelists, save for the applicant and Thabe and Diamond who were allocated 1.2 points due to the recusal of a panelist during their interviews.

[8] After conclusion of the interviews, a memorandum dated 28 January 2016 was drafted to obtain approval to fill the five compliance inspector posts. On 29 January 2016, five of the recommended candidates were approved for appointed. The appointments were made during February 2016 on salary notch R257 405.00. The applicant was not one of the recommended candidates.

[9] The applicant, being unhappy with the 1.2 points allocated to him due to the recusal of one of the panelists, ultimately referred an unfair labour practice dispute to the CCMA. It is unfortunate that quite a lengthy delay was occasioned due to a CCMA commissioner refusing to grant condonation, which was ultimately reviewed and set aside by the Labour Court. The dispute was referred back to the CCMA where condonation was granted, and the dispute was arbitrated by the second respondent.

Arbitration award

[10] The second respondent identifies the issue to be decided as follows:

> '*I must determine whether it was fair to allocate a score of 1.2 to Hendricks, allow five panelists to score him, allow other applicants' scoring by six panelists and if Hendricks was prejudiced.*'

[11] The second respondent, after summarising the parties' respective evidence, states that the applicant conceded that he did not have the required national diploma, which was a requirement for the position, and that he did not meet the requirements. The second respondent finds that the applicant should never have been shortlisted. He also finds that the applicant was evasive on most questions

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so much so that it made him an unreliable witness. The applicant also conceded that the score was a guideline and not a final binding decision.

[12] The second respondent further found that the applicant was disadvantaged by the successful candidates' qualifications and experience, and that a score higher than 1.2 was the applicant's own expectation. The score of 1.2 was unfair to all of them and the recusal was not done in bad faith. This shows that the 1.2 was a criteria decided by the Board. Although it was low, it was not proven that it was necessarily unreasonable. It was consistently applied to three candidates where a recusal happened. The second respondent concludes that clearly the recusal was not mala fide and finds that the 1.2 scoring was not allocated in bad faith.

[13] The second respondent finds that the 1.2 scoring is an employer prerogative that he cannot easily interfere with and, even if it seems unreasonable, it was not unfair. The second respondent refers to the two recommended candidates who both scored the same points, which according to him shows that the score alone was not the determining factor; it was just a guide. On this basis alone, the applicant should fail. The fact that the applicant was only scored by five panelists was not unfair. The applicant was clearly not qualified and not the best person for the position. The applicant was not prejudiced.

[14] The second respondent concludes that the third respondent did not act arbitrary, capricious, or unfair. The criteria were consistently applied and not in bad faith. The applicant did not meet the job requirements and did not show that the respondent had committed an unfair labour practice.

Grounds of review

[15] The applicant takes issue with the second respondent's finding that he cannot interfere with the third respondent's decision, even though he mentions in his award that there were different standards applied to those candidates appointed and the applicant and that, in terms of scoring, it seems unreasonable. The second respondent's error is compounded when he accepts the evidence that it was not

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unfair, as the same score was given to three other candidates. However, these other candidates were also not recommended for appointments.

[16] The applicant submits that the second respondent should have weighed the different standards applied to him against the standard applied to 27 other candidates who received scores from six panelists. The applicant was scored by only five panelists and an average score of 1.2 points were allocated to him due to the recusal of the sixth panelist.

[17] The applicant states that a fairer calculation, under these circumstances, would have been adding the score of the five panelists and dividing the total scores by six, which would have given him an average score of 16 points, or to have each candidate scored by only five panelists.

[18] The applicant also takes issue with the second respondent giving too much consideration to the third respondent's witness whose evidence extensively covers the issue that he should not have been shortlisted. This might be the opinion of human resources. However, the Board as the employer determines the requirements for a post and approved which candidate is to be invited to an interview. The shortlisting should not have been an issue which the second respondent had to decide, as the issue he was required to determine is whether the scoring of 1.2 points amounted to unfair conduct. The second respondent therefore clearly committed an irregularity, as he was not requested to consider whether the applicant should have been interviewed or not.

[19] The second respondent also committed an irregularity by simply accepting the evidence of the third respondent's only witness, who were not even a member of the panel. She was therefore not able to testify to the following issues:

a. Why the panel decided to use the method they did in calculating an average score in the absence of the sixth panelist.

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b. What other factors, if any, were used to determine the applicant's suitability for the post, as the factors for which the applicant and others were scored were contained in each panelist's scoring sheets.

[20] The applicant states that the second respondent failed to consider the scoring sheets of each panelist wherein they scored the applicant as follows:

a. Formal and operational knowledge: two scored the applicant average, two scored him good or above average, and one scored him as excellent or outstanding.

b. Skills/expertise: two scored the applicant average and three scored the applicant good or above average.

c. Experience/exposure: all panelists scored the applicant good or above average.

d. Aptitude/attitude/behaviour: three scored the applicant as good or above average and two scoring the applicant at excellent or outstanding.

[21] If one looks at these scores of the panelists that interviewed the applicant, there is clearly an indication in terms of their scoring that the applicant should have been considered a suitable candidate. The applicant also compares his scoring to that of Bernardo-Smith and Moses, who were appointed, and submits that he was a more suitable candidate and should have been recommended for appointment into one of the five posts.

[22] The applicant concludes that the second respondent's decision is one which does not fall within the range a reasonable decision-maker could have made and therefore that the arbitration award is reviewable and should be set aside.

Review Test

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[23] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,[1] the Court held that *"the reasonableness standard should now suffuse section 145 of the LRA"*, and that the threshold test for the reasonableness of an award was: *"… Is the decision reached by the commissioner one that a reasonable decision maker could not reach?..."*[2]. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[3] the Court applied this reasonableness consideration as follows:

> '*… A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable*.'

[24] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

[25] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[4] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived

[1] (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).
[2] Id at para 110.
[3] (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.
[4] *Fidelity* at para 102.

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at by the arbitrator. In the end, it would only be if the outcome arrived by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.[5]

[26] The court will now proceed to consider the review application by the applicant against the above principles and the test applicable to review applications.

Evaluation of grounds of review

[27] It is appropriate to start the evaluation of the grounds of review by referring to the legal position when it comes to unfair labour practice disputes with emphasis on promotion disputes. The unfair labour practice doctrine is intended to protect against irrational, *mala fide*, and arbitrary decision-making by an employer, and any decision by an employer must be evaluated on that basis. This is evidence from the following dictum of Skweyiya J in *Chirwa v Transnet Ltd and Others*[6]*:*

> *"The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, The LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the audi alteram partem principle and the rule against bias. If the process does not, the employee will be able to challenge his or her dismissal and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices".* (emphasis added)

[28] An employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised

[5] See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC); [2015] 4 BLLR 394 (LAC) at para 12.
[6] (2008) 29 ILJ 73 (CC) at para 42

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capriciously[7], or for insubstantial reasons, or based upon any wrong principle or in a biased manner (see *Rex v Zackey* 1945 AD 505 at 513; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398; *Ex parte Neethling & others* 1951 (4) SA 331 (A) at 335D; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781J and 783C; *Shepstone H & Wylie & other v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045A).[8]

[29] The Industrial Court in *Goliath v Medscheme (Pty) Ltd*[9] held:

> *"Inevitably, in evaluating various potential candidates for a certain position, the management of an organisation must exercise discretion and form an impression of those candidates. Unavoidably, this process is not a mechanical or a mathematical one where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointments will not always be the correct one. However, in the absence of gross unreasonableness which leads to the Court to draw an inference of mala fides, this Court should be hesitant to interference with the exercise of Management's discretion."*

[30] In other words, and in a nutshell for this court to interfere with the second respondent's decision, this court must find that the outcome arrived at by the second respondent is one that a reasonable decision-maker could not reach. If this is found to be the case, the court must determine whether the third respondent's decision not to recommend and appoint the applicant was arbitrary, capricious, *mala fides*, or grossly unreasonable in relation to the scoring allocated to the applicant.

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[7] *Ncane v Lyster NO and others* (DA27/15) [2017] ZALAC 1; (2017) 38 ILJ 907 (LAC); [2017] 4 BLLR 350 (LAC) (10 January 2017) at para 25

[8] Also see *Minister of Home Affairs v General Public Service Sectoral Bargaining Council and others* (JR1128/07) [2008] ZALCJHB 23 (26 March 2008); *Nainaar v Department of Works, KZN and others* (D839/05) [2015] ZALCD 26 (19 May 2015); *South African Police Services ("SAPS") v Gebashe and others* (D676/11) [2014] ZALCD 68; (2015) 36 ILJ 1620 (LC) (24 November 2014).

[9] [1996] 17 ILJ 760 (IC)

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[31] The first ground of review to be considered by this court is whether the second respondent's findings that the applicant should not have been shortlisted, based on the evidence before him, amounted to a decision that a reasonable decision-maker could not reach. Or put differently, did the second respondent misconstrue the nature of the enquiry by delving into questions whether the applicant should have been shortlisted and whether the applicant complied with the requirements for the post as advertised.

[32] The evidence before the second respondent was that the initial shortlisting, done by human resources and which excluded the applicant, was rejected by the Board. A further shortlisting process was done, and the applicant was shortlisted in this second process. It is therefore not for human resources to decide and present evidence that the applicant ought to have been shortlisted, nor was it reasonable for the second respondent to accept the evidence and to conclude that the applicant should not have been shortlisted. The Board was satisfied that the applicant possessed the necessary skills and experience and that he should be shortlisted. The second respondent's conclusion therefore in this regard was not only unreasonable but irregular and extremely prejudicial to the applicant. As can be seen from the second respondent's award, this was a crucial consideration in his outcome that the applicant failed to prove that the third respondent committed an unfair labour practice. But for this incorrect, irregular and unreasonable conclusion, the second respondent would have been hard pressed to arrive at the same conclusion that he did especially when the second respondent found that using the 1.2 scoring may seem unreasonable but was not unfair since the applicant should not have been shortlisted.

[33] In this regard the LAC in *Head of the Department of Education v Mofokeng and others*[10] stated as follows:

> *"Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling*

[10] [2015] 1 BLLR 50 (LAC) at para 33

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indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[34] The second respondent correctly summarised the issue that he was required to decide, yet he continued down the wrong path to determine the issue he himself identified. The issue, correctly identified but strayed from, was whether it was fair to allocate a score of 1.2 points to the applicant for the sixth panelist who recused himself, and whether the applicant was prejudiced.

[35] This court finds the so-called criteria used by the third respondent to be grossly unreasonable to say the least. What is even more mind-boggling to this court is that the third respondent continues to defend the use of the 1.2 scoring as a criteria, which was fairly applied to all candidates. Any reasonable person must

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conclude that the 1.2 scoring was not applied to all candidates, and that the use of the 1.2 scoring directly prejudiced three of the 30 candidates. The remaining 27 candidates were all scored by six panelists, and all six scores were added to arrive at a total score. In the case of the three candidates, which include the applicant, the scores of five panelists were used, and then added to that was 1.2 points for the sixth score to make up for the panelists who recused themselves.

[36] The second respondent's acceptance that the recusal was not done in bad faith is irrelevant. The recusals were clearly necessary, as the panelists knew the three candidates in question. The question surely cannot be whether their recusal was in bad faith. The question must be how one ensures a fair interview process for the three candidates in question given the recusal of a panelist. The three candidates cannot be penalised or prejudiced because a panelist decided to recuse themselves, yet this is exactly what happened when they were given a score of 1.2 points out of a possible 25 points for the sixth panelist who recused themselves.

[37] A demonstration of this severe prejudice and gross unfairness is necessary. Bodigelo obtained the highest total score of 119 points, made up of 6 individual scores of each panelist between 14 and 25 points. The applicant obtained a score of 99 points, made up of 5 individual scores of the five panelists, and then added to that 1.2 points for the recused panelist. The applicant's lowest score amongst the five candidates was 18 points, and the highest were 22 points. But, because one panelist recused himself, he was severely prejudiced by being given an illogical and baseless score of 1.2 points. The unfairness, irrationality and capriciousness of this scoring is clear to any reasonable person applying fair labour practices, yet the third respondent continues to defend same.

[38] There were other alternatives available, which the third respondent was aware of but failed to apply. One such alternative was to calculate the average of the scores by the five panelists, and then to add the average score as the sixth score. If this had been done, the average score of the five panelists would have been a score of 20 points. If one then adds to the five scores 20 points, rather than the absurd

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scoring of 1.2 points, the applicant would have had a total score of 118 points, which would have placed him as the second-best candidate based on scores with Bodigelo on 119 points.

[39] Alternatively, the third respondent could have used the lowest score given to the applicant by the five panelists, which were 18 points. If this then was to be added to the total score of 98 points of the five panelists, the applicant's total score would have been 116 points. This still places the applicant as the second-best candidate, with the third-best candidate having scored 114 points, the fourth-best candidate with 110 points, and the fifth-best candidate with 107 points. The candidates with scores of 104 points would not even have come into the equation had the applicant been given a fair score due to the sixth panelist having recused himself. This being the case, and only based on scoring, the applicant ought to have been recommended for appointment.

[40] The court did take note of the unfairness towards the other two candidates who were given a score of 1.2 points. Even if they received a fair score due to the recusal of the sixth panelist, they would not have received a score more than the applicant. On the scoring alone, they were not prejudiced insofar as an unfair and baseless score of 1.2 points were allocated to them for the sixth panelist versus the prejudice suffered by the applicant. They in any event did not challenge the unfairness of their scoring, and their scoring was not subject to the arbitration proceedings. For sake of completeness, Thabe's score by five panelists, plus the 1.2 points, was 72 points and Diamon's score by five panelists, plus the 1.2 points, was 91 points. These scores, if applied fairly, would still have been substantially lower than the score of the applicant of 99 points based on the 1.2 points allocated for the sixth panelist. In the case of Diamond, if the lowest of her five scores were used, she would have been given a total of 102 points, which would have placed her below the two scores of 104 points. If the average of the five scores were used, she would have been given 108 points, which would have placed her above Barnado-Smith, who received 107 points. Be that as it may, the second respondent

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was required to determine whether the score of 1.2 points given to the applicant was fair and whether the applicant was prejudiced as a result.

[41] Having found that the applicant was severely prejudiced by the score of 1.2 points, the next issue to be determined is whether the scoring was used to determine the recommended candidates, or whether the scoring was merely a guideline in the final decision taken. The difficulty for the third respondent is that not one panelist was called as a witness to explain their reasoning for not recommending the applicant for appointment. The third respondent's witness was not a panelist, and she could not reasonably explain whether the illogical scoring of the applicant led to his downfall in the panel's ultimate recommendations. The court noted the third respondent's version that she was part of the panel, as her name appears on the memorandum. However, the evidence clearly shows that she was not one of the six panelists who scored the candidates and, as such, her evidence could not have been presented as one of the panelists.

[42] One simply must look at the scoring of the 30 candidates to see that scoring proved to be decisive in the recommendations. The six recommended candidates scored the highest points, i.e., between 104 and 119 points. The remaining unsuccessful candidates received scores of 100 points and less. This is a clear indication that scoring was a decisive factor in the recommendations.

[43] Insofar as the two recommended candidates who both received scores of 104 points, which were the lowest scores for the recommended candidates, one of them who scored 104 points were not appointed. This again shows that scoring was decisive in the appointments, as the candidate who fell out had the same score as the fifth-best candidate who was appointed. The third respondent, based on the scores, therefore chose between two recommended candidates with the same total score of 104 points, which was the lowest score for all the recommended candidates. This does not show that scoring was not used, as found by the second respondent. It in fact shows that the candidates appointed were appointed based on the scoring allocated to candidates during the interviews.

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[44] The fact that scoring was used is also supported by the memorandum dated 28 January 2016. It is stated in the memorandum that 30 candidates were shortlisted using the key areas of responsibility as reflected in the advertisement as guiding criteria. It states further that appropriate and relevant qualifications (training) and experience served as additional shortlisting standards. The court must note that this memorandum clearly contradicts the second respondent's finding that the applicants should not even have been shortlisted.

[45] The memorandum states further that the panel members in their final selection made use of a rating scale in the assessment of each candidate's level of competence based on formal knowledge, operational knowledge, skills/expertise and experience/exposure. The scoring done on the aforementioned basis was used as a guide in reaching a final decision. The memorandum then goes on to state the scoring given to each candidate, which includes the 1.2 points given to the applicant and two other candidates.

[46] Following the scores, the memorandum gives a summary of all candidates and a conclusion whether the candidates were recommended for the post. In respect of the applicant, it is stated *inter alia* that the applicant has fair knowledge of the key responsibilities required by the post but had trouble in expressing himself particularly about the legislation and the internal control standard process. No evidence was presented during the arbitration proceedings to corroborate and support this finding, and the third respondent's witness, who was not a panel member, could not present any evidence other than noting what is stated on the memorandum.

[47] However, this summation of the applicant's interview appears to be at odds or contradictory to the individual scoring sheets applicable to the applicant. One panelist scored the applicant as average on two criteria, and as good or above average on three criteria. It is also stated that the applicant has knowledge of the industry and has experience and skill. The second panelist scored the applicant good or above average on all five criteria and concludes that the applicant is

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recommended. The third panelist scored the applicant good or above average on all five criteria and concludes by stating that the applicant is an internal candidate, can be trained, and have a good understanding of gambling. The fourth panelist scored the applicant as average on three criteria, as good or above average on two criteria, and as excellent or outstanding on one criteria. The fifth panelist scored the applicant as good or above average on three criteria, and as excellent or outstanding on two criteria.

[48] It is clear to this court that the applicant was severely prejudiced by the illogical, baseless and unfair scoring of 1.2 points allocated to the sixth panelist. But for this illogical and unfair scoring, the applicant would have been the second-best candidate by far, and only slightly below the best recommended and appointed candidate. In the absence of evidence by any one of the panelists to explain how the scoring affected the applicant's chances to be recommended, and appointed, this court finds that the applicant, being the second-best candidate on the scoring used, ought to have been recommended and appointed as a compliance inspector. The third respondent's failure to recommend and appoint the applicant was based on making use of a scoring that was arbitrary, illogical, baseless and grossly unfair.

[49] The second respondent's finding that the applicant failed to prove that the third respondent committed an unfair labour practice was based on conclusions that he was not required or at liberty to make and was a decision that a reasonable decision-maker could not reach.

[50] The court must conclude by addressing the second respondent's finding that the applicant was evasive on most questions so much so that it made him an unreliable witness. The court read the transcribed record, and the second respondent's finding is not supported by the record at all. The applicant's evidence was always clear and to the point and every time the applicant raised important issues during his cross-examination, he was met with a response by the cross-examiner that "we are not there yet". There is therefore no justification or no basis on which the

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applicant could have been referred to or have been found to as an unreliable witness.

Costs

[51] In terms of the provisions of section 162(1) of the LRA, this court has wide discretion when it comes to the issue of costs. The court is mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[11] when it comes to the issue of costs in employment disputes. In the matter before this court and considering the gross unfairness of the third respondent's actions in allocating the 1.2 points when there was simply no reasonable or justifiable basis for such allocation and which caused the applicant severe prejudice, it will be fair that the third respondent be ordered to pay the applicant's legal costs. The applicant was required to obtain the assistance of an attorney and an advocate to represent him in the review application to enforce his right not to be unfairly treated.

[52] The third respondent and their representative from the state attorney's office also showed unacceptable behaviour when they failed to arrive at court when the application was argued. In fact, the third respondent did not even deliver heads of argument, as they were required to do in terms of the rules of this court. The court was further requested to stand the matter down, as the state attorney was flying down, as advised by the applicant's attorney. Despite the court standing the matter down for at least an hour, the state attorney never arrived at court. No explanation was presented for the failure to attend. It will therefore be appropriate for this court to show its displeasure with this conduct, to award costs on an attorney-and-own-client scale, which includes the costs of counsel.

[53] In the premises, the following order is made:

[11] (2018) 39 ILJ 523 (CC).

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Order

1. The application for the arbitration award to be reviewed and set aside is granted. The award is replaced with the following order:

   1.1. The third respondent committed an unfair labour practice in not recommending and appointing the applicant in one of the five posts of compliance inspectors.

   1.2. The third respondent is ordered to promote the applicant to the position of compliance inspector with effect from 15 February 2016 on the salary notch of R257 405.00 per annum.

   1.3. The parties are directed to calculate the difference between what the applicant earned in February 2016, which was an annual salary of R105 000.00, to date of this award versus the amount he would have earned during this period had he been appointed in February 2016, taking into consideration any annual increases and changes in the salary of compliance inspectors. If the parties can reach agreement on the amount of backpay, the third respondent is ordered to pay the agreed amount within 21 days of reaching an agreement. However, if the parties are unable to reach an agreement within 30 days from the date of this judgment, either party may approach the court for a decision as to the amount of backpay that is due and payable to the applicant, and the date of payment.

   1.4. The third respondent is ordered to pay the applicant's costs in this review application on attorney-and-own-client scale, including the costs of counsel.

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C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: F Rodriques

Instructed by: Steenkamp Abrahams Inc.

For the Third Respondent: No Appearance

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