



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C530/2022

In the matter between:

CITY OF CAPE TOWN

Applicant

and

**FRANCOIS VAN DER MERWE N.O.
SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL (SALGBC)**

First Respondent

Second Respondent

IRWIN OOSTENDORP

Third Respondent

Heard: 5 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 13 October 2025.

JUDGMENT

DE KOCK, AJIntroduction

- [1] This matter came before the court as an application to review the arbitration award issued by the first respondent (the commissioner) in terms of section 145 of the Labour Relations Act¹ (LRA).
- [2] Insofar as the applicant filed the review application late, the application for condonation was not opposed and the parties agreed to abide by this court's decision. The court is satisfied that the delay was not severe, that there is an explanation for the delay although not entirely satisfactory, and that the applicant's prospects of success are good. The court therefore condones the late filing of the review application.

Background

- [3] The background facts relevant to this review application are mostly common cause between the parties and it is not necessary for purposes of this judgment to summarise all the background facts. Oostendorp has been working in the labour relations department of the applicant for some 20 years and occupied the position of professional officer (PO) for some 15 years. He was placed as a senior professional officer (SPO), as part of the ORP-process. In 2010 Oostendorp was placed, via the TASK-process, on the dual-graded position, scale T14/T15 and he has the same job description as eight of his other colleagues. They perform the same job as SPOs, and the job descriptions were updated in 2019.
- [4] Oostendorp was on the top of the T14 scale for the past three to four years and, according to Oostendorp, he became eligible to be advanced to the relevant T15 notch. The dispute before the SALGBC was, in essence, the applicant's failure to include Oostendorp in a deviation report, in terms of the 2019 Advancement SOP,

¹ Act 66 of 1995, as amended.

for the approval of the City Manager when his colleagues, who possessed a national diploma, were included in the deviation report.

Arbitration award

- [5] The commissioner, after surveying the evidence, first addresses the question whether Oostendorp's complaint does concern a benefit as contemplated in section 186(2)(a) of the LRA. The question, more aptly described, is whether an advancement to T15, or the ability to advance, concerns a benefit. The commissioner finds that it does, without seeing the need to dissect all the arguments and authorities, and that the wider definition includes an advantage or privilege in terms of a policy or practice subject to the employer's discretion. The commissioner finds that whether more money may be involved does not make what is being disputed less of a benefit.
- [6] The commissioner turns to the next question, i.e., whether the applicant acted unfairly. The commissioner phrases the question differently by stating that the question is why the qualification criteria were not relaxed for Oostendorp? Why was Oostendorp excluded from the recommendation in the deviation reports? Why was a deviation not granted in respect of Oostendorp? Was it fair to have decided to not deviate (not open the door/barrier for advancement to T15) in respect of Oostendorp? Why was or could a deviation or relaxation not also have been granted for or to Oostendorp?
- [7] The commissioner finds that all criteria and conditions had to be met for advancement – also from T14 to T15 for a dual-graded person – and that the educational requirement from about 2019 was a minimum of a degree. This is why a deviation was sought for regrading and advancement in respect of *inter alia* Collop and Samsodien.
- [8] The commissioner finds, semantics aside, that he is satisfied that the ultimate decision was that of the City Manager and that deciding whether to grant a deviation or not is a form of exercising a discretion. The commissioner finds that

the City manager's ultimate decision directly or indirectly also decided the question of deviation with regards to Oostendorp. In the deviation reports there was clear reference to a legacy official with only a matric.

[9] The next question the commissioner asked himself is whether the discretion was exercised fairly. The only reason or explanation advanced for not lifting the barrier for Oostendorp to advance to T15 is that he had neither a degree nor a diploma. The commissioner finds that the exercise of the discretion to exclude Oostendorp from the deviation report (or rather from the recommendation therein), or from benefitting from an opened door for advancement to T15 was unfair *inter alia* for the following reasons:

- a. There is no absolute bar, law, policy or SOP that prevents a deviation for a person with a matric only.
- b. There was no evidence as to why it would be unlawful, unprofessional, unfair or otherwise untenable to open the salary advancement door for Oostendorp with his matric.
- c. There have been deviations in the past in respect of diplomas.
- d. It is common cause that Oostendorp could do his work and was doing it with distinction and was indeed one of the best. His expertise, knowledge and performance are of the highest order and fully comparable to those of fellow SOPs.
- e. There are other historic or legacy situations where employees do not satisfy or did not satisfy the minimum educational qualification requirement but are at level T15 or are allowed to advance – some with also only a matric.
- f. The defense of a risk at one point should there have been a request for deviation in favour of a matric, the defense of the of the job evaluation unit – those who worked with advancements – and the defense of the reported tone or sentiment of or around the delegated authority concerning a matric

versus a diploma or a degree, do not sway the commissioner to conclude otherwise. In any event, the last two of these explanations arguably constitute hearsay.

- g. The unique circumstances of this case are decisive, including the history and chronology of events. If Oostendorp was or is a legacy, is already operating highly successfully at T14/15 level, and over many years came to where he currently is with only a matric, it is more probable than not that the decision to not open the T15 door for him was arbitrary and unfair.
 - h. Even if Oostendorp could have studied further, and even if there is a perception that he should have done so and/or that people with higher educational qualifications are entitled to better career expectations, all the surrounding circumstances of this case point that it was unfair not to have granted the deviation also for Oostendorp, even if it meant a kind of personal ringfencing or grandfathering.
- [10] The commissioner concludes that it would be unfair for Oostendorp to continually be materially prejudiced simply because some people may believe that a tertiary qualification is better or is more advantageous or is even an absolute requirement to be regarded as a professional person in the applicant's employ.
- [11] The commissioner finds that the unfairness should be overturned and that the door/barrier must be opened. The commissioner therefore finds that the applicant committed an unfair labour practice when it failed to grant a deviation in favour of Oostendorp that is similar to the deviation in favour of Samsodien and Collop, and that the applicant is ordered to grant deviation from the minimum requirements contained in both the job evaluation and advancement systems and procedure for the purpose of regrading and grading and advancement of Oostendorp and to include Oostendorp in these processes. The commissioner lastly finds that the regrading and advancement of Oostendorp must be processed and implemented as if there were approved with effect from 14 December 2021.

Grounds of review

[12] The applicant challenges the arbitration award on the basis that the commissioner committed irregularities that had the effect of depriving the parties of a fair hearing of the issues in the following respects (grounds of review as per the founding affidavit):

- a. The dispute referred to the SALGBC did not concern the provision of benefits as per the definition of an unfair labour practice.
- b. The commissioner failed to indicate the factual basis for his findings that the dispute related to benefits.
- c. The commissioner did not have the power to grant a deviation from the relevant minimum requirements.
- d. The commissioner, by granting the deviation, usurped the duties of the City Manager and acted contrary to the dictates of section 66 of the Local Government: Municipal Systems Act (the Systems Act); alternatively acted *ultra vires* the provisions of the Systems Act.
- e. By granting the deviation, the commissioner created new terms and conditions of employment without any credible evidence.
- f. The findings and conclusions on the issue of benefits are entirely disconnected from the evidence.
- g. The commissioner misconceived the nature of the enquiry and/or arrived at an unreasonable result.

[13] The applicant supplemented its grounds of review (the supplementary affidavit) as follows:

- a. The commissioner committed a gross irregularity and/or misconstrued the enquiry in concluding that “advancement in terms of the Advancement SOP” in the context of the case constituted a “benefit”.
- b. The commissioner committed a gross irregularity and/or misconstrued the material evidence when he ignored the clear terms of the Advancement SOP.
- c. The commissioner arrived at an unreasonable result when he failed to recognise that the onus was on Oostendorp to prove the existence of a right, even if it is subject to an employer’s discretion.
- d. The evidence of Oostendorp does not suggest any unfair conduct by the employer in relation to provision of benefits. It is common cause that Oostendorp did not meet the qualification criteria.
- e. The commissioner’s finding that the conduct complained of falls within the definition of section 186(2)(a) is a finding that is so unreasonable that no reasonable decision-maker would have come to it. The decision to exclude Oostendorp’s name from the report requesting deviation was rational considering the undisputed communication regarding qualifications received from the delegated authority.
- f. The commissioner committed a gross irregularity and/or misconstrued the enquiry when he failed to recognise that his discretion to interfere with the applicant’s substantive decision to approve a deviation was limited to instances where such a decision was irrational, grossly unreasonable or *mala fide*.
- g. The commissioner committed a gross irregularity when he ordered Oostendorp’s advancement where none of the other SPOs who possessed national diplomas have not been advanced through the SOP up until today.

- [14] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,² 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?...”.³ In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁴ the Court applied this reasonableness consideration as follows:

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

- [15] 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.

² (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).

³ Id at para 110.

⁴ (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

[16] 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.⁵ 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 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.⁶

[17] In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & Others*⁷ the Labour Appeal Court further explained the reasonableness test in the following terms:

“[15] A ‘process-related review suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by taking into accounts facts that are irrelevant, and the like. The emphasis here is on process and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the

⁵ *Fidelity* at para 102.

⁶ 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.

⁷ (JA 2/2012) [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) (4 November 2013).

Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review.”

and

“[20] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries. Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?”

and

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

- [18] The Labour Appeal Court in *Head of the Department of Education v Mofokeng and Others*⁸ provided the following exposition of the review test:

“[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling 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;

⁸ (JA14/2014) [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) (1 October 2014).

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.”

- [19] 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

Jurisdiction of SALGBC

- [20] The applicant is challenging the commissioner’s finding that the dispute before him is a “benefit” as provided for in section 186(2)(a) of the LRA. It is therefore necessary, before this court can address the merits of the applicant’s conduct in relation to excluding Oostendorp from the deviation report, to first determine whether the dispute referred to the SALGBC falls within the jurisdictional ambit of section 186(2)(a). More specifically, this court must determine whether advancement from T14 to T15, in terms of a deviation report, for an employee already occupying a dual-graded T14/15 position constitutes a “benefit” as contemplated.

- [21] If the answer is negative, the commissioner would have lacked jurisdiction to determine the dispute, and the award must be set aside on that basis alone. However, for the reasons that follow, this court is satisfied that the advancement opportunity by way of a deviation report, which is subject to the City Manager’s

discretion, clearly falls within the definition of a benefit, and that the applicant's challenge in this regard cannot succeed.

[22] The applicable test to determine this issue of jurisdiction is not the reasonableness test, but the correctness test.⁹ It is therefore not necessary for this court to determine whether the commissioner's decision was reasonable or not. The commissioner was either correct in concluding that the dispute is one of a "benefit", or he was wrong. It is not necessary for this court to evaluate the commissioner's reasons for his finding, or his failure to give reasons as argued by the applicant. This court must determine whether advancement from a T14 to T15, for an employee already appointed in a dual-graded post of T14/15, constitutes an unfair labour practice dispute regarding benefits.

[23] Section 186 (2) (a) of the LRA reads as follows:

'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;'

[24] The leading authority on the meaning of "benefits" in terms of section 186(2)(a) is the decision of the Labour Appeal Court in *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*¹⁰. The LAC, at paragraph 50, held:

"... In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (ex contractu or ex lege including rights judicially created) as well as an advantage or

⁹ *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another* (2008) 29 ILJ 2218 (LAC)

¹⁰ [2013] ZALAC 3; [2013] 5 BLLR 434 (LACE); (2013) 34 ILJ 1120 (LAC)

privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in section 186 (2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion..."

[25] This court does not deem it necessary to refer to any further case law to determine the applicant's jurisdictional challenge. The above extract from the judgment is clear and is directly relevant to the dispute that is before this court. Several key principles arising from this judgment are that the term benefit must be interpreted widely and not restrictively; a benefit includes any advantage or privilege; benefits can arise from established practice or policy; benefits include rights arising *ex contractu* or *ex lege*; benefits include advantages granted in terms of a policy or practice; the employer's discretion over the benefit does not exclude it from being a benefit; and benefits include judicially created rights.

[26] This court is of the view that any dispute about advancement opportunities in the workplace, whether based on policy, practice or standard operating procedures and being subject to management's discretion, fall squarely within section 186(2)(a). There is no need for employees to establish a contractual right to advancement in order to challenge the fairness of an employer's conduct. Career progression opportunities, where same is based on established practice, policy, standard operating procedures, and where provision is made for deviations, subject to approval by the relevant authority based on discretion, constitute a benefit for purposes of section 186(2)(a).

[27] It is also necessary to consider what the LAC said in *Apollo* at paragraph 48:

"The facts of this matter clearly illustrate that the *Hospersa* approach, that the benefit must be an entitlement that is rooted in contract or legislation, is untenable. Hoosen had, in terms of her employment contract, a right to retirement benefits. The contract did not make provision for a right to voluntary early retirement benefits. She would therefore, on the *Hospersa*

approach, be able to challenge, by way of arbitration, any unfairness relating to the ordinary retirement benefits. When the appellant decided to accelerate the existing contractual benefits and retained a discretion to grant the accelerated benefits, the benefits would strangely morph into something less than benefits because according to the *Hospersa* approach she does not have a contractual right to the accelerated retirement benefits. **The employer would then have a license to act with impunity.** She would thus not have recourse in the civil courts, because no contract came into being, nor would she have a remedy in terms of section 186 (2) (a) of the LRA to challenge the patent unfairness because there is no underlying contractual right to the benefits. Being a single employee she would in accordance with *Schoeman v Samsung* not have the right to strike. Clearly the notion that the benefit must be based on an ex contractu or ex lege entitlement would, in a case like this, render the unfair labour practice jurisdiction sterile.” (emphasis added)

[28] There is a direct correlation in what the LAC said and to the matter before this Court. If it is to be found that applying for deviation in the context of this case to advance employees from T14 to T15 despite the employees not meeting the minimum requirements is not a benefit dispute, it will mean that the applicant then has a license to act with impunity as to who to include, for whatever reasons, and who not to include in the deviation report. The decision whether to include an employee in a deviation report or not must be subject to an assessment on the fairness of the decision taken. It surely cannot be left to a line manager to decide who to include and who not to include for unfair, illogical or arbitrary reasons.

[29] The failure to afford Oostendorp with the opportunity to be part of the deviation report, which aim was to advance Oostendorp’s colleagues who similarly held dual-graded posts of T14/15 from T14 to T15, despite not meeting the minimum requirement of a degree, constitutes a dispute about a benefit, as envisaged in section 186(2)(a). The deviation report for Oostendorp’s colleagues resulted in their advancement from T14 to T15 when the City Manager approved the deviation

report. The court notes, however, that the advancement has not taken effect as yet and is still in process of being implemented subject to certain requirements. The City Manager, in exercising a discretion to approve the deviation, effectively granted an advancement. Had Oostendorp been included in the deviation report, and the City Manager exercised his/her discretion regarding a deviation in favour of Oostendorp, Oostendorp would similarly have been advanced from T14 to T15. The possibility of such advancement is sufficient to establish that Oostendorp's dispute relates to a benefit insofar as he was not included in the deviation report to the City Manager.

- [30] This court is therefore satisfied that the commissioner's decision that the dispute is one relating to a benefit is a correct decision and that the SALGBC had the necessary jurisdiction to determine the dispute. The applicant's jurisdictional challenge is therefore rejected.

Unfair Labour Practice

- [31] The next question that needs to be answered is whether the applicant committed an unfair labour practice when Oostendorp was excluded, despite his initial inclusion, from the deviation report sent to the City Manager for approval. Insofar as the applicant contended during the arbitration proceedings that the City Manager approves a deviation and that such approval does not amount to the exercise of discretion in doing so, this court rejects the argument. The City Manager, in considering whether to approve a deviation report, clearly uses his/her discretion.

- [32] This dispute cannot be determined on the City Manager's failure to approve a deviation for Oostendorp, as the City Manager was not presented with a deviation for Oostendorp. Mr Lawrence, Oostendorp's line manager, took the decision to exclude Oostendorp from the deviation report and it is Mr Lawrence's actions in doing so that is subject to a determination whether his decision was exercised fairly. If Mr Lawrence's actions in excluding Oostendorp from the deviation report are not subjected to scrutiny for fairness, it will effectively mean that line managers

can act with impunity as to who they want to include in a deviation report, even for malicious reasons. Such a scenario will be untenable and will be in direct contradiction to an employee's constitutional right to fair labour practices and his/her right not to be subjected to an unfair labour practice in terms of section 186(2)(a).

- [33] The LAC in *Apollo*, after holding that entry into an early retirement scheme constitutes a benefit, went on to determine whether the employer's discretion not to extend this benefit to the employee was exercised fairly. The LAC held as follows at paragraph 53:

"It has been said that unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended."

- [34] This principle was further elaborated in *Protekon (Pty) Ltd v CCMA and Others*¹¹ where the court confirmed that conduct is arbitrary or capricious when it lacks a rational basis or is based on considerations that are irrelevant to the decision at hand. The court in *Chirwa v Transnet Ltd and Others*¹² held:

"The LRA includes the principles of natural justice. 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 alterum partum principle and the rule against bias. If the process does not, the employee will be able to challenge her or his 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.

¹¹ [2005] ZALC 75; (2005) 26 ILJ 1105 (LC); [2005] 7 BLLR 703 (LC)

¹² (2008) 29 ILJ 73 (CC) at para 42

- [35] It is not this court's function to determine whether Mr Lawrence's decision to exclude Oostendorp from the deviation report was the correct decision. This court must determine whether the commissioner's decision is one that falls within the band of reasonableness. Unless it is shown that the commissioner's decision in respect of the failure to include Oostendorp in the deviation report is one that no other reasonable decision-maker could reach, this court must reject the applicant's challenge in these review proceedings. It must, however, be noted that there are two issues to be considered here. The first is whether Mr Lawrence's failure to include Oostendorp in the deviation report constituted an unfair labour practice and the second is whether the commissioner was entitled to grant the relief that he did.
- [36] In respect of the first issue, i.e., whether the commissioner's decision regarding Mr Lawrence's actions was a reasonable decision and falls within the bands of reasonableness, this court can find no reason to interfere with the commissioner's decision. This court in fact agrees without any qualification or reservation that Mr Lawrence's reasons for excluding Oostendorp from the deviation report, after initially having included him, was irrational and unfair. There was no evidence presented by the people who advised Mr Lawrence that, including Oostendorp who only has matric, would jeopardise the chances of those who had national diplomas.
- [37] In any event, the fact that Oostendorp's colleagues had national diplomas does not mean that they met the minimum requirements for advancement, hence the deviation report. It is regrettable that a long serving employee like Oostendorp, who served the applicant extremely well and who at the very least is on par with all his colleagues, was treated in this manner by excluding him from a deviation report simply because he only had matric. Oostendorp is good enough to perform the functions associated with a T15 employee and is doing it very well. Despite the pending advancement of his colleagues to T15 as a result of the deviation report, Oostendorp is left to continue to perform the same functions and responsibilities of those employees who will be advanced to T15. This is untenable and completely unfair towards Oostendorp. At the very least, Oostendorp was entitled to also be included in the deviation report in order for the City Manager to exercise his/her

discretion whether to allow Oostendorp, even though he only has matric, to advance to T15.

[38] Oostendorp's dispute is similar to an employee applying for a promotion due to acting in the position for many years, who has not been shortlisted for the position. The employee will have the right to challenge the employer's failure to shortlist him/her and for not being allowed the opportunity to attend an interview and for the interview panel to properly consider the application. The reason why that employee was not shortlisted must be subjected to an assessment as to the fairness of the decision taken. If the decision not to shortlist was irrational, arbitrary and/or unfair, the employee will be entitled to appropriate relief. In the matter before this court, Mr Lawrence's decision to exclude Oostendorp from the deviation report was irrational, arbitrary, baseless and unfair, which led to the City Manager not being given the opportunity to exercise his/her discretion regarding Oostendorp's advancement.

[39] This court reiterates that it is most unfortunate that the applicant, through the actions of Mr Lawrence and those who advised him, treated Oostendorp in this manner. Their actions clearly advantaged Oostendorp's colleagues at the expense of Oostendorp. It can never be accepted as a fair labour practice to exclude a long serving employee like Oostendorp, who has and is still serving the applicant extremely well, from a deviation report simply because his inclusion would hamper the prospects of advancement of his colleagues with national diplomas. The fact that Oostendorp's colleagues have national diplomas and Oostendorp only has matric does not make his colleagues any more capable to perform the duties of a T15 post. As stated already, the fact that his colleagues had national diplomas did not entitle them to advancement hence the deviation report. To exclude Oostendorp from the deviation report simply because he had matric was irrational, arbitrary and unfair.

Relief Granted

- [40] The second issue referred to above is whether the commissioner's decision to advance Oostendorp to T15 was a reasonable decision and falls within the band of reasonableness. This court is of the view that the commissioner exceeded his powers to do so and that he, in the process, bypassed the City Manager's role in considering whether to approve or reject the deviation regarding Oostendorp. It is common cause that due to Mr Lawrence's actions, the City Manager was not given the opportunity to consider a deviation in respect of Oostendorp.
- [41] In this regard, section 66 of the Municipal Systems Act¹³ vests the City Manager with specific statutory powers regarding the management and administration of the municipality's affairs, including human resource management. The decision whether to approve deviations from minimum employment requirements for advancement purposes falls squarely within this statutory function. The City Manager is the designated authority empowered to make such determinations. By ordering that Oostendorp be advanced to T15, the commissioner usurped a statutory function that had never been exercised and substituted his own discretion for that of the statutory designated decision-maker.
- [42] The fact that Oostendorp was unfairly treated regarding his exclusion from the deviation report does not entitle Oostendorp to be advanced to T15. This decision must be taken by the City Manager upon receipt of a deviation report. The City Manager may well exercise his discretion with specific reference to Oostendorp's deviation and approve the deviation. If the City Manager fails to approve the deviation, his/her decision can then be challenged as an unfair labour practice based on the reasons given for not approving the deviation.
- [43] It is essential to distinguish between two separate wrongs in this matter. The first wrong was the procedural unfairness committed by Mr Lawrence in excluding Oostendorp from the deviation report – thereby denying him the opportunity to be considered for advancement by the City manager. Mr Lawrence's exclusion of Oostendorp from the deviation report constitutes the unfair labour practice that has

¹³ Act No. 32 of 2000

been established. The second, separate issue would be whether the City Manager's substantive decision to grant or refuse advancement was itself unfair. Only the first wrong occurred in this case. The City Manager never had an opportunity to consider Oostendorp's case because the deviation report excluded him. The commissioner's role was limited to remedying the procedural unfairness, not to make the substantive advancement decision himself. By ordering that Oostendorp be advanced to T15, the commissioner usurped a statutory function that had never been exercised and substituted his own discretion for that of the statutorily designated decision-maker.

- [44] The Labour Court in *Ekurhuleni Metropolitan Municipality v SALGBC and Others*¹⁴ reviewed an arbitration award where the commissioner "overstepped the mark" by actively engaging in the proceedings. While that case concerned the commissioner's conduct during proceedings, the principle is equally applicable here. Arbitrators must respect proper institutional decision-making processes and cannot substitute their own judgment for that of designated authorities. An arbitrator cannot bypass a statutory functionary and make a substantive decision that properly belongs to that authority.
- [45] Similarly, in *Protekon* the Labour Court held that a commissioner's decision to order relief that exceeded the scope of the dispute and the commissioner's jurisdiction was irrational. The court found that the commissioner exceeded his powers in granting relief that went beyond remedying the unfair labour practice that was established. The same principles apply in this matter. The commissioner exceeded his remedial jurisdiction by ordering the substantive outcome (advancement to T15) rather than remedying the procedural unfairness (exclusion from consideration).
- [46] This court therefore finds that, insofar as the commissioner found that Oostendorp must be advanced to T15 despite the deviation not having been presented to the City Manager for a decision, the decision was irrational and that the commissioner

¹⁴ [2016] ZALCJHB 513; [2017] 4 BLLR 399 (LC); (2017) 38 ILJ 1820 (LC)

exceeded his powers in granting that relief. The relief so granted must therefore be reviewed and set aside.

[47] The proper remedy in these circumstances is to remit the matter to the City Manager to exercise the statutory function that was bypassed. The commissioner's role was to remedy the procedural unfairness - Oostendorp's exclusion from consideration - not to make the substantive advancement decision himself. By ordering direct advancement, the commissioner usurped a statutory function that had never been exercised. This constitutes a material error that renders the remedy unreasonable.

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

Order

1. The application for the arbitration to be reviewed and set aside is granted.
2. It is declared that the exclusion of the third respondent, Mr Irwin Oostendorp, from the deviation report submitted to the City Manager constitutes an unfair labour practice relating to the provision of benefits as contemplated in section 186(2)(a) of the LRA.
3. The applicant is directed to prepare a proper and comprehensive deviation report in respect of Mr Oostendorp, and to submit such report to the City Manager within 30 (thirty) days of the date on which this judgment is delivered to the parties.
4. The City Manager is directed to consider the deviation report and to exercise his/her discretion whether to grant a deviation in respect of Oostendorp, taking into account:
 - 4.1 Oostendorp's long service and exemplary work performance.
 - 4.2 Oostendorp's successful performance of T14/T15 functions for many years with only a matric qualification.

- 4.3 The existence of other legacy employees at T15 with matric qualifications.
- 4.4 The fact that the deviation process contemplates exceptions to standard minimum requirements in appropriate circumstances.
- 4.5 The arbitrary nature of the distinction between diploma and matric holders in the particular circumstances of this case.
- 4.6 Any other relevant considerations the City Manager deems appropriate.
5. The City Manager shall communicate his decision to Oostendorp in writing, with reasons, within 30 (thirty) days of receiving the deviation report. The City Manager retains the discretion, in the event of approving the deviation report, to determine the effective date of advancement from T14 to T15.
6. Oostendorp retains the right to challenge the City Manager's decision, if required, as an unfair labour practice with the SALGBC within the 90 days from the date of the City Manager's decision.
7. Any non-compliance with this order can be enforced by approaching this court directly.
8. No order is made as to costs.



C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

CS Hendricks from Marais Muller Hendricks Inc.

For the Third Respondent:

Mr Oostendorp representing himself

LABOUR COURT