



THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case No: PR228/23
PR267/23

In the matter between:

**OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA**

Applicant

and

**GENERAL PUBLIC SERVICE SECTOR
BARGAINING COUNCIL**

First Respondent

WILLIAM RICHARD PRETORIUS N.O.

Second Respondent

SIPHEPHELO LUTHULI

Third Respondent

LUNGISA CEZA

Fourth Respondent

MZWABANTU MHLONTO

Fifth Respondent

**DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Sixth Respondent

Heard: 24 July 2025

Delivered: 6 August 2025

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter concerns 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 committed an unfair labour practice against the third respondent, as contemplated by section 186 (2) (a) of the Labour Relations Act¹ (LRA), by revoking the third respondent's recommendation for appointment which resulted in him not being appointed as Court Manager. The applicant was ordered to pay the third respondent compensation as a *solatium* in the amount of R61 104.75.

Background

- [2] The facts in this matter are largely common cause or undisputed. During 2019, the applicant advertised two positions of Court Managers in respect of the Bhisho and Mthahtha High Courts. On 1 November 2019 the applicant received the third respondent's application in respect of the two positions advertised. The application comprised of a duly completed application form. In that form the third respondent was required to indicate if he has ever been convicted of a criminal offence or been dismissed from employment and the third respondent's response thereto was 'NO'.
- [3] Thereafter, on 23 January 2020, the third, fourth and fifth respondents were interviewed, together with other candidates. The third respondent was the first preferred candidate as he scored the highest points in the interviews, followed by

¹ Act 66 of 1995, as amended.

one Ms Nonxuba and Mr Mhlontlo. The next step was to conduct reference checks and the integrity check in respect of all recommended candidates.

- [4] The recommended candidates were required to complete the HR Recruitment Declaration forms, the Lexis Nexis consent and indemnity forms, and the interview integrity check forms. On 23 January 2020 the third respondent completed the forms and returned same to the applicant. According to the Lexis Nexis Consent and Indemnity Form, the third respondent was required to disclose if he has ever been criminally charged and, if yes, he was required to provide the details of the charge. He selected a 'NO', which meant that he has never been charged. Furthermore, according to the interview integrity check form, the third respondent was required to disclose if he had any criminal record or charges against him or pending against him. If yes, he was required to disclose the circumstances of the aforesaid criminal record or charges. Once again, the third respondent wrote 'NO', which meant that he had no criminal record or charges against him.
- [5] On 12 February 2020, the applicant established that on or about 9 August 2019, the third respondent was arrested in respect of a case of driving a motor vehicle while under the influence of alcohol. That case was investigated under CAS No. 102/08/2019, Amanzimtoti. On 17 February 2020, through Mr Mponzo, the Deputy Director HR Eastern Cape and Mr Kroqwana, the Director Court Operations, the applicant addressed an email to the third respondent, advising him about the outcome of the criminal record checks and required him to respond thereto within five days. In that email, the applicant attached a letter dated 17 February 2020, signed by Mr Kroqwana.
- [6] In response thereto, on 19 February 2020, the third respondent furnished the applicant with an affidavit in terms of which he conceded that he knew about the matter but relied on the fact that the matter was not enrolled by the prosecutor. The third respondent also recorded that he could not disclose same because it was not a pending matter. With the view of investigating this issue, on 24 February 2020, Mr Mponzo addressed another email to the third respondent, in terms of

which he asked the third respondent to provide either a SAPS 3M from the investigating officer or a J15 (charge sheet) from the Prosecuting Officer at NPA. In response thereto, on 26 February 2020, the third respondent addressed an email to Mr Mponzo wherein he advised that the criminal case was '*nolle prosequi*' as per the register (which was attached), but the police did not update the docket. The third respondent also advised that the prosecutor undertook to provide him with the updated SAPS 3M, before the closure of business.

- [7] According to Mr Kroqwana and Mr Mponzo, they received the email and the attachment, but the attachment was so faint that they could not read and understand it at all. On 10 March 2020, Mr Mponzo addressed another email to the third respondent, in terms of which he asked him to provide a copy of the charge sheet, clearly indicating his name and the status of the case by no later than 13 March 2020. In response thereto, on 11 March 2020, at 15h31, the third respondent addressed an email to Mr Mponzo, advising that the NPA advised him that the matter was still being investigated and it is not known as to when it will be finalised. Underneath that email, there was an email from Ms Shireen Govender dated 11 March 2020 at 13h58, addressed to the third respondent, wherein, Ms Govender recorded that:

'Re: CAS 102/8/2019 Amanzimtoti,

Good afternoon,

The above matter is still under investigation.

Upon completion of the investigation herein, the state intends to proceed with the issue of summons.

Regards,

S. Govender

District Control Prosecution

Durban'

- [8] Having considered the matter, particularly considering the email of Ms Govender, the panel took a decision not to recommend the third respondent due to his failure to make the necessary disclosures regarding the criminal case of driving a motor vehicle while under the influence of alcohol, which was investigated under CAS No. 102/8/2019, Amanzimtoti. The panel also considered that the third respondent did not disclose this criminal matter in the interviews when he was asked if he had any criminal record or pending case against him. Considering the above, the panel concluded that the third respondent had a duty to disclose the aforesaid matter as it was still pending and he failed to do so. Thereafter the panel recommended the fourth and fifth respondents who were later appointed in the positions.
- [9] Dissatisfied with the aforesaid decision, the third respondent referred an unfair labour practice dispute with the first respondent.

Arbitration award

- [10] The second respondent, in the analysis of the evidence and arguments, identified that the key issue to decide is whether the decision of the applicant to revoke the third respondent's recommendation for appointment as Court Manager is irrational, arbitrary, capricious or *mala fide*.
- [11] The second respondent found that the definition of 'pending case' or 'pending criminal case' or 'pending court matter' provided by all witnesses were 'homemade' or subjective and was not informed by an objective definition either provided for in legislation or policy. He found that the third respondent understood the integrity questions because he did not ask for clarity when he completed the questions on 23 January 2020.
- [12] The second respondent found that, in his view, the 'SAP 69' report dated 31 January 2020 was factual insofar as at 31 January 2020, no final decision had been taken regarding the third respondent's case taking into account with the benefit of hindsight that the SAPS case docket showed that the public prosecutor, McGrath, had struck the case off the roll on 25 February 2020. Put differently, as

of 31 January 2020 there were allegations before the court which allowed a decision to prosecute or not, which decision was taken on 25 February 2020.

- [13] The second respondent states that he says this being mindful of the fact that the third respondent's case was not enrolled in court on 13 August 2019 following his arrest on 9 August 2019 as conceded by Mponzo and Kroqwana, under cross-examination. It is also unchallenged, so the second respondent found, that the register from the magistrate's court showed that the status of the third respondent's case was recorded as '*nolle prosequi*' as of 19 November 2019 – well before the date on which the third respondent completed the integrity questions, i.e., 23 January 2020.
- [14] The second respondent found, in the absence of a definition of a 'pending criminal case' in legislation or policy, he prefers the version of Mkhize that the third respondent did not have a 'pending criminal case'. The second respondent states that he says so based on the concession by Kroqwana that the third respondent's case was not enrolled in court and the third respondent did not have a criminal record.
- [15] The second respondent states that the difficulty with the version of Mponzo is that it presupposes that the SAPS case docket carries a conviction that is pending a decision of the court which, in his view, is not correct. The second respondent states that he says so because it is uncontested that the prosecuting authority is clothed with the power to decide whether to prosecute or not. In other words, the SAPS case docket is nothing else but an allegation(s) still to be tested in court. This is why the second respondent agrees with Mkhize's admission, under cross-examination, that the third respondent ought to have declared that he was criminally charged, because it would have given the third respondent a golden opportunity to put the allegation or 'case awaiting trial' against him into context in relation to the fact that it was not enrolled in court.
- [16] The second respondent took issue with the reference to '*pending case*' and not 'pending criminal case' and found that the word 'criminal' appeared for the first time

in the memorandum. Therefore, the second respondent found, to have read into Govender's email that the third respondent had a 'pending criminal case' is in conflict with the ordinary wording of Govender's email which is not ambiguous. The second respondent found that 'a pending criminal case', in his view, refers to a case whether the National Prosecuting Authority (NPA) has finalised its investigation in terms of the SAPS case docket, charges (J15) have been finalised against the accused, and the matter is enrolled in court. The matter is now pending with the finding of the court. Simply put, a pending criminal case is a matter enrolled in court for prosecution as persuasively argued by the third respondent in his closing argument. The second respondent therefore found that there was 'no pending criminal case' against the third respondent at the time when he completed the integrity forms on 23 January 2020.

- [17] The second respondent then deals with whether the applicant's decision as captured in the memorandum was irrational, arbitrary, capricious or *mala fide*. He finds that it is a proven fact that the applicant did not inform the panel regarding the email received from the third respondent dated 26 February 2020 by Mponzo wherein he referred to the case docket (SAPS 3M) and the register which clearly indicated the result of the third respondent's case as '*nolle prosequi*'. No plausible reasons were provided for its non-disclosure. The second respondent says this in the light of the fact that Mponzo did not verify the contents of the said email with the NPA. Both Mponzo and Kroqwana were unable to show evidence of requesting clearer copies of the attachments from the third respondent with reference to the email from Kroqwana dated 16 March 2020.
- [18] The second respondent finds that even if the attachments were illegible as claimed by the witnesses for the applicant, the applicant's failure to verify the contents of the email with the NPA and more importantly not disclosing the aforesaid email to the panel, as Kroqwana did with the email from Govender, weighed heavily against the applicant's claim of a fair decision. The SAPS docket under the heading finding / result of trial clearly showed that on 25 February 2020 the matter was 'struck off the roll' by the public prosecutor, McGrath. The applicant did not deem it necessary

to verify the decision of McGrath and/or the meaning of the contents of the email from Govender. Instead, the applicant relied on an interpretation not informed by legislation or policy. An adverse inference is then drawn by the second respondent from the fact that McGrath and Govender were not called as witnesses to support its case against the third respondent.

- [19] The second respondent states that he is puzzled by the email from Govender in that it confirmed the third respondent's matter was still being investigated whilst McGrath on the other hand had decided to strike the matter off the roll about twelve days earlier. It appears, as per the second respondent's finding, that it was a question of the left hand not knowing what the right hand was doing.
- [20] The second respondent agreed with Mkhize's evidence when he admitted that the third respondent ought to have declared that he was arrested and charged by SAPS for drunken driving and that he ought to have explained the subsequent unfolding of events. The second respondent, however, hastened to indicate that this was not the basis for the applicant's decision not to recommend the third respondent for appointment when considering the email from Kroqwana dated 16 March 2020 and paragraph 3.2 of the memorandum on the appointment of Court Managers.
- [21] The second respondent finds that he is not convinced that the 'misrepresentation' was done with the intention to deceive. He says this because the contents and the frequency of the trail of emails between the third respondent and Mponzo, in his view, showed that there was at best a 'misunderstanding' about the disclosure of information flowing from the integrity questions. The second respondent finds, secondly, that there is no evidence before him to show that disciplinary action was taken against the third respondent for dishonesty considering the applicant's emphasis on integrity and honesty in relation to the position of Court Manager.
- [22] The second respondent therefore finds that the applicant's decision to revoke the third respondent's recommendation was capricious and irrational and amounted to an unfair labour practice against the third respondent.

- [23] The second respondent then, peculiar so given his finding that the applicant is guilty of an unfair labour practice, penalises the third respondent by not ordering protected promotion because the third respondent continuously denied that he was criminally charged, despite the admission by his own witness that he was obliged to disclose that he was criminally charged. This, according to the second respondent, contributed to the weakening of the third respondent's case in terms of the relief that he was seeking.

Grounds of review

- [24] The applicant states that its case from the onset is that the second respondent's award is unreasonable and is one which no reasonable decision maker could arrive at. The award is unreasonable and/or the second respondent committed a gross irregularity in the conduct of the arbitration proceedings and/or misdirected himself.
- [25] The applicant's first ground of review is that the second respondent committed a gross irregularity in the conduct of the arbitration and that he misapplied the law, when he was analysing the evidence. As a result, thereof, he reached an incorrect conclusion with regards to the question whether the third respondent had a pending case. The second respondent, from a legal point of view with regards to what a pending case is, should have taken guidance from judgments such as *Director of Public Prosecutions, Western Cape v Khumalo; Khumalo v Minister of Police*². Considering the totality of the evidence tendered by the parties particularly the cover of the docket, the letter of Mr Mkhize dated 11 December 2020, Mkize's concession and the email from Govender, it was clear that the case against the third respondent was still pending and there was an intention on the part of the NPA to prosecute the third respondent. In this regard, a reasonable decision arbitrator, in the shoes of the second respondent, armed with the evidence at hand, would have arrived at a conclusion that there was a pending case against the third respondent. Therefore, the third respondent had a duty to disclose the same.

² (A182/2022) [2022] ZAWCHC 172.

- [26] Secondly, the second respondent lost sight of the fact that, in principle, a provisional withdrawal of a criminal case does not mean that the accused is off the hook because it does not exonerate the accused from being prosecuted in future of the same charge.³ To conclude the criminal prosecution proceedings, the suspect has a right to lodge an application for a permanent stay of his prosecution in terms of section 342A of the Criminal Procedure Act of 1997, as amended. That is a legal process that ensures finality in criminal cases.
- [27] Thirdly, the second respondent misapplied the law in his analysis of the evidence and when dealing with conflicting versions. This is evidenced from the award where the second respondent recorded that the conflicting versions between the parties in respect of the issues in dispute, as identified in the pre-arbitration minute, will be decided on the probabilities. This is a clear illustration of the failure to properly analyse the evidence in accordance with the principles laid in *Stellenbosch Farmers' Winery Group Ltd and another v Martell & Cie SA and others*⁴. A proper application of the legal principles to the facts of this case would have led the second respondent to the conclusion that there was a pending case against the third respondent, therefore he had a duty to disclose same to the applicant.
- [28] Finally, under the first ground of review, the applicant submits that, concluding that the decision to revoke the third respondent's recommendation for the position at hand was irrational, capricious, and amounted to an unfair labour practice, was bad in law as it had no proper legal foundation. The second respondent lost sight of the principles laid down in *Pharmaceutical Manufacturers' Association of SA and Others: In Re Ex Parte Application of the President of the RSA and Others*.⁵ The applicant maintains that the second respondent misapplied the law and premised his decision on incorrect legal positions. If the purpose sought to be achieved by the applicant's panel was within the authority of the functionary, and as long as the

³ *Nemavhulani v Station Commissioner Thohoyandou and Others* (090/2013) [2017] ZALMPHC 6 (25 August 2017) at para 22.

⁴ 2003 (1) SA 11 (SCA) 14 I – 15 E.

⁵ 2000 (3) BCLR 241 (CC) at para 90.

functionary's decision to disqualify the third respondent, viewed objectively, is rational, an arbitrator cannot interfere with the decision simply because he disagrees with it, or considers that the power was exercised inappropriately.

[29] The second ground of review is that the second respondent failed to properly analyse the facts. The second respondent overlooked the most essential aspects of the enquiry regarding whether the third respondent failed to make the necessary disclosures. The starting point was to establish whether there was a duty to disclose on the part of the third respondent. The common cause facts dictate that the third respondent was required to disclose a criminal case in which he was charged and that there was a pending case. This is evidenced from the evidence. Furthermore, the evidence of the applicant was to the effect that, even during the interviews, the third respondent was called upon to disclose a pending criminal case, if any. In the circumstances, it is common cause that there was a duty to disclose the required information, and the third respondent was aware of such a duty.

[30] The second question was whether the third respondent made the necessary disclosures. The evidence of the applicant was that he failed to make the necessary disclosures and as a result he failed the integrity test. From a factual point of view, it was common cause that the third respondent was charged in respect of the case of driving a motor vehicle, while under the influence of alcohol under CAS Number 102/08/2019, Amanzimtoti and he failed to disclose that in Annexures SP2 and SP3. According to the letter of Mr Mkhize, the Control Prosecutor, the following is evident:

‘...Mr Luthuli was charged in this matter for drinking and driving on 9 August 2019 and was to appear in Court on 13 August 2019...’

[31] Furthermore, the third respondent's own witness, Mr Mkhize, conceded that he had to disclose that he was charged with the case of drinking and driving. In essence, on his own version, the third respondent was charged with a criminal case of drinking and driving and he had a duty to disclose same, but he did not.

- [32] The third ground of review is that the second respondent considered irrelevant evidence and ignored relevant evidence. It is submitted that it was irregular for the second respondent to explore the issue of the 'intention to misrepresent' because it is irrelevant as it was neither pleaded nor fully canvassed during the arbitration proceedings. Furthermore, the fact that the applicant did not charge the third respondent for the proven dishonesty, is also irrelevant because, the applicant had no power to discipline the third respondent, as it was not his employer. Finally, the conclusion that the decision to revoke the decision to recommend the third respondent's appointment was capricious and irrational and amounted to an unfair labour practice is premised on incorrect factual and legal foundation.

Review test

- [33] In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*,⁶ 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?...'.⁷ In *Herholdt v Nedbank Ltd and Another*⁸ 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 consequence if their effect is to render the outcome unreasonable.'

- [34] 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

⁶ (2007) 28 ILJ 2405 (CC).

⁷ *Id* at para 110.

⁸ (2013) 34 ILJ 2795 (SCA) at para 25.

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.

[35] 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.⁹ 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 at 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.¹⁰

[36] 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

[37] The court firstly notes that the third respondent applied for the position of Court Manager in the Office of the Chief Justice, Republic of South Africa. It goes without saying that any candidate applying for the position of Court Manager must be honest and truthful when applying for the position, when interviewed, and when answering questionnaires regarding their ability to be appointed as a Court Manager.

⁹ *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 102.

¹⁰ See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

- [38] This is demonstrated by the evidence in this case where the questions regarding whether the third respondent was charged, or had a criminal record, or had a pending criminal matter were asked on multiple occasions. It is necessary to refer to the specific questions asked, and the third respondent's response thereto.
- [39] The third respondent submitted his application on 1 November 2019. The application form required from the third respondent to indicate if he had ever been convicted of a criminal offence or been dismissed from employment and the third respondent's response thereto was 'NO'. The court cannot take issue with this response, as the third respondent had neither been convicted of a criminal offence nor had he been dismissed from employment. What this does, however, show is that not having a criminal record was of crucial importance to the applicant. The third respondent was, however, questioned during the interview whether he had a pending criminal case, which he denied.
- [40] In order for the applicant to conduct an integrity check and reference checks, after the interview process held on 23 January 2020, the applicant required the recommended candidates to complete the HR Recruitment Declaration forms, the Lexis Nexis consent and indemnity forms, and the interview integrity check forms. The third respondent completed the forms on 23 January 2020 and returned the same to the applicant.
- [41] According to the Lexis Nexis Consent and Indemnity Form, the third respondent was required to disclose if he had ever been criminally charged and, if yes, he was required to provide the details of the charge. He selected a 'NO', which meant that he had never been charged. Furthermore, according to the interview integrity check form, the third respondent was required to disclose if he had any criminal record or charges against him or pending against him. If yes, he was required to disclose the circumstances of the aforesaid criminal record or charges. Once again, the third respondent wrote 'NO', which meant that he had no criminal record or charges against him.

- [42] It is clear from the questions asked that the third respondent was required to disclose whether he had any criminal convictions, whether he had been criminally charged, or whether he had any criminal charges pending against him. These questions were crucial questions for the consideration of any recommended candidate. If the answer to any of these questions was affirmative, the third respondent was obligated and expected to answer the question(s) with a 'YES', and he was obligated and expected to provide reasons. That the third respondent failed to do so is common cause.
- [43] The crucial issue for consideration before the second respondent therefore came down to whether the third respondent was charged with a criminal offence, or whether there was a pending criminal matter. If the answer to this was that the third respondent was criminally charged and had a pending criminal matter at the time that he completed the forms, it must follow logically that the third respondent failed to disclose a crucial fact from the applicant.
- [44] This then brings this court to the second respondent's finding that there was no 'pending criminal case' against the third respondent at the time that he completed the integrity forms on 23 January 2020. This decision is not supported by the evidence placed before the second respondent and his finding that there was 'no pending criminal case' is a decision that a reasonable decision maker could not reach. The second respondent's reasoning as to what constitutes a 'pending criminal case' is not supported by well-established legal principles relevant to the prosecution of an accused based on a criminal charge.
- [45] The starting point is that the third respondent was arrested for driving under the influence, which is a criminal offence. There can be no confusion or misapprehension that driving under the influence is a criminal offence. In fact, a case was opened by SAPS under CAS No. 102/8/2019, Amanzimtoti. This is undisputed, and the second respondent was expected to accept the evidence.
- [46] In order for SAPS to arrest, and open a docket, an accused must be charged. The charge in the case of the third respondent was that of driving under the influence.

The charge, before prosecution, will be subject to an investigation before a decision will be taken by the NPA whether to prosecute or not. The investigation of the charge does not mean that there is no charge, neither does the fact that an accused did not appear in court mean there is no charge. The charge of driving under the influence remains pending until a final decision is taken, by the NPA, whether to prosecute or not. It is not relevant whether the third respondent was found guilty or not, as the reference to 'pending' is just that, i.e., that there is a criminal charge(s), which is subject to an investigation and a final decision whether to prosecute or not.

- [47] The applicant referred this court to the *Khumalo*-judgment¹¹ where the full bench stated that:

'The prosecution has failed:

[104] It cannot be said that where a case has been provisionally withdrawn by prosecutors in the circumstances which applied in this case, the prosecution has failed. The reason for the withdrawal was to gather further evidence to strengthen the case against the respondent, after Barnard, during consultation, discovered that two further witnesses were available. The prosecutors embarked on this course of action and exercised their discretion in such a way so as to not prejudice the respondent by requesting a postponement, which would have resulted in him being kept in custody for a longer period. This is what happens in criminal courts on a daily basis. Although, in my view, they would have been perfectly justified in the interests of justice to request a postponement for this reason, especially in circumstances where the accused had abandoned his bail application and where he was sought on four warrants of arrest, by other courts. It was, however, a discretion that they exercised, in a rational manner.

[105] As I said earlier, at the very least at that stage, the case was not trial ready, but it does not mean that there were no grounds to prosecute the

¹¹ *Supra* at fn 2.

respondent. In fact, by doing what they did, the grounds to prosecute him would have been strengthened. The respondent has by no means proven that this withdrawal resulted in the criminal proceedings being terminated in his favour. The intention was clearly to reinstitute the proceedings against the respondent and the withdrawal was of a temporary nature. The respondent's prosecution was also not settled by an acquittal or a finding of not guilty or a withdrawal on the merits. On the contrary, it seems that the prosecution had a strong case and the temporary withdrawal of the proceedings was made in order to strengthen, or enhance, its case.

[106] The case against the respondent was not withdrawn because of an unmeritorious prosecution, or a lack of evidence, where the prosecutors believed that there was no prospect that the respondent could be found guilty should they proceed with the prosecution. That does not mean the prosecution against the respondent has failed. For all these reasons, the court a quo, in my view, was wrong to conclude that the respondent has proven that there was a malicious prosecution.'

[48] On the same reasoning, it is irrelevant whether the third respondent appeared in court or that the public prosecutor had struck the case off the roll, on 25 February 2020. What is clear is that the third respondent was charged, and that the NPA was busy investigating the matter before a final decision would be taken. This is clear from the e-mail from Ms Govender, which was presented by the third respondent, that the matter was still under investigation on 11 March 2020 and that the NPA, upon completion of the investigation, intends to proceed with the issue of summons. The criminal case was clearly still pending and the second respondent's decision that there was no 'pending criminal case' is not supported by the undisputed facts. According to the second respondent's own assessment of the evidence, as of 31 January 2020, there were allegations before the court which awaited a decision to prosecute or not. The criminal case was therefore clearly still pending, and no final decision was made whether to proceed with prosecution. It is irrelevant that the decision was taken on 25 February 2020, as this was after there was a duty on the third respondent to disclose.

- [49] The second respondent's reliance on the '*nolle prosequi*' written on a register, showing the date of 11 October 2019, which was well before the third respondent completed the integrity questions on 23 January 2020, is also of no assistance to the third respondent. The second respondent's reliance on this register was irregular and amounted to a reviewable irregularity for various reasons. Firstly, the second respondent was not aware of the entry into the register when he completed the integrity questions. The onus to prove that the applicant committed an unfair labour practice rests with the third respondent, and not on the applicant. It was for the third respondent to explain the contradiction between this entry in the register and the email from Ms Govender. The third respondent failed to explain this contradiction. In any event, as already stated, the register does not assist the third respondent given that he was unaware of the entry when he completed the integrity form. The third respondent was aware that his case was still pending, and he was obliged to disclose this to the applicant, which he failed to do.
- [50] The second respondent's finding with regards to the applicant not seeking to enquire about the illegible register attached to the third respondent's email is noted by this court but not much turns on this. This is so because the third respondent was not aware when he completed the integrity form that there was a '*nolle prosequi*' on a register. This only came to the third respondents after the fact, i.e., on or about 26 February 2020. In any event, this entry is directly contradicted by the email from Ms Govender.
- [51] The second respondent's reasoning regarding the meaning of 'a pending case', or 'pending criminal case', or 'pending court matter' must be rejected as unreasonable. Any reasonable decision maker will find, based on the evidence, that there was indeed a pending criminal matter, that the third respondent was charged, and that the third respondent was obliged to disclose same to the applicant. In fact, when it comes to the relief granted, the second respondent accepts that there was an obligation on the third respondent. He finds that the third respondent's continuous denial that he was criminally charged, despite the

admission by his own witness that he was obliged to do so, has contributed to the weakening of the third respondent's case in terms of the relief he was seeking.

- [52] If then, according to the second respondent's finding that the third respondent failed to comply with the obligation to disclose that he was charged, why was the decision taken to revoke the recommendation capricious and irrational and amounted to an unfair labour practice? Why is the third respondent penalised by not being awarded protective promotion, yet on the same facts the applicant is said to have acted capriciously, and irrationally. The second respondent completely misunderstood the nature of the enquiry in this regard. The third respondent was obliged to disclose the fact that he was criminally charged and that the matter was still pending at the time when he completed the integrity forms. The third respondent's failure to make this disclosure was a serious failure in the context of the process followed by the applicant to assess the recommended candidates.
- [53] The court now turns to deal with the second respondent's finding that revoking the recommendation to appoint the third respondent was not based on the third respondent's failure to disclose that he was arrested and charged by SAPS for drunken driving. This finding is entirely disconnected from the decision that the second respondent was called upon to decide. There was an obligation on the third respondent, which the second respondent correctly found to be the case, to disclose whether he was arrested and charged, which he failed to do. This should have been the end of the enquiry, and the second respondent's analysis in which he questioned the meaning of the various phrases such as '*pending criminal case*' was irregular. The third respondent was obliged to make the disclosure, which he failed to do, and the applicant was well within its right to revoke the recommendation because of the non-disclosure. The second respondent's finding to the contrary is a decision that a reasonable decision maker could not reach.
- [54] It is also of concern that the second respondent remarked that there is no evidence before him that disciplinary action was taken against the third respondent for dishonesty. The second respondent must have known that the applicant could not

initiate disciplinary action against the third respondent, as the third respondent was employed by another state department and not by the Office of the Chief Justice. The court will not delve into the reasons why it was decided, in proceedings before the arbitration commenced, that the third respondent was entitled to pursue an unfair labour practice against the applicant. This issue did not form part of the grounds of review and the court therefore accepts that the third respondent had the right to pursue an unfair labour practice dispute against the applicant. The second respondent, however, ought to have known that the applicant had no authority to discipline the third respondent and his remark is completely irregular and not based on the evidence.

- [55] The second respondent's decision that there was no intention to deceive by the third respondent is also not what he was required to determine. Whether there was an intention to deceive or not is irrelevant to the question that the second respondent was required to determine, which was whether there was an obligation on the third respondent to disclose, and if so, whether he disclosed the fact that he was arrested and charged, and that the criminal case is still pending. In the third respondent's own knowledge and understanding, when he completed the forms, the matter was still pending, and no final decision had been taken. He ought to have disclosed this, and his failure to disclose entitled the applicant to revoke the recommendation that the third respondent be appointed as Court Manager.
- [56] It boggles this court's mind that the second respondent could find, on the evidence before him, that the applicant's decision to revoke the recommendation that the third respondent be appointed was capricious and irrational and amounted to an unfair labour practice. The second respondent seems not to understand what it means to be capricious and irrational. Capricious refers to actions which are *inter alia* sudden and unexpected, headstrong and whimsical. There is nothing capricious or irrational in the applicant's decision to revoke the recommendation in circumstances where the third respondent had a duty to disclose, and he failed to do so. This is where the enquiry should have stopped, and not to be used to

penalise the third respondent when it came to the relief sought for failing to make the disclosure.

Cross review

[57] The third respondent, instead of delivering a cross-review, delivered a review application under a different case number. This court will treat the third respondent's review application, which was argued simultaneously with the applicant's review application, as a cross-review.

[58] The parties agreed that, if this court decides that the applicant's review application succeeds, that the third respondent's challenge to the relief granted by the second respondent will become a moot point. This is so because if it is found that the second respondent's decision finding that the applicant committed an unfair labour practice is reviewed and set aside, the issue of relief awarded is no longer something that can be pursued. It is this court's finding that the award is indeed reviewable and that the award must be set aside in its entirety. This in effect means that the applicant has not committed an unfair labour practice and that the unfair labour practice dispute must be dismissed. The third respondent's review application (dealt with as a cross-review) therefore has no merit and must be dismissed.

Costs

[59] The court has considered the applicant's request for costs to be awarded. However, the third respondent was already armed with an award in his favour, and he was entitled to oppose the applicant's review application. It will not be in the interest of law and fairness to saddle the third respondent with a cost order simply because he opposed the applicant's review application.

[60] However, insofar as the third respondent's review application is concerned (dealt with as a cross-review), there is no reason why the third respondent should not be ordered to pay the applicant's costs.

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

Order

1. The application under case number PR228/23 for the arbitration award to be reviewed and set aside is granted and is replaced with an order that the third respondent failed to prove that the applicant committed an unfair labour practice. No order is made as to costs.
2. The application under case number PR267/23 is dismissed with cost, including the cost of counsel.



C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. Madokwe

Instructed by: The State Attorney

For the Third Respondent: S Hlongwane from Mhlanga Inc.

LABOUR COURT