



- (1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised

[Redacted Signature]

Signature

27/08/2026

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C376/2024

In the matter between:

MAHLATSE MAEBANA

APPLICANT

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

FIRST RESPONDENT

D DU PLESSIS N.O.

SECOND RESPONDENT

CITY OF CAPE TOWN

THIRD RESPONDENT

Heard: 19 August 2026

Delivered: 27 August 2026

*Review of arbitration award - unfair labour practice (promotion) - material error of law
- impermissible headhunting denied applicant a fair opportunity to compete - error led
directly to unreasonable result - award reviewed and compensation awarded.*

JUDGMENT

HARVEY, J

Introduction

- [1] The applicant, Mahlatsi Maebana, is employed by the City of Cape Town as Head of the Operational Programmes Management Unit in its Urban Waste Management Directorate. He applied unsuccessfully for appointment to the position of Manager: Collections Branch. He referred an unfair labour practice dispute (unfair conduct relating to promotion) to the SALGBC.
- [2] The Commissioner found that the City had not committed an unfair labour practice by failing to appoint him. The applicant seeks to review and set aside that award. The application is opposed.
- [3] The applicant also initially sought orders setting aside the recruitment process which resulted in the appointment of George Jonkers, declaring Mr Jonkers' appointment unlawful and invalid, and directing the City to conduct a fresh recruitment process. At the hearing, however, the applicant indicated that he no longer seeks to disturb Mr Jonkers' appointment and seeks only compensation of 12 months' remuneration for the unfair labour practice.

Background

- [4] The post of Manager: Collections Branch, which reports to the Director: Waste Services, Mr Keraan, was advertised in 2022. The applicant applied. Although he met the minimum requirements, he was not shortlisted. No appointment was made.
- [5] The City thereafter embarked on what it described as a headhunting process. Three candidates were identified, including Mr Jonkers, who was then employed by the City as Manager: Departmental Support Services in the Urban Waste Management Department. Two of the headhunted candidates were found competent, and Mr Jonkers was recommended for appointment. The Executive Director (ED) did not support the recommendation, however, due to employment equity considerations and concerns arising from the psychometric assessments.
- [6] The post was accordingly re-advertised in 2023, and the applicant applied again. This time the applicant was shortlisted and interviewed. He obtained the highest interview score of the three candidates interviewed, but none was considered competent for appointment.

- [7] When the re-advertised process produced no candidate considered competent for appointment, the City returned to the two candidates who had been found competent during the earlier headhunting process. The earlier recommendation of Mr Jonkers was resubmitted to the Executive Director for reconsideration, and thereafter referred to the Municipal Manager. Mr Jonkers was ultimately appointed.

The award

- [8] The Commissioner considered whether the City had engaged in unfair conduct relating to the applicant's non-promotion. He noted that an employee has no right to promotion; an employee is entitled only to a fair opportunity to compete for a post, and the employer is free to select the candidate it considers most suitable. Employees are however protected against a selection process or decision that is arbitrary, capricious, discriminatory, made in bad faith, based on irrelevant considerations or otherwise unfair.
- [9] The Commissioner assessed the applicant's various complaints regarding the recruitment and selection process. One of the principal complaints was that the City had acted contrary to the 2021 Municipal Staff Regulations issued under the Systems Act¹ by resorting to headhunting whereas the post was not categorised as a critical and scarce-skills post. The Commissioner held that the Regulations prescribed minimum standards and were not peremptory, and that the City's 2020 Recruitment and Selection Policy (the Policy) did not conflict with the Regulations. He found that the Policy permitted headhunting if a recruitment process had failed to produce a suitable candidate. He accordingly rejected the applicant's contention that headhunting was confined to critical and scarce-skills posts.
- [10] The Commissioner also rejected the applicant's complaints about bias and conflicts of interest, the panel's composition, and the scoring process. He found that the fact that the applicant obtained the highest score of those interviewed did not entitle him to appointment, because he had ultimately been found not

¹ Local Government: Municipal Staff Regulations issued under the Local Government: Municipal Systems Act 32 of 2000 GN 890 in GG 45181 of 20 September 2021 (hereinafter 'the Regulations').

competent: his assessment reflected four developmental areas, and his score was insufficient for him to be recommended for appointment. He also found insufficient evidence to conclude that the applicant had a stronger employment equity claim than Mr Jonkers.

- [11] The Commissioner concluded that the applicant had failed to establish unfair conduct by the City in the recruitment and selection process and accordingly found that he had not been subjected to an unfair labour practice.

Review Grounds

- [12] The applicant alleges gross irregularities in the conduct of the arbitration and contends that the outcome was one that a reasonable decision-maker could not reach.
- [13] His principal complaint concerns the Commissioner's treatment of the City's use of headhunting. He contends that the Commissioner erred in finding that the Regulations did not restrict headhunting to critical and scarce-skills posts, and in accepting that the City was entitled to rely on its Recruitment and Selection Policy to appoint a candidate identified through headhunting.
- [14] The applicant further contends that the Commissioner failed properly to consider and assess his complaints concerning the fairness of the recruitment and selection process, Keraan's involvement in identifying and subsequently assessing Mr Jonkers, which he contends gave rise to a conflict of interest, and the irregular *ex post facto* signing of the declarations of interest by the members of the interview panel .
- [15] He further contends that the Commissioner acted irregularly and unfairly in refusing to issue a subpoena for the Municipal Manager without providing reasons for such refusal.
- [16] The City contends that the application is, in substance, an appeal against the Commissioner's findings. It maintains that the Commissioner properly considered the applicant's complaints, that the applicant was afforded a fair opportunity to compete for the post but was assessed as not competent for appointment, and that no irregularity has been established which rendered the outcome unreasonable.

[17] In oral argument, the applicant focused principally on the Commissioner's treatment of the Regulations, the alleged conflict of interest involving Keraan, and the refusal to subpoena the Municipal Manager.

Evaluation

[18] The review test is outcome-based. In *Herholdt*,² the SCA held that a gross irregularity is established where the Commissioner misconceived the nature of the enquiry or arrived at an unreasonable result. Material errors of fact, or errors concerning the weight or relevance of particular facts, do not in themselves render an award reviewable. They are relevant only if their effect is to render the outcome unreasonable.

[19] In *Mofokeng*³ the Labour Appeal Court held that errors of fact or law are insufficient to vitiate an award; what matters is the materiality of the error and its effect on the arbitrator's conception of the enquiry, the issues to be determined and the ultimate outcome. An error which causes the Commissioner to misconceive the enquiry or materially affects the result may render the award reviewable.

[20] The decision in *Mofokeng* also concerned an alleged unfair labour practice relating to promotion. The Commissioner had misunderstood the collective agreement governing the appointment process and, as a result, had approached the enquiry into the fairness of the non-promotion from an incorrect premise. The Court held that the error was material because it caused him to misconceive the enquiry and resulted in an unreasonable outcome.

[21] A similar difficulty arises in this matter. There is merit in the applicant's complaint that the Commissioner misunderstood the governing regime. Both the City's 2020 Policy and the 2021 Regulations address the situation in which a recruitment process fails to produce a suitable candidate. Under its 2020 internal Policy, the City could, in such an instance, resort to alternative recruitment

² *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 (6) SA 224 (SCA) at para 25.

³ *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC) at paras 30–33.

methods, including headhunting.⁴ However, the 2021 Regulations promulgated under the Systems Act provide that where no suitable candidate is identified, the post may be re-advertised. Alternative recruitment methods, including headhunting, are reserved for situations where the post is a critical and scarce-skill post.⁵

- [22] It is common cause that the post for which the applicant applied was not a critical and scarce skill post. The Policy predated the Regulations and is in any event subordinate to them. To the extent that it permitted headhunting in circumstances in which the later Regulations did not, it could not prevail over the Regulations.
- [23] The Commissioner nevertheless held, without giving reasons, that the Regulations were not peremptory and that the Policy was not inconsistent with them. This was an error of law. The Regulations prescribe the requirements for municipal recruitment and selection, and the City was bound by them. Its Policy could not permit a wider use of headhunting than the 2021 Regulations allowed.
- [24] The City was invited in argument to explain the basis for the Commissioner's conclusion on this point, but was unable to do so. Its suggestion that the Regulations would have expressly required inconsistent policies to be repealed if they were intended to prevail cannot be sustained. Nor can any concession or understanding by the applicant as to the status of the Regulations determine their legal effect.
- [25] Was this error material? I am persuaded that it was. Had the Commissioner correctly interpreted the Regulations, he would have appreciated that, once the advertised process failed to produce a suitable candidate, the City could not return to candidates identified through an impermissible headhunting process.

⁴ Clause 5.2.1.4 of the City's 2020 Recruitment and Selection Policy provides that:

'If it is determined that the recruitment process has not elicited suitable candidates, the pool of candidates may be extended by considering ad hoc applicants, executive search/headhunting, referrals and/or re-advertising.'

⁵ See note 1 above. The relevant clauses read as follows:

18(8) If it is determined that the recruitment process has not attracted suitable candidates, the post may be re-advertised.

18(9) If the post is categorised as a critical and scarce skill post, alternative recruitment methods, such as executive search, headhunting, referrals and re-advertising may be considered only if the recruitment process has not attracted suitable candidates.'

The post should instead have been re-advertised. That would have given the applicant a further opportunity to compete for it.

- [26] The applicant may again have been found unsuitable. He may also have improved his skills or performed better in a further recruitment process. It is impossible to know. He was not required to establish that he would have been appointed. The unfairness lay in denying him a further opportunity to compete in accordance with the Regulations. Instead, he was compared with candidates identified through an earlier impermissible recruitment method, and one of those candidates was appointed.
- [27] The Commissioner's error of law therefore went directly to the fairness of the recruitment process. Had he correctly understood the Regulations, he may well have reached a different conclusion concerning whether the City's conduct in not promoting him was unfair. The error was therefore material and rendered the outcome unreasonable.
- [28] The Commissioner's unexplained refusal to issue a subpoena for the Municipal Manager, who had approved Mr Jonkers' appointment despite the ED's previous refusal to approve him, was procedurally unfair. The applicant was entitled either to call his witness, or to reasons for the Commissioner's decision to decline the subpoena.
- [29] I am not persuaded, however, that the applicant's complaint concerning the alleged conflict of interest has merit. The Regulations require a panel member to recuse himself or herself if the interviewee is a spouse, partner, close family member, or close friend; if there is a relationship of indebtedness; or if another conflict of interest exists. That Mr Keraan, as the responsible manager, had identified Jonkers as a potentially suitable candidate did not, without more, give rise to a conflict of interest. Nor did the later completion of the declaration of interest forms establish one. Mr Keraan explained that the disclosures of interest were made at the meeting, and that the declaration forms merely recorded them.
- [30] Nor do the applicant's complaints concerning his scores establish a further ground of review. He complained in particular that the panel member who scored him lowest lacked technical expertise. Nothing in the evidence establishes that

the scoring was manipulated or unfair or that the Commissioner's treatment of this complaint rendered the outcome unreasonable.

- [31] In the result, the Commissioner's error concerning the Regulations was material and rendered his conclusion that the City had not acted unfairly unreasonable. The unexplained refusal to issue the subpoena was, in addition, procedurally unfair. The award falls to be reviewed and set aside.

Remedy

- [32] The applicant has left the City and no longer seeks appointment to the post or to disturb Mr Jonkers' appointment. He seeks the maximum compensation of 12 months' remuneration.

- [33] I am not persuaded that maximum compensation is warranted. I have found that the applicant was denied a fair opportunity to compete for the post in a process conducted in accordance with the Regulations. That was a material infringement of his right to fair labour practices. Its seriousness must, however, be assessed in the light of the limits of the findings I have made. The unfair labour practice is confined to the City's impermissible resort to headhunting, which deprived the applicant of a further opportunity to compete for the post. I have not found that the scoring was unfair or that the process was manipulated to secure Mr Jonkers' appointment. Nor have I found that, but for the unfairness, the applicant would have been appointed to the post. The compensation is intended to afford a solatium for the denial of the applicant's right to compete fairly for the post, rather than to compensate him for the loss of the post itself.⁶ In all the circumstances, compensation equivalent to three months' remuneration is just and equitable. The award records that the applicant's annual remuneration at the time of the hearing was R1,278,419.

- [34] Neither party sought an order as to costs.

⁶ Compare *South African Police Services v Solidarity obo Slingers and Another* (JA57/2020) [2021] ZALAC 35; (2021) 42 ILJ 1934 (LAC) (14 June 2021).

Order

- [1] The arbitration award dated 19 August 2024, issued under case number WCM012416, is reviewed and set aside.
- [2] It is declared that the City committed an unfair labour practice relating to promotion in respect of the applicant.
- [3] The City is ordered to pay the applicant compensation in the amount of R319,604.75 (three hundred and nineteen thousand, six hundred and four rands and seventy five cents) by 15 September 2026.
- [4] There is no order as to costs.


SJ Harvey
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: (in person)

For the Third Respondent: Adv Jansen instructed by Timothy & Timothy Attorneys