



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR2044/21

In the matter between:

NOZUKO Y NTUKELA

Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES

First

Respondent

MKO RADEBE

Second

Respondent

PANELLIST S MOEKETSI NO

Third

Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Fourth

Respondent

Heard: 4 November 2025

Date delivered: 31 August 2026

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 31 August 2026.

Summary: Application to review and set aside an arbitration award finding that the first respondent did not commit an unfair labour practice. Applicant would have been appointed to the position but for the unfair labour practice. Resorting to self-help and changing selection criteria without authority resulting in unfairness.

JUDGMENT

SAVANT, AJ

Introduction

[1] This is an opposed review application in terms of section 145 of the Labour Relations Act¹ (“LRA”). The applicant, Ms Nozuko Y Ntukela, seeks to review and set aside an arbitration award (“award”) issued by the third respondent, SM Moeketsi N.O (“commissioner”), under the auspices of the fourth respondent, the General Public Service Sectoral Bargaining Council (“bargaining council”) under case number GPBC2484/2018 on 8 September 2021.

[2] The applicant seeks an order substituting the award with a finding that the first respondent, the Department of Correctional Services (“Department”) committed an unfair labour practice by failing to promote the applicant, along with appropriate relief.

Background

¹ No. 66 of 1995, as amended.

- [3] The applicant is an employee of the Department. During 2016 she applied for a position, titled Area Coordinator: Development and Care. At the time that she applied for the position she was employed in a post titled “Manager: Social Work Services”.
- [4] It is common cause that the advert in respect of the position contained computer literacy as one of its inherent requirements. It is also common cause that during April 2016, the interview panel submitted a written motivation to the Regional Commissioner, Ms. Subashni Moodley (“RC”), seeking her approval to approve the shortlisting criteria and a list of individuals shortlisted (“criteria memorandum”). The criteria memorandum outlined the criteria utilised for shortlisting as follows:
- “4.2.1. Basic criteria (the correctness and completeness of application form (part F), certification of documents, divers licence)
 - 4.2.2. Relevant qualifications (Diploma/Degree)
 - 4.2.3. 3-5 years relevant experience (development & care services) on management level
 - 4.2.4. Other (EE)”.
- [5] The applicant and the second respondent, Mr. Radebe were included among the shortlisted candidates in the criteria memorandum. Importantly, it is common cause that the above criteria did not include computer literacy as shortlisting criteria.
- [6] In a memorandum, signed by the chairperson of the interview panel, Mr. TG Molatedi dated 19 May 2016 addressed to the RC (“appointment memorandum”), the panel sought various Departmental officials to recommend the applicant to be appointed to the position and that if she was not available for the appointment, that the second respondent, Mr Radebe be appointed. The appointment memorandum also sought the RC’s approval to appoint the applicant to the position and that if the applicant was not available, that Mr Radebe be appointed.

- [7] The appointment memorandum also had placeholders for various officials to sign their recommendations. There were separate recommendation pages for each official to sign. Each of these pages contained the heading “Recommendation” and contained identical paragraphs 11.1 and 11.2 which read as follows:

“11.1: Ms Ntukela NY ... be appointed in terms of the Public Service Act with effect from 1 July 2016 in the position of Area Coordinator: Development & Care: Goedemoed Management Area...”

Recommended / not recommended

11.2: In the event that strongly recommended candidate, Ms. Ntukela ... not be available for appointment, Mr Radebe KO ... be appointed in terms of the Public Services Act with effect from 01 July 2016 in the position of Area Coordinator: Development & Care: Goedemoed Management Area ...

Recommended / not recommended”

- [8] Various officials signed the above recommendation and scratched out the words “not recommended” thus indicating their recommendation for the applicant to be appointed and for Mr Radebe to be appointed if the applicant was not available.
- [9] The page in the appointment memorandum for the RC to sign contained the heading “Decision” as opposed to “Recommendation” (as in the case of the other officials). It also contained paragraphs 11.1 and 11.2 as reflected above but instead of the words: “Recommended / not recommended” it reflected the words: “Approved / not approved”.
- [10] On 1 June 2016, the RC signed the appointment memorandum. There is a dispute whether her signature is indicative of her approval or disapproval of the applicant’s appointment to the position. The Department contends that the RC did not approve the applicant’s appointment, whereas the applicant avers otherwise.

- [11] On 3 June 2016, the RC inserted written amendments (and signed next to the amendments) to the appointment memorandum to the page that she signed on 1 June 2016. In her written amendments, she stated that one of the post requirements was computer literacy. She also noted that “this requirement was not part of the shortlisting memo, as advertised, meaning that the list of criteria was changed, without approval for deviation”. By this, her testimony revealed that she meant that only the National Commissioner was empowered to amend the selection criteria, which had not been done. Her written amendments also state that because the applicant did not produce any documents/information “on the CV indicating whether she is or is not computer literate”, the runner up candidate, Mr Radebe is approved. Her written amendments further read that Mr Radebe stated in his CV that he was computer literate.
- [12] On this score, it was common cause that the RC had the delegated power to approve or appoint the successful candidate. However, as noted above, there was a dispute between the parties whether the RC or only the National Commissioner had the power to amend the shortlisting criteria.
- [13] Ultimately, the applicant was not promoted or appointed to the position, which led to her referring an unfair labour practice dispute relating to promotion against the Department, culminating in the award.
- [14] Only the applicant and the RC testified at the arbitration. The commissioner found that the Department did not commit an unfair labour practice and dismissed the referral.

Evidence at the arbitration

The Department's evidence

- [15] It is convenient to first canvass the RC's evidence. During her evidence, the RC confirmed that she was appointed in that position in June 2012. She was referred to an excerpt of a document which required her to be satisfied that

the candidate “qualifies in all respects for the post and that her or his claims in his or her application for the post have been verified” before making a decision on an appointment or filling of a post. The RC testified that she therefore utilised the information at her disposal to satisfy herself that the candidates qualify for the position in all respects. She stated that she had regard to the job advert, which reflected computer literacy as an inherent requirement for the position and that there was no information at her disposal which indicated that the applicant was computer literate. It was common cause or at least undisputed that Mr Radebe’s CV reflected “computer literacy” as one of his skills or competencies.

- [16] In her evidence in chief, in the context of whether the RC initially approved the applicant as the candidate to be promoted on 1 June 2016 but then reversed her decision on 3 June 2016, she testified that she normally scratches out or underlines what is not applicable. For example, she would scratch out or underline “approved” to signify “not approved”. She mentioned that this is how she deals with all memoranda presented to her and referred to the criteria memorandum in which she approved the shortlisting criteria and shortlisted candidates as an example. In that memorandum she underlined or somewhat scratched out the words “not approved / amended” to signify her approval of the shortlisting criteria and candidates. The options in this regard that were presented to her were: “approved / not approved / amended”.
- [17] As stated above, in respect of the appointment memorandum, the panel sought, through paragraph 11.1 of the appointment memorandum, the RC’s approval for the applicant to be appointed and through paragraph 11.2 for Mr Radebe to be appointed if the applicant was not available. The RC signed the appointment memorandum on 1 June 2016. She testified that on 1 June 2016 she “scratched off approved” under paragraph 11.1 of the appointment memorandum, thus according to her above explanation, this signified that she did not approve the applicant to be appointed. However, I note that she did not scratch out the term “approved” per se but rather underlined it.

- [18] Under paragraph 11.2 of the shortlisting memorandum, the RC scratched out “not approved”, thus on her version or explanation, approving the recommendation that Mr Radebe ought to be appointed to the position if the applicant was not available for the appointment. This is strange in that according to the RC’s version, her “scratching off” (or rather, underlining) of approved under paragraph 11.1 signified that she did not approve the applicant being appointed to the position.
- [19] The RC testified that the appointment memorandum was returned to her, and she was requested to insert her motivation (presumably in the appointment memorandum) as to why she did not approve the recommended candidate, being the applicant. She did not indicate who requested her to do this, though when the applicant testified, it was put to the applicant that HR requested the RC to provide reasons for disapproving the applicant’s appointment and approving Mr Radebe’s appointment to the position. The RC explained that she therefore inserted her handwritten comments to the appointment memorandum (referred to in paragraph 11) on 3 June 2026.
- [20] Under cross-examination, in the context of her decision to appoint Mr. Radebe, the RC testified as follows.

“So I did not change my decision, I realised that there was an omission from the side of the panel and in order to be fair to the advert, I had to make sure that all criteria was being attended to... I did not change my decision, I picked up that computer literacy is [an] inherent requirement and it was not cited by the panel, so therefore I had to take that into account Sir because in my final decision I have to take into account all the factors at my disposal and all the information at my disposal...”

Yes, the CV, the... was approved, yes, interviews took place, when the memo was sent to me for approval, it is still incumbent on me as the delegated authority to look at all the facts at my disposal and satisfy myself. So, I did not just disapprove or deviate or go away from that, I took all factors into account and realise that the panel did not put the criteria in the shortlisting memo”.
[added emphasis]

- [21] It was further put to the RC in cross-examination that it would be unfair to include computer literacy as one of the requirements for the position in circumstances when it was excluded as shortlisting criteria with her “blessing”. The RC conceded that it was not a requirement as per the shortlisting criteria but stated that it remained an inherent requirement as per the job advert.
- [22] It was further put to the RC that she acted in bad faith. In response, she stated that if the panel “did not want to take computer literacy into account”, the panel should have submitted a deviation request to the National Commissioner in terms of section 97(2) of the Correctional Service Act², which was never done. She averred that computer literacy remained criteria for the panel to consider, which “possibly would have gone into interviews and sought information from the candidate”. She explained that there was no information at her disposal to indicate that the applicant had computer literacy skills, but that it was stated in Mr Radebe’s CV that he had computer literacy skills.
- [23] It was also put to the RC that she ought to have questioned the panel why they recommended the applicant for the position if she did not have computer literacy skills. She was of the view that it was not necessary for her to do so in that the panel would have been informed of her decision to appoint Mr Radebe to the position and if they had any objection, they could have raised it with her, but did not do so.
- [24] The apparent inconsistency in the appointment memorandum of the RC disapproving the applicant to the position yet approving Mr Radebe if the applicant was not available to be appointed to the position was also taken up with her under cross-examination. It was put to her that “...if indeed you were not approving her appointment on paragraph 11.1, you should have cancelled approved in the manner you cancelled not approved on paragraph 11.2”. It was also put to her further that under paragraph 11.1 that she actually

² Section 97(2) states that: “The National Commissioner may delegate any of the powers vested in him or her by this Act or any other Act to any correctional official or other person employed by the Department and may delegate any of the delegated powers in terms of subsection (1) to a correctional official of a post level of Deputy Director or higher.”

approved the applicant's appointment. In my view, the RC could not properly explain this discrepancy. She maintained that she approves or disapproves a memorandum in the manner that she explained during her evidence in chief. In other words, that she normally scratches out or underlines what is not applicable. For example, she would scratch out or underline "approved" to signify "not approved".

The applicant's evidence

- [25] The applicant testified that she obtained the appointment memorandum by following channels in terms of the Promotion of Access to Information Act³ after hearing rumours that she was approved to be appointed the position.
- [26] During her evidence in chief, the applicant was asked whether there was any information contained in her CV that would have indicated to "an ordinary person of the calibre of the panellist or the delegated authority" that she was computer literate. Reference to the delegated authority here was to the RC. The applicant replied that the structure of her CV would have indicated that she was computer literate. She also stated that reference to "Quality assessment of services rendered to offenders by social workers" would have indicated that she was computer literate. She explained that this involved *inter alia* receiving monthly statistics via email, which she consolidates for purposes of reporting and that she would conduct "monitoring evaluation which is also computerised". In other words, she had to be computer literate to assist with these tasks. This evidence was undisputed, at least in respect of the interview panel (i.e., that the panel ought to have appreciated that the applicant was computer literate) as the RC refuted that she was aware whether the applicant was computer literate.
- [27] The applicant gave further evidence regarding her computer literacy skills. I am cognisant however, that much of this evidence may not necessarily have been before the interview panel. That for instance, in 2014 she completed a course or attended training in advanced computer literacy skills or that she

³ No. 2 of 2000.

utilised Microsoft word during her (then) 22 years of employment with the Department.

- [28] Under cross examination, the applicant was taken through the regulations in the public service, which effectively stated that before deciding on an appointment or the filling of a post, the RC must be satisfied that the candidate qualifies in all respects for the post and that the candidate's claims in their application must have been verified. She was also taken through a procedure manual post advertisement manual that applied in the Department, which stated that shortlisting must be concluded on the basis of information provided for in the application form and in the CV. With reference to all of this, the applicant acknowledged that she did not qualify for the position because "computer literacy" was not mentioned in her CV.

The award

- [29] The commissioner found the RC's explanation with regard to her manner of approving memoranda as plausible.
- [30] The commissioner correctly accepted that neither the RC nor the interview panel had the power to amend the selection criteria regarding the position, albeit that he referred to Section 96(3) of the Correctional Services Act⁴. Section 96(3) empowers the National Commissioner to "determine the qualifications for appointment and promotion". In terms of the regulations applicable at the time, the RC did not have the power to do so.
- [31] Ultimately, the commissioner was not convinced that the facts justified that the applicant qualified (or was suitable) for the position, it appears because he was not satisfied that the applicant demonstrated to the Department that she had computer literacy skills. He accordingly found that it would not be appropriate for him to interfere with the Department's decision refusing to appoint the applicant to the position.

⁴ No. 111 of 1998.

Grounds of review

- [32] The applicant contends that the commissioner ignored, alternatively misconceived, vital evidence and arrived at a decision that no reasonable decision could have reached.
- [33] The applicant also avers that the award is reviewable because the RC exercised her discretion capriciously and for insubstantial reasons. The applicant argues that this is on account of the RC first approving shortlisting criteria, which excluded computer literacy but later applied it as a requirement for the position when deciding not to appoint her. Also due to the reversal of the Department's decision to appoint the applicant.
- [34] The applicant argues further that on a balance of probabilities, the RC must have had the necessary power to approve the shortlisting criteria. So the argument goes, as I understand it, that it does not make sense for the RC to, on the one hand contend that she did not have the power to change the selection criteria in respect of the position but on the other, have the power to appoint the successful candidate.

Evaluation

Test on review

- [35] As the Labour Appeal Court ("LAC") has held in *Department of Higher Education & Training v Smiza NO & Others*⁵ that the test for review of an arbitration award in an unfair labour practice dispute is the same as the test in a dismissal dispute, namely, "whether the commissioner misconceived the nature of the enquiry, or arrived at an unreasonable result in the sense that

⁵ (2024) 45 ILJ 1981 (LAC).

the decision made is one that a reasonable decision maker, on the material before them, could not have reached”.⁶

Principles concerning an unfair labour practice relating to promotion

[36] Section 186(2) of the LRA defines an unfair labour practice as:

“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”.

[37] The LAC in *Department of Higher Education & Training* provides a useful account as to what constitutes an unfair labour practice dispute in the context of promotions. It has held that:

“[8] A determination as to the fairness of a promotion decision is typically weighted heavily on an evaluation of the process and the justification given for the promotion decision made by the decision makers. An employer is required to act lawfully and adhere to the objective standards of fairness and the criteria that it has set for promotion, including its own policies, in order to ensure that an eligible employee is provided with a fair opportunity to compete for the post. Conduct that does not allow an employee such a fair opportunity will usually be found to constitute an unfair labour practice. The evaluation of the suitability of a candidate for promotion is required to be assessed fairly, rather than mechanically, with a justifiable element of subjectivity or discretion reserved for the employer.

[9] To succeed in an unfair labour practice claim related to promotion usually requires an employee to prove that they were not given a fair opportunity to compete for a post. This may involve evidence that the process was unfair and that, despite the employee having the necessary experience, ability and

⁶ Ibid. paragraph 7.

technical qualifications for the post, an unfair appointment decision was taken. An arbitrator is required by s 193(4) to determine an unfair labour practice dispute on terms that are deemed reasonable and may, where it is just and equitable, in terms of s 194(4), award compensation to an employee.”⁷ [added emphasis]

- [38] In determining whether the employer in question committed an unfair labour practice, the LAC in *Department of Higher Education & Training* has also considered whether the employer acted in bad faith, with an ulterior motive, arbitrarily, capriciously or in a manner which was grossly unreasonable in relation to the employee when undertaking the promotion.⁸

Department resorted to self-help

- [39] In my view, the probabilities suggest that the RC first appointed the applicant to the position on 1 June 2016, only to make an about turn on 3 June 2016 by appointing Mr Radebe instead. The RC explained that when considering memoranda if she underlined or struck out approved it signified the opposite. Thus, on her version, her underlining of “approved” meant that the applicant was not approved for the position (under paragraph 11.1 of the appointment memorandum) and the striking out of “not approved” under paragraph 11.2 of the appointment memorandum meant that she approved Mr Radebe to be appointed to the position if the applicant was unavailable. When this discrepancy was put to her, she failed to adequately explain it. Instead reiterating the manner in which she approved memoranda.

- [40] On a plain reading of the appointment memorandum, the probabilities suggest that the RC’s underlining of “approved” under paragraph 11.1 meant that she approved the applicant for the position. This is consistent with her striking out of “not approved” under paragraph 11.2, in other words actually approving

⁷ Footnotes omitted.

⁸ Paragraph 11 of the judgement. See also *Ga-Segonyana Local Municipality* paragraphs 20 and 21, *Arries v CCMA & Others* (2006) 27 ILJ 2324 (LC) at paragraph 17 where consideration was also given to whether the employer’s decision was motivated by being based on insubstantial reasons for the employer’s decision not to promote or upon a wrong principle or was taken in a biased manner.

Mr Radebe to be appointed to the position if the applicant was unavailable for the appointment.

- [41] Also, the RC's version that she was requested to provide reasons in the appointment memorandum as to why she did not approve the applicant is hearsay and in itself improbable. If she was requested to provide reasons for not approving the applicant, I think that she probably would have provided some other form of written communication to that effect or at least at the time when deciding whether to approve a recommended candidate (i.e., on 1 June 2016). In this regard, clause D.8 of the Public Service Regulations applicable at the time required the RC (as the delegated authority) to record her reasons in writing when not approving a recommended candidate.
- [42] If the Department was not satisfied with appointing the applicant to the position, it was not competent for it to resort to self-help by making an about turn appointing Mr Radebe after first appointing the applicant. In my view, the Department ought to have resorted to legal recourse instead, if any, if it wished to overturn the decision that it made on 1 June 2016 appointing the applicant to the position.
- [43] On this score, this court in *Bojosinyane v Ditsobotla Local Municipality & Others*⁹ with reference to various authorities restated trite legal principles that: (a) public officials may not take the law into their own hands when seeking to override conduct which they disagree with, and (b) decisions by public officials remain valid until set aside.
- [44] In my view, the applicant's ground of review that the RC's decision to appoint Mr Radebe after appointing the applicant to the position succeeds. I agree that the Department exercised its discretion capriciously and for insubstantial reasons. The award is note one that a reasonable decision maker could not have reached. It is also noteworthy that were it not for the Department's unfair conduct, the applicant would have been appointed to the position.

⁹ (2025) 46 ILJ 1350 (LC) at paragraphs 25 to 28.

RC acted ultra vires

- [45] If I am wrong that the award is susceptible to be reviewed and set aside on the above basis, I believe that the applicant was still deprived of a fair opportunity to compete for the position by the RC approving shortlisting criteria that excluded computer literacy as a requirement but considered it. The RC acted *ultra vires* (or did not have the power) when changing the shortlisting criteria. In this regard, item C.1.1 of the Public Service Regulations¹⁰ applicable at the time (read with the Public Service Act¹¹), empowered the Minister of the Department to determine the requirements for employment in any post based on the inherent requirements of the job. The said power has been delegated to the National Commissioner (not the RC).¹²
- [46] As part of the enquiry whether the applicant was given a fair opportunity to compete for the position, it is worth considering whether an inference should be drawn that the panel did not consider computer literacy as a requirement for the position. This is also because there is no direct evidence whether the panel considered it as a requirement for the position.
- [47] The principles regarding inferential reasoning were considered by the LAC in *Minister of Safety & Security & Another v Madikane & Others*¹³, wherein it quoted with approval the decision of *SA Post Office v De Lacy & another*¹⁴, summarising the principles as follows:

"The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be "consistent with all the proved facts. If it is not, then the inference cannot be drawn" and it must be the "more natural or plausible,

¹⁰ Part VII in particular in Government Gazette No. 1, volume 427, no. 21951, 5 January 2001.

¹¹ Of 1994 (see section 1).

¹² By virtue of Government Gazette – volume 566, 2 August 2012, no. 35561, Executive Authority Delegations: Public Service Regulations, Appendix B reference the PSR, page 46.

¹³ (2015) 36 ILJ 1224 (LAC).

¹⁴ 2009 (5) SA 255 (SCA) at para 35.

conclusion from among several conceivable ones" when measured against the probabilities."¹⁵

- [48] To my mind, an inference can be drawn that the interview panel probably did not consider computer literacy as a requirement for the position. Such a finding is consistent with all the proved facts. This inference especially ties in with the RC's evidence. It explains why she testified under cross-examination that she ultimately was of the view that computer literacy was indeed a requirement for the position. She explained that "to be fair to the advert" she had to ensure that computer literacy was part and parcel of the factors to be considered when determining which candidate ought to be appointed in that she realised that the interview panel excluded computer literacy as a requirement for the position. She must therefore have opined that notwithstanding that she did not have the power to change the selection criteria (to exclude computer literacy), the panel did not or may not have factored in computer literacy as a requirement for the position during the recruitment process.
- [49] The applicant did not lead evidence about any discussions regarding her computer literacy skills during her interview, probably because there were none. Instead, she focused on examples demonstrating her computer literacy skills which did not serve before the panel (as alluded to in paragraph 27 above), save for the example referred to in paragraph 26 above, wherein it was undisputed that the panel would have known that she was computer literate. Lastly, none of the other proved facts meddles with an inference that the panel did not consider whether the applicant was computer literate.
- [50] When the RC realised that computer literacy ought to have been considered as a requirement for the position and that the interview panel did not or may not have considered whether the applicant had computer literacy skills, she ought to have known that appointing Mr. Radebe to the position had the potential to deprive the applicant of a fair opportunity to compete for the

¹⁵ At para 44. The word "plausible" refers to "acceptable, credible, suitable" (see para 44 of the judgment).

position. This is because based on the amended selection criteria, it is unlikely that the panel considered whether the applicant was computer literate. Yet the RC ultimately decided not to appoint the applicant to the position because she was of the view that the applicant was not computer literate.

- [51] I am also mindful that the applicant acknowledged during cross-examination that she did not qualify for the position because “computer literacy” was not stated in her CV. I do not think that this acknowledgment or concession is correct. It must be viewed in its proper context. It is disingenuous to take the applicant to task for not explicitly stating that she was computer literate in her CV in circumstances where the RC first excludes it as shortlisting criteria (which power she did not have in the first place), the interview panel did not consider whether she was computer literate, and the RC subsequently decided not to appoint the applicant because she was of the view that the applicant was not computer literate. Here too, she would have been appointed to the position but for the Department’s conduct in this respect.
- [52] On a conspectus of the above, the applicant’s ground of review that the RC exercised her discretion capriciously and for insubstantial reasons succeeds. At the very least, the Department’s conduct was capricious. The award is not one that a reasonable decision maker could not have reached.
- [53] In sum, it was improper for the Department to resort to self-help by backtracking on its decision appointing the applicant to the position. Even if I am wrong, the applicant was still deprived of a fair opportunity to compete for the position by the Department’s conduct first excluding computer literacy as a requirement for the position but then deciding not to appoint the applicant because it was of the view that she was not computer literate. This was manifestly unfair to the applicant.
- [54] Given that the applicant succeeds on its ground of review that the Department conduct was capricious and based on insubstantial reasons, it is unnecessary for me to consider the applicant’s other grounds of review.

Appropriate relief?

- [55] This then brings me to the question of relief. The applicant seeks a substitution order to the effect that the Department's decision not to appoint her constitutes an unfair labour practice. The applicant also seeks to be appointed to the position to which she applied but was not appointed or to a vacant position on the same level as the position to which she applied. Failing all of this, she seeks a protected promotion, further alternatively, compensation.
- [56] This court is in as good a position to grant a substitution order that the Department committed an unfair labour practice based on the evidence before it.
- [57] I enquired from the applicant's representative, Mr. Naude, that in event that I find in the applicant's favour (that the award is reviewable) whether he agrees that it would be appropriate for the matter to be remitted to the bargaining council so that the question of relief can be properly determined, assuming this court is not in a position to grant a substitution order placing the applicant in the position. Mr. Naude advised that the applicant was reluctant for the question of relief to be remitted to the bargaining council for determination given that this dispute has not been resolved since 2016.
- [58] Based on the record and the time that has passed since the conclusion of the arbitration, it is unclear whether the post to which the applicant applied remains vacant. At the commencement of the arbitration proceedings, the applicant's representative mentioned that Mr Radebe was transferred to another position and that someone else was appointed to the position. That person was not identified. Furthermore, during argument before this court, the parties' representatives agreed that it was still not clear whether the post was vacant. This court is also not privy whether there are any vacant positions on a similar level to which the applicant can be appointed. All of this indicates that it would be inappropriate to appoint the applicant to the position to which she applied or to a different position on an equal level.

- [59] What about a protected promotion? A protected promotion entails placing the employee in a financial position that the employee would have been in had the employee been appointed to the position to which the employee applied but was not appointed owing to the unfair labour practice.¹⁶
- [60] A protected promotion is an appropriate remedy in terms of section 194(4)¹⁷ of the LRA where the “unfair labour practice most probably had the effect of denying the employee appointment in a post”.¹⁸ As stated above, I am satisfied that the applicant would have been appointed to the position had it not been for the Department’s unfair conduct. It appears from the record that Mr Radebe was joined to arbitration proceedings following an application to that effect filed by the applicant. It is unclear what gave rise to the filing of that application. In other words, whether the applicant was aware that Mr Radebe was indeed appointed to the position at the time that she referred the dispute to the bargaining council.
- [61] I mention this because I do not think it would be fair for the Department to pay the applicant the same remuneration that she would have earned had she been appointed to the position for the duration that it took to join Mr Radebe to the proceedings as part and parcel of relief under a protected promotion when it is uncertain whether the applicant ought to have joined Mr Radebe earlier to the dispute. Were it not for the applicant’s reluctance for the question of relief be remitted to the bargaining council, I would have ordered the question of the extent of a protected promotion to be remitted to the bargaining council for determination.

¹⁶ *SAMWU & Another v Emalahleni Local Municipality & Others* (2011) 32 ILJ 2196 (LC) at para 29.

¹⁷ Section 193(4) states that: “An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering, reinstatement, re-employment or compensation”.

¹⁸ *Minister of Safety & Security v SSSBC & others* [2010] 9 BLLR 965 (LC) at para 26. See also *SAPS v Safety and Security Sectoral Bargaining Council and Others* (C33/2021) [2025] ZALCCT 53 (11 July 2025) at para 34 and *Minister of Safety & Security v SSSBC & others* at para 19 to 26 for further discussion why a protected promotion is a competent remedy under the LRA.

[62] In the circumstances, in my view, it would be appropriate to instead grant the applicant compensation. I believe that it would be just and equitable for the Department to pay the applicant 12 months' compensation. In making this determination I have considered the egregious nature of the unfairness that unfolded during the recruitment process and that had it not been for the Department's unfair conduct, the applicant would have been promoted to the position.

[63] As to the issue of costs, Mr Naude stated that the applicant does not seek costs against the Department.

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

Order

1. The arbitration award dated 8 September 2021 under case number GPBC2484/2018 is reviewed and set aside.
2. The third respondent's finding is substituted with a finding that the first respondent's failure to appoint the applicant to the position of Area Coordinator Development and Care committed an unfair labour practice relating to promotion.
3. The first respondent is ordered to pay the applicant 12 months' compensation within 30 days from the date of this judgment.
4. There is no order as to costs.

MI Savant

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Advocate CP Naude

Instructed by:

Isaac Teke Mothibe Attorneys

For the first respondent:

Advocate NM Phakama

Instructed by:

The State Attorney

LABOUR COURT