REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA
PORT ELIZABETH

Reportable

Case no: P 206 /2013

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF SPORT, RECREATION, ARTS AND CULTURE,

EASTERN CAPE **Applicant**

and

GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL **First Respondent**

W F BENTZ *N.O* **Second Respondent**

TOZAMILE CECIL KUZE **Third Respondent**

Heard: 21May 2015

Delivered: 26 June 2015

Summary: Review application. Unfair labour practice dispute relating to promotion. True nature of dispute was upgrading of post in the public service. Public Service Regulations apply. Arbitrator misconstrued the nature of the enquiry and made no findings on the issue he had to decide. Award is reviewed and set aside.

JUDGMENT

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PRINSLOO, AJ

Introduction

[1] The Applicant (the Department) is seeking to review and set aside an arbitration award issued on 7 December 2012 and to substitute it with an order to the effect that the First and Second Respondents did not have the jurisdiction to arbitrate the dispute.

[2] The issue in dispute was whether the Department committed an unfair labour practice relating to promotion, as provided for in terms of the provisions of section 186(2)(a) of the Labour Relations Act[1] (the Act).

[3] The Second Respondent (the arbitrator) ordered the Department to adjust the Third Respondent's (the employee) salary from salary level 3 to salary level 5. The arbitrator further ordered the Department to conduct an evaluation on the post held by the employee.

[4] The Department filed an application for condonation for the late filing of the review application, which was filed 14 days late. The application for condonation is not opposed.

[5] The application for review is opposed and the employee also filed an application for condonation for the late filing of his answering affidavit. The answering affidavit was to be filed on 2 September 2013 but was only filed on 24 April 2014 and was therefore filed 7 months late.

[6] The employee also filed an application to dismiss the review application on the basis of non-compliance with the Rules of Court and unreasonable delay, as well as an application in terms of the provisions of section 158(1)(c) of the Act for the arbitration award to be made an order of Court.

[7] Before this Court there are the following applications to consider: a review application, condonation applications from both parties, an application to dismiss the review application and a section 158(1)(c) application to make the arbitration award an order of Court.

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[1] Act 66 of 1995.

[8] I will deal with the applications in the following manner: first the applications for condonation and then the application to dismiss the review application. If the application to dismiss succeeds, that would be the end of the matter and there will be no need to further consider the application for review. If the dismissal application fails, the review application will be considered and if the application for review succeeds, there will be no need to consider the section 158(1)(c) application.

[9] I have considered the applications for condonation and without spending too much time on the merits of the applications and the principles applicable, it suffices to state that I have considered the applications and I grant condonation for both parties for the late filing of their respective papers and the remainder of the applications will be dealt with on an opposed basis.

Background facts

[10] The brief history of this matter is as follows:

[11] The Applicant has employed the employee since 1983 and since 2003 he is employed at Bayworld Museum as an auxiliary services officer (ASO). It appears that there were a number of attempts to adjust the employee's salary level to a level that is commensurate with the position he holds and the duties he performs. The employee is remunerated at salary level 3.

[12] Frustrated, and understandably so, the employee referred an unfair labour practice dispute relating to promotion to the First Respondent (GPSSBC) on 12 June 2012. The matter was set down for arbitration on 24 October 2012.

[13] The employee presented no evidence at the arbitration and the representatives for the parties merely addressed the arbitrator.

[14] It is evident from the transcribed record of the proceedings that the Department sent a representative to attend the arbitration proceedings who was wholly unprepared and not in a position to make any meaningful contribution to the process.

[15] The arbitrator issued an award on 7 December 2012 wherein he ordered the Department to adjust the employee's salary from salary level 3 to salary level

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5 and for the Department to conduct an evaluation on the post held by the employee.

The Rule 11 dismissal application

[16] As already pointed out on 11 November 2014 the employee filed an application to dismiss the review application on the basis of non-compliance with the Rules of Court and unreasonable delay in prosecution of the review application.

[17] In consideration of the application to dismiss the review application it is important to consider the sequence of events. The arbitration award was issued on 7 December 2012 and the review application was filed on 17 April 2013, 14 days outside the prescribed six week period.

[18] The Department's Rule 7A(8) notice was filed on 21 August 2013. The employee had to file an opposing affidavit within 10 days thereafter and that was due on 2 September 2013. The employee did not file his opposing papers and on 4 September 2013 the State Attorney on behalf of the Department wrote a letter to NEHAWU indicating that it was awaiting the opposing papers. Another letter was written on 25 September 2013, indicating that no opposing papers were received and NEHAWU was put on terms to file opposing papers within 5 days.

[19] The employee's opposing affidavit was only filed on 24 April 2014 and was therefore filed 7 months late.

[20] The Department's replying affidavit was filed on 29 April 2014 and on 18 July 2014 the State Attorney requested that the matter be enrolled on the opposed motion roll.

[21] On 11 November 2014 the employee filed an application to dismiss the review application. The application is opposed and the Department's case is that the application is mischievous and that it is incorrect to allege that the Department was not prosecuting the review application.

[22] From the sequence of events alone it is evident that the employee caused a 7 month delay in the matter by filing his opposing affidavit late. That alone is a

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longer and more excessive period than any of the delays for which the Department could be held responsible.

[23] The record was filed at Court on 31 May 2013 and was transcribed and filed by the Department on 21 August 2013, less than three months after it was filed at Court. The Department filed its replying affidavit on 29 April 2014 and requested that the matter be enrolled on 18 July 2013, less than three months after filing the replying affidavit. All these delays do not amount to 7 months, which was the delay the employee singlehandedly caused by filing his opposing affidavit late.

[24] The employee is not with clean hands before Court insofar as the delay in the prosecution of the review application is concerned.

[25] In *Bezuidenhout v Johnston NO and Others*[2] the Court held that:

> 'If applicant parties have unduly delayed prosecuting their applications, and fail to provide acceptable reasons for the delays, the ultimate penalty of dismissing such applications should be used in appropriate cases. This will hopefully help creating a culture of compliance and ensure that disputes are expeditiously dealt with.
>
> At the same time, the respondent party must not sit by idly and bide his time, waiting for a particular undefined moment in time when the applicant party's delay may enable him to apply to have the delaying party barred from seeking further relief, or to have the matter dismissed, by reason of delays in pursuing it. I am of the view that, if an applicant drags his feet, the respondent party also bears a responsibility to ensure that disputes are resolved expeditiously. This obligation of a respondent party is in my mind a primary one in respect of ensuring that the applicant party complies with time periods applicable to it.'

[26] In my view, the position in respect of undue delay is as follows:

26.1 The practice when an applicant has delayed unduly in prosecuting a review application is for a respondent to bring an application dismissing the review proceedings under rule 11 of the Labour Court Rules;

27.1. 26.2 This Court has a discretion to grant an order to dismiss an application on account of an unreasonable delay in pursuing it;

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[2] (2006) 27 ILJ 2337 (LC) at paras 31-32.

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27.2. 26.3 In the exercise of its discretion, the Court ought to consider three factors:

i. the length of the delay;

ii. the explanation for the delay; and

iii. the effect of the delay on the other party and the prejudice that that party will suffer should the claim not be dismissed.

[27] An application to dismiss a review application is a drastic remedy and should not be granted unless the dilatory party has been placed on terms, and when appropriate, after any further steps as may have been available to the aggrieved party to bring the matter to finality, have been taken. This means that the conduct of the aggrieved party is to be considered.

[28] *In casu* the delay, insofar as the Department caused it, is not excessive. The aggrieved party on the other hand contributed significantly to the delay and took no proper steps to place the Department on terms. In view of the factors as stated above and applied in this matter and the employee's own conduct, I am of the view that he is not entitled to the relief he seeks to dismiss the Department's application for review.

<u>The review application</u>

[29] What remains is to consider the application for review.

[30] The crux of the Department's case is that the arbitrator had no jurisdiction to adjudicate a dispute, clothed as an unfair labour practice dispute in respect of promotion, which in actual fact was a claim for the adjustment of the employee's salary.

[31] The dispute the employee referred to the GPSSBC was an unfair labour practice dispute in relation to promotion and as provided for in section 186(2)(a) of the Act. The arbitrator identified the issue to be decided as whether or not the Department committed an unfair labour practice relating to promotion.

[32] The arbitrator however and despite recording the issue to be decided, never made a finding in respect of whether an unfair labour practice relating to

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promotion was committed. He merely ordered the Department to adjust the employee's salary from salary level 3 to salary level 5 and to conduct an evaluation on the post held by the employee.

[33] The Department raised a number of grounds for review.

[34] Firstly, the Department submitted that the GPSSBC lacked jurisdiction to arbitrate the dispute. Jurisdiction is challenged on two levels namely that the dispute was referred out of time and no application for condonation was made or granted and secondly that the dispute was one of mutual interest that could not be arbitrated.

<u>Dispute referred out of time:</u>

[35] Section 191(1)(a) and (b) of the Act provides that an unfair labour practice dispute must be referred within 90 days of the date of the act or omission which constitutes the unfair labour practice or of the date the employee became aware of it.

[36] The time frame for referring an unfair labour practice dispute is set out in the Act and has to be adhered to. The Act provides that late referral may be condoned if good cause is shown.

[37] It is evident from the transcript that Mr Vena who represented the employee at the arbitration submitted that the case dated as far back as 1999 and despite all attempts to rectify and adjust the employee's salary level, it was not done and the employee was still paid on salary level 3.

[38] In the survey of evidence the arbitrator found that documents were presented to support the employee's case dating back to 1999. The arbitrator accepted that the employee obtained his senior certificate in July 2008 and that is the date from which the adjustment of his salary was ordered.

[39] If the employee's case, as on his own version, dated back to 1999, or as accepted by the arbitrator dated back to July 2008, and an unfair labour practice dispute was referred to the GPSSBC in 2012, it was evidently referred outside the prescribed 90 day period and an application for condonation was required.

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[40] It is common cause that there was no application for condonation.

[41] The provisions of the Act are clear and there can be no doubt that this matter was referred late and that condonation was to be applied for.

[42] Without an application for condonation and without condonation being granted, the matter was not properly before the arbitrator and he had no jurisdiction to arbitrate the dispute.

[43] In *Pick 'n Pay Supermarkets, Northern Transvaal (A Division of Pick 'n Pay Retailers (Pty) Ltd) v Commission for Conciliation, Mediation and Arbitration and others*[3] the Court dealt with a matter where there was no condonation application and held that it followed that the proceedings before the CCMA, commencing with the conciliation and culminating with the arbitration proceedings, were void.

> "It follows therefore on the undisputed facts before this court that there was a late referral. It is now settled law that unless there was condonation granted, any dispute referred out of time is invalid and renders subsequent proceedings invalid."

[44] The Department never raised this issue at the arbitration or in its application for review. It was only raised as a point of law at the hearing of the review application.

[45] Although there is merit in this argument, I deem it prudent to deal with the merits of the application for review and the grounds for review raised by the Department.

<u>Dispute cannot be arbitrated</u>

[46] The Department's case is that a dispute in terms of section 186(2)(a) of the Act can only be used to enforce existing rights. A dispute about compensation and remuneration is a dispute of interest and as a matter of mutual interest it falls within the collective bargaining structure as opposed to arbitration.

[47] The conditions of service for public servants are governed by special legislation namely the Public Service Act, 1994 (PSA) and the Public Service

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[3] (2000) 21 ILJ 234 (LC).

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Regulations (PSR) issued in terms of section 41 of the PSA and collective agreements.

[48] The Department's case is that it is a provincial arm of government and is part of the public service, where the process of job evaluation is regulated by the PSA, the PSR, the 'Job Evaluation Policy of the Eastern Cape Administration' and the 'Job Evaluation Manual'.

[49] The process of promotion is also regulated in the PSR. As the dispute the employee referred to the GPSSBC is one of an unfair labour practice relating to promotion, it is prudent to consider the prescripts of the PSR in respect of promotion. Part VII of the PSR sets out the procedures for appointment, promotion and termination of service. Item F of Part VII provides for promotion as follows:

> F.1 An executing authority may promote an employee to a vacant post on the approved establishment of the department if-
>
> (a) sufficiently budgeted funds, including funds for the remaining period of the relevant medium-term expenditure framework are available for filling the vacancy; and
>
> (b) the vacancy has been advertised and the candidate selected in accordance with regulations VII C and D.
>
> F.2 A promotion may not take effect before the first day of the month following the month during which the executing authority approved it.
>
> F.3 No employee has any right to promotion to a vacant post until the promotion has been approved in writing by the executing authority.

[50] It is evident that 'promotion' relates to a vacant post on the approved establishment of the Department, for which funding is available and that has been advertised and a recruitment and selection process followed.

[51] It follows that a dispute relating to 'promotion' should be a dispute involving a vacant, advertised position for which the employee sought promotion to.

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[52] Part V of the PSR provides for the compensation for employees and Item C deals with grading and remuneration and the relevant portion provides as follows:

C.5 An executing authority may increase the salary of a post to a higher salary range in order to accord with the job weight, if-

(a) the job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and

(b) the department's budget and the medium-term expenditure framework provide sufficient funds.

C.6 If an executing authority increases the salary of a post as provided under regulation V C.5, she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent-

(a) already performs the duties of the post;

(b) has received a satisfactory rating in her or his most recent performance assessment; and

(c) starts employment at the minimum notch of the higher salary range.

C.7 The absorption of the incumbent employee in the higher-graded post as provided under regulation V C.6 shall take effect on the first day of the month following the month during which the executing authority approves that absorption.

[53] It is evident that promotion is different from job grading where the salary of the post is increased to accord with the job weight after a job evaluation process has been conducted.

[54] *In casu* the arbitrator stated that the issue in dispute was whether the Department committed an unfair labour practice relating to promotion, as provided for in terms of the provisions of section 186(2)(a) of the Act.

[55] In his 'findings and reasons' the arbitrator held that he was satisfied that sufficient justified effort had been made to rectify the employee's salary level with no success and other ASO's are employed at salary level 4 or higher. The arbitrator ordered the Department to adjust the employee's salary from salary

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level 3 to salary level 5 and to conduct an evaluation on the post held by the employee.

[56] There are a number of difficulties with the findings and the order made by the arbitrator.

[57] Firstly, the arbitrator never made a finding in respect of the unfair labour practice dispute relating to promotion, which he had to determine and which was a dispute that he could arbitrate.

[58] Secondly, he disregarded the provisions of the PSA, the PSR and the principles set out in decided cases when he treated a claim for the adjustment of the employee's salary as an unfair labour practice dispute in respect of promotion.

[59] In *Polokwane Local Municipality v SA Local Government Bargaining Council and others*[4] the employee referred a dispute regarding an unfair labour practice to the bargaining council *inter alia* regarding the failure to upgrade her post from level 8 to level 6 and compensating her accordingly. The arbitrator found in the employee's favour but on review, the court agreed with the municipality that the arbitrator had committed a fundamental error in law by failing to distinguish between a dispute of rights and a dispute of interest. The complaint of the employee was that her position should be evaluated and that she be placed on level 6. The employee's post was never evaluated and she sought an upgrade of her post and salary without any form of job evaluation. In this regard she was seeking to create a new right of being placed and paid a salary at a higher position. The court held that the grading or evaluation of a post was a matter of mutual interest.

> "In failing to distinguish between a dispute of right and of interest in as far as the issue of upgrading of the position from level 8 to 6, the commissioner committed a fundamental error in law. The grading or evaluation of a post is a matter of mutual interest…"

[4] (2008) 29 ILJ 2269 (LC)

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[60] In *Minister of Labour v Mathibeli and others*[5] the public service post occupied by the employee was re-graded, but he was not given the salary increase of the re-graded post. His dispute with the employer was referred to the GPSSBC where the arbitrator found that the employee had continued to function in the upgraded post and that this amounted to a promotion. The employer had therefore committed an unfair labour practice relating to promotion in terms of s 186(2)*(a)* of the Act by not paying the employee at the rate applicable to the re-graded post. On review, the principal question for determination by the Labour Court was whether the upgrading of the post amounted to a promotion as contemplated in s 186(2). By merely re-grading a post the incumbent does not acquire a right to be promoted to the newly created status level of the post, as it has to be determined whether he or she meets the essential requirements for the post. The Court accordingly found that a dispute relating to upgrading was not a promotional issue, but rather an issue of mutual interest, and the bargaining council lacked jurisdiction to determine the matter at arbitration.

[61] The Labour Appeal Court however held a different view[6]. The Labour Appeal Court addressed the jurisdictional question, which had been the basis upon which the Labour Court had set aside the award. Despite agreeing with the Court *a quo* that being the incumbent of an upgraded post did not give an employee a right to promotion, the Labour Appeal Court held that this was not sufficient to construe the dispute as a dispute of interest. The employee had in fact claimed that he was occupying a grade 11 post, but was being incorrectly paid in that post. Referring to an earlier Labour Court decision (*National Commissioner of the SA Police Service v Potterill NO and others*[7]*)* concerning 'the unravelling of the facts to discern the true dispute in a matter concerning money claims in relation to job upgrades' the Labour Appeal Court adopted the dictum that 'a claim for a higher salary as a matter of right is not an "interests dispute"' and held that the employee had in fact referred a rights dispute to the council. However, the employee's claim had been without merit both on the facts and in the law and by reference to the PSR and ought to have been dismissed.

[5] (2013) 34 ILJ 1548 (LC)
[6] Mathibeli v Minister of Labour (2015) 36 ILJ 1215 (LAC)

[7] (2003) 24 ILJ 1984 (LC)

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[62] *In casu* the facts are distinguishable from the *Mathibeli* matter. There was no evidence adduced that a job evaluation of the employee's post was done and that approval was granted for the upgrading of his post and that he was incorrectly paid at a lower salary level in an upgraded position. The employee was simply seeking to upgrade his salary level. In my view and in the absence of a job evaluation, the issue of job grading remains a matter of mutual interest.

[63] Be that as it may and even if I am wrong in this regard, the facts *in casu* and the provisions of the PSR do not support a claim for an unfair labour practice dispute relating to promotion. The provisions of the PSR cannot be ignored.

[64] A claim for adjustment of salary is not a promotion dispute and cannot be arbitrated as an unfair labour practice dispute as provided for in section 186(2)(b) of the Act.

[65] Thirdly it is trite that in an unfair labour practice dispute relating to promotion the onus is on the employee to show that a higher post existed for which he or she was a contender and that the employer refused or failed to promote the employee to the post for an unfair reason.

[66] *In casu* no shred of evidence was adduced and the arbitrator based his findings on nothing but the statements made by the representatives of the parties. There was no agreement between the parties that the matter would be presented and should be considered as a stated case and how the dispute could be decided without any evidence, is inconceivable.

[67] There was no evidence adduced to show that the employee's post was evaluated and that approval for an upgrade was granted. The arbitrator failed to consider the applicable prescripts of PSR and discounted the fact that there was no evidence placed before him.

[68] It appears that the arbitrator accepted that the facts of another dispute he arbitrated namely that of S Kolokolo (case number GPBC3493/2011) were similar to the employee's case and the outcome of the Kolokolo matter to some extent manipulated or directed the outcome of this dispute.

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[69] In *The South African Social Security Agency v NEHAWU obo Malizo Punzi and others*[8] the Court was faced with a review application in respect of an unfair labour practice where no evidence was adduced and the case was decided on the papers only. The Court held that it was incomprehensible how a dispute that hinges on the fairness of the conduct of an employer can be decided (in the absence of a stated case) without parties giving oral evidence. It was held that:

> "In the absence of such a stated case, oral evidence should be led on the material facts in dispute at arbitrations in terms of the LRA. Commissioners and arbitrators should not condone an agreement between parties that no oral evidence be led unless such a stated case has been agreed, and on which they may draw legal conclusions. Although parties may regard submitting documents and argument as a fast way of resolving a dispute on the day of arbitration, it in fact renders the award issued susceptible to review. In the result, the principle of speedy resolution of disputes is ultimately sacrificed."

[70] Fourthly the arbitrator, in conflict with the clear provisions of the PSR, ordered the Department to adjust the employee's salary from level 3 to 5, with effect from July 2008. The arbitrator evidently exceeded his powers by making this order.

[71] However, the arbitrator did not stop there. He further ordered the Department to conduct an evaluation on the post held by the employee. Not only should this order have indicated to the arbitrator that the true nature of the dispute is not promotion, but job evaluation that should be done within the confines of the provisions of the PSA and PSR, it is also non-sensical. What purpose would be served to evaluate a post he had already upgraded to level 5? The arbitrator not only exceeded his powers but has also put the cart before the horses. It seems logical to first evaluate a post to determine the level it should be graded and remunerated on and once the level is determined, to upgrade the post to the appropriate level and it seems illogical to do it the other way around.

[72] This dispute was arbitrated in the GPSSBC, a tribunal specifically dealing with labour disputes in the public service. One would expect arbitrators presiding

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[8] Labour Court case number C233/14.

over matters in the GPSSBC to understand and appreciate the legislation and regulations that apply to public servants.

[73] It is unacceptable that arbitrators in the GPSSBC adjudicate disputes where there is a demand for the upgrading of posts as if those were unfair labour practice disputes relating to promotion. Such conduct disregards not only the provisions of the PSA and PSR, but also the provisions of section 186(2)(a) of the Act and judgments of this Court that have to be followed and applied.

<u>The test on review</u>

[74] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable is well established and has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[9]. It is ultimately a test of reasonableness. The arbitrator's decision must fall within a range of decisions that a reasonable decision maker could make.

[75] In *Goldfields Mining South Africa v Moreki*[10] the Labour Appeal Court held that:

> "In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable."

[76] The Labour Appeal Court recently held in *Head of the Department of Education v Mofokeng and others*[11] that the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner and that there should be a fair trial of the issues.

> "To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a

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[9] 2007 28 ILJ 2405 (CC) at para 110.
[10] (2014) 35 ILJ 943 (LAC).
[11] (2015) 1 BLLR 50 (LAC).

> misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her."

[77] These are the principles this Court should apply in consideration of the review application.

Analysis and conclusion

[78] In reviewing the arbitration award, the grounds for review as raised by the Applicant must be assessed with the evidence that was before the arbitrator as well as the findings he made.

[79] The arbitrator recorded that the issue in dispute was whether the Department committed an unfair labour practice relating to promotion, as provided for in terms of the provisions of section 186(2)(a) of the Act. Glaringly absent from the arbitration award is a finding on the issue which the arbitrator had to determine.

[80] The arbitrator instead made findings, not on whether an unfair labour practice dispute was committed, without a shred of evidence being adduced. In his analysis of the 'evidence' the arbitrator recorded that much of the 'evidence' in the matter was the same or similar to that which was presented in the arbitration of Kolokolo.

[81] In his 'findings and reasons' the arbitrator held that he was satisfied that sufficient justified effort had been made to rectify the employee's salary level with no success and he ordered the Department to adjust the employee's salary from salary level 3 to salary level 5 and to conduct an evaluation on the post held by the employee.

[82] The applicable principles[12] require only the following:

> "The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or

[12] As per Gold Fields Mining at paragraph 20

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> she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?"

[83] A decision made in the way the arbitrator did *in casu* cannot but mean that this Court must answer all these questions in the negative.

[84] The Labour Appeal Court held in *Mofokeng*[13] that:

> "The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the inquiry so as to lead to no fair trial of the issues with the result that the award maybe set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[85] Viewed cumulatively, and in line with *Mofokeng,* the arbitrator's failure to apply his mind to issues, which as demonstrated above, were material to the determination of the dispute, led him to misconceive the nature of the enquiry. The arbitrator failed to address the issue he had to determine, namely whether the Department committed an unfair labour practice relating to promotion.

[86] The findings the arbitrator made were disconnected from the issue he had to determine and reflect not only on the arbitrator's failure to address the issue he had to determine, but also that he made a decision which no reasonable decision maker could have made, principally because he wholly misconstrued the nature of the enquiry before him and his duties in connection therewith. But for these material irregularities in the award, the arbitrator would have and should have arrived at a different result. It cannot therefore be said that the Applicant was given a fair hearing or that the arbitrator's decision was one that

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[13] (2015) 1 BLLR 50 (LAC).

a reasonable arbitrator could have reached on the full conspectus of all the facts before him. More so as no evidence was adduced.

[87] Based on the above, I am persuaded that this award cannot stand and should be interfered with on review. It follows that the application in terms of section 158(1)(c) of the Act to make the arbitration award an order of Court fails.

[88] The submissions made during the arbitration seem to show that the Department made attempts to rectify the employee's salary level and it even tendered to adjust the employee's salary level to level 4, which tender the employee rejected. It is inexplicable why the issue about the employee's salary level is not addressed internally and the treatment the employee received from the Department is a far cry from constructive to resolve the issue that could have been resolved internally. Understandably it caused frustration and led to the referral of his dispute. Unfortunately for the employee he was crying at the proverbial wrong funeral.

[89] This is a case where the interests of justice and fairness would be best served by not making a cost order.

Order

[90] In the premises I make the following order:

90.1 Condonation is granted for the late filing of the Applicant's review application;

90.2 Condonation is granted for the late filing of the Third Respondent's opposing affidavit in the review application;

90.3 The application for the dismissal of the application for review is dismissed;

90.4 The application in terms of section 158(1)(c) of the Act to make the arbitration award an order of Court is dismissed;

90.5 The arbitration award issued on 7 December 2012 under case number GPBC2718/2012 is reviewed and set aside;

90.6 There is no order as to costs.

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Connie Prinsloo

Acting Judge of the Labour Court

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Appearances:

For the Applicant:	Advocate L Ntsepe
Instructed by:	State Attorney, Port Elizabeth
For the Third Respondent:	Advocate N Ali
Instructed by:	Moposho Attorneys

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