REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D839/05

In the matter between:

MICHAEL NAINAAR	**Applicant**
and	
DEPARTMENT OF WORKS, KZN	**First Respondent**
COMMISSIONER B. PILLEMER	**Second Respondent**
GENERAL PUBLIC SERVICE SECTORAL BARGAINNG COUNCIL	**Third Respondent**

Heard: **28 October 2014**

Delivered: **19 May 2015**

Summary: **Application for Review- Public servant- survey to identify newly qualified graduate employees- survey to lead to translation or promotion of existing graduate employees to level 7 positions- proviso: employees be acting in available level 7 positions- difference between promotion and translations to the position acted in- alleged unfair labour practice- reasonable conclusion reached on the facts put before the court- Section 145 discussed- Duties of Commissioners discussed- Performance Management Development System('PMDS') in public service discussed.**

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Fouché AJ

Introduction

[1] This matter was brought to this Court in accordance with Section 145 of the Labour Relation Act 66 of 1995 ("LRA") as a review matter.

[2] At the outset it is noted that the application for review was lodged on 6 January 2006. The Commissioner's award was handed down on 24 November 2005, but came to the notice of the Applicant on 28 November 2005. The application for review was noted timely as the due date for the lodging of the application for review was 6 January 2005.

Relief sought

[3] The relief sought in this matter on behalf of the Applicant is that the arbitration award issued by the Second Respondent, Commissioner Pillemer under Case no PSGA 1241-04/05, on 24 November 2005, in the arbitration proceedings between the Applicant and the First Respondent, be reviewed and set aside in accordance with Section 145 of the Labour Relations Act. Furthermore, that the Third Respondent be ordered to instruct a Senior Commissioner to hear this matter. Lastly, costs to be paid jointly and severally by any of the Respondent who opposes the application.

Facts

[4] The Applicant is an employee of the First Respondent. The Applicant was employed since March 2000 as a Senior Administrative Clerk at level 5[1]. He submitted that he was not promoted between the periods 2000 to 2009 which resulted in an unfair discrimination. This period where the Applicant received no promotion is thus approximately 9 years.

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[1] See the Award paginated page 65.

[5] During 1999, the First Respondent conducted a skills survey (skills audit) to determine the skills level in the Department[2]. The Skills audit classified staff members with University Degrees as RQV13/level 5 and higher. The Applicant obtained a University degree in 1999 and was thus RQV 13 compliant since 1999.

[6] On 15 January 2001, the First Respondent sent a letter to all the Regional Directors and Directorates with the instruction to partake in a survey for officials with RVC13 qualifications/Level 5 and higher. The RVQ 13 survey reflects the newly acquired tertiary qualifications of employees. It reads as follows:

> '1. Kindly furnish the following information in respect of the officials who have Diplomas/certificates with RVQ 13/level 5 value and who have not been translated to the officer cadre:
>
> 1.1 Name
> 1.2 Rank
> 1.3 Qualifications
> 1.4 Date obtained
>
> 2. Mr M M Hlongwa is the co-ordinator of the required information. This survey must not be construed as an effort of considering the said officials for translation in ranks.'[3]

[7] A second letter, dealing with the RVQ13 process, dated 18 May 2001, followed, which reads as follows:-

> 'SURVEY OF THE OFFICIALS WITH RVQ13/NQF LEVEL 5 QUALIFICATON AND OTHER:
>
> 1. …
> 2. It is not clear from your submission whether there are any employees already executing work in the identified vacancies.
> 3. however it is strongly suggested that a recommendation should be submitted considering the merits of each case to enable this office to do justice to all transaction/appointments.

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[2] Page 83 of the paginated bundle. See pages 84-86 of the paginated bundle for the Skills Audit is survey.
[3] See Annexure "C" paginated bundle page 91.

4. should it happen that there are no cases that comply with paragraph 2 above, then such vacant posts should be advertised to ensure fair competition.

HEAD WORKS' [4]

[8] The RVQ 13 information had to be sent to the First Respondent. Subsequent to the receipt of the information of the RVQ13 survey, First Respondent sent a letter dated 1 March 2001 to all Regional Directors and Directorates, requesting:

> 'Further to the request dated 15.01.2001, please indicate whether there are any vacant administrative officer post in your region that could be used to accommodate these officers.'[5]

[9] The RVQ 13 translation was aimed at employees already executing work in the identified vacancies. The letter dated 18 May 2001 reads as follows:

> '2. It is not clear from your submission whether there are any employees already executing work in the identified vacancies.
>
> 3. However, it is strongly suggested that a recommendation should be submitted considering the merits of each case to enable this office to do justice to all the translations/appointments.
>
> 4. Should it happen that there are no cases that comply with paragraph 2 above, then such vacant posts should be advertised to ensure fair competition.'[6]

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Submissions of the parties

[10] Applicant submitted that he obtained his degree and the RVQ 13 skills audit status in 1999. The RQV 13 status flowed from the Respondents skills audit survey which posed the opportunity for a RQV 13 employee to qualify for a level 7 post[7]. It was submitted in Court that the skills audit process consisted of three steps, firstly, the classification of RVQ13 employees, secondly, determining the availability of vacant positions in the Department and thirdly, the identification of employees qualifying for the translation to a higher post

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[4] Paginated Page 84.
[5] See Annexure "B" paginated bundle page 92.
[6] See Annexure E paginated page 84.
[7] Respondent's Opposing Affidavit para 4 paginated page 32.

level[8]. The advertising of the position is according to the Applicant not a prerequisite for the translation or promotion of an employee[9].

[11] The Applicant referred this Court to the 1999 Skills audit survey(the "RVQ 13 survey"). He submitted that the fifth person on the skills audit document was promoted and translated to a higher post level in 1999. The third and fourth persons on the skills audit survey were translated and promoted without the prior advertising of the position[10]. The seventh to the eleventh persons were promoted and translated to a higher post level in 2001 whilst employees 10 and 11 received their respective degrees after the Applicant, but was promoted and translated to a higher post level in 2001. The fourth employee was translated to a higher post without receiving a higher salary.

[12] The Respondent submitted that not all of the employees recorded in the skills audit survey, were translated and promoted to higher post levels. The purpose of the skills audit was to ensure that RVQ 13 employees would be able to apply for positions on level 7 and not to translate employees into positions they have no experience in[11].

[13] In rebuttal the Applicant relied on an unfair labour practice. The submission was that the Respondent unfairly promoted, demoted or probated, or trained an employee or paid the benefits of another employee, at the exclusion of the Applicant. The Applicant testified that he was employed since 2000 in three departments, firstly, contract management, then internal control and lastly, finance. The Applicant stated that he applied for vacant level 7 positions, but was unsuccessful[12].

[14] The Applicant submitted that the Respondent erred to timely promote the Applicant, subsequent to the RVQ13 skills audit survey. The Applicant stated that the Respondent should have promoted the Applicant to a level 7 position in 2000, following the completion of his degree. The Applicant submitted that the failure occurred in 2000 and that this Court should order the Respondent to promote the Applicant to a level 7position retrospectively to 2000.

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[8] Respondent's Opposing Affidavit pages 85-86.
[9] See para 4 Annexure "C" on paginated page 83.
[10] See Annexure E, paginated page 84.
[11] See para 12 of the First Respondent's Opposing affidavit paginated page 36.
[12] Award paginated page 66.

[15] The Respondent submitted that it would be incorrect to promote the Applicant to a level 7 position from 2000 as Mr Moodley was translated and promoted to that position in December 1999. The latter position was not advertised as the Respondent applied the skills audit survey to promote the candidate to level 7.

[16] The Applicant submitted that the Respondent applied the RVQ 13 promotion requirements incorrectly. The error was not in the identification of the RVQ13 qualifying employees, but in the selection process for suitable employees and to determine the quantity and quality of employees up for promotion. Applicant submitted that the mere fact that another employee held the same type of position for a period exceeding that of the Applicant, should not benefit such other employee over the Applicant.

[17] The Applicant submitted that the third and fourth person on the skills survey list was promoted to level seven positions in 1998. Person seven to eleven on the Skills Audit Survey list were promoted at the expense of the Applicant. Persons three and four on the list were translated into a position but were not promoted.

[18] The Applicant submitted that he applied for advertised positions as and when they came up, but was unsuccessful in securing a higher position.

[19] The First Respondent submitted that the RVQ process was an information exercise in the form of a Skills Audit survey aimed to absorb employees with RQV13 qualifications into level 7 posts[13]. The determining factor of this process entailed that when two RVQ13 qualified candidates vying to be absorbed into the same level 7 position is compared, the candidate with the more experience in the vacant position is to be preferred[14].

[20] The First Respondent admitted that the Applicant had a RVQ13 qualification[15]. First Respondent submitted that another employee was preferred over the Applicant as that employee had more experience in the

[13] See para 7 of the Respondent's Opposing Affidavit.
[14] See para 7.2 of the Respondent's Opposing Affidavit.
[15] See para 19 of the First Respondent's Opposing Affidavit.

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relevant position and obtained the RVQ 13 qualification a longer period prior to the Applicant[16].

[21] First Respondent submitted that the skills audit survey conducted by the First Respondent was not a placement tool, but an information exercise[17]. First Respondent submitted that the absorption process and the decision which employees were to be absorbed into level 7, was reasonable, lawful and within the parameters of the scope of the First Respondent's approach. The Applicant stated that the process was unfair as he should have received a translation to a level 7 position in 2000.

[22] The First Respondent submitted that the First Respondent has the discretion to choose the employee best suited for the available level 7 position. It does not follow that an employee acting in a vacant position will automatically be absorbed into that position.

Evaluation of the submission of the parties

[23] A promotion can be defined in terms of general systems used by most employers through which employees may progress or advance to another rank or level in the organisation. In the Government sector, the system to manage performance is called Performance Management and Development system ("PMDS"). Employees are evaluated on a quarterly basis, where the individual performance is measured against the Key Responsibility Areas ("the KRA's") and the Generic assessment factor ("the GAF") set for the performance of the individual employee.

[24] Item 2(1) (b) of Schedule to the Labour Relations Act, 66 of 1995("the LRA") states that unfair conduct relating to the promotion of an employee can constitute an unfair labour practice. In *Public Servants Association v Northern Cape Provincial Administration*[18] "promotion" is defined as:

> '…as the employee had applied for a post, duly advertised in a newspaper, such application, should it be successful, could not be a promotion. Although

[16] See para 19 of the First Respondent's Opposing Affidavit.
[17] See para 23 of the First Respondent's Opposing Affidavit.
[18] 1997 18 *ILJ* 1137 CCMA 1141 B-D.

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> the appointment would have been made within the same department, it would not constitute a promotion as a promotion is usually an internal matter…'

[25] In *Mashegoane and Another v University of the North*[19] a promotion was defined as an elevation or an appointment to a position which carries greater authority and status, than the employee's current position. It reads as follows:

> 'Had Mashegoane been appointed, his salary would have remained the same but he would have received a Dean's allowance and would have had a car at his disposal…He would further have responsibilities relating to the management and control of the Faculty.'

[26] In *Mulder and Telkom SA Ltd*[20] it was held that the upgrading to a higher position without a change in the job content or responsibilities does not constitute a promotion[21].

[27] Two criteria are used to determinate if a promotion occurred. Firstly, if there is an existing employment relationship between the Applicant and the Respondent and secondly, once the *nexus* between the employee and the employer exists, a comparison of the employer's current job is compared to the job applied for. The author Garber[22] opines that in general the following factors may indicate that the employee received a promotion, namely:

(a) Differences in remuneration levels

(b) Differences in fringe benefits

(c) Differences in status

(d) Differences in level of responsibility

(e) Differences in the level of authority and power

(f) Differences in job security.

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[19] [1998] 1 BLLR 73 (LC) at 77G-77I.
[20] (2002) 23 *ILJ* 214 (CCMA).
[21] See also: *Mzimni and Another v Municipality of Umtata* (1998) 7 BLLR 780 (Tk) at 784 G-H; *Vereniging van Staatsamptenare on behalf of Badenhorst v Department van Justisie* (1999) 20 *ILJ* 253 (CCMA). See also: Du Toit, Bosch, Woolfrey, Godfrey and Rossouw 'Labour Relations Law- a comprehensive guide (2003) 463; C. Garbers 'Promotions: keeping abreast with ambition- An overview of the current law on promotion of employees' Contemporary Labour Law Vol 9 No 3 October 1999 p 21-30 at 22.
[22] Garber 23-23.

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[28] To reach a finding that a promotion was due to the Applicant, the Applicant had to prove the existing employment relationship between the Applicant and the Respondent, and the difference in substance between the level 5 position he held and the level 7 position he aspired following the RVQ13 skills audit. Once it is clear that the required *nexus* was in place, the substantive and procedural unfairness relating to the promotion must be addressed.

[29] The employer must follow the formal procedure laid down in legislation, employment equity plans[23], collective agreements, established practice[24], or directives unless "good and sufficient reason" for the deviation[25] can be shown. The procedural aspect of promotions should be measured against the test of fairness.

[30] Prof Rycroft in 'Rethinking the Requirements for a Fair Appointment or Promotion' extrapolates the fair requirements for promotions[26] and opines that a promotion is fair if it meets the following criteria;

'*(a)* the advertisement must contain accurate information about both minimum requirements and preferred experience/competencies, and these must be necessary for the job.

(b) the assessment of the candidates at the interview must relate only to the competencies required for the job.

(c) The necessary qualifications or inherent requirements for the job may not be changed after the advertisement.

(d) The successful candidate should ordinarily be the person who not only meets the minimum requirements, but who scores highest in the assessment.

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[23] *Meyer v South African Police Service* (2002) 23 *ILJ* 974 (BCA). See also: *Crotz v Worcester Transitional Local Council National* [2001] 8 BALR 824 (CCMA); *SA Transport and Allied Workers Union and Metrorail* Services (2002) 23 *ILJ* 2389 (ARB).
[24] See:*SA Transport and Allied Workers Union on behalf of Fourie and Another v Transnet Ltd (*2002) 23 *ILJ* 1117 (ARB).
[25] See: *Page v SA Police Service* (2002) 23 *ILJ* 111 (ARB) at 115-116.
[26] 'Rethinking the Requirements for a Fair Appointment or Promotion: Arries v CCMA and Others (2006) 27 *ILJ* 2324 (LC)' (2007) *ILJ* 2189-2193 at 2192

(e) If there is deviation from the highest scored candidate, there must be a sound reason, either operationally or for employment equity, to justify this.

(f) If there is deviation from the highest scored candidate, the successful candidate must possess the competencies needed for the job.

(g) The employer must be able to articulate the reason(s) why a particular candidate is unsuccessful.'

[31] In *De Nysschen v General Public Service Sectoral Bargaining Council and Others,*[27] the Court followed the fair promotion test. That Applicant had been acting in an upgraded post for several years and applied for appointment when it was formally upgraded and advertised. The selection committee recommended the Applicant's appointment and that another Applicant, Mr M, be appointed to another post for which that candidate was better qualified. Months later a further 'final' report was issued which read that Mr M was suitable for all three posts advertised, including the one which the applicant had applied for. The MEC accordingly appointed Mr M to the post for which the Applicant had been recommended. The post for which Mr M had been recommended remained unfilled and had to be re-advertised.

[32] In *De Nysschen infra*, the selection committee recommended the Applicant for the filling of the upgraded position she acted in for several years. The matter was brought to Court as an unfair labour practice. Mr M, the second candidate was recommended to fill another position. The Department received these recommendations but decided that Mr M was the stronger candidate and recommended Mr M for the upgraded position. On review, the Labour Court held there was no compelling evidence that Mr M was the stronger candidate but that the appointment was the result of arbitrary reasoning which was unreasonable and unfair. Procedure also had not been followed when the Department deviated from the recommendation of the selection committee. The Court held that the discretion of the MEC was not an unlimited one but had to be exercised in a way which did not result in an unfair labour practice. That Court held that there would have been no prejudice to the Department or

[27] (2007) 28 *ILJ* 375 (LC).

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Mr M if the MEC had followed the selection committee's recommendations. The Court held that a *de novo* hearing would not change the inherent unfairness of the failure to retain the Applicant in her post. The Court ordered the Applicant to be appointed and remunerated as if she had been successful in her application.

[33] It is trite law that there are three basic requirements for a fair appointment or promotion, firstly, the procedure must have been fair, secondly, there must have been no discrimination, and thirdly, the decision must not have been grossly unreasonable. *Arries v CCMA and Another*[28], interrogates the third basic requirement set for a fair appointment, being that the decision must not have been grossly unreasonable[29]. That Court held that third requirement requires determination 'whether the third respondent's discretion was exercised capriciously or for insubstantial reasons or based on any wrong principle or in a biased manner'[30]. Reliance was placed on the *ratio decidendi* of *Ndlovu v Commissioner for Conciliation, Mediation and Arbitration and Others*[31] at paras 11-12, where Wallis AJ said:

> '11. In my view, the questions which the commissioner asked in the first paragraph of that quotation were wholly justifiable questions in relation to a dispute over a matter of promotion. It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed'.
>
> '12. The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant C was unfair. That will almost invariably involve comparing the qualities of two candidates. Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise.'

[28] (2006) 27 *ILJ* 2324 (LC).
[29] Para [16] on page 2330.
[30] Para [48] on page 2336.
[31] (2000) 21 *ILJ* 1653(LC.)

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[34] The First Respondent submitted before this Court that employees have no right to promotion and that the employer has the right to appoint or promote suitably qualified employees[32]. An objective standard must be applied by the employer in choosing fairly between two employees for the same post. Failure of the employer to apply the objective standard may result in arbitrary, capricious or inconsistent conduct, whether intended or negligent. The process applied should culminate in the employer preferring one employee above another[33].

[35] The First Respondent indeed submitted that there is sufficient evidence to reflect that the employer preferred another employee over the Applicant. Both employees had RVQ13 qualifications, the other employee was promoted as he had more experience in the relevant post and had obtained the RVQ13 qualification prior to the Applicant[34].

[36] The First Respondent concluded that appointing of another employee above the Applicant, was not arbitrary, capricious or inconsistent conduct. The Applicant submitted the skills audit process consisted of the classification of RVQ13 employees, identifying vacant posts in the Department and the identification of employees qualifying for the translation to a higher post level which constituted the objective standard used during the translation and in some cases the promotion[35]. It is trite law that the employee could object to the promotion if the employer's discretion to promote another employee was capricious, or for insubstantial reasons or based on the wrong principle or biased manner[36].

[37] The Applicant submitted that the advertising of the level 7 positions was not a prerequisite for the translation or promotion of an employee[37]. This follows as persons 3, 4, 7 to 11 on the RVQ13 survey was translated without advertised

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[32] *Port Elizabeth Municipality v Municipality v Minister of Labour and Another* 1975 (4) SA 278 (E) at 282 G. See also: Du Toit, Bosch, Woolfrey, Godfrey and Rossouw: Labour Relations Law-A Comprehensive Guide (2003) 459.

[33] See Garbers 1999 CLL 23. See also: *NEHAWU on behalf of Thomas v Department of Justice* (2001) 22 *ILJ* 306B (BCA) where it was held that not appointing the highest scoring candidate in order to improve the department's representativeness was not an unfair labour practice as it was neither *ad hoc*, nor haphazard.

[34] Para 19 of the First Respondent's Opposing Affidavit, paginated page 39.

[35] Respondent's Opposing Affidavit pages 85-86.

[36] See: para [17] Arries v CCMA and Others (2006) 27 *ILJ* 2324 (LC).

[37] See para 4 Annexure "C" on paginated page 83.

posts. The Applicant's perception is that the First Respondent was unfair in not promoting him. The First Respondent denied that it mounted to unfairness. In *SA Municipal Workers Union on behalf of Damon v Cape Metropolitan Council*[38] it was stated that:-

> 'The onus is on the union to make a case of Unfair Labour Practice to do so, it needs to examine the reasons why its member was not appointed and identify defective reasoning on the part of the appointing authority. Unless the appointing authority were shown to have not applied its mind in the selection of the selection of the successful candidate, the CCMA may not interfere with the prerogative of the employer to appoint whom it considers to be the best candidate. The process of selection inevitably results in a candidate being appointed and the unsuccessful candidate(s) being disappointed. This is not unfair.'

[38] In *Goliath v Medscheme (Pty) Ltd*[39] the Industrial Court, without citing authority dealt as follows with the test to measure substantive unfairness in an appointment:

> 'Inevitably, in evaluating various potential candidates for a certain position, the management of an organization must exercise a discretion and form an impression of those candidates. Unavoidably this process is not a mechanical or a mathematical one where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointment will not always be the correct one. However, in the absence of gross unreasonableness which leads the court to draw an inference of *mala fides*, this court should be hesitant to interfere with the exercise of management's discretion.'

> And at 614 G-F:

> '…It is not unfair or unreasonable for an employer to appoint a person with a view not only to immediate needs, but also with a view to future development. To hold otherwise would place unreasonable restraints upon an employer's prerogative to manage its business. In the absence of tangible evidence

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[38] (1999)20 *ILJ* 714 (CCMA).
[39] [1996] 5 BLLR 603 (IC) at 609-610.

demonstrating that the employer was *mala fide* in its decision, this court will not readily interfere with the exercise of that prerogative.'

[39] In *Arries v Commission for Conciliation, Mediation and Arbitration and Others*[40], the Court held that if it is proved that the employer exercised the discretion capriciously, for insubstantial reasons, or based on any wrong principle, or in a biased manner, the employee could succeed in having it interfered with. A 'capricious act' denotes the arbitrary making of a decision in the absence of reason or the absence of justifiable reason. In juxtaposition, this Court assessed the discretion exercised by the employer against a test of fairness.

[40] In the Public Service there are set requirements to be met if a selection committee wishes to recommend a candidate, other than the highest scoring candidate for a position. The managerial prerogative in justifying the deviation from the highest scoring candidates on the grounds of operational requirements or employment equity is procedurally and substantially limited. The managerial prerogative to select another candidate should be respected unless bad faith or improper motive, such as discrimination, is present[41]. Any non-rational ground of deviation must render the decision unfair to the unsuccessful higher scoring candidates[42].

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The test for review

[41] The grounds for review set out in Section 145 of the Labour Relations Act are:-

'(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

[40] (2006) 27 *ILJ* 2324 (LC) para 17.
[41] Prov*incial Administration Western Cape v Bikwani and Others* (2002) 23 *ILJ* 761 (LC).
[42] See: *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC).

(a) within six weeks of the date that the award was served on the applicant

(2) a defect referred to in subsection (1) means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award had been improperly obtained'.

[42] In *Carephone (Pty) Ltd v Marcus NO and Others*[43], which was decided before the advent of PAJA, the Court enunciated the test for Section 145 of the Labour Court reviews as:

> '.....is there a rational objective basis for justifying the connection made by the administrative decision maker between the material property available to him and the conclusion he or she eventually arrived at?'

[43] The Applicant before this Court submitted that this Court must apply *Rustenburg Platinum Mines Ltd (Rustenburg section) v Commissioner for Conciliation, Mediation & Arbitration and Others*[44], where the Labour Appeal Court stated that Section 33 of the Constitution extended the scope of review to introduce a requirement of rationality in the outcome of decisions. Section 33 of the Constitution states that:

> '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair'.

[44] The Applicant before this Court submitted further that an objective inquiry must take place during the arbitration proceedings and should be reflected in

[43] 1999 (3) SA 304 LAC; (1998) 19 *ILJ* 1425 LAC; 1998 11 BLLR 1093 (LAC).
[44] 2007 (1) SA 576 (SCA);(2006) 27 *ILJ* 2076 (SCA); [2006]11 BLLR 1021 (SCA).

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the Arbitrator's award[45]. The award must be rationally connected to the information before the arbitrator and the reasons entered on the record. It must be established if the arbitrator properly exercised the powers given to him in compliance with Section 3 of the Labour Relations Act and the Constitution. The rational objective test set out in *Carephone (Pty) Ltd v Marcus NO and Others*[46] *infra*, must thus be applied.

[45] The Respondent submitted that this Court must not apply *Carephone (Pty) Ltd v Marcus NO and Others*[47], nor *Rustenburg Platinum Mines Ltd (Rustenburg section) v Commissioner for Conciliation, Mediation & Arbitration and Others*[48], but *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[49] In *Sidumo*, Navsa AJ held that a Commissioner conducting a CCMA arbitration performs an administrative function and the Promotion of Administrative Justice Act does not apply to arbitration matters in terms of the Labour Relations Act. The majority of the Constitutional Court in this matter held that Section 145 of the LRA must be "suffused" with the test of reasonableness in Section 33 of the Constitution and accordingly the essential question to ask in determining if the arbitration award should be reviewed is the following:

> 'Is the award one that a reasonable decision maker could not reach?'

[46] In paragraph 110 of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[50] *Navsa AJ* held:-

> '[110] To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not

[45] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paragraph 25.
[46] 1999 (3) SA 304 (LAC); (1998) 19 ILJ 1425 (LAC); [1998] 11 BLLR 1093 (LAC).
[47] 1999 (3) SA 304 (LAC); (1998)19 ILJ 1425 (LAC); [1998] 11 BLLR 1093 (LAC).
[48] 2007 (1) SA 576 (SCA); (2006) 27 ILJ 2076 (SCA); [2006] 11 BLLR 1021 (SCA).
[49] 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC).
[50] 2008 (2) SA 24 (CC); 2007 28 *ILJ* 2405 (CC).

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only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

[47] In *Rustenburg Platinum Mines Ltd(Rustenburg Section)v Commission for Conciliation, Mediation and Arbitration and Others*[51] Cameron JA held as follows:

'The criterion of fairness denotes a range of possible responses, all of which could properly be described as fair. The use of 'fairness' in everyday language reflects this. We may describe a decision as 'very fair' (when we mean that it was generous to the offender); or 'more than fair' (when we mean that it was lenient); or we may say that it was 'tough, but fair', or even 'severe, but fair' (meaning that while one's own decisional response might have been different, it is not possible to brand the actual response unfair).It is in this latter category, particularly, that CCMA commissioners must exercise great caution in evaluating decisions to dismiss. The mere fact that a CCMA commissioner may have imposed a different sanction does not justify concluding that the sanction was unfair.'

[48] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental affairs and Tourism and Others*[52] O Reagan J of the Constitutional Court held, that what constitutes a reasonable decision depends on the circumstances of each case. Similarly, the determination of the fairness of the procedure depends on the circumstances of each case. It enumerates the determination factors as follows:-

'Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected'.

[49] In *Palaborwa Mining Co Ltd v Cheetham and Others*[53] the LAC held that:-

'*Sidumo* enjoins a court to remind itself that the task to determine the fairness or otherwise of a dismissal falls primarily within the domain of the commissioner. This was the legislative intent and as much as decisions of

[51] 2006 ILJ 2076; 2007 (1) SA 576 SCA.
[52] 2004 (4) SA 491 para 45-E 513D-E.
[53] (2008) 29 *ILJ* 306 (LAC).

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different commissioners may lead to different results, it is unfortunately a situation which has to be endured with fortitude despite the uncertainty it may create.'

[50] In *Rustenburg Platinum Mines Ltd(Rustenburg Section)v Commission for Conciliation, Mediation and Arbitration and Others*[54] Cameron JA held that, provided the employer's decision fell within a notional range of fair sanctions, the commissioner should defer thereto. Cameron JA went on to summarize the legal position as follows:

> 'Commissioners must exercise caution when determining whether a workplace sanction imposed by an employer is fair. There must be a measure of deference to the employer's sanction, because under the LRA it is primarily the function of the employer to decide on the proper sanction.'[55]

> 'In determining whether a dismissal is fair, a commissioner need not be persuaded that dismissal is *the only* fair sanction. The statute requires only that the employer establish that it is *a* fair sanction. The fact that the commissioner may think that a different sanction would also be fair does not justify setting aside the employer's sanction.'[56]

[51] In *Fidelity Cash Management Service v CCMA & others*[57] Zondo JP set out what is required of commissioners following *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[58]:

> '[94] In terms of the *Sidumo* judgment, the commissioner must -
>
> *(a)* 'take into account the totality of circumstances' (para 78);
>
> *(b)* 'consider the importance of the rule that had been breached' (para 78);
>
> *(c)* 'c onsider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the
>
> dismissal' (para 78);

[54] 2008 (2) SA 24 (CC); 2007 28 *ILJ* 2405 (CC).
[55] Para 48(d).
[56] Para 48(e).
[57] (2008) 29 *ILJ* 964 (LAC).
[58] 2008 (2) SA 24 (CC); 2007 28 *ILJ* 2405 (CC).

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> *(d)* consider 'the harm caused by the employee's conduct' (para 78);
>
> *(e)* consider 'whether additional training and instruction may result in the employee not repeating the misconduct';
>
> *(f)* consider 'the effect of dismissal on the employee' (para 78);
>
> *(g)* consider the employee's service record.
>
> The Constitutional Court emphasized that this is not an exhaustive list… '
>
> '[95] Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was in all of the circumstances a fair sanction in such a case. In answering that question he or she would have to use his or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide. He or she is required to make a decision or finding that is reasonable.'

[52] The Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[59] for the reasons given by the Labour Appeal Court in *Fidelity Cash Management Service v CCMA and Others*[60] have held that PAJA does not apply in the review of awards made pursuant to statutorily compulsory arbitration processes.

[53] The Applicant referred this Court to *Herholdt v Nedbank Ltd*[61] which was overturned by the LAC. In that matter the Labour Court had held that the test applicable to Section 145 LRA reviews should recognize that a dialectical and substantive reasonableness is intrinsically interlinked and that latent process irregularities could carry the inherent risk of causing a possible unreasonable outcome. The Applicant insisted that this Court must scrutinize the Commissioner's reasons to determine whether a latent irregularity occurred, being an irregularity in the mind of the Commissioner, which is only ascertainable from the Commissioner's reasons. The Applicant referred this Court to page 1802 where AJA Murphy in paragraph 39 stated:-

> 'There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of the inquiry.

[59] (2007) 28 *ILJ* 2405 (CC) at para [104].
[60] (2008) 29 *ILJ* 964 (LAC) at paras [92] and [94].
[61] (2012) 33 *ILJ* 1789 (LAC).

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The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different'.

[54] It is clear that the Applicant referred to the incorrect test. The Labour Appeal Court in *Herholdt v Nedbank Ltd (Cosatu as amicus curiae)*[62] overruled the Court *a quo's* finding. It held that:-

> '[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2) *(a)* of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) *(a)*(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[55] In *Kievits Kroon Country Estates (Pty) Ltd v Mmoledi and Others*[63] the Labour Appeal Court held:-

> 'And if the commissioner determines the dispute in accordance with a fair procedure, a review court will not interfere with the decision unless it is one that could not have been reasonably made on the available material.'

[56] In *Goldfields Mining SA(Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[64], the Labour Appeal Court held:-

> '[16] In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the

[62] 2013 (6) SA 224 (SCA) para 25. See also: *Kieviets Kroon Country Estate (Pty) Ltd v Mmoledi and Others* 2014 (1) SA 585 (SCA) para 20; *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (2014) 35 *ILJ* 943 (LAC para 16-22.
[63] 2014 (1) SA 585 (SCA) para 20.
[64] (2014) 35 *ILJ* 943 (LAC).

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facts presented at the hearing and came to a conclusion that is reasonable to justify the decisions he or she arrived at'[65].

And

> '[18] In a review conducted under s 145(2)*(a)*(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.'[66]

[57] In *Nampack Corrugated Wadeville v Khoza*[67], the Labour Appeal Court in 1999 held that:

> '...this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable..'.

[58] I am accordingly satisfied that the Commissioner Pillemer (the Second Respondent) considered all relevant factors in this matter. The decision made is one that a reasonable decision-maker would reach.

Evaluation of the award

[59] The second Respondent in analysing the evidence reached the conclusion that:

> 'The Applicant did not seem to understand the processes and procedures. He did not understand the criteria used in the survey, which was a short term attempt to remedy the situation where the employees were already acting in

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[65] Page 949 D-E.
[66] Page 949 E-G.
[67] (1999) 20 *ILJ* 578 (LAC); [1999] 2 BLLR 108 (LAC) at para 33.

a position, to make that post permanent. The Applicant plainly did not meet the criteria. He was not already acting in a level 7 post'. [68]

[60] The second Respondent in evaluating the evidence, recorded that MM Hlongwa, the survey co-ordinator of the First Respondent, testified that three criteria were used by the First respondent during the survey being that-

'1. The applicant had to be in possession of the RVQ13;

2. There had to be a vacant post

3. The applicant must already be performing duties of the higher post'.[69]

[61] Mr Hlongwa testified that the Applicant did not meet the above criteria set for the Level 7 positions. Mr Moodley who was more experienced, was translated to the level 7 position[70]. The Applicant was not already performing the duties of the higher level 7 post. The Respondent testified that the objective standard applied reflected that Mr Moodley was more experienced than the Applicant[71].

[62] The Applicant did not request the Human Resource division to conduct a job evaluation to determine the specifications of the position he held at the time of the translation request. The Applicant merely relied on the skills survey as the tool for translation to a higher level 7 position. The Arbitrator recorded that the Applicant testified 'he expected to be promoted the same way as other employees flowing from the survey'[72].

[63] The arbitrator found that the survey was a short term attempt to remedy the situation where employees were already acting in higher positions. The Applicant at no stage held an acting appointment in a level 7 position. Employees, who were translated to level 7 positions, were already acting in these level 7 positions. Applicant was not acting in a level 7 position and did not meet the criteria set out in the survey[73].

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[68] Award, paginated page 70.
[69] Award, paginated page 68.
[70] Award, paginated page 69.
[71] Award paginated page 69.
[72] Award paginated pages 68-69.
[73] Award paginated page 70.

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[64] It is clear that the arbitrator considered the principal issue before him; evaluated the facts presented at the hearing and came to a reasonable conclusion. I accordingly hold that the Application for review is dismissed.

Costs

[65] The Applicant requested no order as to costs. The First Respondent submitted that costs should follow the order.

[66] I have considered the requests of the parties. The matter before the Court is not a typical matter where the Court will order costs.

Order

[67] In the result therefore, it is ordered as follows:-

1. The Applicant's application for review in terms of Section 145 is dismissed;

2. No order as to costs

____

Fouché AJ

Acting Judge of the Labour Court of South Africa

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APPEARANCE

For the applicant: E. Nompefu (NUPSAW)

For the respondent: N.G. Winfred

Instructed by: State Attorney

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