REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 363/2012

In the matter between:

NEHAWU obo MANYANA & 1 OTHER **Applicants**

and

KEHEDITSE MASEGE N.O. **First Respondent**

GENERAL PUBLIC SERVICES SECTORAL

BARGAINING COUNCIL **Second Respondent**

DEPARTMENT OF LOCAL GOVERNMENT

AND HOUSING, GAUTENG **Third Respondent**

Heard: **18 January 2014**

Delivered: **08 April 2014**

Summary: **Bargaining Council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – determinations of arbitrator compared with evidence on record – arbitrator's award regular and**

sustainable – award upheld

Bargaining Council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – assessment of evidence and legal principles by arbitrator – assessment and determination reasonable – award upheld

Unfair labour practice – promotion – principles applicable to promotion disputes – determination as to the requirements for establishing unfair labour practice for promotion – duties of employer considered - arbitrator properly applying legal principles applicable to determination of unfair labour practice dispute relating to promotion

Unfair labour practice – promotion – employees failing to make out case of unfair conduct on the part of the employer – no unfair labour practice found to exist – award of arbitrator sustainable and review application dismissed

Unfair labour practice – employment equity considerations – absence of employment equity plan – employer still entitled to have regard to general employment equity considerations even in the absence of a plan

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicants to review and set aside an arbitration award of the first respondent in her capacity as an arbitrator of the GPSSBC (the second respondent). This application has been brought in terms of Section 145, as read with Section 158(1)(g), of the Labour Relations Act[1] ("the LRA").

[2] This matter concerned an unfair labour practice dispute as contemplated by

[1] Act No 66 of 1995.

section 186(2)(a) of the LRA. The applicants contended that the two individual applicants should have been appointed into certain vacant positions, by the third respondent as their employer, which appointment would constitute a promotion. When the individual applicants were not so promoted, the applicants then pursued an unfair labour practice dispute concerning this failure to promote them to the second respondent as the applicable bargaining council. The matter came before the first respondent for arbitration, pursuant to which arbitration proceedings the first respondent determined that the applicants had failed to establish that the failure by the third respondent to promote the individual applicants constituted an unfair labour practice and dismissed the applicants' case. It is this determination by the first respondent that forms the subject matter of the review application brought by the applicants, which application was timeously filed on 20 February 2012.

[3] As part of the pleadings, the applicants also filed a notice in terms of Rule 22 to amend the citation of the second respondent from being the CCMA as reflected in the original review application to that of being the GPSSBC. It was clear to me that the reference to the CCMA by the applicants in the original review application was simply an administrative error. Attached to the original review application was the arbitration award, which clearly emanated from the first respondent as arbitrator of the GPSSBC. No prejudice of any kind can result from simply amending the citation to reflect the true state of affairs. There was also no record of any objection being made by any of the respondents to the proposed amendment. Therefore, and insofar as it may be required, I amend the citation of the second respondent to that of the GPSSBC, as recorded above.

Background facts

[4] The two individual applicants, Philip Manyana and Tshediso Lebelo, were both existing employees of the third respondent and at the time when the events giving rise to these proceedings arose were employed as assistant directors,

which was a level 10 position in the third respondent. There was never any issue or dispute about the individual applicants' work performance or the manner in which they discharged their duties in the third respondent.

[5] The events giving rise to this matter arose following a decision by the third respondent to "regionalise", meaning that the third respondent divided itself into 4 regions, namely Johannesburg, Tshwane, Ekurhuleni and West Rand. This regionalisation led to particular project manager positions being moved out into these regions, which positions were in effect created as new and vacant positions. A total of 8 project manager positions became available in these 4 regions as a result of the regionalisation. The third respondent then embarked upon a recruitment process to fill these project manager positions in the regions. At issue in this instance is the three project manager positions based in Johannesburg.

[6] On 16 April 2008, the third respondent advertised these regional manager positions, inviting applications. It is also pointed out that these were level 12 positions and would clearly be promotional positions for the individual applicants. The individual applicants each applied for one of these project manager positions in Johannesburg. The individual applicants were short listed for the positions, following their applications, along with 10 other incumbents. All the short listed incumbents were interviewed on 12 September 2008 by an interview panel.

[7] The interview panel considered Mr Manyana to be the most suitable candidate of all the incumbents interviewed and recommended him for one of the positions. Similarly, Mr Tshediso Lebelo was considered to be a suitable candidate and also recommended for one of the positions. The two individual applicants in fact scored the highest in the interview process, being 127 and 129 respectively. There can be no doubt that the two individual applicants were fully qualified and suitable for the positions, and should appointments have actually been made into these positions, they would be the proper candidates to be actually so appointed.

[8] It was, however, equally clear that a recommendation by the interview panel was not an appointment into the position or any kind of approval of such appointment being made. In terms of the third respondent's recruitment and selection policy, the interview panel has the responsibility of only making what is defined as a "considered recommendation" to the relevant delegated authority actually approving the appointments. This policy further prescribes that in any selection, the Employment Equity Act must be considered. The policy also specifically records that the interview panel is not the decision-maker for appointments. The policy does provide for the situation that where the recommendations of the interview panel are not approved, reasons must be provided for this. Finally, any actual appointment that is made must be done in the form a written offer of employment which must be accepted by the employee.

[9] In line with the above process, the interview panel drafted a report which dated 18 September 2008, following the completion recruitment and interview process. In this report, it was recorded that because the positions were level 12 positions, the power to approve the filling of these positions vested only with the head of department. The report was prepared for the very purpose of obtaining approval from the head of department to fill the three vacant project manager positions for Johannesburg. The report concluded by recommending that approval be granted for the two individual applicants to fill vacant project manager posts.

[10] The report containing the recommendation for the approval of the appointment of the individual applicants, despite being dated 18 September 2008, was only actually presented for approval, in terms of the documentary evidence, on 11 February 2009. Unfortunately for the individual applicants, this recommendation and their appointment was never approved by the head of department. As such, the individual applicants were actually never appointed into these positions. The documentary evidence shows that despite the recommendation by the interview panel and in March 2009, the regional head Johannesburg, the director: human resource management, the chief director: corporate service and the deputy

director general all did not support the recommendation.

[11] In fact, and in a handwritten annotation to the request for approval, the deputy director general records that the positions be put in abeyance because of financial challenges and an EE plan should first be made available to show how equity targets are going to be achieved. The regional head: Johannesburg, also submitted a written report (reasons), which was dated 13 March 2009, for not supporting the recommendations of the interview panel for the appointment of the individual applicants and this report was then ascribed to by all the other approving authorities referred to above, in equally not supporting the recommendations. These reasons provided by the regional head: Johannesburg, were that the recommendations failed to have proper regard to equity considerations (in particular the appointment of females), and that at the time, the vacant posts were still unfunded and as a result no new posts could be filled until there was budget approval for this.

[12] The issue has another nuance. It appears that in November 2008, a moratorium was placed on the filling of any vacant positions in the department. In executive management meetings on 2 and 13 February 2009, it was confirmed that this moratorium still existed. This situation was further confirmed in circular 1 of 2009, dated 25 March 2009. Then, and in a further memorandum dated 24 July 2009, the moratorium issued in November 2008 and February 2009 was again confirmed, pending the finalisation of a merger between the Department of Local Government and the Department of Housing. This memorandum of 24 July 2009 specifically recorded that all previous recruitment processes relating to the filling of vacancies in the department were declared to be null and void until the completion of the new structure in the new merged department. This finally negated any prospect of the approval of the appointment of the two individual applicants in the project manager positions in terms of the 2008 recruitment process referred to above.

[13] It was also undisputed that the individual applicants never received written offers of employment for the project manager positions, as the applicable conclusion to any successful recruitment and appointment process.

[14] The individual applicants remained employed in their current positions, referred to above and this continued to be the case into 2010. The individual applicants did contend that they did the work of project managers but conceded that their actual appointments never changed. Then, and only in August/September 2010, which is more than a year after they were recommended for appointment by the interview panel, the individual applicants raised a grievance about the fact that they were not appointed into the project manager positions. The gist of these grievances were that they were still awaiting feedback on the appointments following the interview process, that they were actually doing the work of project managers and that they wanted information on the issue of the moratorium on the filling of posts (i.e. when would it end). These grievances were not resolved to the satisfaction of the individual applicants, who then decided to pursue the dispute as an unfair labour practice dispute to the second respondent.

[15] This matter, on the facts, then has one last twist. It appears that the recruitment, and selection and appointment process with regard to the project manager positions in Ekurhuleni and West Rand had been completed much more expeditiously. In the documentary evidence there was an actual offer of employment for a project manager position in West Rand issued to one Glenda Sambo ("Sambo") on 19 September 2008. This was clearly one of the project manager positions initially advertised, as set out above. The applicants contended that this appointment of Sambo whilst the individual applicants were not appointed established some or other form of inconsistency by the third respondent, which according to the applicants was unfair. What was, however, undisputed was that this appointment of Sambo that was made, was actually made before the imposition of the November 2008 moratorium and the appointment of Sambo was an appointment of a female.

[16] The unfair labour practice case of the individual applicants was that they should have been promoted into the project manager positions and that the reasons given for not appointing them were simply not valid considerations insofar as it related to their particular cases, as it simply did not apply to them. As stated, the applicants also contended as part of their case that the appointment of Sambo illustrated inconsistency on the part of the third respondent.

[17] The first respondent ultimately determined that the individual applicants did not have a right to being promoted, that their appointments had never been approved, and that the considerations of employment enquiry, financial constraints and the imposed moratorium were all valid and proper considerations that applied to the appointment of the individual applicants. The first respondent also concluded that the appointment of Sambo did not create any issue of inconsistency, as it was not unfair and distinguishable. The first respondent found that there is no basis to interfere with the third respondent's decision not to appoint the individual applicants and consequently that no unfair labour practice was committed by the third respondent towards the individual applicants. This determination of the first respondent then gave rise to the current proceedings before me.

The relevant test for review

[18] I intend to make a few short comments about the appropriate test for review in the current matter. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] Navsa, AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and that 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable

[2] (2007) 28 ILJ 2405 (CC).

decision-maker could not reach?'[3] Following on, and in *CUSA v Tao Ying Metal Industries and Others,*[4] O'Regan J held:

> 'It is clear... that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.*'*

[19] The *Sidumo* review test was applied in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others,*[5] and the Court, as to what would be considered to be unreasonable for the purposes of this test, said:[6]

> '… It seems to me that… there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[20] In applying this review test, the SCA in *Herholdt v Nedbank Ltd and Another*[7] concluded as follows:[8]

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[3] Id at para 110.
[4] (2008) 29 *ILJ* 2461 (CC) at para 134.
[5] (2008) 29 ILJ 964 (LAC).
[6] Id at para 102.
[7] 2013 (6) SA 224 (SCA) per Cachalia and Wallis JJA.

> 'In summary, the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall 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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

What the Court was saying is that if the arbitrator ignored material evidence, and in considering this material evidence together with the case as a whole, the review court believes that the arbitration award outcome cannot now be reasonably sustained on any basis, then the award would be reviewable.

[21] Following the judgment of the SCA in *Herholdt*, the Labour Appeal Court has now in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[9] again interpreted and applied the *Sidumo* review test and held as follows:[10]

> '*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator.… In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

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[8] Id at para 25.
[9] [2014] 1 BLLR 20 (LAC), per Waglay JP.
[10] Id at para 14.

The Court concluded:[11]

> 'In short: A review 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 which was reasonable to justify the decision he or she arrived at.'

[22] Therefore, the first step in a review enquiry is to consider and determine if a material irregularity indeed exists. A review court determines whether such an irregularity exists by considering the evidence before the arbitrator as a whole, as gathered from the review record and comparing this to the content of the award and reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law in order to determine what indeed constituted the proper evidence that the arbitrator, as a whole, would have had to consider. If the review court, in conducting this first step, enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations need to be made and the review must fail.

[23] Should the review court, however, conclude that a material irregularity indeed exists, then the second step in the review test follows, which is a determination as to whether if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? The review court, in essence, at the second stage of the review test, takes the proper evidence as a whole, as ascertained from the review record, considers the relevant legal principles and decides whether the outcome that the arbitrator arrived at could nonetheless reasonably be arrived at by another reasonable decision-maker, even if it is for different reasons. The end result always has to be

[11] Ibid at para 16.

an unreasonable outcome flowing from an irregularity, for a review to succeed.

The reasoning of the arbitrator

[24] The first respondent, as arbitrator, firstly found that the onus was on the applicants to show that an unfair labour practice with regard to promotion was perpetrated by the third respondent on the individual applicants. The first respondent accepted that as a matter of law, where an internal candidate was able to demonstrate that the new position would increase his or her salary, responsibility and/or status, it would constitute a promotion and the internal candidate would be entitled to protection under the unfair labour practice jurisdiction under the LRA. The first respondent accepted that the case was properly before her as an unfair labour practice.

[25] In the deciding the issue of the unfair labour practice, the first respondent accepted that both the individual applicants applied for the regional managers' positions in Johannesburg, which was a promotion, being a grade 12 position, and that the interview panel recommended their appointment. The first respondent also accepted that one female candidate had been appointed to a regional manager position in a different region (referring to Sambo).

[26] The first respondent held that the reasons given why the individual applicants were not appointed were that the third respondent had to consider employment equity considerations relating to gender, there were budget constraints, there was an implemented moratorium on the appointments and, lastly, that the merger of the Departments of Housing and Local Government still had to be completed. The first respondent reasoned that the mere fact that employees qualified for and were recommended for a position does not mean that it was an unfair labour practice if they were not actually appointed. The first respondent held that the employees (individual applicants) had to show that the employer's reasoning for not appointing them was defective. The first respondent then dealt with the four reasons given, so as to determine if this reasoning was indeed defective.

[27] In dealing with the employment equity issue, the first respondent accepted the applicants' case that there was no actual employment equity plan in place at the time of their consideration for the positions. The first respondent, however, concluded that the absence of an employment equity plan does not mean that an employer cannot consider general employment equity requirements. The first respondent concluded that the absence of an employment equity plan does not nullify the considerations of employment equity in fact relied on by the third respondent. The first respondent concluded that there was nothing defective in the third respondent applying this as a reason for not appointing the individual applicants.

[28] The first respondent in her reasoning also referred to the HR Plan, which specifically contained equity requirements and which was introduced in 2008. The applicants contended that this plan was irrelevant because it was introduced only after their interviews had been concluded. The first respondent, however, found that it was introduced at the time when the appointment process had not yet finalised and thus was applicable. The first respondent concluded that to accept the argument of the applicants, that the HR plan had to be ignored, would mean that the third respondent would have to act contrary to its own strategy as it existed at the time when making the actual appointments, which could not be correct.

[29] The first respondent then dealt with the issue of budget constraints. The first respondent analysed the documentary evidence and concluded that budget constraints was indeed a consideration and a valid one. Together with this issue, the first respondent considered the issue of the moratorium on appointments, which the first respondent held to be in line with the PFMA and concluded that the failure to make the appointments due to budgetary constraints was neither arbitrary nor capricious.

[30] The first respondent also had regard to the applicants' case that the moratorium did not apply to their appointments as it was issued after their interviews and recommendation for appointment into the positions had been concluded. The first respondent accepted that the moratorium was applicable before any approval of the appointment of the two individual applicants had been made. The first respondent also referred to the fact that the moratorium in fact specifically nullified all previous recruitment processes. The first respondent held that she could not see how the individual applicants could be appointed without consideration of the moratorium and thus the conduct of the third respondent in considering the moratorium was not irregular.

[31] The first respondent then turned to the final reason, being the department merger. The first respondent found that the moratorium also applied because of this merger and as this moratorium nullified all previous recruitment efforts and processes, which would include that involving the two individual applicants, there was nothing unjustified in not filling the positions at a later stage. The first respondent found that the suspension of the filling of the positions was retrospective and this was a valid consideration in not approving the appointment of the individual applicants.

[32] The final part of the applicants' case was then the inconsistency issue. As stated above, the applicants' case in this regard related to the appointment of Sambo in another region in the position of project manager. The first respondent found, firstly, that each region had its own budget and as such the budgetary issues of another region cannot be used to establish an unfair labour practice for the Johannesburg region. The first respondent, however, did find that whilst it may be argued that this appointment of Sambo can possibly be considered to be inconsistent *per se*, this issue was nonetheless insufficient to warrant a deviation from her earlier views, based on the fact that the reasons for the non-appointment of the two individual applicants was distinguishable from that of Sambo.

[33] Based on the above reasoning, the first respondent then concluded that the failure by the third respondent to approve the appointment of the two individual applicants in the project manager positions for Johannesburg was not an unfair labour practice.

Merits of the review

[34] The applicants have raised several grounds of review, which I will now deal with only insofar as it is necessary. For the reasons set out hereunder, it is not necessary to deal with each and every ground of review raised by the applicants and where I do not specifically deal with a ground of review raised by the applicant in their founding affidavit, it must be accepted that I did not consider it necessary to determine or refer to it.

[35] The first ground of review I wish to deal with is a contention by the applicants that the first respondent was biased. According to the applicants, the first respondent exhibited bias for the following reasons: (1) the first respondent found that the applicants had the onus to prove the existence of an unfair labour practice; (2) the first respondent favoured the third respondent when it came to cross examination of witnesses; and (3) the first respondent interfered with answers given by the individual applicants when testifying. The applicants also contend in support of their bias argument that the first respondent "misrepresented" the issue placed before her, whatever this may mean.

[36] I intend to immediately dispose of the ground of review of alleged bias on the part of the first respondent. This ground of review has no merit at all. Firstly, it is trite that as the proceedings are unfair labour practice proceedings, the applicants have the onus in establishing the existence of an unfair labour practice.[12] In

[12] See *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others* (2013) 34 ILJ 1156 (LC) at para 19 ; *National Commissioner of the SA Police Service v Basson and Others* (2006) 27 ILJ 614 (LC) at para 7 ; *Trade and Investment SA (Association Incorporated Under Section 21) and Another v General Public Sector Bargaining Council and Others* (2005) 26 ILJ 550 (LC) at para 17 ; *SA Commercial Catering and Allied Workers Union on behalf of Skosana and Others v Triptra (Pty) Ltd t/a*

Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others,[13] the Court said:

> '…. An employee who complains that the employer's decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. This is not one of those cases such as disputes relating to unfair discrimination and disputes relating to freedom of association where if the employee proves the conduct complained of, the legislation then requires the employer to prove that such conduct was fair or lawful and, if he cannot prove that, unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of item 2(1)(b) matters, the Act does not say so because it was not intended to be so.'

The first respondent's application of the issue of the onus is thus correct, and such finding therefore cannot substantiate any allegation of bias on her part.

[37] I have also considered the typed transcript of the arbitration so as to establish whether there was any undue interference by the first respondent in the arbitration proceedings and with the testimony of witnesses. Significantly, the applicants have filed no supplementary affidavit as contemplated by Rule 7A(8) so as to provide specific examples of this mere and bald contention, once the record had been filed. In my consideration of the typed transcript of the arbitration, I could find no undue interference by the first respondent in the arbitration proceedings. In fact, her actual participation in the arbitration was minimal. In particular, I could find no support in the record to substantiate the kind of conduct the applicants complained of in the founding affidavit as having

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Denneboom Station Pick 'n Pay (2013) 34 ILJ 3356 (CCMA) at para 48 ; *Ramoroka v Robben Island Museum* (2012) 33 ILJ 500 (CCMA) at para 14 ; *Police and Prisons Civil Rights Union on behalf of Dumakude v SA Police Service* (2011) 32 ILJ 519 (BCA) at para 16 ; *SA Airways (Pty) Ltd v Blackburn and Others* [2010] 3 BLLR 305 (LC).

[13] (2004) 25 ILJ 248 (LAC) at para 73

been perpetrated by the first respondent. In fact, the transcript shows that the parties were free to present their respective cases as they deemed fit, and ask the questions they deemed appropriate of the witnesses. I hasten to add that the re-examination of the individual applicants by the applicants' union representative went far beyond what would normally have been permitted in conducting re-examination, so, if anything, the first respondent was very lenient towards the applicants. There is simply nothing that becomes apparent from the transcript of the proceedings which could remotely convince me that the first respondent conducted herself in a manner that could be seen to be biased. I can therefore find no irregularity that exists insofar as it relates to this ground of review of the applicants.

[38] The applicants also raise as a ground of review that the first respondent did not issue her award in 14 days. This ground of review is based on the provisions of section 138(7) which reads:

> 'Within 14 days of the conclusion of the arbitration proceedings - (a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner….'

The arbitration proceedings took place on 10 November 2011, and were concluded on that date, which means the 14 day time limit expired on 25 November 2011. The applicants do not in their founding affidavit state exactly when they received the arbitration award but I note from the arbitration award attached to the review application that there is a telefax transmission report at the top of the document dated 11 January 2012, which I shall accept as the date when the award was received by the applicants. This means that the first respondent rendered her award some 47 days outside the 14 day time limit referred to. The question now is – does this failure render the award invalid or in some way irregular?

[39] Soon after the current LRA came into effect, this very issue came before

Landman J (as he then was) in the matter of *Free State Buying Association Ltd t/a Alpha Pharm v SA Commercial Catering and Allied Workers Union and Another,*[14] and the learned Judge specifically considered the question of what is the status of an award which is issued out of time. The Court said the following:[15]

> 'Section 138 of the Labour Relations Act 66 of 1995 does not make provision for an extension of the time within which to issue an arbitration award. In my opinion s 138(7)*(a)* insofar as it relates to the signature and issuing of the arbitration award, is intended to be more of a guideline. It is not intended to be peremptory. It is quite clear that having regard to human nature a commissioner may not always be able to sign and issue an award within the 14-day period. If a commissioner were to sign or to issue the award after that period, it would not be in accordance with the aims of this Act to visit such an omission with invalidity. If that were to be done it would simply mean that the dispute had not reached finality and the arbitration proceedings would have to take place de novo. This could not have been intended.'

I fully agree with this reasoning.

[40] Similarly, and in *Waverley Blankets v Commission for Conciliation, Mediation and Arbitration and Others*[16] the Court considered a situation where an arbitrator had waited six months to render his award. The Court held as follows:[17]

> 'In matters where arbitration awards were rendered late it appears that the attitude adopted by the Labour Court was that the provisions contained in s 138 of the LRA were intended to be guidelines and not imperative. In other words, that the non-compliance with the time-limits contained in s 138 of the Act need not result in the proceedings being rendered a nullity. The court has, however, held that there are exceptions in circumstances where an award is issued so late

[14] (1998) 19 ILJ 1481 (LC); See also *Meyer v Commission for Conciliation, Mediation and Arbitration and Others* (2002) 23 ILJ 154 (LC) at para 5.
[15] Ibid at para 16.
[16] (2000) 21 ILJ 2497 (LC).
[17] Ibidd at para 11.

that different consequences may follow.'

Based on the lengthy delay of six months, the Court said:[18]

> 'The long delay in itself is not an irregularity which would result in the proceedings becoming null and void (see para [11] supra) but it compounded other shortcomings in the award which of necessity were the result of such a long delay. The long delay resulted in a failure on the part of the arbitrator to apply his mind to the evidence.'

[41] I wish to make final reference in this respect to the following dictum in the judgment of *Standard Bank of SA Ltd v Fobb and Others,*[19] which I fully agree with and where the Court had said:

> 'The time limits in this context are a guideline and not peremptory. I say so, firstly, because peremptory treatment can lead to absurdity. Secondly, it is not in the interests of litigants, the public and the national interest to rehear arbitrations for no reason but the fact that the award is issued outside the time limit. Thirdly, it would conflict with the object of the LRA to resolve labour disputes effectively. In the nature of arbitration awards are issued late. If they are a nullity and no effect can be given to them, then the referral for a fresh arbitration would not be an effective, expeditious solution.'

[42] Accordingly, there is no merit in the ground of review raised by the applicants concerning the award not having been rendered in 14 days. Based on the principles set out above, it is my view that the 14 day time limit provisions in section 138(7) is not peremptory but directory, and non-compliance with such time limit does not taint the award with irregularity or invalidity. Of course, and the longer the delay in furnishing the award, the more likely it would be to contend that the arbitrator was unable to bring his or her mind properly to bear on the facts, as was the case in *Waverley Blankets*. Whether the arbitration award is

[18] Ibid at para 13.
[19] [2002] 9 BLLR 900 (LC) at para 7.

capable to be handed down in 14 days is also dependent on the scope and extent of the matter, the duration of the arbitration proceedings, the complexity of the matter and other justified extraneous factors such as the occurring of the traditional December holiday season at the time when the award is due. *In casu*, the mere fact that the award was given outside the 14 day time limit thus does not render it irregular or reviewable. I also do not consider the delay of about one and half months to be unduly lengthy, considering the intervening December holiday season. The issues before the first respondent were fairly complex and certainly required proper and detailed consideration. In addition, and as far as arbitration awards go, the arbitration award of the first respondent is also fairly detailed. Finally, and if I compare the first respondent's reasoning as set out in the award to the actual evidence on record as a whole, there is simply no indication that the delay had any consequence of the first respondent being unable to apply her mind properly to the evidence. I therefore reject this ground of review raised by the applicants.

[43] I will now deal with the applicants' grounds of review relating to the findings of the first respondent on the merits, insofar as it is necessary to do so. As I have set out above, and in a nutshell, there were four reasons for the appointment of the individual applicants into the positions not being approved, being the employment equity consideration, the budget constraints, the moratorium, and the merger of departments. The proper question before the first respondent was twofold, firstly, whether these reasons had substance in the first place (in other words were valid reasons) and secondly, whether the application of these reasons was in the circumstances of the current matter unfair towards the individual applicants.

[44] Before I deal with these reasons, something must be said about the nature of the applicants' case that the applicants actually sought to present. It was undisputed that the third respondent complied with its own internal recruitment and placement procedure in conducting the recruitment processes relating to the filling of the positions. It was equally never an issue that the two individual

applicants were properly interviewed, properly considered and then recommended by the interview panel for approval to be appointed in the positions. It also appeared to be common cause that if the appointments into the positions were actually effected, the two individual applicants would have been appointed. The case of the applicants was permeated with the contention that because of all of this, they were entitled and had the right to be appointed *per se*, into the positions. Of course, and if the applicants had established that the individual applicants indeed had a right to be so appointed, that would have been the end of the matter and the failure to appoint the individual applicants would certainly be an unfair labour practice, simply because the infringement of this right would necessarily be unfair. The question, however, is whether the applicants proved the existence of such a right?

[45] In argument before me, the applicants ultimately conceded that the individual applicants had no right to be promoted. This concession was properly made. On the evidence, it was clear, in terms of the provisions of the recruitment and selection policy itself that the short listing, interview and recommendation by the interview panel of a candidate for appointment does not entitle the candidate as of right to be appointed. It is specifically defined that the purpose of the interview panel is to determine and recommend suitable candidates. The decision to actually appoint what may be recommended as a suitable candidate by the interview panel at all times remains vested in the head of department or delegated authority. *In casu*, and because the project manager positions were level 12 positions, ultimate approval by the head of department was an imperative. The interview panel report dated 18 September 2008 itself confirms the aforesaid. It is specifically recorded in this report, with regard to the individual applicants, that “In view of the above it is suggested that approval be granted to appoint …. to the vacant posts of project manager….’ (referring to the individual applicants) It is clear that the aforesaid events can never be considered to be an actual appointment made or create a right to be appointed. It is simply a

motivated suggestion for approval to be granted for the appointment by the head of department. What then unfortunately happens is that approval was actually declined by all the relevant authorities in the third respondent, including the department head. The individual applicants conceded in evidence that this was indeed the case and that their appointments were never approved. It is, therefore, my conclusion that on the facts, there simply has been no case made out that the individual applicants had any right to be appointed into the project manager positions. Insofar as the applicants may have relied on the individual applicants having a right to be appointed as project managers, such a case had to fail, and the first respondent in effect properly so determined.

[46] Now it is true that even if an applicant in an unfair labour practice dispute relating to a promotion cannot show that a right exists entitling the applicant to promotion, the failure to promote, even in the absence of such a right, can still be unfair. As the Court said in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*:[20]

> '…. An employee who wants to use the unfair labour practice jurisdiction in s 186(2)*(a)* relating to promotion or training does not have to show that he or she has a right to promotion or training in order to have a remedy when the fairness of the employer's conduct relating to such promotion (or non-promotion) or training is challenged….'

What an applicant in an unfair labour practice dispute relating to promotion thus has to show, in the absence of a right to promotion being established, is that the conduct of the employer in failing to promote the employee was unfair.

[47] When deciding what constitutes unfair conduct in the context of promotions, the issue of management prerogative remains of critical importance. In *Provincial Administration Western Cape (Department of Health and Social Services) v*

[20] (2013) 34 ILJ 1120 (LAC) at para 51.

Bikwani and Others,[21] it was held as follows:

> 'There is considerable judicial authority supporting the principle that courts and adjudicators will be reluctant, in the absence of good cause clearly shown, to interfere with the managerial prerogative of employers in the employment selection and appointment process.
>
> So too in *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) the Industrial Court held that an employer has a prerogative or wide discretion as to whom he or she will promote or transfer to another position. Courts should be careful not to intervene too readily in disputes regarding promotion and should regard this an area where managerial prerogatives should be respected unless bad faith or improper motive such as discrimination are present.'

I fully ascribe to this reasoning and *in casu* and for the reasons set out hereunder, no unfair conduct by the third respondent which could justify interference with its decision making was remotely shown to exist by the applicants.

[48] Where it comes to considering whether the conduct of the third respondent in failing to approve the appointment of the individual applicants into the positions was unfair, the applicants' unfairness case has a significant difficulty, from the outset. This difficulty is that when this matter came before the first respondent, the positions were still vacant and no appointments in respect of such positions had been approved. No actual appointment had been made by the third respondent into these positions. It may well happen into the future that the third respondent may fill these positions and if that is the case, and the two individual applicants are then not appointed, then they may well have a case of unfair conduct on the part of the third respondent, considering the recommendations and report of the interview panel. However, and as matters stand, with no appointments actually being made by the third respondent, a moratorium on

[21] (2002) 23 ILJ 761 (LC) at paras 29 – 30.

appointments continuing to exist, and with no established right to be appointed, the failure to appoint the individual applicants simply cannot be considered to be unfair conduct by the third respondent. In *Department of Justice,*[22] the Court dealt with a situation comparative to the matter *in casu*, and said:[23]

> 'The PSA and Mr Bruwer accepted that the post had not been filled on a permanent basis and conducted their case in the arbitration on that basis and on the basis that Mr Bruwer could still be appointed to the post. In the light of this the PSA and Mr Bruwer could only succeed in the arbitration if they showed that it was of particular significance that Mr Bruwer be appointed at a specific time (prior to 1 August 1997) and that, once he had not been appointed at that particular time, the fact that he could still be appointed to the post on a permanent basis later was either irrelevant or was not good enough since the unfairness flowing from his non-appointment at a particular time could not be undone if he was appointed later. The PSA and Mr Bruwer failed to do so.'

The fact is that based on the above reasoning in *Department of Justice*, the applicants had to show that the failure to actually appoint the individual applicants at about the time when the recommendation was made by the interview panel was an imperative to ensure fairness to the individual applicants and that any subsequent appointments that may later be made was simply not good enough to ensure fairness still existed. Similar to the situation in the judgment in *Department of Justice*, the applicants *in casu* made out no such case. In fact, the *status quo* remained for more than a year before the individual applicants took issue with their non appointment, and this delay in my view would certainly dispel any contention that an immediate appointment at the time of recommendation was an imperative to ensure fairness. There was simply nothing before the first respondent to indicate that a failure to appoint the individual applicants immediately in February/March 2009 was unfair, especially considering that when

[22] *Department of Justice* (*supra*) footnote 13.
[23] Ibid at para 71.

the matter came before the first respondent, none of the posts in Johannesburg had been filled and the moratorium still applied.

[49] It is also apparent that the applicants' case never was that the third respondent acted unfairly by implementing a moratorium or considering budget and equity considerations per se. The applicants never contended that the third respondent was not entitled to consider and apply such considerations. What the applicants contended was that the considerations of employment equity did not apply to them because there was no equity plan in place when they were recommended for the positions. The applicants then contended that the moratorium did not apply to their appointments because it only came into existence after they were interviewed and recommended for appointment. Finally, the applicants contended that there indeed a budget to substantiate the positions of which they were recommended. What is thus clear from the case of the applicants is that there is no challenge to the validity and fairness of these considerations *per se* as grounds for not filling the positions. What is in issue is whether these considerations actually find application *in casu* specifically to the recruitment process and appointment recommendation of the individual applicants. Therefore, the reasons relied on by the third respondent not to approve the appointments must be accepted to be valid and fair reasons and all that must be decided if whether these reasons found application in the case of the individual applicants. As the Court said in *Department of Justice*, in dealing with a concession by the employee party in that matter that the employer had the prerogative to decide whether or not to fill a post and that there was no unfairness in the decision to decide to postpone the filling of the post:[24]

> 'In the light of the concession by Mr Bruwer, it would not have been permissible for the commissioner to conclude that the department did anything wrong or unfair when it decided to postpone the filling of the post and to have it re-advertised, especially because Mr Bruwer could still be appointed to the post

[24] Ibid at para 89.

> afterwards. I would have thought that this concession by Mr Bruwer would have marked the end of any case based on the fact that the department postponed the filling of the post and re-advertised it.'

In my view, this reasoning would equally apply *in casu*. In addition and in the memorandum of 24 July 2009, which was issued more than a year prior to the applicants actually proceeding to challenge the failure to appoint the individual applicants,[25] it was specifically recorded that all previous recruitment efforts towards the filling of vacancies in the department were declared to be null and void until the completion of the merger of the department. This can only mean that once this merger is completed, the recruitment processes would start again and the individual applicants could be considered again in the normal course, which must surely mark the end of any unfair labour practice case only brought in 2010 by them.

[50] I also wish to deal specifically with the evidence relating to the moratorium on appointments in the third respondent and its applicability to the individual applicants. It was undisputed that this moratorium came into effect in November 2008. There was no evidence that any appointment had been made in contravention of this moratorium after it had been implemented. The one candidate appointed to a project manager position in another region (being the appointment of Sambo) was appointed end September/beginning October 2008, before the moratorium came into effect. The November 2008 moratorium was also confirmed in the business unit meeting held on 2 February 2009. The individual applicants conceded in evidence in the arbitration that they were at all relevant times aware of the existence of the moratorium, which was implemented, using the words of the individual applicant Lebela, "later in 2008". The only basis for the contention of the individual applicants that the moratorium did not apply to them was based on the fact that they applied for appointment in 2008 prior to the moratorium being implemented and were interviewed in

[25] The first grievance was raised only in August 2010.

September 2008 prior to the moratorium being implemented. Whilst this is true, it simply cannot detract from the actual applicability of the moratorium to the appointment of the individual applicants. Once again and as I have set out above, applying for a position and being interviewed does not entitle the individual applicants to anything unless the individual applicants could show that the advertising of the positions, the consideration of candidates for short listing, or the actual interview process, was in some or other way irregular or unfair and this was never the case of the individual applicants. Added to this and crucially, the individual applicants were only recommended for approval of appointment by the interview panel on 11 February 2009, which was after the implementation of the moratorium in November 2008 and the confirmation thereof in the meeting of 2 February 2009. Therefore, the moratorium, as a matter of fact, applied directly to the appointment of the individual applicants.

[51] The actual application of the moratorium to the appointment of the individual applicants and considering the contents of the memorandum of July 2009 where all prior recruitment activities for vacant positions were declared to be null and void until the department merger had been concluded, had to be the death knell to the case of the individual applicants. For this reason alone and despite all other reasons given, the non appointment of the individual applicants was fair and justified and there is simply no need to consider or determine any of the other reasons given by the third respondent for not appointing the individual applicants. The applicants, in 2010, simply had no unfair labour practice case to pursue, which case in my view was still born from the outset.

[52] I, however, need to say something about the employment equity considerations, which was one of the reasons considered by the third respondent in declining to approve the appointment of the individual applicants and which reason was specifically dealt with by the first respondent in her award. It was in the end undisputed that the third respondent did not have an employment equity plan in place when this reason to decline approval of the appointment of the individual

applicants was provided. Despite this being the case, I must agree with the first respondent where she says that even in the absence of an employment equity plan, the third respondent remained entitled to have regard to equity considerations. I may point out that the EEA formed part of the legislative framework within which the third respondent's recruitment and selection policy was drafted. In the introduction to this policy, it is recorded that 'the Department aims to recruit the best staff in order to develop and maintain standards consistent with its vision, mission and employment equity policy….' Similarly in paragraph 5 of this policy, it is recorded that the third respondent supports and practices employment equity by affording preferential treatment to suitably qualified applicants from designated groups and giving special attention to under-represented designated groups. I also agree with the first respondent's reasoning as to the application of the HR policy, referred to above. All of the aforementioned clearly contemplates equity considerations, which, if regard is had to the content of the report by the interview panel in respect of the Johannesburg project manager positions, seems not to have been considered or addressed. In this regard, I make reference to the following *dictum* from the judgment in *Department of Justice*:[26]

> 'In any event the department's decision not to fill the post permanently in 1997 and 1998 but to re-advertise it and see whether in due course the department might not attract other candidates who could compete for this position with the then present candidates including Mr Bruwer was vindicated because the department gave a person from a disadvantaged group an opportunity to act in the position and in time he performed very well and, as we were told during argument, was subsequently appointed to the post. This was somebody who had been excluded by the policies of apartheid from getting this kind of experience at the time that Mr Bruwer got it. How else other than by giving him an acting opportunity could the department have discovered someone from a disadvantaged group who could prove that he could perform well in this post?

[26] Ibid at para 92.

> There is no other way! The postponement of the permanent filling of the post served a laudable cause which was the intention behind it in the first place.'

[53] In any event, and as a matter of law, the absence of an employment equity plan cannot stand in the way of an employer nonetheless applying considerations relating to employment equity when deciding whether to make appointments, which, *in casu*, and on the reasoning provided by the third respondent at the time, related to the under-representation of black females. In *Willemse v Patelia NO and Others,*[27] the Court equally dealt with a similar situation where there was no employment equity plan. The Court said the following:[28]

> 'Obviously, an employment equity plan is helpful as a framework within which to determine the fairness of an employer's discriminatory decisions when it purports to make appointments, or refuses to make them, in furtherance of the employer's employment equity objectives. In view of the potential discriminatory nature of affirmative action measures, it is of course important, when one has to assess whether such discrimination as may have been perpetrated by an employer in pursuit of affirmative action goals, was fair or not, for a reviewing court to see exactly how and in terms of what the employer exercised its discretion. In this process one of the issues to be determined will be whether the employer had interpreted its own employment equity policies and plans properly. Affirmative action measures should not be applied in an arbitrary or unfair manner. Where an employer, like in the present instance, fails and/or refuses to promote an employee by reason of promoting representativity levels from designated groups, then, if that employer had no employment equity plan whatsoever, it may be very difficult to determine whether such discrimination as it may have perpetrated in its refusal to promote an employee constituted unfair discrimination or not. Whilst the DEAT did not have a formal employment equity plan at the time the acting director-general refused the recommendation to promote Dr Willemse, the evidence before the arbitrator did disclose that the DEAT was operating within a framework of policy statements as well as targets with reference to its

[27] (2007) 28 ILJ 428 (LC).
[28] Id at para 34.

> employment equity goals and objectives… I am therefore satisfied that the fact that the DEAT did not have an employment equity plan as required by the EEA, does not in and by itself render the refusal to promote Dr Willemse unfair. I also do not believe that the absence of an employment equity plan is in and by itself a cause of action when dealing with the question whether the employer committed an unfair labour practice relating to its failure or refusal to appoint or promote an employee…'

What the Court held in *Willemse* is in effect exactly what the first respondent said in her award. I am compelled to agree. It was always a part of the third respondent's recruitment and selection framework to apply employment equity considerations and of particular relevance to the mater *in casu*, to give preferential treatment to under-represented parts of designated groups. Simply put, the applicants' case that the absence of an employment equity plan rendered invalid and irregular any employment equity considerations in deciding not to appoint the individual applicants has no foundation in law and falls to be rejected.[29]

[54] Equity considerations are a legitimate criteria in conducting selections for appointment in any event, and I refer to *City of Tshwane Metropolitan Council v SA Local Government Bargaining Council and Others*[30] where the Court said the following:

> 'Which criteria are used will depend on factors such as the employer's operational needs, organizational values, human resources policy, resources it is willing to devote to recruitment, the number of candidates it might have to consider for each vacancy, and such like considerations, which generally are not prescribed by law.'

[29] See also *Regional Commissioner Correctional Services, Free State and Northern Cape v Wolfaardt and Others* [2013] 7 BLLR 717 (LC) where the Court dealt with a similar policy framework, and said at para 60: 'Thus had the arbitrator applied his mind to the issue of the employment equity, he ought to have found that the applicant, in not promoting Mr Wolfaardt, had interpreted and applied to the provisions of resolution 7 correctly. The approach adopted by the applicant was in line, more particularly, with the provisions of clause 7.2 of the resolution'.

[30] (2011) 32 ILJ 2493 (LC) at para 28.

[55] This then only leaves the issue of the appointment of Sambo in September/October 2008 to consider. According to the applicants, this showed that the third respondent was guilty of inconsistency, so to speak. I cannot agree with this contention of the applicants. From the outset, the appointment of Sambo is distinguishable on the facts and in particular for two critical reasons. Firstly, as the individual applicants themselves even conceded in the arbitration, Sambo was appointed before the implementation of the moratorium. Secondly, the recommendation of the interview panel that Sambo be appointed was actually approved, where that of the individual applicants was not. Another consideration would be the equity considerations referred to above, especially, considering that one of the reasons for the non approval of the individual applicants was specifically the issue of the appointment of black females due to equity considerations and Sambo was a black female. In this respect, the third respondent certainly behaved consistent to its own reasoning. Added to these distinctions of fact, the individual applicants were in any event compelled to prove that the appointment of Sambo coupled with their non-appointment was based on *mala fide*, capricious, discriminatory or grossly irregular conduct by the third respondent. This was never proven by the individual applicants. The individual applicants seem to say that simply because Sambo was appointed in a project manager position, advertised as part of the same basket of project manager positions the individual applicants also applied for and with the individual applicants not equally being so appointed, this is *per se* inconsistent conduct justifying interference. This approach of the individual applicants is clearly flawed. Mere differentiation does not establish inconsistency and more must be shown to exist by the individual applicants to justify interference, as I have said above. As the Court said in *Arries v Commission for Conciliation, Mediation and Arbitration and Others:*[31]

[31] (2006) 27 *ILJ* 2324 (LC) at paras 47 – 48.

> 'As far as the applicable law is concerned, I believe that the commissioner correctly approached the matter before him, namely in the first instance, as he put it, treading warily. He further was correct in approaching the matter, in essence, on the basis of making a determination whether the third respondent's refusal to promote Ms Arries was: on the basis of its having acted on the basis of some unacceptable, irrelevant or invidious comparison on the part of the third respondent; or that its decision was arbitrary, or capricious, or unfair; or that they failed to apply their mind to the promotion of Ms Arries; or that the third respondent's decision not to promote Ms Arries was motivated by bad faith; or that it was discriminatory.
>
> All of these aspects which the commissioner clearly had in mind in reaching his conclusion are in my view in essence a proper search by the commissioner to determine whether the third respondent's discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner.'

Based on what I have already set out above, I fully agree with this reasoning in *Arries*, which in my view can be directly applied to the current matter. There is simply no evidence to indicate that the appointment of Sambo and the non appointment of the individual applicants is based on any of the considerations as set out in the *Arries* judgment. No inconsistency justifying interference has thus been established by the individual applicants.

[56] I, therefore, conclude that the first respondent simply committed no irregularity as contemplated by the review test I have set out above, in determining that the failure by the third respondent to approve the appointment of the two individual applicants into the project manager positions in the Johannesburg region, did not constitute an unfair labour practice. The first respondent properly appreciated the enquiry she was required to make and clearly understood what was needed to establish unfair treatment of the individual applicants as required by the unfair labour practice provision relating to promotion. The first respondent's reasoning

is certainly reasonable and proper and, consequently, entirely sustainable.

Conclusion

[57] Therefore, and having regard to what I have set out above with regard to the merits of the applicants' review application, and based on the application of the review test as I have also set out above, I conclude that the first respondent's award and reasoning simply does not constitute any irregularity. The first respondent properly considered all material evidence, properly and rationally construed and applied the relevant legal principles, and provided proper reasons for the conclusion that she came to. Because I have found no irregularity to exist in this instance, no further determination as to a reasonable outcome needs to be made and the applicants' review application must fail.

[58] The first respondent's award, therefore, must be upheld and her conclusion that the third respondent committed no unfair labour practice towards the two individual applicants must be sustained and I, accordingly, so determine.

[59] In dealing with the issue of costs, both parties asked for an award of costs. I consider that the first respondent's award was a clear, concise and a properly reasoned award and it should have been apparent to the applicants that their review case had no merit. As I have referred to above, the case of the applicants simply never had any merit from the outset. I also consider that the individual applicants and the third respondent are still in an employment relationship and there equally exists an ongoing relationship between the third respondent and the applicant union but I do not believe that in the circumstances this is sufficient to mitigate against the granting of a costs order against the applicants, especially considering that the applicants' case never had any merit. In thus exercising my wide discretion I have in terms of the provisions of sections 162(1) and (2) of the LRA, where it comes to the issue of costs, I do believe a costs order against the applicants is appropriate.

Order

[60] In the premises, I make the following order:

1. The applicants' review application is dismissed with costs.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicants: Mr K Nchaupe – Union official NEHAWU

For the Third Respondent: Advocate P Nkhutha

Instructed by: Malebye Motaung Mtembu Inc Attorneys