**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable

Case no: JA 14/2014

In the matter between:

**HEAD OF THE DEPARTMENT OF EDUCATION** **Appellant**

and

**JONAS MOHALE MOFOKENG** **First Respondent**

**THE EDUCATION LABOUR RELATIONS COUNCIL** **Second Respondent**

**COMMISSIONER K.C. MOODLEY N.O.** **Third Respondent**

**Heard:** **08 September 2014**

**Delivered:** **01 October 2014**

**Summary: Unfair labour practice related to promotion. Review of arbitration award – employer merging two schools and upgrading the merged school- employee former principal recommended for position of principal by school governing body- employer advertising position- employee unsuccessful during interview -- commissioner finding that employee non-promotion unfair- evidence showing that employer had discretion to advertise the position- recommendation not binding on the employer- review test restated- commissioner failing to apply his mind to the evidence- appeal upheld- Labour Court decision set aside- arbitration award reviewed and set aside**

**Coram: Musi JA, Murphy and Kathree-Setiloane AJJA**

**JUDGMENT**

MURPHY AJA

[1] The first respondent has been employed as an educator by the appellant since 1981. In August 2004, he referred a dispute to the Education Labour Relations Council ("ELRC") alleging an unfair labour practice on the part of the appellant in relation to his non-appointment to the post of principal at the school at which he was employed, after it had been upgraded.

[2] Section 191 of the Labour Relations Act [1] ("the LRA") provides *inter alia* that if there is a dispute about an unfair labour practice, the employee may refer the dispute to a bargaining council having jurisdiction for conciliation and arbitration. The alleged unfair labour practice in this case is one contemplated by section 186(2)(a) of the LRA which defines an unfair labour practice to include "any unfair act or omission that arises between an employer and an employee involving… unfair conduct by the employer relating to the promotion, demotion…of an employee".

[3] In the Dispute Referral Form E1, by which he referred the dispute to the ELRC, the first respondent described the dispute in the following terms:

> 'Mr JM Mofokeng was a Post Level 3 principal at Credo Primary School. The school was upgraded to PL4. According to the EEA 76 of 1998 Chapter B 25(6) of the PAM, the School Governing Body could recommend the appointment of the incumbent. The district refused to do so without giving reasons.'

In the section of the form dealing with relief, the first respondent requested that he be appointed principal at Credo Primary School ("Credo") as recommended by the School Governing Body ("the SGB").

[4] On 5 March 2010, almost 10 years after the dispute arose, and six years after it had been referred to the ELRC, the third respondent ("the arbitrator") handed down an award declaring the decision by the appellant not to promote the first respondent to post-level 4 to be an unfair labour practice and ordering it to promote the first respondent to the post of principal at post level 4 (grade 11) at Credo from 15 July 2003 and to adjust the first respondent's remuneration retrospectively in

[1] Act 66 of 1995.

accordance with the order of promotion.[2] The appellant brought a review application before the Labour Court which was dismissed by Cele J on 30 April 2013. The appellant appeals to this Court with the leave of the court *a quo*.

[5] The record in this appeal is below the acceptable standard. The transcript of the proceedings before the ELRC is of such a poor quality as to be almost unreadable. The court *a quo* ought to have directed that the record be reconstructed. It did not do so. The transcript furthermore does not include the expected annotations referencing exhibits and documentary evidence. This Court could justifiably have struck the appeal from the roll. However, the first respondent informed the court that he preferred the appeal to proceed on the record notwithstanding its imperfections. The facts are in the main common cause and it is possible to rely extensively upon the documentary evidence. The appellant's conduct is nonetheless unacceptable, a consideration of some consequence to the question of costs.

[6] The first respondent began working for the appellant in January 1981 as a teacher. On 1 March 1994, he was promoted to the position of principal at Credo. In 2000, the department began giving consideration to merging or amalgamating Credo with another school in the area, Somerpos Primary School ("Somerpos"). There is a dispute between the parties about whether the process of unification was a merger as contemplated by section 12A of the South African Schools Act[3] ("SASA"), or whether it was something less than or different to that. The process was referred to at different times as an amalgamation, absorption, a merger and platooning.

[7] Despite the on-going debate within the governing bodies of both schools about whether to merge, amalgamate, absorb or platoon, the facts on the ground are not contentious. Somerpos closed down and ceased to exist. The pupils and the teachers of Somerpos moved to Credo and for all intents and purposes the two schools became one under the name Credo Primary School.

[8] The first respondent submitted that as there was non-compliance with section 12A of SASA, the amalgamation was not a merger but something else. Section 12A

[2] There is no explanation on record explaining why it took the ELRC so long to process the dispute.
[3] Act 84 of 1996.

confers the power to merge two or more schools upon the approval of the provincial MEC for Education. He or she is required before the merging of the schools to give written notice to the schools and to publish a notice giving the reasons for the proposed merger in local newspapers and to invite interested parties to make representations, which he or she is then obliged to consider. None of this appears to have happened in this case. The governing bodies of the merging schools are obliged in terms of the section to meet and to constitute a single interim governing body to deal with the budgeting and practical issues of the merger. Although the two SGBs did meet, it does not seem that they were constituted as an interim governing body. However, the dispute about whether there was a merger or not is in fact a red herring. For reasons that will become apparent, the characterisation of the consolidation of the two schools is in the final analysis inconsequential to the determination of whether the appellant's conduct amounted to an unfair labour practice. Nothing turns on the categorisation of what happened. But, for what it is worth, the contemporaneous correspondence indicates that the appellant probably intended to effect a merger. If that was indeed the case, then the process was an illegal or un-procedural merger for want of compliance with the provisions of section 12A. The illegality of the merger though had no material bearing on the decision taken by the appellant in relation to the first respondent.

[9] In any event neither the legality of the merger nor the decision of the MEC is on review before us. The real issue relates to the consequences the merger (illegal or otherwise) had for the first respondent's position as principal.

[10] The minutes of a meeting between the two governing bodies held on 8 October 2000 record the following recommendation:

> 'The decision taken is that the two schools will amalgamate to form one school which will be known as Credo Public School and its principal be the hosting principal, Mr Mofokeng JM who will be deputised by Mr Msibi JP, principal of outgoing Somerpos.'

[11] On 18 October 2000, Mr HM Mthombeni, a district manager of the department, who was driving the merger process on its behalf, prepared an internal memorandum recording that the department had put three options to the SGBs of the two schools at a joint meeting of the two SGBs which took place on the same day. The SGBs

expressed a preference for platooning. The department preferred a merger and accordingly Mr Mthombeni made that recommendation. The minutes record that the "merging" of the two schools would take place on 27 November 2000, that from that date, Somerpos would no longer exist and that preparation for the 2001 academic year would be done jointly from then onwards.

[12] On 16 January 2001, Mr Mthombeni addressed a letter to Mr Msibi, the former principal of Somerpos, which read as follows:

> '1. Due to the amalgamation of Somerpos and Credo, you have been absorbed into the establishment of Credo as from 16 January 2001.
>
> 2. Since the school will be upgraded to post level 4, the Principal post will be advertised.
>
> 3. For now, as agreed at our meeting on 8 October 2000, you will be utilized as a Deputy Principal.
>
> 4. Your nature of appointment, income and conditions of service remain unchanged.'

Two aspects of this letter should be noted. First, the utilisation of Mr Msibi as deputy principal was perceived as temporary - "for now". Second, the department expressed its intention to upgrade the school to post level 4 (which was justified on the basis of the increase in the number of pupils and staff after the merger) and that, following the upgrade, the post of principal would be advertised.

[13] Three days later, in a letter dated 19 January 2001, Mr Mthombeni informed the first respondent as follows:

> 'Please be informed hereby that all educators of Somerpos have been absorbed in your school establishment. Mr Msibi will be utilised as a Deputy Principal and you will remain the principal of Credo.'

The letter did not apprise the first respondent of the intention to upgrade the school and the plan to advertise the post of principal. Nor did it specify how long he would "remain" the principal.

[14] Despite the ostensible merger of the two schools, the two SGB's continued to exist and continued to press for a platooning of the schools rather than a merger. On 26 October 2001, almost 11 months after the effective merger, the chairperson of the Credo SGB wrote to the district director of the department informing him that the SGB had made a recommendation that the first respondent, who had demonstrated good leadership, be promoted to PL4 because the number of learners at the school had increased to 1259.

[15] On 3 December 2001, the Acting Head of the department addressed a memorandum to the first respondent which stated:

> 'Approval has been granted by the Acting Head: Education on 2001-11-25 for the merger of Credo and Somerpos public primary schools subject to the following conditions:
>
> - The merged school retains the name Credo Public Primary School with EMIS no 43611174.
>
> - Somerpos School be officially closed retrospectively on 2000.12.31.
>
> - The implementation of the merger be officially recognized to have taken place on 2001-01-01.'

Subsequent minutes of the two SGBs and correspondence indicate that during 2002 there was on-going discussion among the interested parties about whether the merger should be undone and substituted with a process of platooning. That ultimately did not transpire.

[16] It is common cause that at some point between October 2002 and February 2003, the school was upgraded or re-graded to PL4 on account of the increase in learner numbers. The exact date on which this came to pass and the process whereby it occurred, if any, are uncertain. The parties though are in agreement that such did happen as is reflected in an undated letter addressed by Mr Mthombeni to the chairperson of the Credo SGB, which, having regard to the timelines mentioned in the letter, was clearly written in early 2003. It reads:

'1. On 8 October 2000 a meeting was held between the two SGBs of Credo and Ex-Somerpos Primary Schools. The following resolutions were taken by the meeting:

- To amalgamate the two Schools.

- The hosting principal to act as principal of the resultant School and the principal of ex-Somerpos to deputize.

2. The amalgamation of these two Schools resulted into an increase of the number of learners, which upgraded the School to PL4.

3. As indicated in the letters to Mr JP Msibi dated 17 January 2001 and 8 February 2001, the School will be upgraded to PL4 and the principal's post will be advertised for which he will be welcome to apply.

4. Your letter dated 26 October 2001 regarding request for the promotion to higher post level 4 refers

4.1 Due to decisions taken it was not possible to approve this request due to number 1 and 3 above.

5. Please take note that short-listing and interviews will continue as agreed at a meeting held with the SGB on Wednesday, 5 February 2003.'

[17] In January 2003, Mr Msibi, the former principal of Somerpos, who acted as deputy principal at Credo, accepted an appointment as principal at another school. The first respondent applied and was interviewed for the post of principal at the upgraded Credo, but in the end was not appointed to the position. He learnt in July 2003 that Mr Chuta, the former deputy principal at Somerpos, was appointed as principal. Although the position of the first respondent as supernumerary was not formally resolved after the appointment of the new principal, he confirmed during his testimony at the arbitration hearing that he had declined offers of the position of principal at post level PL3 at other schools and opted to stay at Credo where he was utilised to perform the functions of a deputy principal. He retained his post level as well as the salary which he earned in that post.

[18] Clause 4.8 of the pre-arbitration minute required the arbitrator to decide whether the first respondent was: i) unfairly refused promotion to a higher post on upgrading

of the school; ii) unfairly demoted from the position of principal; iii) unfairly lost remuneration and benefits; and iv) has unfairly had his status and benefits degraded. The first respondent's claim that he was victim to an unfair labour practice rested on three legs: firstly, he construed the letter of 19 January 2001 as appointing him permanently to the position of principal at Credo; secondly, he believed that he was qualified to be promoted to PL4 as he had previously been at that level for a short period; and thirdly he believed that the department was bound by the recommendation of the SGB that he should be promoted to PL4 and assume the position of principal. If these submissions are sustained, the appellant's conduct relating to his non-promotion or demotion might be construed as unfair.

[19] The ultimate resolution of the dispute depends on the interpretation and application of two instruments: Chapter B of the Personnel Administration Measures ("PAM") and ELRC Resolution 3 of 2001 - Re-grading of Institutions. The former instrument owes its provenance to the Employment of Educators Act of 1998, while the latter is a collective agreement concluded in the ELRC. The parties agree that the provisions of both are applicable and govern a situation such as the present.

[20] Resolution 3 records the purpose of the agreement as follows:

> 'The purpose of this agreement is to determine measures according to which education institutions are re-graded and what the position of such a re-graded institution is.'

[21] The agreement adopted a number of proposed provisions to be inserted into PAM to provide for the re-grading of institutions and the filling of principals' posts. Paragraph 2.7 of Chapter A of PAM was amended to provide that an institution will be upgraded to a higher grading level if in terms of two consecutive annual statistics surveys, the learner enrolment of the institution exceeds the minimum enrolment requirement of such higher grading level by at least 50 full-time equivalent learners. The head of department may re-grade the institution where sufficient evidence exists that the new enrolment level will be maintained for a reasonable period.

[22] Paragraph 2.5 of Chapter B of PAM was amended by Resolution 3 to read as follows:

'**2.5 Position of principals in cases where an institution is upgraded or downgraded**

(a) When an institution is re-graded, the post of the principal is regarded as a new and therefore vacant post that must, subject to these measures, be filled in terms of paragraph 3 without undue delay.

(b) If the permanent incumbent of a principal post that had been upgraded qualifies to be promoted to the new level and the governing body or council recommends in writing that the person may be appointed to the higher post, such appointment may be made without having to advertise the post. If the governing body or council does not make such a recommendation, the post must be advertised in which case the incumbent will be entitled to apply for the upgraded post and s/he shall be short-listed.

(c) If such a principal's application for appointment to the upgraded post is unsuccessful, he or she will be regarded as in excess as a result of operational requirements and must be dealt with in terms of paragraph 2.4.'

[23] The effect of this provision is that where an institution is re-graded, the post of principal is regarded as a new vacant post which normally must be filled by advertising the post in terms of paragraph 3 of Chapter B of PAM. This latter provision sets out the procedures for advertising, sifting, short listing, interviewing and appointment. Paragraph 2.5(b) of Chapter B of PAM permits a departure from the general requirements of advertising and engagement in a competitive appointment process. It provides that where, as in the present case, the permanent incumbent of a principal post that has been upgraded, qualifies to be promoted to the new level and the SGB or the ELRC recommends that the person be appointed to the higher post, the appointment may be made without having to advertise the post. Absent a recommendation from the SGB or the ELRC, the post must be advertised and the incumbent has a right to be automatically short-listed.

[24] When the incumbent principal is compelled to engage in a competitive interview process for an advertised post and is unsuccessful, he or she, in terms of

paragraph 2.5(c) of Chapter B of PAM, will be "regarded as in excess as a result of operational requirements and must be dealt with in terms of paragraph 2.4".

[25] The relevant part of Paragraph 2.4 of Chapter B of PAM reads:

'**2.4 Transfer of serving Educators in terms of operational requirements**

(a) Operational requirements for educational institutions are based on, but not limited to the following:

(i) change in pupil enrolment

(ii) curriculum changes within a specified educational institution

(iii) change to the grading of the specific educational institution

(iv) financial restraints

(b) These measures do not deal with the transfer of level one serving educators declared in excess in term of operational requirements linked to rationalisation to effect equity in staff provisioning. This aspect is covered by Resolution No.6 of the Education Labour Relations Council (ELRC), dealing with the procedures for rationalisation and redeployment of educators in the provisioning of educator posts.

(c) In cases referred to in paragraph (a) above the following procedure shall apply.

(i) All vacancies that arise at educational institutions must be offered to serving educators displaced as a result of operational requirements of that specific provincial education department as a first step.

(ii) All vacancies must be advertised and filled in terms of paragraph 3 (The advertising and Filling of Educator Posts). Provided that:

- every attempt is made to accommodate serving educators, displaced as a result of operational requirements, in suitable vacant posts at educational institutions or offices; and
- a provincial education department may publish a closed vacancy list. In such an event, the procedures contained in the resolution dealing with the rationalisation and deployment of educators in the provisioning of educator posts shall apply.

(iii) When a governing body exercises its functions in terms of section 20(1)(i) of the South African Schools Act 1996 and chapter 3 of the Employment of Educators Act, they must accommodate the obligations of the employer towards serving educators. The governing body must also take in account the requirements for appointment as determined by the Minister of Education and/or the requirements of the post as determined by the Head of the Provincial Education Department.

(iv) All applicants who are serving educators displaced as a result of operational requirements and who are suitable candidates for a vacant post in an educational institution or office must be shortlisted.'

[26] The first respondent at arbitration, as reflected in the referral to arbitration and in his evidence at the hearing, relied on the recommendation of the SGB made on 8 October 2000, the letter addressed to him by Mr Mthombeni on 19 January 2001 and the letter of the chairperson of the SGB of 26 October 2001, to contend that as the incumbent he had a preferential right to promotion to the post. His contention is premised upon an incorrect interpretation of paragraph 2.5(b) of Chapter B of PAM. Even assuming that the first respondent was qualified to be promoted to the upgraded principal's post for which he was short-listed and unsuccessfully interviewed (which the appellant denies), the appellant still had a discretion to advertise the post. The department is not normally obliged to accept the recommendation of the SGB. Paragraph 2.5(b) confers a choice on the department to either appoint a qualified incumbent principal or to advertise the post. It is evident from the letter to Mr Msibi in January 2001 and the undated letter of early 2003 to the SGB by Mr Mthombeni that the department always intended to advertise the post of principal after the merger and subsequent re-grading of the school. It obviously preferred to appoint the best candidate for the upgraded school.

[27] Moreover, the recommendation of the SGB of Credo pre-dated the re-grading of the school by some months and there is no evidence that a fresh recommendation was made by the joint SGBs after the school was upgraded. Paragraph 2.5(b) requires that a recommendation for the appointment of the incumbent be made in relation to a principal post "that has been upgraded". Consequently, absent a valid recommendation the department was in fact obliged to advertise the post.

[28] The arbitrator's finding that the appellant's non-promotion or demotion of the first respondent constituted an unfair labour practice was similarly based upon his

understanding of the implications of the letter of 19 January 2001 and the recommendation of the SGB. His reasoning is encapsulated in the following paragraph of his award:

> 'The applicant was informed in writing as per letter on 19 January 2001 that he would remain as the principal of Credo. The first respondent (appellant) sought to disown the letter by stating that the author had no mandate to have written it …. The first respondent has for all intents and purposes accepted the recommendation of the governing body, confirmed the appointment of the applicant as principal post level 4. It then sought to undo the acceptance and confirmation by having the post advertised.'

The arbitrator went on and asserted the principle of estoppel. He said:

> 'The respondent is thus estopped from denying that the Applicant should have been promoted to post level 4. The applicant is not sure as to whether he is the principal or not. Strangely the first respondent's witnesses have no clue as to what the applicant has been doing since 2003. The applicant himself does not know what his position in the school is …. The first respondent's conduct in promoting and demoting him is unfair. The contested post is now vacant and Msibi has been transferred. I see no reason why the applicant should not be appointed.'

[29] The arbitrator's reasoning is open to question principally because he failed to apply his mind to and ignored the relevant consideration that the appellant was entitled to regard the principal post at Credo as new and vacant, in terms of paragraph 2.5(a) of Chapter B of PAM, when the school was re-graded.[4] As just discussed, the letter of 19 January 2001 was written and the two SGB recommendations were made before the re-grading of the school and the upgrading of the post. The letter provides no basis for an entitlement for the first respondent to remain in the post after the school was re-graded. The letter cannot override Chapter B of PAM. It also makes no misrepresentation of any kind justifying an estoppel. Moreover, the letter did not promote the first respondent to PL4. He was and remains employed at PL3. The arbitrator accordingly misconceived the true issue before him by not appreciating or ignoring the relevant consideration that the re-grading resulted in the creation of a new and vacant post at a level higher than the one occupied by

[4] The first respondent has not challenged the reasonableness of the provisions of the collective agreement or PAM, nor has he alleged that they are in any way discriminatory or unconstitutional.

the first respondent. He thus did not apply his mind to the question for decision namely whether the non-promotion of the first respondent to the *newly vacant* post of principal was an unfair labour practice. This failure resulted in his not grasping the fact that the collective agreement permitted or obliged the appellant to resort to a competitive interview process, which it did, to fairly and legally appoint Mr Chuta. With that, the appellant fell into the category of employee regarded in terms of paragraph 2.5(c) of Chapter B of PAM "as in excess as a result of operational requirements". The evidence confirms that the first respondent was thereafter treated fairly in accordance with paragraph 2.4 of Chapter B of PAM. He was offered reasonable alternative placements which he declined, and was permitted to remain as *de facto* deputy principal at Credo at the same level and the same terms and conditions of employment. The fairness of the interview process selecting Mr Chuta is not in contention.

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* [5] and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*[6] have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.[7]

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny

[5] 2013 (6) SA 224 (SCA).
[6] [2014] 1 BLLR 20 (LAC).
[7] In *CUSA v Tao Ying Metal Industries and others* [2009] 1 BLLR 1 (CC) at paras 76 and 134 the Constitutional Court held that it is now axiomatic that a commissioner of the CCMA (or an arbitrator of a bargaining council) is required to apply his or her mind to the issues before him or her and that failure to do so may result in the ensuing award being reviewed and set aside. The irregularity must however result in an unreasonable outcome or misconception of the true enquiry resulting in no fair trial of the issues. See also *Sidumo and Another v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).

envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act[8] ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence.[9] Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.[10]

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result.[11] Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the

[8] Act 3 of 2000.
[9] *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) at para 12.
[10] *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) at para 76.
[11] *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) at para 21-25.

arbitrator misconceived the inquiry.[12] In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA.[13] Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.[14]

[34] In the present case, the arbitrator erred in his failure to understand the provisions of paragraph 2.5 of Chapter B of PAM, in particular the fact that the post of principal became vacant once (and only once) the school was upgraded to PL4, and that the arrangement was a legitimate product of collective bargaining consistent with the purposes of the LRA. He furthermore misunderstood that the appellant was not obliged to accept the recommendation of the SGB, which was in any event made prior to the upgrading. His failure to properly apply his mind to these issues which were material to the determination of the dispute, and then to apply the provisions

[12] Perhaps somewhat at variance with the Constitutional Court in *Tao Ying*, the SCA in *Herholdt (*para 25) was of the opinion that 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. In *Tao Ying,* the Constitutional Court seemed to take the view that a factual or legal error would be reviewable if it was material to the determination of the dispute submitted to arbitration.
[13] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at paras 49-54.
[14] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 52-78, 85-88.

of the applicable collective agreement[15] to them, led him to misconceive the nature of the inquiry and failing to address the question raised for determination in the arbitration;[16] namely whether the non-promotion of the first respondent at the end of a competitive appointment process was permitted, justified and fair in accordance with the applicable collective agreement. His point of departure was an incorrect assumption that the first respondent had a preferential right to promotion without the necessity of a competitive appointment process. The failure of the arbitrator to properly apply his mind to these issues and additionally to the material facts that on becoming supernumerary the first respondent had been offered legitimate alternatives and had not been financially prejudiced, reflected not only his failure to address the question raised for determination, but that he made a decision which no reasonable decision-maker could have made in that he wholly misconstrued the policy introduced by the collective agreement. There was in view of that no fair trial of the issues and the outcome was unreasonable. The award must consequently be set aside.

[35] The Labour Court accepted most of the reasoning of the arbitrator and incorrectly concluded that the first respondent's qualifications and the recommendation of the SGB meant that there was no need to advertise the post. For the reasons stated that conclusion is not correct and the learned judge erred accordingly.

[36] In the result, the appeal must be upheld. The appellant did not prosecute the appeal in an appropriate manner by not filing a record compliant with the provisions of the rules. For that reason it is just not to make any order as to costs.

[37] The following orders are issued:

i) The appeal is upheld

ii) The order of the Labour Court is set aside and substituted with the following order:

> 'The award of the Third Respondent in Case No 394-07/08FS dated 5 March 2010 made under the auspices of the second respondent is hereby reviewed and set aside.'

[15] Resolution 3 as incorporated into paragraph 2.5 of Chapter B of PAM.
[16] *Herholdt* at para 19; and *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 52-78, 85-88.

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JR Murphy

I agree

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Musi JA

I agree

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Kathree-Setiloane AJA

APPEARANCES:

| | |
|---|---|
| FOR THE APPELLANT: | Adv P Mokoena SC and Adv Y van Aartsen |
| | Instructed by The State Attorney |
| FOR THE FIRST RESPONDENT: | Adv W B Bank and Adv E Masombuka |
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