IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C718\00

In the matter between:

THE DEPARTMENT OF JUSTICE Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION First Respondent

WW MARITZ N.O. Second Respondent

THE PUBLIC SERVANTS ASSOCIATION Third Respondent

HS NORTIER Fourth Respondent

AA DUMINY Fifth Respondent

JUDGMENT

WAGLAY J:

[1] The Fourth and Fifth Respondents (hereafter Respondents) are both white males who are employed as Assistant State Attorneys by the Applicant - the Department of Justice - in the Office of the State Attorney in Cape Town. In 1999 and in response to an

advertisement the Respondents applied to fill two vacant positions of Senior Assistant State Attorney in Applicant's Cape Town Office. The Respondents were unsuccessful in their applications, despite being recommended by the selection committee for those positions. Instead, on the basis of the recommendation of the National Director for Human Resource Development (Hendricks), the Minister of Justice appointed a black male and a black female to the two positions.

[2] The Respondents, alleging that Applicant's actions in not appointing them amounted to an unfair labour practice regarding their promotions, referred the matter to the Commission for Conciliation, Mediation and Arbitration ("*the CCMA*") - the First Respondent herein. The Applicant objected to the CCMA's jurisdiction to arbitrate the dispute on the grounds that the real dispute between the parties was one of discrimination and not promotion, and therefore had to be adjudicated by this Court. The Applicant, as an alternative to the above argument, defended its action on the basis of affirmative action. The CCMA determined the dispute finding for the Respondents on the grounds that Applicant's action amounted to an unfair labour practice relating to the Respondents' promotion and made an award directing the Applicant to ensure that the Respondents were afforded protective promotion and that should either of the Respondents be promoted, compensation was to be paid to such Respondent from 1 May 1999 to the date on which he was so appointed.

[3] The Applicant now seeks to review and set aside the award on the following grounds:

- That the decision of the Commissioner - sitting as an arbitrator (Second Respondent) -

amounted to a gross irregularity with regard to the conduct of the proceedings;

- That the CCMA did not have jurisdiction to determine the alleged dispute as the alleged dispute did not relate to "*promotion*" but rather related to an "*appointment*" and therefore beyond the ambit of the residual unfair labour practice on which Respondents relied; and

- That the CCMA did not have jurisdiction to determine the alleged dispute as the alleged dispute pertained to an alleged unfair discrimination: the Labour Court was thus the appropriate forum to hear the alleged dispute.

[4] The Labour Relations Act, 66 of 1995 ("*LRA*") works from the stating point that arbitration awards of the CCMA are final and binding on the parties to the award and, although there is no provision for appeal, section 145 of the LRA sets out the grounds upon which a CCMA award may be reviewed by the Labour Court. Broadly, an award may only be reviewed where the Commissioner:

- committed some form of misconduct in relation to his/her duties;
- committed a gross irregularity in the conduct of the arbitration proceedings; or
- exceeded his/her powers.

Awards may also be reviewed and set aside if it is established that it was improperly obtained.

[5] In addition to the grounds set out above, there is a further ground based on the constitutionally entrenched right to fair administrative action. This ground is set out in the matter of Carephone v Marcus & Others [1998] 4 BLLR 1093 (LAC). The constitutionally entrenched right to fair administrative action as a grounds for review had caused some controversy but has now finally been resolved by the Labour Appeal Court in the matter of Shoprite Checkers v Ramdaw & Others, (unreported case no: DA12/00). The position that presently obtains is therefore that in addition to the grounds for review set out in the Act, an arbitration award may be reviewed and set aside if there is no "*rationally objective basis justifying the connection made by the* [Commissioner sitting as an arbitrator] *between the material properly available to him or her and the conclusion he or she eventually arrived at.*" Although I have said that this is an additional ground, it is not necessarily so as a decision by an arbitrator, if it is not justifiable in relation to the evidence presented to him or her, may also be reviewable on the ground that, in arriving at the decision that he or she did, the arbitrator committed a gross irregularity.

[6] Dealing with the issue of gross irregularity as a grounds for review, the rule against gross irregularity goes in essence to the integrity of the hearing. The test is that the conduct of the Commissioner in question must be so grossly irregular that it can be said that there was no proper hearing. Although Section 145(2) of the LRA suggests gross irregularity as applying to the process itself, it includes to a limited extent an enquiry into the merits of the dispute. For example, where the CCMA misconstrued its jurisdiction or as stated earlier where the Commissioner made a finding that was not justifiable in relation to the evidence presented at the hearing. In the matter of Toyota South Africa v Radebe, [2000] 3 BLLR

243 [LAC] the Court held that where there is evidence of gross discrepancy in reasoning and outcome, or some other gross flaw in the approach of the Commissioner, the decision may be reviewed.

[7] Pep Stores v Laka, [1998] 9 BLLR 952 (LC) captured the essence of this Court's power to review in finding that:

"*... The grounds mentioned in section 145* [of the LRA are] *not limited to procedural defects. In enquiring whether an award was 'appropriate' and, the main concern was whether there had been a failure of justice. There would be a failure of justice where a Commissioner ignored evidence that had been placed before him, relied on evidence that was not placed before him, or committed a serious error of law. Where a commissioner had considered all the facts and applied relevant legal principles, his award was not reviewable simply because the Court would have come to a different conclusion.*" (See editorial summary at page 952 I - J).

[8] In this matter, it is also relevant to consider whether not the Commissioner exceeded his powers since the Applicant has alleged that the Commissioner has misconceived his jurisdiction. An award may be set aside as a result of a material error of law by the Commissioner, or a failure to properly characterise the nature of the dispute before the CCMA. The latter entails an enquiry into the exercise of the Commissioner's powers as a whole, and not merely a review of the Commissioner's own decision on jurisdiction. Under certain circumstances, an incorrect determination of jurisdiction by a Commissioner may constitute a gross procedural irregularity as well as an excess of power. Where a

Commissioner misconstrues jurisdiction in the sense that the CCMA does not have jurisdiction to hear a particular matter, this will amount to an excess of power. In such a case it is not the Commissioner's determination on jurisdiction itself that it under review, but the fact that the Commissioner exceeded his statutory power in the making of the award on the matters concerned.

[9] The Commissioner may also misconstrue his or her jurisdiction as a result of failing to properly characterise the nature of the dispute before him or her. The LRA has divided functions between the CCMA and the Labour Court on the basis of the nature of the dispute. The reasoning behind this division must be seen in the broader context of reforms to labour market regulation during the 1990's. In Queenstown Fuel Distributors CC v Labuschagne, [2000] 1 BLLR 45 (LAC) at page 51, paragraph [18] the Court said the following:

"*The Act was introduced to, inter alia, fundamentally reform earlier dispute resolution procedures. These were cumbersome and expensive. In theory an individual dismissal could go through a disciplinary enquiry, an internal appeal hearing, a full rehearing before the Industrial Court, an appeal to the Labour Appeal Court and, finally, an appeal to the Appellate Division of the Supreme Court. The idea of labour law reforms was to take most of the (less important) individual dismissals out of the courts altogether and to entrust their resolution to quasi-judicial bodies which could deal with them swiftly and relatively informally. The more socially disruptive - and potentially explosive - dismissals, such as dismissals arising from strike action or for operational reasons, were left to the Court to*

resolve. So were individual dismissals considered to be automatically unfair (sec. 187). They involve sensitive issues like discrimination and victimisation. Not only were the less contentious dismissals dedicated to less important fora, but the right to have the decisions of those fora adjusted by a superior tribunal was severely curtailed."

(Although the above passage relates to dismissals, the same can be said for the distinction between unfair labour practice and discrimination disputes).

[10] In most cases, it is relatively simple to determine which forum has jurisdiction. However, there are instances where the distinction may be confusing and seem to overlap. An example is the area of alleged unfair dismissals. In terms of Section 191(5)(a), the CCMA must arbitrate a dispute where the employee alleges that the apparent reason for his dismissal pertains to misconduct, incapacity, constructive dismissal, or where the employee does not know the reason for the dismissal. In terms of Section 191(5)(b), the Labour Court has jurisdiction where the employee alleges that his dismissal was automatically unfair as provided in Section 187 of the LRA or based on the employer's operational requirements, or the employee's participation in an unprotected strike or a dispute relating to a closed shop agreement. It is apparent that the distinction between these respective reasons for dismissal may be blurred and that two case classes may overlap. Is the jurisdiction of the CCMA or Labour Court then determined by what is alleged by the Applicant to be the dispute or by them determining what is the actual dispute?

[11] In Future Mining v CCMA & Others, [1998] 11 BLLR 1127 (LC), it was suggested that the onus is on the CCMA Commissioner to establish the "*real issue*" in dispute when determining jurisdiction. The *ipse dixit* of the Applicant would not suffice to confer jurisdiction on the CCMA; rather, the Commissioner should establish the validity of the reasons given for the alleged unfair dismissal. In NEHAWU v Pressing Metal Industries, [1998] 10 BLLR 1435 (LC), however, the Court held that on a correct reading of Section 191(5) of the LRA, it was the employee's application which was decisive and not the allegations of the employer. In Van Heerden v Spes Bona Financial Administrators (1999) 20 ILJ 2127 (LC) the Court held that the jurisdiction of the Court to adjudicate a dispute is derived from the manner in which the employee frames his or her dispute when there is no agreement between the parties to the dispute.

[12] The question of overlap of the CCMA's jurisdiction with that of the Labour Court was raised in a different context in Berman Katz Attorneys v Brand, [2001] 2 BLLR 125 (LC). This matter concerned a review concerning jurisdiction on the grounds that the CCMA Commissioner, in deciding a matter arising from Section 41(6) of the Basic Conditions of Employment act, No 75 of 1997 ("*BCEA"*) had considered matters beyond the jurisdiction of the CCMA. This argument was rejected on the basis that the matters beyond the Commissioner's jurisdiction were incidental in nature:

"*... It is correct that, in order to decide a dispute about severance pay, the Commissioner was obliged to consider other provisions of the BCEA, Section 197 of the LRA and the law of partnership but this was entirely incidental to deciding the core dispute. The fact that*

incidental matters need to be decided does not detract from the fact that the central dispute was about severance pay. I am satisfied that the Commissioner had jurisdiction to arbitrate the dispute which was presented to him." (At page 130, paragraph 21)

[13] The Labour Appeal Court in SACCAWU v Afrox Ltd, [1999] BLLR 1005 (LAC) applied the two fold approach to causation to determine whether a protected strike was the main reason for the dismissal of workers or whether the main reason was operational requirements, as alleged by the employer. This approach dictates that the first enquiry is whether the alleged conduct or state of affairs was in fact a cause without which the resultant harm or complaint could not have arisen. If factual causation is satisfied, the second question then arises which is whether this factual cause was also the "*main*", "*dominant*", "*proximate*" or "*most likely*" cause of the complaint in question.

[14] From the above it seems to me that the following principles are applicable in situations where two possible causes of action are present, and each would lead to a different forum having jurisdiction:

- The Applicant is the master of the dispute and has the right to choose the cause of action and grounds upon which it relies;

- The Commissioner must determine what the main issue to be decided is and whether the matter is one to be determined by arbitration in the CCMA. Although the *ipsa dixit* of the Applicant may be the decisive factor where the wording of the statute is clear on this point,

the Commissioner may, in certain circumstances, be required to look at the objective situation to determine what the "*real issue*" before the CCMA is.

- The mere presence of issues that usually fall to be determined by the Labour Court does not automatically preclude the CCMA jurisdiction. The CCMA may be required to decide issues usually reserved for the Labour Court where it is peripheral or incidental to the main dispute before it.

- Where there are elements of both classes of dispute, that is those that fall to be determined by the Labour Court and those over which the CCMA has jurisdiction, jurisdiction will be determined with reference to the usual twofold test for causation (factual and legal causation).

- In determining the extent of the CCMA's jurisdiction, the wording of the empowering statutes should be given effect to.

[15] The legislature has established a division of issues between arbitration in the CCMA and adjudication in the Labour Court. The conceptual basis of this division is to allow relatively low key, every day disputes to be resolved swiftly and informally through the CCMA, while potentially more complex disputes grounded on broader, social issues and collective rights are reserved for the Labour Court's adjudication. However, the split of functions in the LRA and other legislation is not absolute. In the interests of efficiency and swift resolution of disputes envisaged by the legislation, it is necessary that the CCMA has the authority to

determine peripheral issues which affect the determination of the main issue before it. Therefore, where the CCMA has found on a matter falling within its jurisdiction, and this core matter stands alone without the necessary implications that the real / objective basis for the determination is a distinct matter that falls under Labour Court jurisdiction, the award is not reviewable. Review is only possible on this ground where the CCMA has in fact ruled on a peripheral matter within its jurisdiction and the core issue is one which must be heard by the Labour Court.

[16] The extent of the Court's enquiry in cases of overlap as stated above, or allegations of non-jurisdiction, is in accordance with the normal review standards, and not those of appeal. The Court should not substitute its own opinion for that of the Commissioner, who is in the best position to determine the matter. As the claim against jurisdiction falls under the review ground of excess of power, the test should be that the Commissioner has come to a conclusion that cannot be justified on the evidence. The sources upon which the Court will rely will primarily be the claim of the Applicant, the allegations of the Respondent, the reasoning of the Commissioner and other relevant factors.

[17] Turning then to the application before me, the Applicant's ground of attack on the award pertains to jurisdiction of the CCMA to hear the matter before it. Two arguments are forwarded in this respect:

- Since the advertised posts in question were appointments, in the sense of new posts to be filled, and not promotions as was contended by the Respondents, the issue to be determined could not fall under item 2(1)(b) of Schedule 7 of the LRA.

- The matter to be determine was a case of alleged unfair discrimination, and not residual unfair labour practice concerning the unfair failure to promote the Respondents. The matter should thus have been referred to the Labour Court for jurisdiction in terms of Schedule 7, item 3(4)(a).

[18] Item 2(1)(b) of Schedule 7 of the LRA states:

"*For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving the unfair conduct of the employer relating to the promotion, demotion or training of an employee ...*"

[19] The Applicant contended that the positions to which the Respondents sought promotion were advertised externally and that the Minister used the word "*appointment*" and not "*promotion*". In other words that since the Respondents had to apply for the positions and attend interviews etc, the issue was not their promotion but rather their appointment.

[20] Counsel for the Respondents argued that the appointments in question clearly amounted to a promotion for the Respondents. The fact that the positions were advertised externally as well as internally does not so they contended, detract from the fact that the appointments were clearly promotions from their (the Respondents') point of view, which is the only point of view that is relevant. Further, Respondents continue, an analysis of the relevant case law indicates that there are two requirements which distinguish appointments from promotion, namely:

- that there must be an existing relationship between the applicant / employee;

- that there must be some advancement, elevation in rank or rise in status. This entails a comparison between the applicant / employee's current job and the job to which the applicant / employee has applied, including an examination of whether the position of the applicant / employee will improve as regards status, powers, salary, benefits and responsibilities.

[21] Counsel for the Respondents concluded that since the above requirements were clearly met in this instance, the matter under consideration indeed amounted to a promotion.

[22] The Applicant does not dispute the fact that the Respondents satisfy the first requirement, that is that the Respondents were existing employees of the organisation in which the positions were to be filled arose. Nor does the Applicant contest that the position would amount to an advancement in rank, benefits, status and responsibility. The objection of the Applicant stems from the fact that the positions could have been filled by outsiders and hence it is illogical to speak of the position as being promotional posts. This objection is well founded. I cannot accept Respondents' suggestion that in respect of certain candidates an advertised position constitutes a promotion and in respect of others an appointment.

[23] While the Applicant did not dispute that the posts constituted promotion of the

Respondents, it contended that the matter before the CCMA was really one of discrimination and therefore the CCMA did not have jurisdiction to decide the matter. It argued that the cause of action before the CCMA was not an unfair labour practice but rather a case of alleged unfair discrimination. This was so because, it continued, that the decision giving rise to the proceedings in the CCMA was that taken by Hendricks (see paragraph 1 *supra*). Hendricks was responsible for the decision to reject the recommendation of the selection committee, and to recommend two appointees who would further the aims of representativity of the Department of Justice. The Applicant's argument can be put thus:

- The real issue before the CCMA arose from the decision of Hendricks which led to the rejection of the Respondents in favour of two appointees who would further representativity in the Department of Justice in general and the State Attorney's office in Cape Town in particular.

- Hendricks' recommendation was clearly based on the need to promote representativity or, to be blunt: the Respondents were rejected because they were white males.

- Accordingly, the real issue at hand was that the Respondents had allegedly been discriminated against on the basis of race and/or gender. Whatever the Respondents may say, the real or core issue is one of alleged unfair discrimination.

- The matter therefore fell to be determined by the Labour Court in terms of item 3(4)(a) of

Schedule 7 of the LRA.

[24] Counsel for the Respondents argued that there was no complaint that the Respondents had been unfairly discriminated against on an arbitrary ground such as their race. Rather, the Respondents complained that the Applicant had treated them unfairly in not promoting them. The complaint is related to the process surrounding the Respondents' non-promotion, and not the merits of the employment policies of the employer. The Respondents contended that the Applicant had acted in conflict with its own policies and that it had not followed proper procedure prior to making a decision not to promote. While the basis of this unfairness is the decision taken by Hendricks, the Respondents submit that it is not the stated reason given by Hendricks for his decision (transformation and representativity), but rather the unfairness inherent in the manner in which Hendricks exercised his powers that rendered the process as a whole unfair.

[25] If the test for causation is applied, the discriminatory element of the claim was the *sine qua non* the dispute that had arisen between the parties. Factual causation is thus satisfied. With regard to the question of legal causation, the question before the Court is then: what was the real basis or cause of the Respondent's claim? Or, is this a matter of promotion or discrimination? As dealt with above, the mere presence of elements of discrimination will not take the matter beyond the realm of the CCMA jurisdiction. This Court is concerned with the core or main issue alone. On the reasoning of the Respondents, the claim for an unfair labour practice stands alone independently of the issue of discrimination. The allegation is that the Respondents were treated unfairly through the process as whole, and not that they were unfairly discriminated against by their employer. It may be conceded,

Respondents say, that the ostensible reason for Hendricks' decision was rooted on differentiation on the basis of race and/or gender however, this element of discrimination is not central to respondents claim of unfair treatment at the hands of the employer. Rather to the extent that it is raised at all by the Respondents it is purely peripheral to their case.

[26] Thus, the *ipse dixit* of the Respondents is explicit: the claim is based on an unfair labour practice relating to promotion and not on unfair discrimination. This is an important consideration as the Respondents were the masters of the case before the CCMA and thus had the prerogative to base their action on grounds of their choosing. It is not for the employer to determine what the employee's cause of action should be, nor for that matter to dictate in which forum the case should be heard. Nevertheless the *ipse dixit* of the Respondents is not the only factor to be considered by the Court in determining the central issue before the CCMA. If it is found that the real issue before the CCMA was unfair discrimination, then the Court should find for the Applicant on its jurisdictional point.

[27] The question therefore is whether the Commissioner went beyond the cause of action relied upon by the Respondents and in fact found for them on the basis of unfair discrimination. It is clear from the arbitration award that the Commissioner was aware of the issue to be determined by him, namely that the matter concerned an alleged unfair labour practice regarding the non-promotion of the Respondents and that he was not to consider any claim for unfair discrimination. The question nevertheless remained, however: did the Commissioner in fact decide the matter on the basis of unfair discrimination? The Commissioner found that the failure to appoint the Respondents

amounted to an unfair labour practice relating to their promotion for the following reasons:

- Based on the selection committee's report and the evidence led in proceedings, that as an objective fact neither of the appointees were qualified to be appointed as Senior Assistant State Attorneys because, at the very least, they lacked the minimum experience to be able to fulfil the functions of the job at the time of their appointment.

- On the evidence led before him that Hendricks would not have made the recommendation he did had he been remotely aware of what would be required of the candidate. It should have been clear to Hendricks that the candidates would not be able to do the job after a reading of their work experience.

- That Hendricks, through being "*summarily dismissive*" of the report of the selection committee was "*at lowest ... arbitrary and unreasonable in his decision*".

- Hendricks was, at the very least, grossly negligent in not making further enquiries in the situation which begged of further investigation of the deviant committee decision before reconsidering it.
- Hendricks' recommendation addressed only the question of racial imbalance and failed to provide a balanced view to enable the Minister to exercise his discretion.

[28] While it is not for this Court to replace its opinion with that of the Commissioner, it is permissible to establish whether the Commissioner exceeded his powers by finding (expressly or impliedly) on a basis which goes beyond the jurisdiction of the CCMA.

[29] From the Commissioner's reasoning it is clear that the main issue before him was that of the unfair process in relation to Respondents' promotion. To the extent that matters of discrimination were raised they were clearly incidental to the main issue of promotion. The factual situation giving rise to the proceedings in the CCMA clearly did have the makings of a case of alleged unfair discrimination. Two white males were found to be the most suitable candidates for the positions advertised by the employer's own selection committee, but were rejected in favour of two black candidates, one male and one female. However, the Respondents elected to attack the action of the employer on the basis of an unfair labour practice relating to their promotion: this was their prerogative and the CCMA was obliged to hear the matter within those parameters. On the evidence led before the CCMA the Commissioner found for the Respondents not on the basis of unfair discrimination but as appears from the reasons recorded above, because the process by which the promotion had been denied was unfair and amounted to an unfair labour practice. On an application of the test for causation, while the affirmative action policy and the need for transformation was a factual cause without which the Respondents' claim would not have arisen, the discriminatory aspects of the dispute cannot, relying on the basis of Respondents' claim, be said to be the core cause of the dispute before the Commissioner.

[30] Having found that the Commissioner's decision that the dispute was one of promotion, the further question that arises is was his finding that the Respondents were victims of an unfair labour practice rationally connected to the evidence presented at the arbitration?

The Commissioner found that neither of the appointees were suited for the appointment in question. He says:

"*... I am satisfied that neither* [of the appointees] *could cope with the job at the time of their appointment. I therefore find that as an objective fact that they were not suitable for appointment. I find that, that is the interpretation to be given to the unanimous recommendation of the committee.*"

This finding forms an essential premise in the ultimate conclusion of the Commissioner that the Respondents were the victims of an unfair labour practice. Indeed, had the appointees been suitable for the position, the Commissioner could not have held that the decision and recommendation of Hendricks amounted to unfair conduct, a finding on which the Commissioner's award ultimately turned. The Commissioner essentially held that since the appointees were unsuitable for the job, Hendricks' recommendation that they be appointed amounted to gross negligence, misleading the Minister and rendering the process unfair.

[31] However, as the enquiry related to the fairness of the Respondents' non-promotion, the question is not whether objectively speaking the appointees were unsuitable but rather whether Hendricks' recommendation was unfair under the circumstances. The role of the Commissioner is not to enter the merits of the appointment but rather assess the process that was followed. The Commissioner acknowledges this in his award as follows:

"*It is trite law that under item 2(1)(b)* [of Schedule 7 of the LRA] *the CCMA will not concern itself with querying the merits relating to the choice of candidates. It will, however, concern itself with the fairness - of whatever nature - relating to the process.*"

[32] Therefore, although the Commissioner held that, as an objective fact, the appointees were not suitable for the post, it is the finding that "*is the interpretation to be given to the unanimous recommendation of the committee*" (see paragraph 29 above) that is relevant. As a matter of process, the conduct of Hendricks in recommending the two appointees will be unfair if, and only if, it was or ought reasonably to have been clear to him from the information before him that the two appointees he was recommending were not capable of doing the job. The Commissioner held that Hendricks should have been aware that the appointees were unsuitable and acted unfairly and unreasonably.

[33] The information before Hendricks was chiefly the report of the selection committee and the applications of the short-listed candidates. For the Commissioner's decision to satisfy the rationality test it must have been (or ought reasonably to have been) clear to Hendricks from the information that the appointees were not suitable candidates for the job.

[34] The report of the selection committee sets out the requirements for eligibility for appointment to the advertised post and records the suitability of appointees who meet these requirements, while the selection committee in the report make various comments about the two appointees, its final recommendation in respect of the two appointees is that neither of them were the "*most suitable candidate for appointment*", whilst it held that the

Respondents herein were the most suitable candidates for the appointment.

[35] Despite there being ambiguity in the recommendations of the committee, a reading of the report as a whole cannot sustain the Commissioner's conclusion that Hendricks should have realised that the two appointees were not suitable for the job. Hendricks was not obliged to agree with the recommendation of the selection committee. Further, the committee's recommendations refer to the outcome or conclusion of the committee relative to the other candidates based on the performance areas assessed. Based on the information before Hendricks at the time of the recommendation, including the vital fact that the recommendation of the committee did not promote representativity, it is not clear how he should (or could reasonably) have been certain that the two appointees were not suitable at all for the post.

[36] In addition, the Commissioner overlooks the fact that the decision is made in the context of affirmative action. As Hendricks' overriding consideration was representativity, even if he felt that the report of the selection committee was unclear to the suitability of the appointees, he could nevertheless have deemed them to be suitable on the basis that they met the minimum criteria set by the Applicant for the post. The Commissioner's failure to take this into account increases doubt as to whether there is a rationally objective basis justifying the connection made by him between the material properly before him and the conclusion he eventually arrived at.

[37] The Commissioner further found that Hendricks was "*grossly negligent in not making*

further enquiries" to the selection committee. The procedures followed by the Department do not demand that further enquiries be made. The procedure was followed correctly. Both Hendricks' recommendation and that of the selection committee were placed before the Minister. Once it is established that Hendricks was not unreasonable in assuming that the two appointees were suitable for the post, his failure to make further enquiries cannot be held to amount to unfairness. Such a conclusion is not justifiable in relation to the evidence nor the reasons given by the Commissioner.

[38] The Commissioner's findings therefore that Hendricks should reasonably have been aware that the two appointees were not suitable or capable of performing the job is not justifiable on the evidence, nor on the reasons given. Since it was the "*unfair conduct*" of Hendricks that essentially leads to a finding of an unfair labour practice in the CCMA, the decision must be set aside for its failure to meet the rationality requirement as set out in the case of Carephone (*supra*) and confirmed in Ramdaw (*supra*).

[39] A further issue of some concern, and not pursued before me, was the award itself. The award made by the Commissioner was the following:

"*...*

2. The Applicants, Nortier and Duminy, should have been appointed and so promoted to the post of Senior Assistant State Attorney with effect from 1 May 1999, and the Respondent is accordingly ***directed to act in terms of its policy and procedure to ensure that the Applicants are afforded protective promotion to that post level from that date.*** [Emphasis added]

3. Should the Respondent elect to promote one or both of them into any presently vacant position on that post level then compensation is to be payable to such Applicant to reflect the loss in his remuneration from the date on which he should have been so appointed to the date on which he is so appointed. "

[40] Protective promotion is a form of promotion set out in terms of the Public Service Staff Code. Part B/VI/III, item 9 of these procedures state that:

"*(1) Protective promotions are effected on the recommendation of a* [public service or provincial service] *commission to protect the position of officers or employees* -

...

(d) who are found to have been prejudiced in the filling of a promotional post after such post has been filled. "

Protective promotion, in this context, essentially amounts to an undertaking by the employer to promote the employee, who is nevertheless retained in the post of lower grading pending a post of suitable grading becoming available.

[41] The recommendation to grant an employee protective promotion may only be made if the commission:

"*Without any doubt establishes that the officer or employee concerned is indeed the most*

suitable candidate for the particular promotional post. Only one candidate can be the most suitable candidate at any specific moment and the protective promotion of only one candidate can be considered at a time ..." (Part III, Item 9(3)(a) of the Staff Code).

[42] Where a recommendation of protective promotion has been made, continued employment at the lower graded post shall not exceed 12 months. Should a suitable post become vacant and not be filled by the employee concerned, the Department must provide comprehensive reasons along with its request for an advertisement for that post. Continued employment at the lower graded post may only be extended under special circumstances. (Part III, Item 4(a)(b) and (c)).

[43] It is therefore clear that protective promotion only takes place under certain controlled circumstances, and that exceptional provisions and conditions apply to its operation. The Applicant is not entitled to make the decision to afford an employee protective promotion of its own accord. The function lies with the Public Service Commission ("*PSC*"), which may only exercise this power once it has established beyond doubt that "*the officer or employee concerned is indeed the most suitable candidate for the particular promotional post*".

[44] In the present matter, the PSC was not joined as a party to the proceedings. Counsel for the Respondents (Applicants at the arbitration) recognised this when he argued before the CCMA that the Commissioner should direct the Applicant (the Respondent in that matter) to make an appropriate application to the PSC, along with a recommendation that

protective promotion be granted. Under the circumstances, this was the only real option available to the Respondents. As the appointees were not joined as parties, their appointments could not be prejudiced, as the PSC was not joined the Commissioner did not have the power to order or to recommend protective promotion.

[45] A similar question arose before the CCMA in the matter of PSA obo Dalton & Another v The Department of Public Works, [1998] 9 BLLR 1177 (CCMA). In that matter Commissioner Grogan held as follows:

"*In my view the only reasonable determination I can make in the circumstances is to order the employer to reinterview the applicants with a view to considering whether they are worthy of protective promotion in terms of clause 9 of the Code. The problem, however, is that such promotions can only be made on the recommendation of the Public Service Commission. I cannot make an order binding on any such Commission as none was joined in this application. The most I can do, therefore, is to order the employer to refer the matter to the relevant Commission with the request that Messrs Bradfield and Dalton be considered for protective promotion. A copy of this award must also be furnished to the said Commission....*" [Emphasis added]

[46] The Commissioner's powers in this matter are derived from Schedule 7, Item 4(2) of the LRA. In terms of this, the arbitrator must determine the dispute "*on reasonable terms*". Counsel for the Applicant argued that it would not be reasonable for the Commissioner to effectively appoint the Respondents to the post as this would amount to sabotaging the

entire process and policy followed by the Applicant. The Commissioner nonetheless directed the Applicant in the matter "*to act in terms of its policy and procedures to ensure that the* [Respondents] *are afforded protective promotion to that post level from that date*". From the above it is clear that only the PSC has the power to make the recommendation of protective promotion and the PSC may only make such a recommendation where it is satisfied beyond doubt that the employee concerned is the most suitable candidate for the job. The effect of the award as it stands is that the PSC has become a part of the relief awarded by the Commissioner, without it being party to the arbitration. This amounts to both a procedural irregularity and an excess of the Commissioner's powers.

[47] In addition, it is clear that the award handed down by the Commissioner cannot be reasonable under the circumstances. At best, it is inappropriate and unreasonable to usurp the entire selection process and effectively invoke the unorthodox procedure of protective promotion, drawing an external body (the PSC) into the fray. At worse, performance of the award is impossible as the Applicant cannot "*ensure*" that the Respondents are granted protective promotion. Only the PSC can make such a recommendation under specified conditions.

[48] The Commissioner cannot, therefore, be said to have acted within his powers in making such an order and therefore failed to determine the matter on reasonable terms as defined in the LRA. The Commissioner has exceeded his powers and the award should accordingly be set aside on this basis as well.

[49] I also feel obliged to make certain comments with regard to the application as sought by the Respondents at the CCMA. Where persons in the position of the Respondents are aware that their employer is seeking to fill positions which to them constitute promotional posts by inviting applicants from outside - or those to whom the post is not one of promotion - and these persons , like , Respondents, apply for such posts and participate in the process with regard to selection by consciously competing with outsiders without raising any protest, can they then on the completion of the process and not being awarded the post, claim that failure by the employer to offer them the post amounts to an unfair labour practice relating to their promotion? I believe not.

[50] It was the Respondent's case at the CCMA that since the post to which they had applied and were unsuccessful in securing amounted to a promotion for them, the failure by the Applicant to appoint them to that post constituted an unfair labour practice relating to their promotion. If such an argument is to be accepted, then I fail to see why the Applicant had bothered to advertise the post, and more importantly why the Respondents had bothered to take the trouble of applying for the post and participate in the process at all. The Respondents clearly sought (to use the cliche) "*to have their cake and eat it*". They happily participated in the process in the hope of securing the appointments. Once they failed to secure the position, then claimed that they should have been promoted. Had the Respondents honestly believed, from the outset, that they were entitled to the positions as promotional posts, why did they not, instead of applying for the positions, seek to stop the Applicant from proceeding to seek applicants for whom the vacant position would not be a promotional one within the Applicant's enterprise. To come after participating in the

process and failing to secure the post, I believe does not entitle them to any relief.

[51] In any event, and for reasons stated earlier (other than stated in paragraphs 49 to 50 above), the Applicant succeeds in the application. With regard to costs, I see no reason why costs should not follow the result in this matter as against the third respondent who was the only party that opposed the application.

[52] In the result, I make the following order:

(a) The award handed down by the Second Respondent under the auspices of the First Respondent is hereby reviewed and set aside and substituted with the following:

"*The employee party's referral is dismissed.*"

(b) Third Respondent is to pay the costs of this application.

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WAGLAY J

Advocate Soni SC instructed by the State Attorney, Durban

t: Advocate R Stelzner, instructed by De Klerks Attorneys

7 September 2001