THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: P 614 / 11

In the matter between:

ESKOM HOLDINGS SOC LTD	**Applicant**
and	
NUM obo GWANA KYAYA AND 6 OTHERS	**First Respondent**
COMMISSIONER A MARE N.O.	**Second Respondent**
COMMISSIONER E MQUQO N.O.	**Third Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Fourth Respondent**

Heard: **12 October 2016**

Delivered: **2 May 2017**

Summary: **CCMA arbitration proceedings – review of arbitration award and jurisdictional ruling – test for review – s 145 of LRA 1995 – principles considered – reasonable outcome and right or wrong approach applied**

Unfair labour practice – applicable date when dispute arose for the purposes of Section 191(1) of the LRA – consideration of issue by arbitrator – in imine ruling incorrect – dispute referred out of time and condonation required

Certificate of failure to settle – effect of certificate considered – certificate having no legal effect – condonation still required

Unfair labour practice – grading of position – nature of dispute considered – issue about application of grading – rights dispute – unfair labour practice proceedings competent

Unfair labour practice – promotion and grading – principles considered and applied – no unfair practice exists – arbitrator misconstruing legal principles

Review application – consideration of evidence by arbitrator – arbitrator failing to consider evidence rationally and reasonably – award not sustainable based on proper evidence

Review application – proper case made out for review – arbitration awards reviewed and set aside

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This is once again one of those matters with a long and chequered history. The dispute arose from a contention by the individual first respondents (referred to in this judgment collectively as 'the individual respondents') that the applicant had committed an unfair labour practice in not promoting them pursuant to a regrading of their positions. The dispute was referred to the CCMA (the fourth respondent) as far back as 1 March 2011, and came before this Court on 6 August 2013 in respect of a ruling on a preliminary jurisdictional issue made in the CCMA, dismissing the case of the individual respondents. Lallie J made an order on 15 October 2014 in terms of which the matter was remitted back to the CCMA, for determination whether the dispute

was referred to the CCMA out of time in the first instance, and whether the CCMA had jurisdiction to entertain the dispute.

[2] Pursuant to this order by Lallie J, the matter came before the second respondent as arbitrator, in East London, on 26 January 2015. The second respondent was called on to decide whether the unfair labour practice dispute had been referred to the CCMA in time, and whether the CCMA had jurisdiction to consider the dispute, considering its true nature. In an award dated 10 February 2015, the second respondent answered the issue whether the dispute was referred to the CCMA in time in the affirmative, and directed that the dispute be set down for arbitration, without condonation being required. The second respondent further directed that the true nature of the dispute be decided at the arbitration proceedings on the merits.

[3] The next arbitration proceedings then convened before the third respondent, also in East London, on 13 August and 21 and 22 September 2015. In an arbitration award dated 12 October 2015, the third respondent determined that the dispute indeed concerned an unfair labour practice relating to promotion, and then proceeded to decide the merits of the dispute in favour of the individual respondents. The third respondent determined that the applicant committed an unfair labour practice by failing to promote the individual respondents to grade T12 (save for two of them that already occupied the grade), and that they be appointed to such promoted positions. The third respondent also decided that the individual respondents be paid the difference in salary based on that change in grade back dated to 1 January 2015.

[4] The applicant was dissatisfied with both the *in limine* determination of the second respondent and then the ultimate arbitration award of the third respondent, both awards now forming the subject matter of the review application brought by the applicant. 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').

[1] Act 66 of 1995.

[5] The applicant's review application was filed in Court on 9 December 2015. Considering that the second respondent's award was handed down on 10 February 2015, and the third respondent's award was received by the applicant on 12 October 2015, there is an issue as to whether the review application has been brought in time. Where it comes to the *in limine* ruling of the second respondent, Section 158(1B)[2] comes into play, and it was thus appropriate for the applicant to have waited to first complete arbitration on the merits, before seeking to review such ruling. Accordingly, the appropriate date from which the 6(six) weeks' time limit under Section 145(1)(a) would apply is when the applicant received the arbitration award containing the outcome on the merits, which was on 12 October 2015. Therefore, the review application has been brought 15(fifteen) days out of time. The applicant, as part of its review application, sought to apply for condonation for the late filing of the review application, which condonation application remained unopposed. When the matter came before me, condonation was equally not placed in issue by the first respondents. The delay is minimal, and the explanation provided for it in the condonation application acceptable. Condonation is accordingly granted for the late filing of the review application.

[6] I will now proceed to consider the applicant's review application, starting with the setting out of the facts relevant to deciding all the grounds of review raised by the applicant in its review application, in respect of both the *in limine* ruling and the award on the merits.

The relevant background

[7] The originating cause giving rise to this dispute in effect arose on 1 December 2007, when the applicant implemented a new job evaluation and grading process, with the agreement of the majority unions in the applicant (which includes NUM). This process came about as a result of the applicant replacing its Patterson grading system with the TASK grading system, effective 1 December 2007.

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[2] The Section reads: 'The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.'

[8] The applicant sought to involve the representative trade unions in the implementation of this grading process, long before the ultimate implementation date of 1 December 2007. Negotiations were conducted in the central bargaining forum in place at the applicant, culminating in the conclusion of a collective agreement in October 2003, in which the unions agreed to the implementation of the TASK grading system as a matter of principle. The actual implementation of the TASK grading system was done by way of the Corporate Job Evaluation Policy ('the Policy'). In terms of the Policy, the grading was done only by a job evaluation committee on which NUM was also represented. An individual manager could not effect such a grading, although the general manager of the applicable division, had the final say in approving the grading.

[9] It is important to point out that in terms of the Policy, this grading was specific to a position, and not to the particular employee occupying that position. The mere fact that a job was graded at a particular level in the course of this exercise, did not mean that the employee occupying the job at the particular time would automatically be allocated the grade of the job, or for that matter be placed in the job. In terms of the Policy, any appointment or promotion into a job that had been graded, still required the employee to meet the minimum prescribed requirements for the job, and then subject to the selection and recruitment policy of the applicant which had to be applied. Employees were in fact specifically informed on 25 January 2008, after implementation of TASK, that regrading of positions would not entitle employees to automatic promotions and remuneration increases.

[10] All the individual respondent are employed in the position of Assistant Officer Investigation in the Risk Management Department of the Southern Region of the Distribution business unit (division), commencing employment at different times.

[11] Two of the individual respondents, T J Hoyi and W G Krull, were employed prior to the TASK regrading becoming effective on 1 December 2007. Therefore, on 3 December 2007, following the implementation of the regrading, these individual respondents were advised in writing that their

position title would still be known as Assistant Officer Investigation and the grading would be that of T9.

[12] The other individual respondents commenced employment after the TASK grading implementation. They were all issued with written offers of employment for the position Assistant Officer Investigation (T9), and appointed in such position. All the individual respondents accepted these offers of employment, by signing the offer letters. The effective dates of appointment of these individual respondents were respectively as follows: (1) O Mkosana – 1 July 2008; (2) K Madikizela – 1 March 2009; (3) K Gwana – 1 January 2009; (4) R E Brandt – 14 December 2009; and (5) W Alexander – 1 June 2010.

[13] Also, and as touched on above, it appeared that the individual respondents were actually from the outset dissatisfied with the grading of their positions. According to the individual respondents, they had always being doing the work and fulfilling the duties of Inspectors. According to them, their manager, Edward Koti ('Koti') had promised that they would be placed in the post of Inspector by April 2010, coinciding with the 2010 World Cup. Considering then the post of Inspector, it did exist in the structure at the applicant, but this post was not provided for in the existing structure of the Distribution division in the Eastern Cape, where the individual respondents were employed. This post was actually titled 'Inspector (Security)', had been approved under the TASK structure on 19 November 2009, and had a specific minimum requirement of a three year B degree or related qualification attached to the position. On 25 November 2009 this post was formally graded in terms of TASK at level T12. As a matter of fact, and despite what the individual respondents said they had been promised by Koti, they had not been placed as Inspectors by April 2010.

[14] In 2010, the applicant developed what was called the Generic Security Improvement Plan ('SIP"), involving all its divisions, and each of the divisions would then amend their individual structures in line with this new generic SIP structure. In the case of the Distribution division in the Eastern Cape, in which the individual respondents were employed, this new structure was deliberated on at what was called the Distribution Group Forum ('DGF'), which forum sat on 1 December 2010 for this purpose.

[15] In the DGF meeting of 1 December 2010, the applicant's management made a formal presentation, by way of slide show, of the new structure, which included the structure of Risk Management in the Distribution division. Part of this presentation concerned the Assistant Officer Investigation positions of the individual respondents. It was recommended that these positions be changed and titled "Principal Inspector", be graded at a level T10, and that all the Assistant Officer Investigation incumbents be simply moved into these positions. However, these recommendations still required approval at central level by the job grading committee and by the general manager of the division, in terms of the Policy. It is significant that all the parties to the DGF, which included the representative trade union, and in particular NUM, had given their approval (agreement) for this recommendation, and that the proposed structure be submitted for approval on that basis.

[16] Further, the proposed new structure approved in the 1 December 2010 DGF meeting now made provision for a separate position of Investigator (Security) at level 12. As stated above, this position, at that time, did not exist in the Eastern Cape Distribution division structure. All that was provided for in the Eastern Cape Distribution division structure at higher level than the individual respondents' positions was that of Officer Crime Risk at level T11. But this was not the positon the individual respondents were ever interested in.

[17] Despite all the above, and on 8 February 2011, NUM complained to the manager: risk management about the fact that the individual respondents' manager, Koti, had given his 'word' that he was 'willing to make his investigators T12 due to the nature of the job they are doing and their job profile/compact.' Intervention was requested to resolve this. Nothing however transpired as a result of this complaint.

[18] The individual respondents then referred an unfair labour practice dispute relating to promotion to the CCMA on 1 March 2011. This dispute was disposed of by commissioner Sonamzi of the CCMA in an award dated 4 October 2011, which award was set aside by the order of Lallie J referred to above, and the matter was remitted back to the CCMA for determination *de novo*, in 2015.

[19] In the interim, further developments took place where it came to the individual respondents, and their positions, between the times the dispute was initially determined by the CCMA in October 2011, and when it went back there in 2015. Although the new structure was recommended and approved as referred to above, in December 2010, a moratorium was placed on its implementation (as well as the implementation of all the other proposed new structures in other divisions), because of a further complete strategic review of the applicant's business, in the course of which certain security strategies were changed. This process was finally only completed in 2014.

[20] The proposed new structure of the Eastern Cape Distribution division then went back into the DGF in November 2014 for further consultation and deliberation, and was also referred to a Task Group meeting in December 2014 for a complete assessment of the impact of any further proposed changes.

[21] The new structure was finally approved by all parties (including labour) on 6 February 2015. Where it came to security positions, the situation remained more or less the same as was the case in the 2010 recommendation, but now provided for the position of 'Assistant Officer Security' instead of 'Assistant Officer Investigation' (current position), at level T10. It was determined, by agreement, that all the current Assistant Officer Investigation (T9) incumbents would be placed in the Assistant Officer Security (T10) positons. Provision was also still made for Security Investigator at level T12. An implementation plan was agreed to, which included a brief to the DGF on 20 February 2015, followed by one on one consultation and placement of employees after 31 March 2015. It must be emphasized that all this came about by way of agreement with labour representatives.

[22] Because the Security Investigator (T12) position did not exist in the Eastern Cape Distribution division before, there was still no determination of how many of these positons were actually needed and would be required to be filled. This determination was left up to the region (division) itself, and needed to be discussed and decided in the DGF in due course. Up to the date when this matter was ultimately concluded in the CCMA in 2015, this had still not

happened, and no actual *quantum* of Security Inspector (T12) positions had been discussed, decided upon, nor approved.

[23] Two of the individual respondents, being Alexander and Mkosana had also moved on in the interim, having applied for other Inspector (T12) positons elsewhere in the applicant, in the course of normal selection and recruitment in the applicant, and having been placed in those positions.

[24] For the five remaining individual respondents in the Assistant Officer Investigation positons, they were the consulted pursuant to the above process, with the view to place them in the positions of Assistant Officer Security at level T10, in the new structure. On 13 April 2015, these individual respondents were informed in writing of this placement and that there was no need for them to re-apply for the position. The placement would be effective 1 January 2015. The remaining individual respondents all rejected this placement.

[25] Because the second respondent had decided at the beginning of 2015 that the dispute had not been referred late to the CCMA, the dispute then proceeded to arbitration on the merits before the third respondent, who decided in favour of the individual respondents, leading to the current review application. I will now proceed to decide this review application.

The test for review

[26] I will firstly, and in short, summarize the proper test for review. *In casu*, there are in reality two kind of review tests that find application, because both the jurisdictional ruling of the second respondent and the arbitration award of the third respondent are sought to be reviewed. As the jurisdictional ruling of the second respondent concerns an issue of the jurisdiction of the CCMA, the review test is different to that normally applicable to the reviewing of arbitration awards on the merits. I will hereunder summarize both these applicable review tests.

[27] Where it comes to the review test applicable to the arbitration awards on the merits, the Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and*

Others,[3] held that the standards as contemplated by Section 33 of the Constitution[4] are in essence to be blended into the review grounds in Section 145(2) of the LRA, and the Court concluded that 'the reasonableness standard should now suffuse s 145 of the LRA'. Where it comes the threshold test for the reasonableness of an award, the Court said that the question to be asked was: '...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[5]

[28] Accordingly, in every instance where the constitutionally suffused Section 145(2)(a)(ii) is sought to be applied to substantiate a review application, any failure or error of the arbitrator relied on must lead to an unreasonable outcome, for this failure or error to be reviewable. In my view therefore, what the review applicant must show to exist in order to succeed with a review is firstly that there is a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. But even if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error of failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*[6] the Court said:

> '.... 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.'

[29] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold*

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[3] (2007) 28 ILJ 2405 (CC).
[4] Constitution of the Republic of South Africa, 1996.
[5] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[6] (2013) 34 *ILJ* 2795 (SCA) at para 25.

Mine) v Commission for Conciliation, Mediation and Arbitration and Others[7] said:

> '.... 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.'

[30] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[8] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[9] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[10] it was held:

> '.... the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[31] Turning next to the issue of the applicable review test where it comes to the second respondent's jurisdictional ruling, the Court in *Fidelity Cash*

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[7] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[8] See *Fidelity Cash Management* (*supra*) at para 102.

[9] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.

[10] (2015) 36 ILJ 1453 (LAC) at para 12.

Management Service v Commission for Conciliation, Mediation and Arbitration and Others[11] said:

> '.... Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise .... ' (emphasis added)

[32] In simple terms, where the issue to be considered on review is about the jurisdiction of the CCMA, the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court determines the issue *de novo* in order to decide whether the determination by the arbitrator on jurisdiction is right or wrong. In *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA,* the Court held:[12]

> 'The commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justiciable grounds....' (emphasis added)

[33] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others,*[13] the LAC articulated the enquiry as follows:

> 'The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court...'

[34] I had the opportunity to deal with this kind of review test in *Trio Glass t/a The Glass Group v Molapo NO and Others*[14] and said:

> 'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in

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[11] (*supra*) at para 101.
[12] (1999) 20 ILJ 108 (LAC) at para 6.
[13] (2008) 29 *ILJ* 2218 (LAC) at para 40.
[14] (2013) 34 *ILJ* 2662 (LC) at para 22.

order to decide whether the determination by the commissioner is right or wrong.'

[35] This 'right or wrong' review approach has been consistently applied in a number of judgments, in instances where the issue for determination on review concerned the jurisdiction of an arbitrator, which judgments include *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others*[15], *Hickman v Tsatsimpe NO and Others,*[16] *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others,*[17] *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others,*[18] *Workforce Group (Pty) Ltd v CCMA and Others*[19] and *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others.*[20]

[36] Against the above principles and tests, I will now proceed to consider the applicants' application to review and set aside the jurisdictional ruling and the arbitration award of respectively the second and third respondents.

The jurisdictional determination

[37] As touched on above, both the second and third respondents made jurisdictional determinations which the applicant seeks to review, and thus I need to decide in terms of the appropriate review test articulated above, whether these determinations are right or wrong.

[38] The proper point of departure is deciding the issues of jurisdiction is considering what is contained in the pre-arbitration minute concluded between the parties. In that document, the individual respondents define their unfair labour practice dispute as being founded on two issues. The first issue was that despite having been appointed as assistant investigators, the individual respondents contended that they were fulfilling the functions and duties of investigators, from the outset. The second issue was that they were promised to be graded as investigators by their manager (Koti), before April 2010.

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[15] (2012) 33 *ILJ* 363 (LC) at para 23.
[16] (2012) 33 *ILJ* 1179 (LC) at para 10.
[17] (2013) 34 *ILJ* 392 (LC) at paras 5–6.
[18] (2012) 33 *ILJ* 1171 (LC) at para 14.
[19] (2012) 33 *ILJ* 738 (LC) at para 2.
[20] (2013) 34 *ILJ* 1272 (LC) at para 21.

[39] Despite what is recorded by the individual respondents in the pre-arbitration minute, the dispute referred by the individual respondents to the CCMA on 1 March 2011 reflected that the dispute purportedly arose on 15th February 2011. The referral further recorded that the employer failed to place the employees at a grade that equalled the duties that they were doing. The later arbitration referral dated 20 June 2011 added the issue of the promise made to the employees to be placed at grade T12, as a further ground for alleging unfairness.

[40] On 29 April 2011, the applicant filed a formal application in terms of Rule 31(b) of the CCMA Rules, contending that the CCMA had no jurisdiction to decide this matter. The applicant, in this application, in essence raised two grounds in support of this contention. The first ground was that the dispute was in reality not one about a right to a promotion, but the individual respondents actually only demanded to be promoted, which was an interest dispute. The second ground was that the individual respondents had no right to be promoted, which was essential for them to show in order to rely on an unfair labour practice.

[41] When the applicant's jurisdictional objections were argued in the CCMA on 3 October 2011 before commissioner Sonamzi, the representative of the individual respondents submitted that an expectation of promotion was created by their manager promising the individual respondents in 2009 that they would be appointed as investigators at grade T12, and this manager had the authority to make such appointments. It was also submitted on behalf of the individual respondents that starting from 2009, they were actually fulfilling the duties and writing reports and doing the work of inspectors. Commissioner Sonamzi, in an award dated 4 October 2011, held that the CCMA indeed did not have jurisdiction, leading to a review application which came before Lallie J as referred to above.

[42] In the judgment of Lallie J, the learned Judge records that the individual respondents sought to rely on the promise made by Koti in 2009 that the individual respondents would be promoted to the positions of Investigators before April 2010. The learned Judge further held that because the individual respondents, in referring their dispute to the CCMA characterized it as a rights

dispute, it was not for the commissioner to decide whether this case had merit, in assuming jurisdiction. According to the learned Judge, It remained incumbent on the commissioner to arbitrate the merits of the dispute, and if pursuant to that arbitration it became apparent the dispute was in fact an interest dispute, then the commissioner could decline to decide the matter. The learned Judge then made the order on 15 October 2014, referred to above, sending the matter back to the CCMA. The order of Lallie J however added the consideration as to whether the matter was timeously referred to the CCMA in the first instance, for determination by an appointed commissioner.

[43] In line with the order of Lallie J, the second respondent was called on to decide whether the dispute was referred to the CCMA in time, as well as the two jurisdictional issues referred to above. The second respondent, in his jurisdictional ruling, deferred the two earlier raised jurisdictional issues to subsequent arbitration, and decided only the condonation issue. The second respondent accepted that the condonation issue was competently raised and had to be decided. According to the second respondent, the date of the dispute in the case of an unfair labour practice is when the employee became aware of the alleged unfair labour practice. Having so found, the second respondent decided that there was 'no exact point in time' when the dispute arose, and that the date when a promise was made can hardly be the date when the dispute arose. The second respondent then accepted that the alleged unfair labour practice was an ongoing issue until a formal dispute was declared, and as such, there was not need to apply for condonation, as the referral was made in time.

[44] The third respondent, in his award, did not separately deal with the issue of jurisdiction. The third respondent considered the evidence relating to the unfair labour practice as a whole, and determined, in principle, that because of the promise made by the manager (Koti), the fact that the applicant did not follow its own policies, and that the individual respondents had been doing the work of Inspectors, that an unfair labour practice existed. But he made no actual finding relating to the CCMA having jurisdiction based on the true nature of the dispute.

[45] I will first consider the issue of jurisdiction relating to the nature of the dispute, as forming part of the applicant's review grounds. According to the applicant, the nature of the dispute in this case was an interest dispute, and not a rights dispute. In my view, however, these is no substance in this ground of review of the applicant, for two reasons, now elaborated on.

[46] Firstly, and immediately, Lallie J in her judgment in effect disposed of this issue. As set out above, the learned Judge specifically found in her judgment that the dispute referred to the CCMA was a rights dispute. The learned Judge in essence reasoned that the issue of the nature of the dispute could only be decided as part of the merits of the matter, once all the evidence was in. There was no separate, and live issue, as to the nature of the dispute referred, where it came to assuming jurisdiction. Not only is this reasoning of Lallie J correct, but there is no appeal against it, and thus the conclusion stands. In my view, this in itself disposes of any jurisdictional issue in this respect. As said in *CUSA v Tao Ying Metal Industries and Others*[21]:

> '... A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration ...The dispute between the parties may only emerge once all the evidence is in'.

[47] Secondly, and where it comes to deciding the issue of the CCMA accepting jurisdiction to determine an unfair labour practice dispute, it is not about whether the dispute brought can ultimately be sustained in favour of the employee parties, on the evidence. It is about the case, as it is pleaded. Van Der Westhuizen J, in *Gcaba v Minister for Safety and Security and Others*[22] held:

> 'The specific term 'jurisdiction', which has resulted in some controversy, has been defined as the 'power or competence of a court to hear and determine an issue between parties'. ....'

[21] (2008) 29 ILJ 2461 (CC) at para 66. See also *National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) and Others* (2014) 35 *ILJ* 954 (LAC) at para 17.
[22] (2010) 31 ILJ 296 (CC) at para 74.

The learned Judge added:[23]

> 'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. .... In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings - including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim ...'

[48] And in *Mbatha v University of Zululand*[24], Jafta J referred with approval to the above *dicta* of Van der Westhuizen J in *Gcaba*, and said:

> 'Ordinarily the question of jurisdiction is determined with reference to the allegations made in the plaintiff's or applicant's pleadings. .... In assessing whether this procedural requirement has been met, the proper approach is to take the allegations in the particulars of claim (summons) or the founding affidavit at face value. Usually those allegations are taken to be true for purposes of determining jurisdiction. The question whether a court has jurisdiction does not depend on the substantive merits of the case. The allegations which, if established, would prove jurisdiction are sufficient.'

Jafta J further held[25]:

> 'What emerges from *Gcaba* is that in determining whether this court, and for that matter any court, has jurisdiction, one must examine the pleadings with a view to finding 'the legal basis of the claim under which the applicant has chosen to invoke the court's competence'. The caution that applies to this enquiry, as was observed in *Gcaba*, is that one must consider whether the facts pleaded sustain the pleaded cause of action. ...'

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[23] Id at para 75.
[24] (2014) 35 ILJ 349 (CC) at paras 159 and 160.
[25] Id at para 157.

[49] There are of course no formal pleadings, in the true sense of the word, in CCMA dispute resolution proceedings. However, and for the purposes of deciding jurisdiction to consider the dispute brought, the referral documents can be viewed as pleadings. Added to that, what can also be considered is the dispute as articulated in the opening address of the employee party at arbitration[26], and any documents generated in the course of prosecuting the dispute, such as for example correspondence, interlocutory applications, and pre-arbitration minutes.[27] In *SA Local Government Bargaining Council v Ally NO and Another*[28] the Court held as follows, in applying the above *dicta* in *Gcaba* and *Mbatha*:

> 'I shall apply the above dicta to the current proceedings, despite the fact that there are no pleadings as such in bargaining council arbitration proceedings. The pleaded facts, by the applicant, can however be gathered from the arbitration referral, the submissions to the arbitrator, as well as the case articulated in the applicant's founding affidavit in the review application. For the purposes of deciding jurisdiction, this pleaded case of the applicant must then be accepted, as it stands.'

[50] As set out above, the case brought by the individual respondents, as articulated in the referral documents, the affidavit filed in the course of the earlier *in limine* proceedings in the CCMA, and the pre-arbitration minute, is clearly a rights dispute and a case that could, if true, constitute an unfair labour practice. In a nutshell, the pleaded case is that the individual respondents were promised a promotion, that they were actually working in the promoted position, and as a result were entitled to be promoted into T12 Inspector positions. In respect of a similarly articulated claim, the Court in *Mathibeli v Minister of Labour*[29] held as follows:

> '.... Two claims are made by the appellant: ... First, the appellant's referred dispute alleged a fact: ie, that he was *already occupying* a grade 11 post.

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[26] See *Fidelity Cash Management* (*supra*) at paras 23 – 24; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others* (2013) 34 ILJ 2347 (LC) at para 61.
[27] See *Mathibeli v Minister of Labour* (2015) 36 ILJ 1215 (LAC) at para 14 and 16; *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others* (2009) 30 ILJ 2064 (LC) at 2069G-H; *Unitrans Supply Chain Solution (Pty) Limited v South African Transport and Allied Workers Union and Another* [2014] JOL 31172 (LC) at paras 9 – 11.
[28] (2016) 37 ILJ 223 (LC) at para 38.
[29] (2015) 36 ILJ 1215 (LAC) at para 16.

> Unless that allegation of fact was proven, the appellant had no claim to more pay. This factual allegation was not a claim of entitlement to be promoted to a grade 11 post, which would indeed be an interest issue, but rather an allegation that he was, as a fact, in a grade 11 post. If he failed on that alleged fact, as he plainly did, the claim had to fail too. ....'

The Court concluded:[30]

> 'Accordingly, the view I take is that a rights issue was indeed referred by the appellant ...'

[51] This exact same approach was followed in *National Commissioner of the SA Police Service v Potterill NO and Others*[31] where the Court said:

> '... The substance of the dispute pertained to the employees' complaint that their posts had been regraded but, despite the fact that they had continued to be employed in the same posts and despite the requirements of regulation 24, their salaries had not been increased. In my view this is a complaint about alleged unfair conduct "relating to the promotion" of the employees. ....'

And in *City of Johannesburg Metropolitan Municipality v South African Municipal Workers Union and Others*[32] the Court said:

> 'I am therefore satisfied that the real dispute of the respondents constitutes a rights dispute. The dispute, at its core, is one of promotion. The respondents' case is that the individual respondents have been upgraded, and as such, are entitled to the implementation of such upgrade and to be paid increased salaries accordingly. The fact that the demand is coupled with an increase in salary matters not. The increase in salary flows from the right sought to be asserted by the respondents, which rights accrued pursuant to the 2014 ICT grading. It equally does not matter if the assertion of right is coupled with labelling describing it as unfair. The failure by an employer to implement a regrading and commensurate increase in salary that employees are of right entitled to would be unfair, *per se*. This kind of dispute must be subjected to arbitration pursuant to the unfair labour practice provisions in section 186(2)(a)

[30] Id at para 19.
[31] (2003) 24 *ILJ* 1984 (LC) at para 15.
[32] [2016] JOL 36592 (LC) at paras 58 – 59.

of the LRA. In simple terms, ... if the respondents prove the facts that their posts were in fact regraded at superintendent level with commensurate pay increase, they would be entitled to the relief they now demand in the proceedings before me. If not, they get nothing.

Accordingly, and because the issue in dispute in this instance is subject to resolution by way of arbitration under the LRA ...'

[52] Therefore, the dispute brought by the individual respondents to the CCMA was properly founded on an unfair labour practice as contemplated by Section 186(2)(a) of the LRA. The applicant's counter jurisdictional objection is squarely founded on an argument that the aforesaid case brought by the individual respondents is a bad case which cannot be sustained on the facts. This is a fundamentally wrong approach where it comes to deciding jurisdiction. In *Makhanya v University of Zululand*[33] The Court held:

'... When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution then, as a fact that is the claim. That the claim might be a bad claim is beside the point.'

In *SA Local Government Bargaining Council*[34] the Court applied the dictum in *Makhanya* as follows:

'... The applicant's claim was, as said, for enforcement of the main agreement against the second respondent. It does not matter, for the purposes of deciding jurisdiction, whether this claim had substance in law. Neither does it matter whether the applicant had other options available to it. The first respondent always had the power to answer the question whether to enforce the main agreement, or not. The first respondent decided his jurisdiction on the basis of the outcome of the substance of the applicant's claim, even

[33] (2009) 30 *ILJ* 1539 (SCA) at para 71. See also *SA Maritime Safety Authority v McKenzie* (2010) 31 *ILJ* 529 (SCA) at para 8.
[34] (*supra*) at para 42.

though it is on a question of law, which in the light of the clear ratio in *Makhanya*, is inappropriate and thus wrong ...'

[53] Therefore, it was only necessary for any commissioner, in order to assume jurisdiction to consider the dispute, to decide whether the dispute as described by the individual respondents as it stands, could sustain a finding of an unfair labour practice, if found to be true. It was not necessary to decide whether this described case was true or not, where it came to assuming jurisdiction. This was properly appreciated by Lallie J in her earlier judgment, as well.

[54] If, and at the end of the matter, the applicant's defences are sustained, that would mean that the individual respondents would not be able to establish the existence of the unfair labour practice on the basis that they had brought it, and the case would fail. But this has nothing to do with jurisdiction. The CCMA always could, and in fact should, consider and decide the case. The applicant's review ground relating to the nature of the dispute and the lack of jurisdiction of the CCMA relating to the same, therefore has no merit, and falls to be rejected.

[55] This then only leaves the decision by the second respondent that no condonation was required when the individual respondents referred the dispute to the CCMA on 1 March 2011. Central to any determination in this regard can only be determining the date when the unfair labour practice dispute arose. In terms of Section 191(1)(b)(ii) of the LRA, a dispute concerning an unfair labour practice must be referred to the CCMA or bargaining council, as the case may be, within 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence. It is clear that this definition, as it stands, requires and act or omission by the employer, or an actual ocurrence.

[56] Considering the case brought by the individual respondents, as dealt with above, it is premised firstly on a promise. This promise was that they would be promoted by April 2010. It is thus not about when the promise was made. It is about when the promotion was promised to be effected. That being the case, and if the individual respondents were not promoted by April 2010, that

would be the omission constituting the unfair labour practice, and thus the date of the dispute. Insofar as the second respondent did not accept that this was the case, such a finding would clearly be wrong.

[57] The other part of the case of the individual respondents was that they were always fulfilling the work and duties of an Inspector, graded at T12. If that is the case, can it then be legitimately argued that the unfair labour practice is one that resurrects itself on a month to month basis, until ultimately referred as a dispute to the CCMA? This is the kind of approach ascribed to by the second respondent, and seemed to be based on the judgment in *SABC Ltd v CCMA and Others*[35]. The Court in that case was dealing with discrimination, and continuing discrimination that persisted on a month to month basis. The Court said:[36]

> '... While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example, where an employer selects an employee on the basis of race to be awarded a once-off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds, then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination, in the latter case, has no end and is, therefore, ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination ...'

[58] It must however be considered that in *SABC*, the Court was specifically referring to an instance of differentiation based on arbitrary behaviour by an employer. However, unfair labour practices founded on differentiation is seldom founded on arbitrary behaviour. For example, surely it cannot be said where an employer promotes some employees but not others that should also have been promoted, but not based on arbitrary grounds, that employer on a month to month basis until the dispute is one day referred to the CCMA

[35] [2010] 3 BLLR 251 (LAC).
[36] Id at para 27.

commits a continuous unfair labour practice towards the employee concerned that was not promoted. This was in fact considered by the Court in *City of Johannesburg v South African Local Government Bargaining Council and Others*[37] where it was held:

> 'It was submitted on behalf of the third respondent that the nature of the dispute was continuous, one akin to a discrimination dispute and that since it continued well into 2009 (and indeed to the date of referral), the referral was not late. I have difficulty appreciating the logic of this submission. I see no reason why a demotion does not fall into the same category as a dispute concerning a dismissal or any other disciplinary penalty, both of which are the subject of strict time limits which run from the date of the employer's actions,. Of course, an act of demotion has consequences in the form of a diminution of status perhaps, and those consequences may well be ongoing. But it is not so as it necessarily is in the case of an act of unfair discrimination, where the unfair act complained of is continuous, uninterrupted or repeated. For example, in a claim for equal pay, the fact that the employer continues each month to pay a lower wage on one or more discriminatory grounds, has the result that the act of discrimination is continuous. But an act of demotion is not continuous in the same sense. This much is acknowledged by the wording of s 191 (1) (b) (ii) which requires a referral within 90 days '*of the date of the act or omission which allegedly constitutes an unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence*'. The case in which the third respondent relies in support of its submission, *SABC Ltd v CCMA & others* [2010] 3 BLLR 251 (LAC), supports this analysis. That was a case that concerned unfair discrimination in the form of continuous conduct rather than a single act. Not only is it distinguishable on that basis, but the court drew a clear distinction between ongoing unfair labour practices (unequal pay) and 'one-off' decisions or single acts that are not repetitive in nature. Were an act of demotion (or dismissal or the issuing of a final warning for a 12 month period) to be regarded as continuous for the purposes of s 191, that would make a mockery of the time limits imposed by the section. An employee need only allege that he or she continues to suffer the consequences of dismissal, some lesser disciplinary measure or demotion to avoid the prescribed time limits altogether.'

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[37] (JR3204/10) [2014] ZALCJHB 68 (10 February 2014) at para 11.

[59] I consider the above reasoning in *City of Johannesburg v South African Local Government Bargaining Council and Others* to be sound, and equally applicable to an unfair labour practice based on promotion. The *ratio* in *SABC* is clearly distinguishable. The point can be illustrated by way of a simple example. Two employees apply for a promoted position and one employee is promoted whilst the other is not. Accepting that the decision not to promote the one employee is unfair, does this now mean that that every month after that decision was taken the employer commits a continuous unfair labour practice because the employee does not occupy the promoted position and is paid less? Surely not. This would render the 90 day time limit under Section 191(1)(b)(ii) completely valueless. The employee can in effect do nothing about an employer's decision not to promote for a year, and then decide to pursue it because it is purportedly 'continuous'. This flies directly in the face of the primary consideration of the expeditious resolution of employment disputes.[38] I accept that one must treat a failure to promote for example based on race differently, but that would be because the cause of action is founded on discrimination, and not an unfair labour practice *per se*, with discrimination requiring a different level of continuous protection.

[60] Another comparable example can be found in *South African Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[39]. In that case, the employer stopped paying the employee an acting allowance, but the employee only pursued the dispute as an unfair labour practice to the CCMA more than four years later, contending that the dispute had been ongoing because of a pending grievance. The Court did not accept this contention and held that the dispute was pursued late.

[61] Considering then the unfair labour practice case of the individual respondents, there are two possible dates that could the date when the dispute arose in this instance. The first would be the date by when the applicant promised the promotion to be effected, which would be end April 2010. The second would

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[38] See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 46; *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at paras 12 – 13; *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 *ILJ* 613 (CC) at para 42; *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others* (2011) 32 *ILJ* 2861 (CC) at para 76; *SA Municipal Workers Union on behalf of Manentza v Ngwathe Local Municipality and Others* (2015) 36 ILJ 2581 (LAC) at paras 47.

[39] [2012] 11 BLLR 1183 (LC) at paras 33 – 35.

in effect be the date each of the individual respondents were appointed as Assistant Officer Investigation at level T9, because, according to them, they should have been appointed as Inspector at level T12 because they had been fulfilling the duties, work and functions of a level T12 inspector from the start. These dates would respectively be 3 December 2007, 1 July 2008, 1 January 2009, 1 March 2009, 14 December 2009 and 1 June 2010.

[62] There is therefore simply nothing ongoing in the unfair labour practice dispute of the individual respondents. There are two clear omissions on the part of the applicant as employer, each on a specific date, which could constitute the date of the dispute in this case. The first would be end April 2010, and the second the date of appointment of each of the individual respondents. Either way, any unfair labour practice dispute referred to the CCMA on 1 March 2011, would be referred outside the 90 day time limit under Section 191(1)(b)(ii) of the LRA. This means that the dispute was referred late, that the individual respondents did have to seek condonation, and the second respondent's decision that this was not the case is clearly wrong.

[63] Because condonation was needed, a proper application for condonation needed to have been made for the CCMA to have jurisdiction to entertain the dispute of the individual respondents. In *Member of the Executive Council, Department of Sport, Recreation, Arts and Culture, Eastern Cape v General Public Service Sectoral Bargaining Council and Others*[40] the Court said:

> 'It is common cause that there was no application for condonation.
>
> The provisions of the Act are clear and there can be no doubt that this matter was referred late and that condonation was to be applied for.
>
> Without an application for condonation and without condonation being granted, the matter was not properly before the arbitrator and he had no jurisdiction to arbitrate the dispute.'

[64] This only leaves one final issue for consideration. Does the certificate of failure to settle issued by the CCMA in March 2011 make any difference? This question must be answered because of the judgment in *Fidelity Guards*

[40] [2015] 12 BLLR 1224 (LC) at paras 40 – 42.

Holdings (Pty) Ltd v Epstein NO and Others[41], which determined that once a certificate of failure to settle has been issued by the CCMA, the late referral of the dispute to conciliation cannot be competently considered in deciding whether the CCMA has jurisdiction to arbitrate the matter, unless the certificate of failure to settle is challenged on review, and set aside[42]. The *ratio* in this judgment has been applied ever since, and if this *ratio* is applied *in casu*, then the late referral of the dispute by the individual respondents to the CCMA for conciliation in the first place, because of the certificate of failure to settle issued, would not be a competent consideration in deciding jurisdiction.

[65] The judgment in *Fidelity Guards* was specifically considered by the LAC in *SA Municipal Workers Union on behalf of Manentza v Ngwathe Local Municipality and Others*[43] and the Court said

> 'The appellant also relies on the decision of this court in *Fidelity Guards* in support of its interpretation of s 191(5) of the LRA. I am of the view that such reliance is equally misplaced because, as will be illustrated below, the decision is wrong. ...
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> ... the court then, erroneously, proceeded to link the setting aside of the certificate of outcome to the jurisdiction of the CCMA or bargaining council to arbitrate an unfair dismissal dispute. As alluded to above, the jurisdiction of the CCMA or bargaining council to arbitrate an unfair dismissal or unfair labour practice dispute is not conditional upon the issue of a certificate of outcome, as an employee's right of referral to arbitration accrues on the lapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the dispute remains unresolved.
>
> Whilst the issue of a certificate of outcome by a commissioner of the CCMA or bargaining council may found the right of referral of an unfair dismissal or unfair labour practice dispute to arbitration or adjudication prior to the lapse of the 30-day period contemplated in s 191(5) of the LRA, as the right of referral accrues on the issue of such certificate and is, consequently, a prerequisite for a referral to arbitration or adjudication in those circumstances only, the subsection does not impose an obligation on a commissioner of the CCMA or

[41] (2000) 21 *ILJ* 2382 (LAC).
[42] See paras 11 – 12 of the judgment.
[43] (2015) 36 ILJ 2581 (LAC) at paras 42 – 43.

a bargaining council to issue a certificate of outcome on the lapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the dispute remains unresolved. Since the issue of a certificate of non-resolution by the CCMA or a bargaining council concerned is not a prerequisite for a referral to arbitration in terms of s 191(5)*(a)* of the LRA, it cannot, in my view, cure the lack of jurisdiction of the CCMA or a bargaining council to arbitrate an unresolved unfair dismissal or unfair labour practice dispute, where such certificate is issued after the elapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the employee has not sought condonation for his or her non-observance of that timeframe.'

[66] The judgment in *Manentza* thus disposes of the *ratio* in *Fidelity Guards*. The certificate of failure to settle issued *in casu* cannot save the individual respondents from the obligation to have applied for condonation in the first place. The late referral of the dispute to the CCMA for conciliation remains very much a live issue which needs to be considered in deciding whether the CCMA had jurisdiction to arbitrate the dispute of the individual respondents. In the context of an unfair labour practice dispute, the Court in *City of Johannesburg v South African Local Government Bargaining Council and Others*[44] said:

'In *South African Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2012] 11 BLLR 1183 (LC), this court held that it was competent for a party to seek to review and arbitration award relating to an unfair labour practice dispute for lack of jurisdiction, even though the certificate of outcome issued at the end of the conciliation phase had not been set aside on review. In that case, the court reaffirmed the principle that the late referral of a dispute without any application for condonation deprived the CCMA of jurisdiction to entertain the dispute at arbitration.'

[67] In all of the above circumstances, it is my view that the applicant's complaint to the effect that the individual respondents' dispute was referred to the CCMA outside the time limit in terms of Section 191(1) of the LRA, and that without condonation being sought in granted in such circumstances the CCMA would have no jurisdiction, has merit. The dispute was indeed referred late to the

[44] (*supra*) at para 9.

CCMA by the individual respondents. It is common cause that condonation was not applied for. As a result, the CCMA had no jurisdiction to consider the dispute. The second respondent's determination to the contrary is wrong, and because this is an issue of jurisdiction, this wrong determination falls to be reviewed and set aside.

[68] My finding in this respect should be the end of the matter for the individual respondents. But I will nonetheless follow the same approach as that which the Court followed in Member of the *Executive Council, Department of Sport, Recreation, Arts and Culture, Eastern Cape v General Public Service Sectoral Bargaining Council and Others*[45], and still decide the merits of the application for review and the grounds for review raised by the applicant, in respect of the unfair labour practice determination of the third respondent, on the merits.

The unfair labour practice

[69] Turning then the arbitration award of the third respondent in finding that the applicant had committed an unfair labour practice towards the individual respondents, his finding in this regard was founded on a number of reasons. The third respondent accepted that Koti had promised the individual respondents T12 positions, and that the individual respondents had been doing T9 and T11 work from the outset. The third respondent was critical of the fact that Koti was not called by the applicant to testify. According to the third respondent, and as a result of all of the aforesaid, this satisfied the requirements of a 'legitimate expectation' to a T12 position on the part of the individual respondents, and thus the failure to promote them was unfair.

[70] The third respondent also found in favour of the individual respondents on the basis of inconsistency. According to the third respondent, the applicant did not always follow its own recruitment and selection procedure, with specific reference to what the third respondent called the "HR employees', who according to the third respondent were moved from T5 to T6 and from T6 to T8 without following recruitment procedures. Also, and according to the third respondent, some of these HR employees did not meet the minimum

[45] (*supra*) at para 45.

requirements for the positons, but were nonetheless promoted. This rendered what happened to the individual respondents unfair, according to the third respondent.

[71] Finally, the third respondent, accepted that the T12 positions did not exist in the structure, but held that a new organogram was introduced in 2015 which phased out the T9 and T11 position and implemented a T12 position. According to the third respondent, it would be unfair to require the individual respondents to do T9 and T11 work, and then not place then in T12. The third respondent was of the view that the individual respondents were entitled to reject the T10 placement because it was a demotion.

[72] The applicant took issue with the above reasoning of the third respondent, in the founding affidavit, on a number of grounds. According to the applicant, the third respondent's award meant that the applicant would be compelled to regrade the positons of the individual respondents without positons being available or even existing. The applicant also contended that the third respondent misconstrued the evidence by deciding the matter on the basis of a structure that did not exist, and did not appreciate that the positions of the individual respondents did continue to exist as a T10 position. The applicant complained that the individual respondents did not meet the minimum qualification for the approved Inspector T12 position, and it was irregular for the third respondent to in effect appoint them in these positions despite this.

[73] In the supplementary affidavit, the applicant then added a number of further grounds of review, which grounds, as a general proposition, all relate to crucial evidentiary material not considered or misconstrued by the third respondent, resulting in an outcome which cannot be considered to be reasonable. This included the following: (1) Any change in job grading could only be done by the job evaluation committee and then must be approved by the general manager of the division; (2) the number of actual Inspector T12 positons in the new structure still had to be debated and approved by all stakeholders in the DGF, which did not happen; (3) the union, including NUM, actually agreed to the positons of the individual respondents being graded at T10; (4) the grading and filling of positions always had to comply with the applicant's policies and procedures; (5) Mkosana in fact followed these policies, applied for a T12

position, and was then promoted into that position; (6) Employment equity policies had to be considered; (7) the fact that an employee may be doing additional work or work of another grade does not lead to the employee being placed at a higher grade; and (8) Koti was never in a position to have made a promise and authorized a promotion.

[74] In the supplementary affidavit, the applicant also takes issue with the inconsistency findings of the third respondent. The applicant again contends that the third respondent failed to consider and ignored material evidence and made material errors of law where it came to the inconsistency findings, in the following respects: (1) The case of the individual respondents and that of the other employees referred to were entirely distinguishable; (2) the HR employees' positions were redundant and the placement was for legitimate operational reasons which permitted, in terms of the applicant's own policies, a departure from the normal recruitment and selection process; (3) one of the HR employees were in fact not placed because the employee did not have the minimum qualification for the position; and (4) the two individual respondents that were promoted to T12 positions actually applied for these positons and were appointed following a proper application of the processes in the applicant.

[75] Considering the review grounds of the applicant, it is convenient to start with a reference to Section 186(2)(a) of the LRA, which reads:

> "Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving — *(a)* unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee.'

[76] It is trite that as the proceedings are unfair labour practice proceedings, the individual respondents have the onus in establishing the existence of an unfair labour practice.[46] In *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others,*[47] the Court said:

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[46] See *National Education, Health and Allied Workers' Union obo Manyana and Another v Masege NO and Others* [2016] JOL 35711 (LC) at para 46; *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*

> '.... 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.'

[77] It is not necessary that an employee party seeking to rely upon an unfair labour practice relating to promotion must show that a right to that promotion exists. Of course, if it can be shown that such a right to promotion indeed exists and was infringed upon, an unfair labour practice claim should succeed. But even if that applicant in the unfair labour practice dispute relating to a promotion cannot show that a right exists, 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*:[48]

> '.... 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, considered overall, was unfair.

(Association Incorporated Under Section 21) and Another v General Public Sector Bargaining Council and Others (2005) 26 ILJ 550 (LC) at para 17.

[47] (2004) 25 ILJ 248 (LAC) at para 73.

[48] (2013) 34 ILJ 1120 (LAC) at para 51.

[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 Bikwani and Others,*[49] 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.'

[78] In this instance, it was ultimately, after all the evidence was in, and in terms of the individual respondents' own case brought to the CCMA, undeniable that the individual respondents had no right to be promoted to Inspector T12. This was never a case of them having been actually graded as Inspector T12, being entitled to be so appointed, and then not being appointed by the applicant. The individual respondents' case is squarely one that the applicant acted unfairly in not promoting them, for the two reasons mentioned above. So, in short, did the individual respondents succeed in proving that because of the promise made to them by Koti and the fact that they had always been doing Inspector T12 duties, it was unfair not to promote them to Inspector T12, in the face of all else?

[79] In answering this question, I must from the outset say that the manner in which the third respondent determined the testimony presented to him was entirely unsatisfactory, to the extent of being grossly irregular. In particular, the third respondent completely failed to assess and determine the credibility of the three individual respondents that testified before him, despite this being

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[49] (2002) 23 ILJ 761 (LC) at paras 29 – 30. See also *National Education, Health and Allied Workers' Union obo Manyana and Another v Masege NO and Others* (*supra*) at para 47.

pertinently raised by the applicant. It was essential for the third respondent to have made credibility findings.[50] As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and others*[51]:

> 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis. ....'

[80] The three individual respondents that testified were Mkosana, Gwana and Madikizela. If one considers each of their respective testimonies, as apparent from the transcripts, genuine concern as to their credibility follows. Mkosana, when testifying under cross examination, was overall extremely evasive. Mkosana often refused to answer direct questions, especially when being confronted with questions about the structure, the application of the applicant's policies, and whether it was in fact competent to be appointed without meeting the minimum requirements of the position. Mkosana contradicted himself on several occasions, and was generally argumentative where it came to what was contained in the documentary evidence, which he could not explain, especially about whether the T12 positions existed in the structure. In certain

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[50] In *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5 it was said: '...To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities...'.

[51] (2011) 32 ILJ 723 (LC) at para 7; *Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 923 (LC) at para 63; *Solidarity on behalf of Van Zyl v Kpmg Services (Pty) Ltd and Others* (2014) 35 ILJ 1656 (LC) at para 8. In *SFW Group* (*supra*) at para 5, the Court said the following as to how to assess credibility: '...the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf..., (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. ...a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. ...' (see also *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 *ILJ* 2038 (LAC) at para 14).

instances, Mkosana even refused to answer pertinent questions. Mkosana was not a credible witness.

[81] Where it came to the testimony of Gwana, he similarly fared poorly. When confronted with direct and pertinent questions about what had actually been decided by the DGF, he became argumentative and evasive and simply did not answer that which was put to him. A number of concessions had to be drawn out of him in cross examination, only when such concessions were really inevitable. Gwana was particularly evasive and argumentative where it came to the pertinent issue that no Investigator positions were ever established in the Eastern Cape. Gwana would often lapse into long speeches without really answering questions asked, especially where it came to the application of the recruitment and selection policy. Gwana was similarly not a credible witness.

[82] Finally, the same criticism can be dispensed concerning Madikizela as a witness. He was equally evasive and argumentative about the application of the applicant's policies, and in particular the recruitment and selection procedure. He in effect had no answers to effective cross examination. On occasion, Madikizela even went so far as to seek to disavow what is contained in minutes of the DGF meetings and related documents, despite not even being present in the meetings nor involved in what is contained in the documents. Madikizela's evidence must therefore also regarded as materially lacking in credibility.

[83] The testimony of Mkosana, Gwana and Madikizela were in my view clearly self serving. They clearly adapted their evidence to support the case the individual respondents sought to articulate in their referral to the CCMA. This being said, and even worse still, Lawrence Mgendane ('Mgendane'), the shop steward that testified for the individual respondents, directly contradicted their evidence in material respects, and in particular with regard to the fact that incumbents simply could not be appointed in positons if they did not meet the minimum requirements for such positions, as well as the evidence relating to the application of the applicant's policies. He actually confirmed that the T10 grading came about by agreement.

[84] The upshot of the above credibility findings is that any testimony by these three witnesses, insofar as the same is advanced to contradict what is contained in the policies of the applicant, and the DGF meeting minutes and related documents, must be rejected. Further, and where this testimony is sought to be applied to contradict what has been testified to by Davids and Van Jaarsveld, who testified for the applicant, it had to have been rejected. In failing to do so, the third respondent failed to reasonably and rationally determine and consider the evidence, and as such committed a gross and reviewable irregularity.

[85] On the proper evidence, the following facts are simply undeniable:

85.1 All the individual respondents signed letters of appointment accepting appointment as Assistant Officer Investigation at grade T9. That was the specific term of their contracts of employment.

85.2 On their own version, they were always fulfilling the same duties, as from their respective dates of employment. There was thus no change in their duties, work or functions, at any time, throughout this matter.

85.3 The TASK grading also established the positon of Security Inspector (T12) in November 2009. This was a position distinct and separate from Assistant Officer Investigation (T9). Both positions existed simultaneously in the applicant, but not in the structure in the Eastern Cape Distribution division, where the individual respondents were employed. Only the Assistant Officer Investigation (T9) existed in that region.

85.4 A complete evaluation of the structures in the applicant took place in 2010. Insofar as it concerns the Eastern Cape Distribution division, a structure was agreed to in December 2010 by all stakeholders, including the unions, that the position of Security Inspector (T12) be created in the structure, but this was not the position occupied by the individual respondents. The positions of the individual respondents was actually specifically dealt with, and it was agreed that these positions be retitled Security Inspector and be graded at T10.

85.5 The structure agreed to in the Eastern Cape Distribution division needed to be approved by the Job Evaluation Committee and the general manager. This would have happened, but for a moratorium that imposed on implementation as a result of further restructuring in the applicant, which only concluded in 2014. Accordingly, the structure as it existed on 2009 continued to endure.

85.6 In January / February 2015, the new structure in the Eastern Cape Distribution division was finally implemented, once again by way of agreement with all the same stakeholders. The position of Security Investigator (T12) was once again implemented in the structure as a position distinct and separate to that occupied by the individual respondents.

85.7 In the 2015 approved and implemented structure, the positions of the individual respondents was classified as 'Assistant Officer Security' at grade T10. It was agreed by all stakeholders that this implementation be done without the individual respondents having to apply for the positions, as the job content remained the same.

85.8 The applicant then indeed sought to implement this position in the newly agreed structure on the individual respondents, effective 1 January 2015, but this was declined by the individual respondents.

[86] It was undisputed that the applicant, at all times, had a number of specific policies in place, regulating instances such as these. These policies (and specifically the Policy) are referred to above, and specifically regulated the changing of structures in the applicant, the regarding of positons, and then the selection of employees to be placed in regraded or created positions in a new structure. The proper evidence was that these policies at all times were indeed consistently applied in the applicant.

[87] In terms of the Policy, referred to above, the grading of a position does not entitle an employee to a position, even if that employee is currently in that position. It is a specific requirement that the minimum qualification for the position must be met, and that the position can only be filled by application of the recruitment and selection policy / process, requiring, as a most basic level,

advertising of the position, application for the position, and an interview process. Further, any grading can only be done by the Job Evaluation Committee, and must then be approved by the general manager of the division. Insofar as these policy provisions are applied in this case, and again on the undisputed facts, the only approved grading that happened where it came to the positons of the individual respondents is to the level of T10, and the applicant did seek to place them accordingly, which they refused.

[88] It is equally important to consider how the grading actually came about. It was part of a new structure for the Eastern Cape Distribution division. It was debated and agreed to by all stakeholders in the DGF, which included the trade union and in particular NUM. The posts of the individual respondents were specifically dealt with in this process, and it was determined, and then accepted and agreed, that these posts were at level T10. Further still, this even happened twice, the first time in 2010 which was not implemented because of the moratorium, and then again end 2014 / beginning 2015, when the new structure was finally debated, agreed and then implemented.

[89] It is difficult to understand, in the above context, now it can be said that the applicant acted unfairly towards the individual respondents. The fact that the individual respondents may disagree with the grading attached to their positions because of the nature of the work and the duties they fulfilled simply does not matter. There was no evidence by the individual respondents or even any case that the grading of T10 attached to their positons was improperly arrived at, wrong, or for example in breach of the applicant's policies. What matters, beyond doubt, is that this grading was properly considered and debated by all stakeholders, agreed to, and then graded by the Job Evaluation Committee accordingly, leading to a grading of the individual respondents' positions at T10. Accordingly, the high water mark of the individual respondents' case is that they did not agree that their positions were a T10 grade. Such disagreement simply cannot successfully found a case of an unfair labour practice.

[90] In giving evidence, Gwana in fact conceded that the individual respondents did not agree with the grading done by the applicant. According to Gwana, they disagreed with the grading, and it was up to the arbitrator to then do the proper

grading in place of the applicant. Such an approach, as correctly pointed out by the applicant, is entirely improper, and it is simply not competent for an arbitrator to step into the shoes of the applicant, consider the positons of the individual respondents, and conduct a grading exercise *de novo*. All that an arbitrator can do is to assess what the applicant did where it came to such positions, and then decide, based on the applicant's own actions and the terms of its policies, whether such conduct was fair. In *SA Police Service v Safety and Security Sectoral Bargaining Council and Others*[52] the Court said:

> '... A commissioner or arbitrator is not the employer. It is not the task of the commissioner or the arbitrator to decide who the best or most suitable candidate is. The role of the commissioner is to oversee that the employer did not act unfairly towards the candidate who was not promoted. ...'

[91] The Court in *Arries v Commission for Conciliation, Mediation and Arbitration and Others*[53] said the following, which I agree with, and which clearly indicates the fallacy in the approach of the individual respondents:

> '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.'

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[52] (2010) 31 ILJ 2711 (LC) at para 15.
[53] (2006) 27 *ILJ* 2324 (LC) at paras 47 – 48.

[92] *In casu*, and considering the facts as set out above, I have little doubt that what the applicant did, overall, was fair. The third respondent failed to have regard to any of this. The reasoning of the third respondent is entirely at odds with all of this clear evidence and ignores the undeniable policy provisions always in place at the applicant. Considering all this evidence, the outcome arrived at by the third respondent is unsustainable, on any ground, and thus reviewable.

[93] In addition to the above, the individual respondents face two further, and insurmountable obstacles. Firstly, and when the Security Inspector T12 positions were approved in the new structure, these positions were distinct and separate from the positions occupied by the individual respondents. The actual positions of the individual respondents, being Assistant Officer Investigations, were dealt with *per se*, and it was decided that these positions were forthwith Assistant Officer Security positions at grade T10. Accordingly, and if the individual respondents envisaged being placed in the positons of Security Inspector T12, this was a different and new position to the one they occupied, and surely they could only be considered for this by way of due and proper application of the selection and recruitment policy, which never happened. This distinction the third respondent completely failed to appreciate. His award is couched in general terms, just referring to grades T10 and T12 as if they were the same positions. The third respondent seemed to be entirely oblivious to the fact that these were two different positions, in the same structure. This failure on the part of the third respondent in my view has a direct and material impact on the outcome arrived at, rendering it unreasonable.

[94] But a second, and even more formidable obstacle, is the fact that as at the date when this dispute was referred to the CCMA in 2011, there existed no Inspector T12 position in the Eastern Cape Distribution division structure. Also, and because of the moratorium referred to, the creation of the new structure and the grading of posts had not been approved until end 2014. The individual respondents simply cannot seek to be placed in a position that did not exist, and was not approved, no matter what work they may have been doing. The point is that although the Inspector T12 position was sought to be created in the 2010 new structure, the moratorium came into place before

implementation, which only lifted end 2014, and the *status quo* remained until then. Then finally, and even in 2015, after the position of Inspector T12 has been approved and implemented in the new structure in the Eastern Cape Distribution division, the number of posts had still not been considered, debated, or determined in the DGF, as required. It was up to the region itself to decide the number of posts, and at the time when the matter was heard before the third respondent, none of this happened. In *Manyana*[54], the Court said:

> '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 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.'

[95] The Court in *Mathibeli*[55] also dealt with a similar situation of an exercise which resulted in recommendations approved by the director-general to upgrade several posts, including the post of an employee which was to be upgraded from grade 10 to 11, with a higher salary attached to the grade 11 post. But the implementation of the upgrading were dependent upon ministerial approval, and no evidence existed of a decision by the minister to approve and implement the recommendations. The Court then accepted, despite finding that there was a bungling of the upgrading exercise, the impression was created by the exercise with employees that they would benefit and the exercise was indeed implemented, and the failure to alert the employees that

[54] (*supra*) at para 48.
[55] (*supra*) at para 4.

the upgrading had been abandoned at the recommendation stage, could not result in a right to achieve what the Court called a back-door promotion of a possible incumbent of an upgraded post.[56] The same considerations apply *in casu*.

[96] Even if it can be argued that because the post of Inspector T12 had, in general, been graded and approved in November 2009, this was a post the individual respondents could be placed in, the difficulty was that all three the individual respondents that testified conceded that they did not meet the minimum requirement for the Inspector T12 position. This requirement was a three year B degree or related qualification. None of the other individual respondents testified as to their qualifications. It must thus be accepted that the individual respondents did not meet the minimum requirement for the Inspector T12 position, and therefore any such placement sought by the individual respondents was just not competent.

[97] Accordingly, the applicant is correct in contending that what the individual respondents wanted the third respondent to do, and what the third respondent then in fact did, was to place the individual respondents in positions that simply do not exist, as yet, and for which they in any event did not qualify for. This is simply not permissible, and a gross misdirection on the part of the third respondent, having a direct and material impact on the outcome in this matter, rendering it unreasonable. In simple terms, the third respondent pre-empted what needed to still happen in the future. Assume the applicant did approve a specific number of Inspector T12 positions in the new structure, and then sought to place persons in these positions without following its own policies, or, and when doing the selection for the positions conducted the selection in an unfair manner. In such instances, the individual respondents, if they did not get the Inspector T12 positions, would have a legitimate complaint of an unfair labour practice. But, and as said, none of this was the case, and thus no unfairness exists. In *Department of Justice*[57] the court said:

> '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

[56] See para 12 of the judgment.
[57] (*supra*) at para 71.

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.'

And in *Manyana*[58] the Court added:

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

The same considerations apply *in casu*.

[98] I next turn to the inconsistency issue. Again, the point of departure has to be that the duty is on the individual respondents to establish the existence of inconsistency.[59] The case of the individual respondents in this regard related

[58] (*supra*) at para 48.
[59] See *Comed Health CC v National Bargaining Council for the Chemical Industry and Others* (2012) 33 ILJ 623 (LC) at para 10; *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 ILJ 2406 (LAC) at para 39; *Banda v General Public Service*

to the case of the HR employees that were upgraded to T8 and then placed in the upgraded positions without the recruitment and selection policy being applied. This case was accepted by the third respondent, who concluded that as a result, it was unfair not to have done the same where it came to the individual respondents.

[99] In the context of applying discipline, a number of principles apply where inconsistency is considered, being: (1) Employees must be measured against the same standards (like for like comparison); (2) Did the chairperson of the disciplinary enquiry conscientiously and honestly determine the misconduct; (3) The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, or induced by improper motives or by a discriminating management policy (in other words this conduct must be bona fide); and (4) A value judgment must always be exercised.[60] I see no reason why the same considerations could not equally apply in this case, where it comes to alleged unfair treatment based on inconsistency in the context of an unfair labour practice dispute, but of course just with the contextual changes that the references to misconduct and disciplinary process be regarded as references to actions or omissions by the employer on the topics as set out in Section 186(2)(a) of the LRA. In *Manyana*[61] the Court said:

> '... 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

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Sectoral Bargaining Council and Others [2014] JOL 31486 (LC) at para 49; *SA Municipal Workers Union on behalf of Abrahams and Others v City Of Cape Town and Others* (2011) 32 ILJ 3018 (LC) para 50

[60] See *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para 29; *Absa Bank Ltd v Naidu* (2015) 36 ILJ 602 (LAC) at paras 36 – 37; *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) at para 10; *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1707 (LC) at para 19; *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others* (2010) 31 ILJ 2836 (LAC) at para 21; *SRV Mill Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 135 (LC) at para 23.

[61] (*supra*) at para 55.

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 ...'

[100] In this instance, and applying these principles, any case of inconsistency is entirely without substance. There simply exists no like for like comparison, where it came to the issue of the HR employees. In fact, it was the individual respondents' own witness, Mgendane, the full time shop steward, whose testimony was the death knell to the inconsistency case. Mgendane testified that the regrading of the HR Employees came about as a result of a specific collective agreement concluded with the applicant, because of certain operational difficulties the applicant. In short, these difficulties arose due to the applicant simply having a drastic shortage of HR practitioners. Additional positions of such a nature were approved in the structure, in the place of the former lower grade positions. In effect, this agreed change in structure resulted in the positions occupied by the HR employees becoming redundant, meaning that if they were not placed in these newly established positions, they could face retrenchment. This was specifically testified to by Davids as well as Mgendane (as said). Because the HR employees were exposed then to possibly losing their jobs, this changed the situation, as recognized in *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Another*[62] where it was held:

'... Two considerations arise from the above ratio in *SA Police Service v Public Servants Association*. The first is that the functionary has a discretion. Even where a particular position has actually been upgraded, the functionary is not obliged to promote the incumbent who currently occupies the position into the upgraded position. The second is that in exercising the discretion, the functionary must not place the incumbent in the position who is actually performing satisfactory at the risk of losing his or her employment. Applying this ratio to the current matter, it would not matter whether the job evaluation panel in fact upgraded the positions of the individual applicants. It was still up to the second respondent to exercise a discretion to give effect to the upgrade or not, and even should the upgrade be approved, whether actually to place

[62] (2013) 34 ILJ 690 (LC) at para 28. The Court in the quoted *dictum* was referring to *SA Police Service v Public Servants Association* (2006) 27 *ILJ* 2241 (CC) at para 35.

> the individual applicants in the upgraded positions. In exercising this discretion, the second respondent will be guided by the consideration that no job losses should be envisaged ...'

[101] Further, none of the individual respondents had any personal knowledge of the events relating to the HR employees, and could not contradict any of the above evidence relating to the clear distinction between the HR employees and the case of individual respondents.

[102] The applicant's own policies specifically provide that in the case of legitimate operational requirements, the recruitment and selection policy could be departed from, if appropriate. This was indeed such a case. What adds impetus to this exception is the fact that an immediate operational need had to be met, and this occurred with the actual agreement of labour by way of collective agreement. This completely distinguishes the situation of the HR employees from that of the individual respondents. In the case of the individual respondents, their positons remained unaffected in the new structure, and even came with a higher T10 grade. What the individual respondents wanted was to be placed in positions that were not approved, did not exist, and which was contrary to the actual structure agreed to with labour. There is absolutely no comparison to what was the case with the HR employees.

[103] There is another issue which completely disposes of any inconsistency argument. Contrary to what the third respondent seemed to accept in his award, the placement of the HP employees as set out above always remained subject to the essential requirement that the minimum qualification for the new position had to be met. There was specific undisputed evidence presented that one of these HR employees was indeed not appointed because she did not meet the minimum qualifications. The third respondent completely misconstrued the evidence, which did not support his conclusion at all.

[104] Accordingly, and in accepting that inconsistency existed where it came to the HR employees which caused the individual respondents to have been unfairly treated, the third respondent completely misdirected himself, and ignored pertinent evidence. He conducted no proper like for like comparison, and thus misconstrued the legal principles where it comes to inconsistency issues. The

third respondent's determination of the existence of unfairness based on inconsistency is unsustainable on any ground, and thus reviewable.

[105] The fact that the individual respondents may have working above their pay grade, so to speak, is of no consequence. But it interesting to consider part of reasoning of the individual respondents in this respect, which found favour with the third respondent. According to the individual respondents, they did both T9 and T11 grade work, and this translated then into a T12 grade. This makes no sense at all. It simply cannot be said that T9 plus T11 work equals a T12 position. Van Jaarsveld explained that if one looks at a profile in general of different grades of in essence the same core job, there are similarities in what is contained therein, but the difference comes in where it comes to the details and responsibilities, from grade level to grade level. He explained, which was not contradicted, that grade T11 work cannot be considered to be grade T12 work.

[106] This only leaves the alleged promise made by Koti for consideration. Accepting it is true that Koti indeed made the promise, this cannot serve to contradict all that is set out above, and render the conduct of the applicant in not grading the individual respondents at grade, to be unfair. I add that Gwala conceded under cross examination, that when they pushed Koti on the issue, he specifically told them that he did not have the power to make such a promotion. Considering the clear policies of the applicant, known to all that worked in the applicant, it was simply unreasonable to have relied on any promise by Koti. The third respondent's finding of what he called a 'legitimate expectation' where it came to this is entirely irregular, and unreasonable. In *Duncan v Minister of Environmental Affairs and Tourism and Another*[63] the Court held as follows:

> 'Reliance on the doctrine of legitimate expectation for any purpose presupposes that the expectation qualifies as legitimate. The requirements for the legitimacy of such expectation have been formulated thus:
> *(a)* the representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications;
> *(b)* the expectation must have been induced by the decision-maker;

[63] [2010] 2 All SA 462 (SCA) at para 15. See also *Minister of Defence and Others v Dunn* (2007) 28 ILJ 2223 (SCA) at para 32.

(c) the expectation must be reasonable;

(d) the representation must be one which is competent and lawful for the decision-maker to make ...'

In casu, and objectively, there is clearly nothing legitimate in the individual respondents seeking to rely on the promise of Koti, if compared to all else. It was undisputed that Koti was also not the decision maker where it came to promoting the individual respondents, and never had the power to promote them. Finally, any promotion would be subject to meeting the minimum qualification for the positions, which the individual respondents did not have.

[107] The third respondent's reliance on what he saw as a legitimate expectation as a result of the duties fulfilled by the individual respondents and the promise made by Koti was thus a fundamental misdirection. Legitimate expectation cannot create a substantive right where none exists. As said in *Meyer v Iscor Pension Fund*[64]:

> '... in administrative law, the doctrine of legitimate expectation has traditionally been utilized as a vehicle to introduce the requirements of procedural fairness and not as a basis to compel a substantive result. According to the traditional approach, it matters not whether the expectation of a procedural benefit is induced by a promise of the procedural benefit itself or by a promise that some substantive benefit will be acquired or retained. The expectation remains a procedural one. ...'

There was no case ever made out by the individual respondents in respect of a failure of process in this case.

[108] Finally, I must also confess that I find it strange that three of the individual respondents, being Mkosana, Madikizela and Alexander, would actually apply for other T12 positions in terms of the applicant's recruitment and selection process, if they genuinely believed they were actually already in such positions. Mkosana and Alexander had been successful and were placed in such positions, in other regions. This adds to the consideration I have referred to above, namely that the future was still uncertain and the individual

[64] (2003) 24 ILJ 338 (SCA) 25. See also *Apollo Tyres* (*supra*) at para 39.

respondents may well be promoted in due course, once the entire structure has been finally implemented and then populated, and provided all policies and processes have been complied with.

[109] In summary, it is my view that the third respondent failed to consider material evidence, and in essence relied on what was actually irrelevant evidence. On the evidence, it is clear that conduct of the applicant simply did not constitute an unfair labour practice. Also, the third respondent misconstrued the applicable legal principles, especially where it comes to what constitutes an unfair labour practice and the principles relating to inconsistency. These failures by the third respondent clearly constitute gross irregularities, satisfying the first leg of the review test. It is then further my view that in the absence of these irregularities, there is simply no basis on which the award of the third respondent can be sustained as being a reasonable outcome, especially considering the proper evidence as a whole and the applicable legal principles. I am satisfied that the outcome arrived at by the third respondent is unreasonable, satisfying the second leg of the review test. The arbitration award of the third respondent thus falls to be reviewed and set aside, where it comes to the merits of his finding of the existence of an unfair labour practice.

Conclusion

[110] Therefore, and for all the reasons set out above, the arbitration award of the third respondent in favour of the first respondents cannot stand, as it is simply irregular and an unreasonable outcome. This arbitration award has to be reviewed and set aside, which I hereby do. Also, and as set out above, the determination of the second respondent that the dispute was referred in time to the CCMA and that no condonation was required equally falls to be reviewed and set aside, on the basis that it is clearly wrong.

[111] This matter dates back to 2011, with a plethora of litigation in between. It is essential that it now be finally brought to a conclusion, whether on the basis of a lack of jurisdiction, or on the merits of the case. This must be so, especially considering the essential requirement of expedition in employment law dispute

resolution[65]. In terms of 145(4), this Court has the power to make any order it considers to be appropriate, having reviewed and set aside an award of a CCMA arbitrator. I therefore intend to substitute the arbitration award of both the second and third respondents with a single award that the first respondents' referral of an unfair labour practice dispute to the CCMA be dismissed.

[112] This then only leaves the issue of costs. In terms of the provisions of Section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was successful, I do not intend to burden the first respondents with a costs order, especially considering the opportunity afforded to me to bring this matter finally to an end. There is still an ongoing employment relationship between the parties, and I believe it to be fair that all parties now build this relationship going forward, with a clean slate. To mulch the first respondents with costs will not help this, and may only serve to compound resentment. I accordingly exercise my discretion as to costs in this matter, by making no order as to costs.

Order

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

1. The applicant's review application is granted.

2. The arbitration award of the second respondent, being arbitrator A Mare, under case number ECEL 608 – 11 and dated 10 February 2015, is reviewed and set aside.

3. The arbitration award of the third respondent, being arbitrator E Mquqo, under case number ECEL 608 – 11 and dated 12 October 2015, is reviewed and set aside.

4. Both arbitration awards reviewed and set aside in terms of paragraphs 2 and 3 of this order is substituted with a determination that the first respondents' referral of an unfair labour practice dispute to the fourth respondent, is dismissed.

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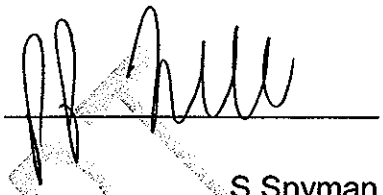
[65] See footnote 38 above.

5. There is no order as to costs.



S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate F A Boda SC
Instructed by:	Cliffe Dekker Hofmeyr Inc
For the Third Respondents:	Advocate J Grogan SC
Instructed by:	Wesley Pretorius & Associates