

SOUTH AFRICA / JUDGMENT

**Koma and Others v Member of the Executive Council
(MEC): Gauteng Department of Agriculture and Rural
Development and Others (JR1544/19) [2023] ZALCJHB
315; [2024] 2 BLLR 170 (LC) (8 November 2023)
[2023] ZALCJHB 315**

COURT

Labour Court Johannesburg

BEFORE

S Snyman

CASE / FILE NUMBER

JR1544/19

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Source record

FLYNOTES:

LABOUR – Unfair labour practice – Demotion –
Job
evaluation conducted and implemented at department –
Implementation did not change position of employees –
Position remained at same grade of level 8 – Employees
raised grievance against decision not to grade them at grade
level
10 – Employees must have right to particular grade and
employer must diminish such right – No such right
shown –
Employees must show decision by employer not to promote – No
such decision exists – No demotion
shown to exist –
Arbitrator considering all evidence rationally and reasonably –
Arbitration award unassailable
on review – Application
dismissed – Labour Relation Act 66 of 1995, ss 145 and
158(1)(h).
THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Not Reportable
case
no: JR 1544 / 19
In

the matter between:

MASEGO
JACQUELINE KOMA
First
Applicant
KGARAGARA
THOMAS MAJA
Second
Applicant
ABRAHAM
SEPUTI MANOKE
Third
Applicant
TOLO
ABRAM MOSEKI
Fourth
Applicant
LOYISO
VICTOR SOBUKA
Fifth
Applicant
and
MEMBER

OF THE EXECUTIVE
COUNCIL (MEC):

GAUTENG
DEPARTMENT OF AGRICULTURE
AND
RURAL DEVELOPMENT
First
Respondent
HEAD

OF DEPARTMENT:

GAUTENG
DEPARTMENT OF AGRICULTURE
AND
RURAL DEVELOPMENT
Second
Respondent
GAUTENG
DEPARTMENT OF AGRICULTURE
AND
RURAL DEVELOPMENT
Third
Respondent
MAHASHA
T.M. N.O.
Fourth
Respondent
GENERAL
PUBLIC SERVICE SECTORAL
BARGAINING
COUNCIL (GPSSBC)
Fifth

	Respondent
Heard:	25 August 2023
Delivered:	8 November 2023 This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 8 November 2023
Summary:	CCMA arbitration proceedings – review of arbitration award – test for review – s 145 of LRA 1995 – principles considered – unreasonable outcome approach applied Review application – applicant bringing part of review application under s 158(1)(h) of LRA – such review not permitted / competent in the circumstances – review dismissed Unfair labour practice – arbitrator’s finding that no unfair labour practice committed sustainable and reasonable – arbitrator properly and reasonably considered relevant provisions of law and reasonably / correctly applied the facts Unfair labour practice – demotion – principles considered – requires conduct by employer demising rights, position or status – no demotion shown to exist Unfair labour practice – employees must have right to particular grade – employer must diminish such right – in casu no such right shown – position of employees always remained at the same grade – no demotion proven Unfair labour practice – promotion – employees must show decision by employer not to promote – no such decision exists – even if decision exists – no basis to interfere with prerogative discretion of employer – no unfair labour practice relating to promotion proven Review application – application under s 145 of LRA – consideration of evidence by arbitrator – arbitrator considering all evidence rationally and reasonably – arbitrator properly applying legal principles – outcome arrived at reasonable Review application –

proper case for review not made out – application dismissed

JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicants have brought an application for review in two parts. The first part of the application (Part A) is an application in terms of section 145 of the Labour Relations Act (LRA)[1] to review and set aside an arbitration award handed down by an arbitrator of the General Public Service Sectoral Bargaining Council

(GPSSBC), being the fifth respondent. The second part of the application (Part B) is a so-called legality review, brought by the

applicants in terms of section 158(1)(h) of the LRA, relating to the very same arbitration award. The arbitration award in question was handed down by the fourth respondent in his capacity as arbitrator appointed by the GPSSBC and concerned a dispute involving an unfair labour practice relating to promotion referred by the applicants to the GPSSBC. The fourth respondent held that the applicants had not been visited with an unfair labour practice by the first, second and third respondents, and thus refused their unfair labour practice claim.

[2] The arbitration award of the fourth respondent was handed down on 23 May 2019. Therefore, the six weeks' time limit in terms of section 145(1) of the LRA expired on 4 July 2019. The applicants' review application was brought on 18 July 2019, and is thus some two weeks out of time. The applicants did apply for condonation in the review application itself. The application for

condonation was not strenuously opposed by the first, second and third respondents.

[3] In my view, this is an appropriate case where condonation should be granted. The delay of 14 days, in the circumstances, is not material. The applicants have also offered a reasonable and proper explanation for the delay. They explain that they were previously assisted by NEHAWU, and following consultations with such union about the award once it came to hand, they were informed by NEHAWU on 31 May 2019 that it would no longer be able to assist them. In the month of June 2019, the applicants engaged with the first, second and third respondents with the view to try and resolve the matter amicably, which attempts were not successful. Also in this month, the applicants raised the necessary funds for legal representation and instructed their current attorneys at the end of June 2019. The review application followed less than three weeks later. I do not believe the conduct of the applicants exhibited any undue procrastination. I am satisfied that they remained engaged in their matter throughout, with the intention of pursuing it further. This is certainly a case where the prospects of success of their review application must be properly and fully

considered. I will therefore grant condonation, so that the merits of the applicants' review application can be fully ventilated.

- [4] I will now proceed to decide the applicants' review application, starting with the setting out of the relevant factual background. For ease of reference, I will refer to the first, second and third respondent jointly as 'the Department'.

The relevant

background

- [5] The Department is a Provincial Government Department, responsible for agriculture in the Gauteng Province. The Department functions under the auspices of the National Department of Agriculture.
- [6] The five individual applicants are all employed in the Department. Papie Mokesi (Mokesi), Leyiso Sobuza (Sobuza) and Abraham Mankoe (Mankoe) were employed between 2012 and 2015, in the position, titled at the time of their employment, as a 'Senior Agricultural Economist'. Thomas Maja (Maja) was employed in 2014 as an Agricultural Advisor and Jaqueline Koma (Koma) was employed in 2009 also as a Senior

Agricultural Economist. It was undisputed that all these positions were graded at a grade level 8. It was also undisputed that none of the applicants had any subordinates reporting to them and that they exercised no supervisory or management functions.

- [7] In and during 2008 / 2009, a complete job evaluation was done at the level of the National Department of Agriculture. This was a comprehensive evaluation process, involving all positions in the National Department and subsidiary departments, and was conducted with the full participation of all stakeholders, including employee representatives. Once this exercise was completed in and around 2009, and by way of instruction from the National Department, the Department was then required to implement the outcome of that job evaluation in the Department itself. In fact, and as early as 2009, a decision was taken at national level that the job evaluation results of what was called the 2nd, 3rd and 4th rounds of evaluations, had to be implemented by 1 April 2009.
- [8] Prior to the aforesaid job evaluations and the implementation that followed, there were five levels in the organizational structure at the Department. First was an Administrative Officer level at grade level 7, second was the Senior Agricultural Economist level at grade level 8, third was the Principal Agricultural Economist at grade level 9, fourth was the Assistant Director, Micro Economics at grade level 10, and finally the Deputy Director, Micro Economics at grade level 12. The national job evaluation however specifically changed this organizational structure, and arrived at a structure consisting of three levels, being firstly a production level, secondly a supervisory level, and thirdly a management level.

- [9] In the new three levels structure, the production level was that of Agricultural Economist at grade level 8. The supervisory level was that of a Senior Agricultural Economist at grade level 10, and the management level was a Director General Agricultural Economist at grade level 12. What was envisaged with regard to the Senior Agricultural Economist position at grade level 10, was a supervisory / management position, and was in essence a combination of the Principal Agricultural Economist at grade level 9 and the Assistant Director position at grade level 10 under the old (former) structure. Because it was a supervisory / management position, an essential requirement for the position of Senior Agricultural Economist in the new structure was that the position had to have subordinates reporting into the position, and the position had supervisory and direct management functions. It was determined that what was called the Senior Agricultural Economist position in the former structure was actually the Agricultural Economist position in the new structure under the production level, remaining as a grade level 8 position without any supervisory duties or management functions.
- [10] On 20 November 2017, the Department resolved to implement the national job evaluation results. On 1 December 2017, the Department then gave formal notice to the applicants that the outcome of the National job evaluation had been approved by the Department, and would now be implemented. It was further stated in this notice that the current salary post level of the applicants would be retained at the same level (thus grade level 8), and the title of their positions will be changed to 'Agricultural Economist'.
- [11] In the end, and in simple terms, what the implementation of the National job evaluation exercise meant is that nothing in the position of the applicants would be changed, and all that would be changed is the job title. They always were and remained at grade level 8, and were doing the same job they had been doing all along on the same conditions of employment.
- [12] The applicants however seized upon the position of Senior Agricultural Economist in the new structure as an opportunity, and in essence contended that since they were employed as what was termed Senior Agricultural Economists, it meant that they had to be upgraded to level 10, which would be commensurate to their existing titles of Senior Agricultural Economists. They raised a grievance against the Department's decision not to grade them at grade level 10 pursuant to the implementation of the National job evaluation. A number of meetings were held in the course of 2018 about this, the particulars of which are of little moment in deciding this matter. In the end, the Department remained unconvinced to change the implementation, as set out above.

[13] On 24 August 2018, the applicants referred an unfair labour practice dispute to the GPSSBC. In the referral document, the dispute is described as one of an unfair labour practice relating to promotion. It is recorded in the referral that 'the department is not willing to upgrade / promote all the incumbent to the position of senior agricultural economist, the employer instead change the title'. Under the summary of the facts as contained in the referral, the applicants similarly state that the Department had issued a circular

in which all the Senior Agricultural Economists were to be upgraded to level 10, but instead the Department just changed their title. It is reiterated under this summary that 'the employer fail to promote / upgrade the applicants to grade 10' (sic).

[14] This dispute remained unresolved at conciliation on 27 September 2018, and the GPSSBC issued a certificate of failure to settle, describing the dispute that remained unresolved as an unfair labour practice relating to promotion. This was followed by a referral to arbitration by the applicants on 22 October 2018, in which the issue in dispute is described as 'unfairly treated in relation to promotion'.

[15] The dispute came before the fourth respondent for arbitration on 24 April 2019. In his arbitration award handed down on 23 May 2019, the fourth respondent recorded that the issue in dispute was that the applicants were challenging the decision by the Department not to upgrade them from salary level 8 to salary level 10, and that they sought to be upgraded to salary level 10.

[16] However, and as the applicants' case in the arbitration unfolded, it also became apparent that they were then further contending, despite what was contained in all their referral documents, that their posts of Senior Agricultural Economists had been downgraded and thus amounted to an unfair demotion. The applicants however did concede in the arbitration that their salaries, responsibilities and functions remained the same after the implementation of the National job evaluation and the new organizational structure. They also never challenged the outcome of this National job evaluation.

[17] The fourth respondent, in his arbitration award, then dealt with both questions, namely whether the applicants were supposed to be upgraded, or whether they had been demoted. As to the question whether the applicants were entitled to be upgraded, the fourth respondent found that they could not be upgraded, because they were not performing supervisory functions that were an integral part

of the new post of Senior Agricultural Economist. He also reasoned that the Department took no decision not to upgrade them, and that in any event, the Department had the prerogative whether or not to upgrade an employee and it was never shown that the Department acted improperly in this respect.

[18] Dealing with the issue of demotion, the fourth respondent was of the view that the posts of the applicants were downgraded when the job evaluation was implemented. However, and having so found, the fourth respondent adopted the view that this downgrade could not be

seen to be unfair. In this respect, he considered that none of the terms and conditions of employment (including salaries) of the applicants had been changed. He also again referred to the fact that the position of Senior Agricultural Economist as it now existed, on the undisputed facts, had as an essential component that the applicants had to perform supervisory duties, which they did not perform. He was also critical of the fact that the applicants never challenged the re-grading itself, which compromised their unfair demotion case.

- [19] The fourth respondent concluded that since the applicants demanded an upgrade, and the fourth respondent having found that what was at stake was in reality a downgrade, the applicants simply could not make out a case that they were entitled to an upgrade. He also considered that the decision whether or not to upgrade the applicants would also involve the exercise of a discretion by the Department, and there was no case that this discretion had been exercised in which a manner that would open it up for a successful challenge by way of an unfair labour practice dispute.
- [20] The fourth respondent then dismissed the applicants' unfair labour practice claim / dispute, giving rise to the current review application.

The basis of review

- [21] As touched on above, the applicants' notice of motion in this matter consists of two parts. In part A of the notice of motion, the applicants seek, for the want of a better description, the standard relief on the standard basis, found in virtually all review applications before Court where arbitration awards handed down by arbitrators of the CCMA or the various bargaining councils, are challenged on review. There applications come before this Court in terms of section 145 and / or section 158(1)(g) of the LRA. Therefore, part A of the applicant's notice of motion is a competent review application placed before this Court for consideration and ultimate determination.
- [22] The same cannot be said for part B of the notice of motion. In that part of the notice of motion, the applicants seek to challenge the decision of the Department on review directly to this Court, on the basis of what can generally be called a legality review. In these kinds of review applications, a decision taken by the State in its capacity of employer is sought to be challenged to this Court on review by way of section 158(1)(h) of the LRA.[2] It is true that if there exists a decision by the Department not to upgrade the applicants from level 8 to level 10, that would be a decision of the State in its capacity as employer which this Court in principle would have jurisdiction to consider and decide on review.[3] But that is not where the enquiry ends. In *Mohlomi v Ventersdorp/Tlokwe Municipality and Another*[4] the Court held:

‘The enquiry whether or not to entertain such a review application however does not stop just because it may be accepted that the Labour Court in general terms has jurisdiction to do so. Simply put, the fact that the Labour Court has jurisdiction/power does not mean that the court should exercise this power. In other words, and even though the court may have jurisdiction to consider such a review under s 158(1)(h), it does not mean that it is appropriate for it to exercise such power, especially where there are other specifically prescribed

alternative means by way of which the issue can be resolved ...’

[23] As is clear from all that happened in this matter, the applicants squarely rely on the existence of an unfair labour practice as defined in section 186(2)(a) of the LRA, be it an unfair demotion or promotion. In particular, and even as contemplated by part B of the notice of motion as articulated therein, the refusal or failure of the Department to upgrade the applicants would fall squarely within the parameters of what would be an unfair labour practice as defined in the LRA. This is where the statutory prescribed dispute resolution processes under the LRA come in and must be followed. These dispute resolution processes are far more than simply an alternative remedy, and are actually an obligatory and prescribed remedy.[5] There is no choice, and dispute resolution must be done in that manner. That is why the Court in *Chirwa v Transnet Ltd and Others*[6] made the following clear:

‘... The LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective

of who the employer is, and includes the state and its organs as employers.

Ms Chirwa’s case is based on an allegation of an unfair dismissal for alleged poor work performance. The LRA specifically legislates the requirements in respect of disciplinary enquiries and provides guidelines in cases of dismissal for poor work performance. She had access to the procedures, institutions and remedies specifically designed to address the alleged procedural unfairness in the process of effecting her dismissal. She was, in my view, not at liberty to relegate the finely tuned dispute-resolution structures

created by the LRA. If this is allowed, a dual system of law would fester in cases of dismissal of employees by employers, one

applicable in civil courts and the other applicable in the forums and mechanisms established by the LRA.’

[24] In short, the LRA has a unique scheme where it comes to resolving disputes that arise in the scope of the employment environment, and this even includes the State as employer.[7] The LRA creates a right to a fair dismissal and a fair labour practice, and then provides for a prescribed dispute-resolution process to give effect to such right. At the heart of this dispute-resolution process lies the notion of fairness as between

both employer and employee, which notion is incompatible with concepts such as unlawfulness or irrationality or illegality or invalidity.[8] At a level of policy, this Court should always strive to give primacy to this prescribed dispute resolution processes of the LRA and the notions underlying it.

[25] It must follow that where the Court is faced with a review application under section 158(1)(h) to challenge a decision of the State in its capacity as employer, it is essential for the Court to consider the true nature of the decision, or, in other words, the true nature of the dispute. [9] So, and for example, if the decision is tantamount to a dismissal or would constitute an unfair labour practice as defined in section 186(2) of the LRA, then such a decision would be susceptible to challenge under the auspices of the dispute resolution processes enshrined in the LRA. In casu, the decision could be tantamount to unfair labour practice as contemplated by the LRA, in which event the prescribed dispute resolution processes in that Act would ordinarily apply. This enquiry must always be conducted by the Court, irrespective of how the review applicant may choose to label the dispute.[10] And once it is true that the true (real) nature of the dispute is one contemplated by the LRA, then the dispute must be resolved by way of the proper prescribed processes under that statute, and this Court should decline to entertain the same by way of a review application under section 158(1)(h). As said by Ngcobo J in *Chirwa supra*: [11]

‘... It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of s 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute-resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case ‘for practical considerations’. What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution ...’

[26] The fact that the State may be the employer makes no difference. Employees of the State are to be treated no differently and have no additional rights or benefits, as opposed to their counterparts in the private sector.[12] In *Public Servants Association of SA on behalf of De Bruyn v Minister of Safety and Security and Another*[13] this was aptly described as follows:

‘The supposition that public servants had an extra string to their bow in the form of judicial review of administrative action, ie acts and omissions by the state vis-à-vis public servants, evaporated

when the Constitutional Court in *Chirwa v Transnet Ltd & others*, held that the dismissal of a public servant was not “an administrative act” as defined in PAJA and therefore not capable of judicial review in terms of that Act. Any uncertainty regarding the interpretation of the *Chirwa* judgment was removed in the subsequent decision in *Gcaba v Minister for Safety & Security & others*. The result is that a public servant is confined to the other remedies available to him or her.’

[27] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*[14], the Court was faced with a situation where it was alleged that a decision by the State not to appoint the applicant party on a

permanent basis resorted under the definition of what would be a dismissal as contemplated by section 186(1)(b) of the LRA. That

applicant, instead of following the dispute resolution processes under the LRA, rather decided to approach the Labour Court directly

by way of a legality review. The Court held as follows with regard to this approach:[15]

‘The Labour Appeal Court was correct in upholding the Labour Court’s decision that it did not have jurisdiction in the matter. This is because the claim by the applicant relating to the Premier’s decision not to appoint her, and the contention that this was unlawful, falls squarely within the definition of dismissal in s 186(1)(b) of the LRA. The dispute should have been referred to conciliation and ultimately to arbitration under s 191 of the LRA. Therefore, the applicant cannot bypass the dispute-resolution process envisioned in the LRA. The applicant was obliged to follow the

dispute-resolution process in chapter VIII of the LRA but did not do so.’

[28] The conduct of the applicants in *casu* is also comparable to what transpired in *Chirwa supra*. That case concerned a dismissal based on poor work performance, which the applicant party had initially challenged in the CCMA in terms of the LRA. However, the applicant then decided to abandon the CCMA in proceedings in favour of a review application directly to the High Court, in which she challenged the decision to dismiss her as unlawful and irregular (thus a legality review). The Court came to the following conclusion:[16]

‘Nonetheless, Ms Chirwa chose to abandon the process she had started in the CCMA and approached the High Court where she contended that her right to administrative justice, protected by s 33 of the Constitution, had been breached. She was ill-advised in abandoning the process that she had started in the CCMA. This is the route that she should have followed to its very end ...’

[29] It must also be remembered that the decision by the Department not to upgrade the applicants does not constitute administrative action as contemplated by section 33(1) of the Constitution and / or in terms of PAJA.[17] For example, and as said by Skweyiya J in *Chirwa supra*:[18] ‘... Accordingly, the failure to promote and appoint the applicant was not

administrative action ...'. The applicants have not pleaded reliance on PAJA, leaving section 33(1) of the Constitution. However, and in *Gcaba supra*,^[19] the Court held as follows in a case where an employee sought to challenge a case relating to a refusal to promote the employee on the basis of alleged unlawful administrative action:

'Generally, employment and labour relationships do not give rise to administrative action as contemplated by the PAJA. Section 23 of the Constitution regulates the relationship between employer and employee but s 33 does not. A grievance raised by employees relating to the conduct of the state as employer has few if any direct implications or consequences for other citizens. Employment disputes are therefore not to be equated with matters such as tenders.'

[30] The judgment in *Gcaba supra* arose from certain dicta by Ngcobo J in *Chirwa supra*^[20], where the learned Judge had said:

'Support for the view that the termination of the employment of a public sector employee does not constitute administrative action under s 33 can be found in the structure of our Constitution. The Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other. It recognises that employment and labour relations and administrative action are two different areas of law. It is true they may share some characteristics. Administrative law falls exclusively in the category of public law while labour law has elements of administrative law, procedural law, private law and commercial law ...'

[31] The SCA in *Kriel v Legal Aid Board and Others*^[21] also interpreted and applied the judgment in *Chirwa*, and held:

'... The question whether an unfair dismissal in the public sector amounts to administrative action has been settled by the Constitutional Court in *Chirwa v Transnet Ltd & others*. The Constitutional Court held that public servants now enjoy the same protection afforded employees in the private sector under the LRA. The court further held that a public service employee could not have two causes of action, one under the LRA and the other under PAJA, and that the decision of an organ of state to dismiss an employee is not an administrative act but involves the exercise of a contractual power ...'

[32] It follows that the applicants' review application under part B of the notice of motion is not competent. That part of the application thus cannot succeed, for this reason alone. The applicants were compelled to have followed the dispute resolution process in terms of section 191 of the LRA, which they did, and which led to an arbitration award determining the dispute. It is not open for the applicants to now approach the Court under a different cause of action thereby effectively bypassing these processes and heading directly to this Court, as a Court of first instance. The only remedy left open to the applicants is to challenge the arbitration award of the fourth respondent on review to this Court under section 145 / 158(1)(g) of the LRA, which they have done under part A of the notice of motion. Accordingly, part B of the review application of the applicants falls to be dismissed, and only the review application under part A will be considered.

The test for review

[33] Where it comes to the review application under part A, the test for review to be applied is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,^[22] the Court held that ‘the reasonableness standard should now suffuse s 145 of the LRA’, and that the threshold test for the reasonableness of an award was: ‘... Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...’^[23]. This means that the award in question is tested against all the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.^[24] In conducting this test it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.^[25] In *Herholdt v Nedbank Ltd and Another*^[26] 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. ...’

[34] Based on the aforesaid, the first enquiry is to establish if there a failure or error on the part of the arbitrator. Second, and where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable as a result. It would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, 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.^[27] As said in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*^[28]:

‘... 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 ...’

[35] As against the above principles and test, I will now turn to deciding the merits of the applicants’ review application.

Analysis

[36] In this instance, the applicants’ case was founded on an unfair labour practice in terms of section 186(2)(a) of the LRA,^[29] and in particular, a contention that the Department refused / failed to upgrade them, in their positions as Senior Agricultural

Economists, from a grade level 8 to a grade level 10, following the implementation of the National job evaluation as applicable to the Department. It is trite that the applicants had the onus to prove the existence of such an unfair labour practice.[30] As to how the unfair labour practice is to be established, the Court in *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others*[31] gave the following guidance:

‘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.’

[37] Despite the reams of paperwork presented in this case, the core facts to be considered in deciding this matter are simple and straight forward. There was no dispute that the applicants were originally appointed in the positions of Senior Agricultural Economists in the former organizational structure. It is further undisputed that these appointments were made prior to the implementation of the National job evaluation and consequent new organizational structure in the Department. The applicants were appointed in a structure where there was no such thing as an Agricultural Economist, and where the overall organizational structure in the Department and reporting levels were entirely different.

[38] It was common cause that the results of the National job evaluation exercise were implemented in the Department on 1 December 2017, and this implementation resulted in an actual change in the organizational structure in the Department. Prior to 1 December 2017, the applicants, in their positions as Senior Agricultural Economists, were always graded at grade level 8. It was also common cause that they never exercised any supervisory or management functions, and had no subordinates reporting to them. In the structure prior to 1 December 2017, the applicants reported to the Principal Agricultural Economist which was a post at grade level 9, who in turn reported to the Assistant Director, Micro Economics at grade level 10.

[39] After 1 December 2017 and in the new structure, the two supervisory positions of Principal Agricultural Economist and Assistant Director, Micro Economics were no more. Instead, these two positions were consolidated into one level 10 position, now called a

Senior Agricultural Economist, at grade level 10. This Senior Agricultural Economist would then exercise all the supervisory and

management duties previously exercised by the Principal Agricultural Economist and the Assistant Director, Micro Economics, in the former structure. It had to follow that the applicants would then report into that new Senior Agricultural Economist position.

[40] As to the applicants themselves, where did the new organizational structure then leave them? The answer is simple, being that there was a newly named position in the new structure, called the Agricultural Economist. Despite being called this, it was basically the same position the applicants always occupied. It was still a grade level 8 position, with the same terms and conditions of employment and salary. But because the applicants were called Senior Agricultural Economists, and the position now linked to that title being a higher level supervisory / management position in the new structure, a title change of the applicants' positions was the order of the day. In short, the title of 'senior' was dropped from their position descriptions and it became Agricultural Economists. That is exactly what the Department conveyed to them in writing on 1 December 2017.

[41] So, was the decision of 1 December 2017 a demotion of the applicants? The fourth respondent seemed to think it was. In my view however, and in this regard, he got it completely wrong, for the reasons to follow. But more importantly, it was simply not open for the fourth respondent to consider whether there was a demotion of the applicants, considering the nature of the case brought by the

applicants to the GPSSBC for determination. The case brought by the applicants was one of an unfair labour practice relating to

promotion, in that they believed they were entitled to be upgraded into the position of Senior Agricultural Economist in the new

structure.[32] They never pursued a case that their existing positions were downgraded when the new structure was implemented and that such downgrade was unfair. Even in his own award, the fourth respondent identified the case he was required to decide being one of an 'upgrade'.

[42] As a matter of law, it in any event cannot be said that the referral by the applicants to the GPSSBC could have, despite its characterization

in the referral documents, encompassed an unfair demotion dispute. The reason is simple. A single decision by an employer cannot be a promotion, and a demotion. The concepts are mutually exclusive. A demotion must involve a diminishing in status, level, salary,

employment conditions, responsibilities, or the like. In a demotion, the actual diminishing is key.

[33] In the case of a promotion, there can be no diminishing. A promotion concerns a decision not to enhance, again relating to status, level, salary, employment conditions, responsibilities, or the like of an employee. Diminishing and enhancement cannot be used in the same breath or be the subject matter of exactly the same decision. It is either the one, or the other. The applicants chose a failure to enhance. It follows that the decision described as a failure to enhance cannot also be described as a decision to diminish.

[43] There is in my view a perfectly good reason why the applicants elected to articulate and then pursue the dispute as one of a dispute relating to unfair promotion. That reason is simply that if the dispute was one related to an unfair demotion, then it would have been necessary for them to challenge the grading exercise conducted at National department level, which was completed as far back as 2009. It is in the course of this exercise that the job of Senior Agricultural Economist as it existed in the previous structure

was assessed, and it was determined that it was a grade level 8 position (as it always was) that carried with it the title of Agricultural Economist. Attempting to challenge that grading exercise in 2018 would simply be far too late, and would require a challenge at National level.

[44] Even if it can be said for the purposes of argument that the applicants' referral to the GPSSBC on 24 August 2018 encompassed a case that they were unfairly demoted when the new structure was implemented, that demotion would have happened on 1 December 2017, when they were informed in writing by the Department of the implementation of the new structure and what it meant for the applicants' positions. If the applicants wanted to challenge that decision as a demotion, they needed to have referred the same to the GPSSBC within 90 days of such date,[34] thus being on or before 28 February 2018. The only unfair labour practice dispute ever referred by the applicants to the GPSSBC was the one on 24 August 2018 as referred to earlier. This is some six months outside the 90 days' time limit, and no condonation was applied for. It must follow that the GPSSBC had no jurisdiction to entertain a claim for unfair demotion based on that decision, in the absence of condonation being applied for and granted.[35] The fact that the matter was conciliated and a certificate of failure to settle was issued does not matter, as a certificate of failure to settle is not a ruling bestowing jurisdiction on the GPSSBC where none exists, and simply records the dispute is unresolved.[36]

[45] A further difficulty the applicants would of course face where it comes to an unfair demotion dispute is that they were never appointed to the position of Senior Agricultural Economist in the new structure, and then moved out of that position into a lesser position, which is what is required to establish a demotion.[37] By way of comparison, the following dictum in *Mathibeli v Minister of Labour*[38] is apposite, where the Court was dealing with an allegation of a demotion and said:

'First, the appellant's referred dispute alleged a fact: ie, that he was already occupying a grade 11 post. 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. ...'

[46] It follows that all that remains for determination is whether the decision not to upgrade the applicants constituted a failure to have promoted the applicants, and whether this failure was unfair. This is in any event what was specifically referred to in the

referral documents referring the dispute to the GPSSBC. That being the dispute, and in my view for the reasons to follow, this case of the applicants never had any merit.

[47] From the outset, and insofar as the applicants' case is founded on the re-grading of positions in the Department and to the consequent implementation of the new structure, per se, it cannot be a dispute concerning a promotion. That is because the nature of the positions and accompanying salary and conditions of employment of the applicants never changed. Where the actual grading is challenged, that can only be an unfair labour practice dispute relating to benefits, and the applicants never pursued or made out a case pertaining to such a dispute. As the Court said in *National Union of Mineworkers on Behalf of Coetzee and Others v Eskom Holdings SOC Ltd*[39]:

'... The failure to properly grade an employee is related to the provision of benefits for the simple reasons that benefits (including status, remuneration, eligibility for promotion etc) are normally determined by grade. As Ms Harvey, on behalf of NUM, correctly submitted, an employee who complains that his or her job is wrongly graded does not seek promotion to a new, higher or different job. Any re-grade of the job to coincide with the actual work done does not change the job contents. A re-grade does not promote an employee into a new position — it merely recognises the correct value to be attached to what the employee, in fact, is already doing. A promotion gives an employee a different or revised task. A dispute about an unfair incorrect grading is thus an unfair labour practice dispute relating to the provision of benefits ...'

[48] In any event, the applicants have made out no case that the grading exercise and implementation of the new organization structure as a consequence thereof, was somehow wrong or incorrect or otherwise unfair.[40] Once the grading of the applicants' current positions as Agricultural Economists at grade level 8 stands, as it must, then

they simply have no right or entitlement to be placed in the position of Senior Agricultural Economists at grade level 10. It is not possible to simply regrade, at the level of the structure in the Department, the applicants' existing positions to grade level 10, as that would undermine the detailed grading exercise conducted at National level over a long period of time, and the specific conclusions arrived at following that process at that level. Further, and as already said, the new position of Senior Agricultural Economist in the new structure carried with it the essential component of supervising other employees reporting into the position, which the applicants simply did not do. And finally, to move the applicants in the new Senior Agricultural Economist positions at grade level 10 as an ordinary course promotion, would necessitate it being proven that there was firstly a vacancy that needed to be filled, and then such appointment would have to comply with all the procedural pre-requisites necessary for the promotion of an employee in the public service, which never transpired in this case.

[49] Further, the applicants have no right to be promoted, and it in any event falls within the prerogative (discretion) of the Department to decide whether an employee is to be promoted. There is no case by the applicants, nor was there any evidence presented, that the Department decided not to promote the applicants on the basis of a decision that was

capricious, mala fide, irregular, arbitrary or based on some or other discriminatory policy. In short, and 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*,^[41] 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 ...’

[50] All considered, the Department effectively never took any decision not to promote the applicants. The Department simply implemented the new organizational structure. In *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others*,^[42] the Court said:

‘... An employee who complains that the employer's decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. ...’

[51] In nonetheless deciding whether what happened to the applicants in this case was fair or unfair, it is an important consideration to establish what exactly changed for the applicants. The answer to this question has to be nothing at all. None of their duties were taken away. The salary and conditions of employment remained unchanged. The work that they were doing remained the same. In particular, their grading level remained as it always was. There were only two changes that came to pass. Firstly, the word ‘senior’ was removed from their job title. Secondly, they would now report into the new created management position of Senior Agricultural Economist. These changes, in my view, are immaterial, and thus cannot be seen to constitute any unfair conduct towards them.^[43]

[52] Other factors to consider in deciding whether a decision was fair or unfair in the context of an unfair labour practice would be whether the employee was afforded the opportunity to make representations prior to any decision being taken, what the rationale for the decision was, and / or whether the employee was treated in a manner consistent with the treatment of other employees in similar circumstances.^[44] In the end, fairness contemplates a consideration of not just what is fair to the employee, but also to the employer.^[45] In casu, what happened undoubtedly had a proper rationale. It was the implementation of a National regrading exercise, which was the outcome of a long consultation process with all

stakeholders in the Department at National level, which regrading exercise was never challenged. Even when the Department implemented the new structure on 1 December 2017, it still afforded the applicants an opportunity to make representations as to how they believed the new structure should affect their positions. Detailed written representations were provided by the applicants in this regard, and meetings were held, before the Department made a final decision. There was no evidence or case before the fourth respondent that the applicants were treated different to any other employee in the Department in the same position. It would simply not be fair to compel the Department to upgrade the applicants having regard to all these circumstances.

[53] In the end, and properly considered, the case of the applicants was really straight forward. When the new organizational structure came out that attached a grading level 10 to the position described in that structure as Senior Agricultural Economist, the applicants seized the opportunity to obtain an upgrading for themselves, because their positions under the former organizational structure was described as being that of a Senior Agricultural Economist. This approach was always misconceived and without substance, as the applicants needed to consider what exactly the position of Senior Agricultural Economist in the new structure meant and what the position entailed. If so considered, the applicants could not have had any doubt that it was never the same position the applicants occupied. It was a consolidation of the positions the applicants would report into in the former organizational structure. In short, it was a new consolidated management position, and the applicants occupied no such position and never occupied such a position. All said, the applicants wanted the fourth respondent as arbitrator to upgrade their positions, which the fourth respondent simply could not do. In *Eskom Holdings SOC Ltd v National Union of Mineworkers obo Kyaya and Others*,^[46] the Court said:

‘... it is simply not competent for an arbitrator to step into the shoes of the applicant, consider the positions 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. ...’

What the Department did, as fully discussed above, can never be seen to be unfair. The applicants’ case could never succeed.

[54] It is true, as I have dealt with above, that the fourth respondent considered the positions of the applicants to have been downgraded because of the re-grading exercise and the consequent implementation of the new organizational structure. This conclusion, for the reasons set out in this judgment, would not be a rational and reasonable conclusion. The dispute was actually one of an unfair

labour practice relating to promotion, and if that did not exist, it should have been the end of the matter. But at least the fourth

respondent did consider whether this downgrade was fair, and concluded that it was, because the applicants never challenged the

grading exercise, there was very little change to their positions (in particular their salary was not changed), and that the applicants

were not performing any supervisory functions. This reasoning and conclusions of the fourth respondent is fully in line with the

facts

and the legal principles ventilated in this judgment and this nonetheless constitutes a reasonable outcome, even considering that he acted unreasonably in deciding that there was a downgrade and that he could consider such a dispute.

[55] The fourth respondent however did deal with the issue of whether the failure to have promoted the applicants was an unfair labour practice. He correctly recognised that it was not his task to review the decision taken by the Department not to promote the applicants, as this remained the prerogative of the Department. The fourth respondent also recognised that the Department actually took no decision not to promote the applicants, and in the absence of such a decision, there could not be an unfair labour practice relating to promotion. The fourth respondent concluded that even if the Department had taken a decision, there was no evidence to indicate that the decision was biased, based on wrong principle, was made without substantial reasons, and / or was mala fide, arbitrary

or capricious, which is yet again not only a reasonable conclusion, but is actually correct.

[56] In summary therefore, the fourth respondent's conclusion that the Department did not commit any unfair labour practice towards the applicants is fully in line with the evidence before him, and the applicable legal principles. There was no decision to demote or promote in existence in this case, which could be seen to be unfair towards the applicants. And even insofar as it may be considered that the Department had made a decision vis-à-vis the applicants and their positions in the Department, there is nothing unfair in that decision, and the applicants had simply failed to discharge the onus that rested on them to show the existence of any such unfairness. The fourth respondent's award therefore would be a reasonable

outcome in the circumstances and must be upheld.

Conclusion

[57] For all the reasons as set out above, the fourth respondent's arbitration award is unassailable on review. The fourth respondent rationally and reasonably found that there existed no unfair demotion and / or promotion in this case, and that the Department had committed no unfair labour practice towards the applicants. The review application of the applicants must therefore be dismissed.

Costs

[58] This only leaves the issue of costs. In terms of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicants were not successful, they at least had an arguable case. I do take a dim view of the fact that the applicants chose to pursue a legality review, when that was never legally competent in this case. However, and as far as the review application under section 145 of the LRA is concerned, I do not think any of the parties acted unreasonably in seeking to pursue this matter to finality, and in any event, it is an issue that called for final determination by this Court. I also consider the dictum of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[47] where it comes to costs awards in employment disputes before this Court, and in this case there certainly exists no reason to depart from the principle set out therein. Therefore, I consider it to be in the interest of fairness that no costs order should be made.

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

Order

1. The applicants' condonation application for the late filing of their review application is granted.
2. The applicants' review application is dismissed in its entirety.
3. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances: For the Applicants: Mr M Tumelo of Masile Maake Attorneys For the First, Second and Third Respondents: Adv V P Ngutshana Instructed by: The State Attorney

[1] Act 66 of 1995 (as amended).

[2] In terms of section 158(1)(h), the Labour Court may '... review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.'

- [3] See *Merafong City Local Municipality v SA Municipal Workers Union and Another* (2016) 37 ILJ 1857 (LAC) at para 36.
- [4] (2018) 39 ILJ 1096 (LC) at para 34.
- [5] See *Madzonga v Mobile Telephone Networks (Pty) Ltd* [2013] ZALCJHB 232 (30 August 2013) at para 63; *Ida v Department of Co-Operative Governance Human Settlements and Traditional Affairs Limpopo Province and Another* [2016] JOL 37301 (LC) at para 53; *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 17.
- [6] (2008) 29 ILJ 73 (CC) at para at 64 – 65. Also, and in *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) at para 56, it was held: ‘... Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasized in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees ...’. See also *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC) at paras 10 – 12; *Mpele v Municipal Council of the Lesedi Local Municipality and Others* (2019) 40 ILJ 572 (LC) at para 42.
- [7] *Public Servants Association of SA on behalf of de Bruyn v Minister of Safety and Security and Another* (2012) 33 ILJ 1822 (LAC) at para 26.
- [8] *Mohlomi* (supra) at para 39. See also *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Mashanda NO and Others* (2023) 44 ILJ 520 (LC) at para 83.
- [9] In *Zungu v Premier, Province of Kwazulu-Natal and Another* (2017) 38 ILJ 1644 (LAC) at para 18, the Court said: ‘... Accordingly, the first exercise in any proceedings is to read, as in this case, the allegations in the affidavits, and make the determination. It is not, primarily, the form of relief sought, but rather the necessary averments to demonstrate the ‘cause of action’ that determines the ‘character’ of the dispute, although the form of the relief, if it is consonant with the cause of action, will point in the same direction’. See also *Mohlomi* (supra) at para 42; *Ngubane v Safety and Security Sectoral Bargaining Council and Others* (2022) 43 ILJ 2543 (LC) at para 24.
- [10] Compare *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC) at para.52; *Chirwa* (supra) at para 63; *Gcaba* (supra) at para 66; *Farre v Minister of Defence and Others* (2017) 38 ILJ 174 (LC) at para 17.
- [11] *Id* at para 124.
- [12] As said in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 ILJ 613 (CC) at para 31: ‘... The LRA does not differentiate between the state and its organs as an employer, and any other employer. Thus, it must be concluded that the state and other employers should be treated in similar fashion ...’

- [13] (2012) 33 ILJ 1822 (LAC) at para 26. See also Chirwa (supra) at paras 41 and 124; Gcani v Minister of Justice and Correctional Services and Others (2019) 40 ILJ 358 (LC) at para 28.
- [14] (2018) 39 ILJ 523 (CC).
- [15] Id at para 20.
- [16] Id at para 67.
- [17] Promotion of Administrative Justice Act No 3 of 2000.
- [18] Id at para 68.
- [19] Id at para 64.
- [20] Id at para 143. This reasoning was concurred with by the majority judgment penned by Skweyiya J, at para 73.
- [21] (2009) 30 ILJ 1735 (SCA) at para 13. See also Minister of Labour and Another v Public Servants Association of SA and Another (2017) 38 ILJ 1075 (LAC) at paras 51 – 52.
- [22] (2007) 28 ILJ 2405 (CC).
- [23] 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.
- [24] See Duncanmec (Pty) Ltd v Gaylard NO and Others (2018) 39 ILJ 2633 (CC) at para 43.
- [25] Id at para 41.
- [26] (2013) 34 ILJ 2795 (SCA) at para 25. See also Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (2014) 35 ILJ 943 (LAC) at para 14; 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.
- [27] See Campbell Scientific Africa (Pty) Ltd v Simmers and Others (2016) 37 ILJ 116 (LAC) at para 32.
- [28] (2015) 36 ILJ 1453 (LAC) at para 12.
- [29] The section 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’.

- [30] 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 (Association Incorporated Under Section 21) and Another v General Public Sector Bargaining Council and Others* (2005) 26 ILJ 550 (LC) at para 17.
- [31] (2004) 25 ILJ 248 (LAC) at para 73.
- [32] In *September and Others v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC) at para 43, it was said that ‘... The general rule is that the referral form and certificate of outcome constitute prima facie evidence of the nature of the dispute conciliated. However, if it is alleged that the nature of the dispute is in fact different from that reflected on such documents, the parties may adduce evidence as to the nature of the dispute ...’. See also *Tao Ying* (supra) at para 65.
- [33] In *Minister of Justice and Another v Bosch NO and Others* (2006) 27 ILJ 166 (LC) at para 21, it was stated that: ‘... Demotion must, in the context of a labour practice, mean at least that something to which the employee is entitled is taken away or withdrawn ...’.
- [34] Section 191(1)(b)(ii) provides that a referral must be made 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.
- [35] See *SA Municipal Workers Union on behalf of Manentza v Ngwathe Local Municipality and Others* (2015) 36 ILJ 2581 (LAC) at paras 42 – 43. In *SA Transport and Allied Workers Union and Another v Tokiso Dispute Settlement and Others* (2015) 36 ILJ 1841 (LAC) at para 18, it was held that: ‘... where the steps constitutes a jurisdictional step, a time-limit, and the party is out of time then, in the absence of an application for condonation, a court cannot come to the party's assistance ...’.
- [36] See *Helderberg International Importers (Pty) Ltd v McGahey NO and Others* (2015) 36 ILJ 1586 (LAC) at para 11; *Mbele and Others v Chainpack (Pty) Ltd and Others* (2016) 37 ILJ 2107 (LC) at paras 31 – 32; *Cook4life CC v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2018 (LC) at paras 8 – 9; *Bombardier Transportation (Pty) Ltd v Mtiya NO and Others* (2010) 31 ILJ 2065 (LC) at para 14.
- [37] See *Molosioa v Eskom Holdings Limited (Komati Power Station)* [2021] 4 BLLR 368 (LAC) at para 16.
- [38] (2015) 36 ILJ 1215 (LAC) at para 16.1.
- [39] (2020) 41 ILJ 391 (LAC) at para 66.
- [40] *Compare Eskom Holdings SOC Ltd v National Union of Mineworkers obo Kyaya and Others* [2017] 8 BLLR 797 (LC) at paras 88 – 89.

- [41] (2002) 23 ILJ 761 (LC) at paras 29 – 30. See also Manyana (supra) at para 47.
- [42] (2004) 25 ILJ 248 (LAC) at para 73.
- [43] Compare Stofile v Msimbithi Fidelity Security Services (2010) 31 ILJ 1980 (CCMA) at para 6.
- [44] See Murray v Independent Newspapers (2003) 24 ILJ 1420 (CCMA) at para 23.
- [45] See Solidarity obo Oelofse v Armscor (SOC) Ltd and Others (JR2004/15)
- [2018] ZALCJHB 87 (21 February 2018) at para 36.
- [46] [2017] 8 BLLR 797 (LC) at para 90. See also SA Police Service v Safety and Security Sectoral Bargaining Council and Others (2010) 31 ILJ 2711 (LC) at para 15.
- [47] (2018) 39 ILJ 523 (CC) at para 25. See also Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others (2021) 42 ILJ 2371 (CC) at para 35.
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