

SOUTH AFRICA / JUDGMENT

**Productivity South Africa v
Commission for Conciliation Mediation
and Arbitration (JR734/22) [2024]
ZALCJHB 460 (19 November 2024)
[2024] ZALCJHB 460**

COURT

Labour Court Johannesburg

BEFORE

S.M. Shaba

CASE / FILE NUMBER

JR734/22

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case

No: JR 734/22

In

the matter between:

PRODUCTIVITY
SOUTH AFRICA
Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
First
Respondent

COMMISSIONER:

DAVID SELLO
Second
Respondent
DIMAKATSO
PHIRI
Third
Respondent

Heard:

10 October 2024

Delivered:	19 November 2024 (This judgment was handed down electronically by emailing a copy to the parties. The 19 November 2024 is deemed to be the date of delivery of this judgment).
Summary:	Review under section 145 of the LRA-Factual matrix in pleadings at conciliation and arbitration if not disputed or raised may confer jurisdiction-Arbitration award falling outside the bands of reasonableness.

JUDGMENT

SHABA, AJ

Introduction

- [1] This is a review application in terms of section 145 of the LRA[1], in which the Applicant seeks to review part of the arbitration award of the Second Respondent dated 22 February 2022, under case number GAVL 3911-20 within the First Respondent.
- [2] Part of the award sought to be reviewed and set aside, is the conclusion by the Second Respondent that the Applicant committed an unfair labour practice by failing to give the Third Respondent the opportunity to contest for the Executive Manager: Regional Operations (Region 1: Executive Manager position), within the Applicant and awarding such Respondent compensation in the amount of R439 090.68 (four hundred thirty-nine, ninety and sixty-eight cents)[2]. The Third Respondent opposes the application.

Background

- [3] The Applicant reconfigured its strategic business units (SBUs) organisational structure to ensure clear delineation of functions and optimum utilization of its human resources within its financial constraints.
- [4] The organisational review and design process to achieve the reconfiguration of the Applicant's organisational structure aforementioned to its SBUs was done through the establishment of an organisational review and Design task team, which was tasked with developing a revised organisational structure to give effect to the Applicant's new business model.
- [5] The Applicant's revised organisational structure was approved by its Board in March 2016 and its implementation was partially approved in phases thereafter.
- [6] Emanating from the above, reconfiguration and restructuring, a new Region 1, which would service Gauteng, Northwest and Limpopo was created as part of a new and revised organisational structure of the Applicant.

- [7] The creation of Region 1 as aforementioned, resulted in the disbandment of the then Applicant's head office-based Productivity Organisational Solutions (POS) which had the Applicant's Ms Lelanie Janse Van Rensburg (Janse Van Rensburg) as its Executive Manager since 2011.
- [8] The creation of Region 1 aforementioned, also resulted in the disbandment of the Applicant's Workplace Challenge Programme from its Value Chain Competitiveness Programme to establish a new head office-based Strategic Business Unit called Competitive Improvement Services (CIS) programme or function with effect from April 2020.
- [9] Ms Janse Van Rensburg was following the aforementioned reconfiguration, restructuring and establishing of the newly created units within the Applicant, laterally moved from her previous position of Executive Manager: POS to that of the newly created Executive Manager: Regional Operations of Region 1.
- [10] The Applicant's other employees were also laterally moved into new created positions to avoid dismissals relating to operational requirements. This resulted in the Third Respondent being laterally moved from her previous position of Senior Manager: Design Solutions within POS to another office-based position of Senior Manager:

Competency Development Strategies within the Applicant's Competitiveness Improvement Services (CIS).

- [11] None of the Applicant's employees were demoted nor promoted as they all retained their titles under different functions to be performed in the Applicant's reconfigured and restructured

organizational new structure without their conditions of employment being adversely affected. None of the posts related to such

reconfiguration and restructuring were advertised internally or externally by the Applicant.

- [12] None of the Applicant's employees, including the Third Respondent prior to or after the partial implementation of the Applicant's

new organisational structure, lodged individual complaints or grievances in accordance with the Applicant's grievance policy[3], for their placement into new positions in the new and revised organisational structure.

- [13] The Third Respondent and two other employees referred an unfair labour practice dispute to the First Respondent on 2 December 2024. The Third Respondent's dispute was for her no-placement in the Executive Manager's position 1 in which Ms Janse Van Rensburg, who at all material times before such dispute, was the Third Respondent's senior and Executive head, was placed.

[14] Failing conciliation, the Third Respondent and the two other employees referred their disputes to arbitration that resulted in the Second Respondent's award, which is a subject matter of these review proceedings.

[15] Aggrieved by the Second Respondent's arbitration award, the Applicant instituted these review proceedings to review and set aside part of the Second Respondent's award.

The award

[16] The gravamen of the Second Respondent's award is the conclusion that the Applicant's failure to give the Third Respondent, the opportunity to contest for the Region 1: Executive Manager position, which according to the Third Respondent, she qualified for, constituted an unfair labour practice and awarded the Third Respondent compensation[4].

[17] The Second Respondent inter alia, accepted that Ms Janse Van Rensburg, was already a senior to the Third Respondent at the time of being placed as Executive Manager for Region 1, during the Applicant's reconfiguration and restructuring of its organisational structure but that the Third

Respondent "was also able to contest given the fact that she expressed intention to occupy such post"[5].

[18] The Second Respondent found that the Applicant's "policy" made provision for the rotation of employees in acting capacity but unlike Ms Janse Van Rensburg the Third Respondent, was not given an opportunity to be rotated in the aforementioned position even though she expressed interest in such rotation as "it could have given the Third Respondent and Ms Janse Van Rensburg a fair chance to be appointed or moved to"[6].

[19] The Second Respondent also found that the Third Respondent based on the above, was appointed into the Applicant's Region 1: Executive Manager position as aforesaid despite, Ms Janse Van Rensburg being senior to the Third Respondent and on the Second Respondent's own finding, such Ms Janse Van Rensburg was capable and fit for that position by virtue of her experience and qualifications, having demonstrated capabilities in moving the Applicant's business to higher levels and achieving a clean audit.[7]

[20] The Second Respondent further found that it is appropriate based on the above circumstances, to award the Third Respondent R439 090.68 calculated at the rate of the Applicant's 6 months' salary of R73 181.78[8].

[21] The Applicant was ordered by the Second Respondent to pay the Third Respondent, the amount referred to above, by no later than 15 March 2022[9].

[22] The Applicant seeks part of the Second Respondent's award to be reviewed and set aside based on the grounds referred to hereunder.

Grounds for review

[23] The Applicant assails part of the award on the following grounds[10].

‘[9.1] the decision reached by second respondent that the applicant has subjected third respondent to unfair labour practice, by failing to give her an opportunity to act in, or contest for a position of Executive Manager: Regional Operations (Region 1); and award of compensation to the third respondent, is one that a reasonable decision maker could not reach, for the following reasons:

1.1.1. third respondent was not subjected to unfair labour practice;

1.1.2. the position in question was never vacant, as it arose from a duly approved, fair and consultative process of the organisational review and design (restructuring process) and was filled during that process with effect from 1 April 2020. There was therefore no need to advertise that position;

1.1.3. award for compensation and quantum thereof is wholly inappropriate, unjust and inequitable under prevailing circumstances;

1.1.4. the current incumbent to the position of Executive Manager: Regional Operations (Region 1), who has always been in a position of an Executive Manager was, like all other applicant’s employees whose positions were affected by partial implementation of the organisational review and design process (restructuring), laterally placed in a newly created position; and

1.1.5. the award is not justified by the reasons given for it.’

[24] I will deal with the test for the review of awards in terms of section 145 of the LRA[11] and related case law jurisprudence, as hereunder, before dealing with the Applicant’s grounds of review.

Test for review

[25] The test for review of arbitration awards was comprehensively set out by the Labour Appeal Court (LAC) in *Makuleni v Standard Bank of South Africa Ltd and others* [12] wherein it was held inter alia that:

‘[3] The critical approach to reviews that turn on “unreasonableness” was articulated by Murphy AJA in *Head of Department of Education v Mofokeng and others* at paragraphs 30-33. The significant passages are emphasized:

“[30] The failure by/an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the ‘SCA’) in Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) and this court in Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

...

- [4] The import of these remarks demands reflection in order to digest the essence of the exercise that a commissioner embarks upon. The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation i.e. reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only the conclusion is untenable is a review and setting aside warranted.' [Emphasis added]
- [26] Apart from the above authorities, there is a plethora of other authorities on the test for the review of arbitration awards by commissioners in terms of the LRA, which must be read together in order to review an award and to determine whether the decision reached is one that a reasonable decision maker could have reached and whether such decision-maker committed any misconduct or irregularity[13].

Analysis

Whether the second Respondent's award stands to be reviewed based on the Applicant's jurisdictional ground of review?

- [27] The Applicant, initially set out its grounds for review in its founding affidavit[14].
- [28] Subsequently and with its supplementary papers under the cover of its Rule 7A(8)(a) notice, the Applicant raised a further ground of review that was not raised at the CCMA and only raised for the first time in these review proceedings[15].
- [29] The Applicant's further ground of review in its supplementary papers as aforementioned, is briefly stated, that the First Respondent
- did not have jurisdiction to conciliate and arbitrate the Third Respondent's and that of the Applicant's two other
- employees', unfair labour practice dispute, which ought to have been referred within 90 days in terms of the LRA[16].
- [30] Seeing that it is trite that a jurisdictional issue can be raised at any stage in the CCMA proceedings and in this Court, as correctly submitted by the Applicant, with this much, being conceded by the Third Respondent, it can only be prudent that I deal with this Applicant's belated ground of review based on the alleged non-jurisdiction of the First Respondent, first before dealing with other grounds of review.
- [31] The adjudication and determination of this ground that, the First Respondent did not have jurisdiction to deal with the Third Respondent's unfair labour practice dispute, is decisive from the onset of these proceedings, hence dealt with first, as, if I decide that there was indeed no such jurisdiction that would be the end of this matter and the award relevant herein, will be invalid and a nullity as submitted by the Applicant.

- [32] It is trite that the reasonable test as a ground for the review of arbitration awards in terms of section 145 of the LRA in this Court, is not applicable to the assailing of an award on a jurisdictional point relating to the forum that issued an award.
- [33] It is further axiomatic that the test for assailing an award for want of the requisite jurisdiction by the forum and trier of facts and the law that issued the award, is that of “right or wrong” as it is either, the forum that issued the award, had the requisite jurisdiction or no such jurisdiction.
- [34] It is common cause that in this case, the Applicant belatedly raised the non-jurisdiction of the First Respondent for the first time in its supplementary papers in this Court, which jurisdictional issue was never raised before the First Respondent at all, at the time of conciliation within the First Respondent and arbitration of the Third Respondent’s dispute by the Second Respondent.
- [35] The Applicant only raised its jurisdictional challenge of the first Respondent, in its supplementary affidavit under cover of its applicable Rule 7A(8)(a) notice. Such supplementary affidavit was filed on 12 August 2022[17] after the filing of the Applicant’s founding papers on 6 April 2022[18].
- [36] The contestation between the Applicant and the Third Respondent on whether the First Respondent, had the requisite jurisdiction to deal with the latter’s unfair labour practice dispute, centers around the letter attached to the Applicant’s supplementary affidavit, by its CEO, dated 3 April 2020[19] to the Third Respondent, which according to the Applicant, is the date on which the dispute arose.
- [37] The Third Respondent contends that her dispute did not arise on 3 April 2020 as alleged by the Applicant but on 28 October 2020 or latest 17 November 2020 for the reasons advanced in its answer and submissions[20].
- [38] Based on the Applicant’s CEO’s letter of 3 April 2020[21] mentioned above, the Applicant contends that the Applicant’s referral of the unfair labour practice dispute to the First Respondent ought to have been referred within 90 days after receipt of such letter and that failure to do so, ousted the First Respondent’s jurisdiction, for want of condonation.
- [39] The Applicant further submits that the Third Respondent ought to have exhausted its internal grievance policy, if dissatisfied with the placement by its CEO as per letter of 3 April 2020 aforementioned, and did not do so[22].
- [40] The Third Respondent submits that, there was no need to follow the Applicant’s grievances procedure as part of exhausting internal remedies, as in terms of an agreement between the Applicant and SAPTU, (trade union) called: Agreed Principles for Restructuring

Process[23], it was agreed inter alia that:

‘10.1.1 [i]n case of a dispute, a mediator should intervene, as agreed upon

10.1.2 [i]n executing its duties, the Bargaining Forum should resolve any grievance around restructuring.’ [Emphasis added]

[41] The Third Respondent further submits that based on the principles of restructuring agreed as aforementioned, the Third Respondent were well within their right to use the provisions of such agreement to raise their grievances by writing inter alia correspondence of 26 October 2020 and not through the Applicant’s grievance policy[24].

[42] Having not received any response from the Applicant to the Third Respondent’s letter of 26 October 2020 aforementioned, the

Third Respondent and the other two employees wrote another correspondence dated 17 November 2020 about their complaints and as

part of the Agreed Principles for Restructuring, as aforementioned and to which there was no response by the Applicant[25].

[43] The Third Respondent further submits that there were no concerns raised by the Applicant’ for the Third Respondent and the two other employees when raising their grievance in terms of the Agreed Principles of Restructuring Agreement instead of the Applicant’s formal grievance procedure[26].

[44] The Third Respondent further submits that the Applicant acquiesced to the grievance process that was followed by the Third Respondent and the two other employees aforementioned as an internal process that was followed to exhaust internal remedies in terms of the Agreed Principle for Restructuring, Agreement. Further, they had a duty to exhaust all internal remedies before they referred their unfair labour practice disputes to the First Respondent, which thing could only happen on either 28 October 2020 or alternatively and at the latest, on 17 November 2020, when there was no response to their correspondence as aforementioned[27].

[45] The Third Respondent further submits that based on all the above, the unfair labour practice dispute was referred timeously within the required 90 days and that the First Respondent had jurisdiction under the circumstances.

[46] Regard being had to the Applicant’s and Third Respondent’s contestations and submissions above, I am persuaded by the Third Respondent that the referral of the unfair labour practice dispute, was timeous and that the First Respondent had the requisite jurisdiction to conciliate and arbitrate the dispute under the circumstances.

- [47] Even if I were to be wrong, in my conclusion that the First Respondent had the requisite jurisdiction based on all the aforementioned, the First Respondent, in any event, did indeed have jurisdiction under the circumstances, based on the authority that was introduced by the Third Respondent's legal representative on the day of the sitting of this matter, which I will deal with further as hereunder.
- [48] In persuading this Court to decide in its favour that the First Respondent did not have jurisdiction even though such an issue, was not raised before the Second Respondent at the time of arbitration, the Applicant relies inter alia on the City of Johannesburg Metropolitan Municipality v Mthombeni and Others[28].
- [49] The Third Respondent drew this Court's attention to Monare v South African Tourism and others[29] wherein it was held inter alia that:
- [24] The court a quo seemingly did not in the context of the facts before it consider the principle that a claimant may formulate his or her claim in a way that enables him or her to bring it before a forum of his or her choice. If a claim as formulated is enforceable in that forum then the claimant is entitled to bring it in that forum. The fact that the claim is bad is another matter and that jurisdiction is to be assessed on the pleadings properly construed and not on the substantive merits of the case.
- [25] While the principle has been articulated principally in relation to court pleadings there is in my view no reason why it should not be applicable to the CCMA and the documents in that forum that served to introduce the claim and define the issues between the parties, but I will revert on this aspect.
- [28] There is no reason why that term in relation to the CCMA should not have a similar meaning. Section 114 of the LRA provides that the CCMA has jurisdiction in all the provinces of the Republic. The term "jurisdiction" in that context, in my view, includes "the power of the CCMA to hear and determine an issue between the parties".
- [29] Applying the Astral criterion (or test), it is appropriate to state that in terms of our law, the CCMA, inter alia, has the power to hear and determine a dispute (of the kind the LRA permits it to deal with) between an employer and an employee where the undertaking of the employer, in which the employee is employed, is located within any of the provinces of the Republic. Now applying the principle that jurisdiction is determined by the "pleadings", it would be appropriate to say that if the claimant has alleged facts that satisfy the jurisdictional test and the other party has not taken issue with those facts, the CCMA, may, arguably, have jurisdiction in the matter.' [Emphasis added]
- [50] This Court agrees more with the Third Respondent that based on the Monare v South African Tourism and Others supra, the factual basis for the non-jurisdiction aspect of the First Respondent, which is raised for the first time in the Applicant's

supplementary papers, in these review proceedings, ought to have been raised before the Second Respondent, at least at the time when the dispute was arbitrated by such Respondent.

- [51] This Court is further persuaded by the Third Respondent that the Applicant based on the *Monare v Mthembu and Others* supra, cannot raise new things about the factual things that were not raised before the Second Respondent and that if raised then, could or could not have ousted the First Respondent's jurisdiction.
- [52] Annexure PSA 12 to the Applicant's supplementary affidavit[30], which could have laid the basis for challenging the First Respondent's jurisdiction, was never put to the Second Respondent and the Third Respondent at the arbitration proceedings a quo.
- [53] To afford the Applicant, to rely on this letter aforementioned in these proceedings, would be a bad precedent, allowing parties to advance new things that ought to have been dealt with within the First Respondent, in these review proceedings.
- [54] The letter ought to have been part of the factual matrix raised about jurisdiction before the Second Respondent to make a determination on whether the First Respondent had jurisdiction under the circumstances in terms of the decision in *Monare and Mthembu and Others*[31] supra. Failure to do so constitutes new material in these proceedings that is not permissible as was held in inter alia others *Gqibela v West Driefontein Mine and others*,[32] *Coin Security (Pty) Ltd v CCMA and others*[33] and *MEC for the Department of Finance, Eastern Cape v De Milander and others*[34].
- [55] The Third Respondent and the two other Applicant's employees identified the date including an alternative date, on which their disputes arose in both their conciliation and arbitration referral forms that served before the First Respondent, which dates were not disputed by the Applicant at either conciliation or arbitration proceedings.
- [56] The Applicant, which ought to have already been aware of the letter dated 3 April 2020 aforementioned and had the opportunity to raise the jurisdictional issue relevant herein, based on such letter and lay the factual basis for jurisdiction based thereon, at either conciliation or at the very latest arbitration, before the Second Respondent and did not do so. I invited the Applicant to explain why, this letter was never introduced at the First Respondent during conciliation or arbitration, and there was no explanation at all.
- [57] On the facts, to find jurisdiction at the arbitration of the Third Respondent's dispute, there was a compelling factual matrix based on the dates of referral and the date on which the dispute was conciliated and arbitrated, that the First Respondent had the requisite jurisdiction to deal with such unfair labour practice dispute. I find no basis to find anything to the contrary in this regard, in these review proceedings.
- [58] A forum is clothed with jurisdiction ex-lege or on the factual matrix contained in the parties' pleadings. If there is no jurisdiction according to the law, there can't be any jurisdiction at the time a dispute is conciliated or arbitrated or at any subsequent stage in law.

- [59] In contradistinction, if non-jurisdiction is based on a certain set of facts at the time of conciliation or arbitration, then and in that event, jurisdiction can only be found based on such factual matrix at the time. Such jurisdiction cannot be belatedly raised in these review proceedings when there was an opportunity to raise or counter jurisdiction, which was not seized at the relevant time.
- [60] If litigants were to be allowed to get away with not raising the factual matrix to find or challenge jurisdiction before the relevant fora and willy nilly raise them only during review proceedings of awards in terms of section 145, there will not only be chaos, but acute prejudice of litigants affected by such belated jurisdictional issues.
- [61] A litigant cannot just stand by, without raising a jurisdictional issue founded on the factual matrix during conciliation and arbitration proceedings within the auspices of the First Respondent and its accredited bargaining councils, and only raise such jurisdictional issue that is factual matrix related and ought to have been within its knowledge at all material time, for the first time, in review proceedings of this nature.
- [62] Regard being had to all the above, I part ways with the Applicant and concur with the Third Respondent that the First Respondent had a requisite jurisdiction to conciliate and arbitrate the Third Respondent's dispute under the circumstances. Moreso that in terms of the Agreed Principles Agreement reached between the Applicant and the relevant trade union, the Applicant agreed to resolve grievances relating to the Applicant's restructuring, through an internal mediation process that had to be exhausted first and not the Applicant's grievance policy, before approaching the First Respondent for conciliation of disputes relating to the restructuring process[35].
- [63] The Applicant's ground of jurisdiction to assail the Second Respondent's award stands to fail and such respondent's award cannot be reviewed and set aside on such ground under the circumstances.

Whether the Second Respondent's award is to be reviewed based on the Applicant's other grounds?

Unfair labour practice

- [64] The only conclusion arrived at by the Second Respondent, based on the totality of oral and documentary evidence, that the Applicant subjected the Third Respondent to an unfair labour practice by failing to give her the opportunity to contest for the Region 1: Executive Mnager's position within the Applicant, merely because the Third Respondent inter alia, testified that she qualified and expressed her intention for such position[36], is out of kilter with the standard and test for the review of arbitration awards and unreasonable for the reasons advanced hereafter.

[65] The fact that a potential candidate for appointment into a position in a workplace has the qualifications or is more qualified and an expression of an interest into a particular position, falls short of being the only *conditio sine qua non*, for appointment into a position especially where an employer, like the Applicant, has a Recruitment and Selection Policy and Procedure

(Recruitment Policy)[37]. There is no process or procedure based on the Applicant's Recruitment Policy, which was properly placed before the Second

Respondent that provides for such a phenomenon.

[66] The totality of oral and documentary evidence that was properly placed before the Second Respondent, unequivocally, indicated that the new post of Region 1: Executive Manger and all other related posts, within the Applicant, only became vacant within the context of the reconfiguring, redesigning and restructuring of the Applicant's organisational structure and not as a result of vacancies that arose and had to be normally filled through the Applicant's Recruitment Policy[38].

[67] None of the posts, including that of the Third Respondent's head office-based post of Senior Manager: Design Solutions within the Applicant, were filled on the basis of them having been vacant in the normal sense. These posts became vacant and were exclusively and internally filled through the Applicant's implementation of its new organisational structure emanating from the restructuring process aforementioned.

[68] This Court is persuaded by the Applicant's submissions that the Third Respondent could only have been considered for promotion, for purposes of fair labour practice, if after all Applicant's employees were placed in the new organisational structure and the post of Region 1: Executive Manager, still remained vacant[39].

[69] This Court is not persuaded by the Third Respondent that the post of Region 1: Executive Manager was vacant based on the submissions in that regard[40]. The totality of oral and documentary evidence that was placed before the Second Respondent, is clear that, if such a post became vacant, it became vacant on equal footing, with all other posts within the Applicant at the time of the implementation of the new structure.

[70] This Court is further persuaded by the Applicant that the position of Region 1: Executive Manager, was not vacant in the sense of having to be advertised so as to enable the Third Respondent and others to contest it as it was laterally filled through Ms Janse Van Rensburg, who was a senior to the Third Respondent and the only Executive Manager to be transferred into such post, during the restructuring process as well as that the Applicant had no obligation to advertise any such post or appoint anyone, including the Third Respondent, into any such post[41].

[71] It is now trite that employees affected by the employer's restructuring process and implementation of a new organisational

structure, are not expected to harbour expectations for promotion as opposed to being placed in alternative positions available in the new structure, whether senior or junior or rank[42].

[72] The totality of oral and documentary evidence before the Second Respondent was indicative of inter alia that the position of Region 1: Executive Manager, was never vacant outside the Applicant's restructuring process as it arose from a duly approved, fair and consultative process of the Applicant's redesigning of its organisational structure in which none of the Applicant's were required to apply for any position during such restructuring as they were all consulted and offered available posts in the Applicant's new organisational structure. The Position of Region 1: Executive Manager and that of the Third Respondent's Senior Manager: Design Solutions, were equally not advertised but laterally filled during the Applicant's restructuring. The Third Respondent accepted such placement and yet wants placement of the Region 1 position referred to herein.

[73] It ought to be trite in terms of the doctrine of peremption that may find application in the factual matrix of this case that: "no person can be allowed to take up two positions, inconsistent with one another". Effectively that "no person can be allowed to blow hot and cold, to approbate and reprobate". The Third Respondent was not an Executive employee of the Applicant and accepted the new restructured position of Senior Manager: Design Solution, and yet persists with a complaint of not having been placed or moved into the Region 1: Executive Manager's position in which Ms Janse Van Rensburg, her senior, was placed.

[74] The Supreme Court of Appeal in *Mhlonto Local Municipality and Others v Ngcangulula and Another*[43], pronounced itself on the doctrine of peremption by stating inter alia that:

'[13] ... The underlying principle of the doctrine of peremption is that a litigant cannot take two inconsistent positions.'

[75] The totality of oral and documentary evidence before the Second Respondent, is indicative of the fact that the Third Respondent, Ms Janse Van Rensburg and all other employees, were laterally placed into the new vacant posts in the Applicant's restructured organisational structure in accordance with the Agreed Principles of Restructuring, to retain their terms and conditions of service and most significantly, to avoid dismissals based on operational requirements as well as that none of these vacancies during restructuring, were promotional posts to be filled through the Applicant's Recruitment Policy.

[76] Regard being had to all the above, the Second Respondent's only conclusion that the Applicant subjected the Third Respondent to unfair labour practice by failing to give her an opportunity to contest for a post that she expressed interest in, which was not, and could not be advertised through the Applicant's Recruitment Policy, as a result of the restructuring process relevant herein, falls outside the band of the trite reasonableness test.

- [77] Having found that the Third Respondent was not subjected to any unfair labour practice by the Applicant and that the Second Respondent's only conclusion, in this regard, is not that of a reasonable decision-maker, that part of the Second Respondent's award stands to be reviewed and set aside on this ground alone, without a need to deal with the Applicants further grounds of review.
- [78] In the event that I may be wrong in not dealing with the Applicant's further grounds of review as aforementioned, I will nevertheless deal with such grounds, for completeness as hereafter.

Award for compensation

- [79] The Second Respondent awarded the Third Respondent compensation of 6 months calculated at the rate of the Applicant's salary of R73 181.78 amounting to R439 090.68.[44]
- [80] It may be apposite to mention that the salary of the Third Respondent, referred to by the Second Respondent, is neither qualified in the award as being that of net or gross salary by the Second Respondent and there is neither, the Third Respondent's salary advice as part of the record.
- [81] Given the above, I invited the representatives of the Applicant and the Third Respondent, in the absence of the Third Respondent's salary advice, which does not constitute part of the record before this Court, to clarify the nature of salary multiplied by six months awarded to the Third Respondent as aforementioned. None of the two representatives favoured me with an answer in this regard.
- [82] It is axiomatic that, where there is no clarity and specifics or a dispute about the amount of compensation awarded in an arbitration award, the matter would be remitted to the CCMA or its accredited bargaining councils, for determination.
- [83] Having found that the Second Respondent's only conclusion was that the Applicant subjected the Third Respondent to unfair labour practice by failing to give her the opportunity to contest for the Region 1: Executive Manager's position, merely because she testified that she qualified for such position and expressed her intention for same, is unreasonable, there is no basis

for awarding of compensation to the Third Respondent. Such an award by the Second Respondent remains unreasonable.

- [84] It appears prima facie from the Second Respondent's award at paragraph 51 that apart from the enabling reasoning of such award being an unfair labour practice that according to the Second Respondent, the Third Respondent was subjected to by the Applicant, which ought to have not been found to be the case, the compensation awarded to the Third Respondent, is further based on the fact that the Applicant did not rotate the Third Respondent in the position that she expressed her interest, which rotation in the Second Respondent's view, could have given the Third Respondent and Ms Janse Van Rensburg, a fair chance to be

appointed or moved into the position relevant herein.

- [85] The awarding of compensation for acting in a position by the Second Respondent, if not based on the applicable acting allowance but on the whole monthly salary, is out of kilter with the band of reasonableness.
- [86] A 6 months awarding of compensation for a mere expression of intention to a post by the Second Respondent to the Third Respondent, cannot be that of a reasonable decision-maker.
- [87] Even if, this Court were to accept that the Region 1: Executive Manager's position was vacant and was to be filled by the Applicant internally or externally by the Applicant, through its Recruitment Policy, there is no legal nor factual basis for the Second Respondent's finding that, having "expressed intention" for such position, the Third Respondent would be

shortlisted, interviewed and appointed into such position, so much so that, a 6 months compensation, would be appropriate and reasonable

under the circumstances.

- [88] Absent, the applicable Third Respondent's salary advice, I have no reason not to accept the Applicant's submission that the R439 090.68, six months' salary compensation, would not be payable to the Third Respondent, even if she was appointed into the position of Region 1: Executive Manager. Further, such an amount would still be unreasonable if the Third Respondent were to act in such a position as she would only be eligible to earn 10% of the monthly median total cost to the company in such position[45] in terms of the Applicant's Acting and Secondment Policy[46].
- [89] The awarding of compensation to the Third Respondent as aforementioned, is further unreasonable as to the extent that such compensation may be based on her not having been afforded an opportunity to act in an Executive position, the Third Respondent on her own version and as found by the Second Respondent, stated that she was afforded an opportunity to act in such position[47].
- [90] The totality of the evidence before the second Respondent was that acting in positions within the Applicant is done in accordance with the requirements stipulated in the Acting and Secondment Policy[48]. Ms Janse Van Rensburg never acted in the position of Region 1: Executive Manager before her lateral transfer, so much so that, it is argued and found that the Second Respondent, by not being afforded to act in such position, the Third Respondent was subjected to unfair labour practice and observe, unreasonable compensation awarded by the Second Respondent.
- [91] The Second Respondent awarded compensation to the Third Respondent under circumstances where he found that in any event Ms Janse Van Rensburg, is equally experienced and has a master's degree in Psychology and demonstrated her capabilities within, the Applicant including the Second Respondent's acceptance she was already a senior to the Third Respondent at the time of the Applicant's restructuring, further that she

is capable and fit for the position, makes the awarding of compensation to the Third Respondent by the Second Respondent more unreasonable.

[92] Ms Janse Van Rensburg was placed during the Applicant's restructuring process and not promoted into the position of Region 1: Executive Manager and her salary adjustment and that of the Applicant's other employees, was done in accordance with the

Applicant's Remuneration Policy emanating from a fair job evaluation process by an independent external service provider[49].

[93] This Court is not persuaded by the Third Respondent's submissions that there was any basis for the Second Respondent to exercise discretion and award compensation to the Third Respondent, under the circumstances.

[94] Regard being had to all the above, the awarding of R439 090.68, six months' compensation to the Third Respondent by the Second Respondent is unreasonable.

Conclusion

[95] In the result, the Second Respondent's award that the Third Respondent was subjected to an unfair labour practice by the Applicant and that six months' compensation of R439 090.68 be awarded to the Third Respondent, is not justified for the reasons advanced by the Second Respondent as such decision falls outside the bounds of reasonableness.

[96] The decision reached by the Second Respondent as aforementioned, is further one that could not be reached by a reasonable decision-maker based on the conspectus and totality of all oral and documentary evidence that was before the Second Respondent.

[97] In the premises, the following order is made:

Order

1. Part of the Second Respondent's award dated 22 February 2024, under case number GAVL 3911-20 that the Applicant subjected the Third Respondent to unfair labour practice and the awarding of R439 090.68, six months' compensation to the Third Respondent, is reviewed and set aside.
2. There is no order for costs.

S.M. Shaba

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Instructed by: Adv Brummer Mphela Janet Ramokoka of Diale Mogashoa

Attorneys For the Respondent: Instructed by: Adv Victor Mndebele Thomas Sibuyi of TTS Attorneys Inc.

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- [1] Act 66 of 1995.
- [2] Paras 1 and 2 of the Applicant's notice of motion (Notice of motion).
- [3] Pages 384 to 400 of the record.
- [4] Paras 51 and 54 of the award.
- [5] Para 51 of the award.
- [6] Ibid.
- [7] Ibid and para 50.
- [8] Ibid and para 54.
- [9] Para 54 of the award.
- [10] Para 9.1 to 9.2 of the Applicant's founding affidavit (founding affidavit) and paras 4 to 10 of the Supplementary Affidavit.
- [11] Act 66 of 1995.
- [12]
- [2023] 4 BLLR 283 (LAC);
- [2023] ZALAC 4 at paras 3 and 4.
- [13] See: Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] ZACC 22; [2007] 12 BLLR 1097 (CC) at para 110; Super Group Autoparts t/a AutoZone v Hlongwane NO and Others [2009] ZALCJHB 68; [2010] 4 BLLR 458 (LC) at 461 8E; Manana v Department of Labour and Others [2010] ZALAC 26; [2010] 6 BLLR 664 at 668 20F; National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others
- [2011] ZASCA 74; [2011] 11 BLLR 1041 (SCA) supra, Afrox Healthcare Ltd v Commission for Conciliation Mediation and Arbitration and Others
- [2012] ZALAC 2; [2012] 7 BLLR 649 (LAC) at 657 21D-I; Herholdt v Nedbank Ltd (Congress of South African Trade Unions as "amicus curiae")
- [2013] ZASCA 97; [2013] 11 BLLR 1074 (SCA) at 1084 24C-D; Goldfields supra; Derivco (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration [2014] ZALCJHB 257; [2014] 10 BLLR 1000 (LC) at 1007 37B; Shoprite Checkers v Commission for Conciliation, Mediation and Arbitration and others
- [2015] 10 BLLR 1052 (LC); [2015] ZALCJHB 229 (LC) at 1056E-H 9-10; Mbatha v Safety and Security Sectoral Bargaining Council
- [2015] ZALCJHB 332 (30 at para 25; Head of the Department of Education v Mofokeng and others

[2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at paras 60 – 61; Kock v Commission for Conciliation, Mediation & Arbitration & others

(2019) 40 ILJ 1625 (LC); [2019] 7 BLLR 703 (LC) at para 27; and Ethekewini Municipality v Hadebe and Others [2016] ZALAC 14, [2016] 8 BLLR 745 (LAC) at para 20. Belloord 28 CC v CCMA Johannesburg

[2019] JOL 42664 (LC); [2018] ZALCJHB 112 at para 10.

[14] Para 9.1 to 9.10 of the founding affidavit.

[15] Applicant's Rule 7A(8)(a) notice and supplementary affidavit.

[16] Section 191(1)(b)(ii) of Act 66 of 1995.

[17] Applicant's Rule 7A(8)(a) notice and supplementary affidavit supra.

[18] Page 1 of the notice of motion and pleadings.

[19] Annexure PSA 12 to the Supplementary Affidavit pages 101 to 107 of the pleadings.

[20] Paras 51 and 51.5 of the Third Respondent's answering affidavit (answering affidavit) and paras 10.4 and 12 of the Third

Respondent's heads.

[21] Annexure PSA 12 to the Supplementary Affidavit pages 101 to 107 of the pleadings supra.

[22] Para 19 of the founding affidavit and paras 15 to 17 of the Applicant's heads.

[23] Paras 10.1.1 and 10.1.2 of the Third Respondent's heads.

[24] Para 10.2 of the Third Respondent heads.

[25] Para 10.3 of the Third Respondent heads.

[26] Para 10.4 of the Third Respondent's heads.

[27] Paras 11 and 12 of the Third Respondent's heads.

[28] [2021] ZALCJHB 28 at para 19.

[29]

[2016] 2 BLLR 115 (LAC); (2016) 37 ILJ 394 (LAC) at paras 24-29.

[30] Letter dated 3 April 2020 by the Applicant's CEO to the Third Respondent.

[31] Para 3 of Monare and Mthembu and Others supra.

[32]

[2000] 4 BLLR 414 (LC) at para 14.

[33]

[2005] 7 BLLR 672 (LC);

(2005) 26 ILJ 849 (LC) at para 37.

[34]

[2011] 9 BLLR 893 (LC) at para 29.

[35] Paras 10.1 to 12 of the Third Respondent's submissions.

[36] Para 51 of the award.

[37] Recruitment and Selection Procedure pages 111 to 119.

[38] Clauses 3.1, 3.2, 3.3, 4.1 and 4.2 of the Recruitment Policy,

[39] Annexure PSA 2 to the founding affidavit page 34 para 8 of the pleadings and para 24.3 of the Applicant's heads.

[40] Para 4 of the answering affidavit page 124 of the pleadings and paras 8 of the Third Respondent's heads.

[41] Para 31 of the founding affidavit.

[42] Telkom SA Ltd v Commission for Conciliation, Mediation & Arbitration & others

[2019] 40 ILJ 1093 (LC) at para 14.

[43]

[2024] ZASCA 5; [2024] 3 BLLR 239 (SCA).

[44] Paras 51 and 54 of the award.

[45] Para 35 of the founding affidavit page 19 of the pleadings.

[46] Para 4.4 of the Applicant's Acting and Secondment Policy pages 104 to 106 of the record.

[47] Para 19 of the award and para 27 of the founding affidavit.

[48] Para 4.1 of the Acting and Secondment Policy page 107 of the record.

[49] Para 3.4 of the Recruitment Policy and para 26 of the founding affidavit.

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