REPUBLIC OF SOUTH AFRICA

THE LABOUR OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J3047/12

In the matter between:

SAMWU OBO NEMO AND 717 OTHERS **Applicant**

and

MOPANI DISTRICT MUNICIPALITY Respondent

Heard: **23 November 2012**

Delivered: **09 April 2013**

Summary: **Applicants urgent application to interdict the respondent from short-listing, interviewing, approvals to appoint and appointments. Respondent taking objection to authority of deponent to depose to the founding affidavit. Requirements of authorisation by an artificial entity. Rule 7(1) of the High Court Rules approach should be used. Rule 11 of the Labour Court is a "catch-all" – it contemplates interlocutory applications, incidental to proceedings already instituted. The Court itself is given extensive powers to act as sees fit or to adopt appropriate procedures in situations for which the Rules make no specific provisions.**

JUDGMENT

KUMALO, AJ

[1] On 20 November 2012 in an urgent application to interdict the respondents I granted in an ex tempore judgment an order on an urgent basis:

1.2 The respondent is interdicted from short listing or conducting interviews pertaining to the posts listed in Annexure B to the application;

1.3 In the event that interviews have already been conducted at the time of the hearing of this application, the respondent is interdicted from appointing the interviewed candidates;

1.4 The respondent is ordered to re-advertise the post listed in Annexure B specifically those posts which have not been filled, within 30 days of the granting of this order, in line with the terms of the Respondent's Personnel Provisioning Policy;

1.5 The advertisement should assure those persons who have already applied for positions before 28 October 2011 that they need not apply again as the respondent has their details on its database and their applications are still being considered. The advertisement is intended to invite new applications from persons who had not applied before 28 October 2011;

1.6 The respondent shall pay the Applicants' costs of the application.

[2] The applicant now appeals against this order on the following grounds:

'1. The Court erred in finding that the applicant had demonstrated that its application was urgent and that the application should not have been struck off the roll.

2. The court erred in finding that the deponent to the applicant's founding affidavit was duly authorized to act on behalf of SAMWU.

3. The court erred in finding that the Labour Court had jurisdiction to order the relief sought by the applicant.

4. The court erred in determining that the applicant had a clear right to the relief sought and that it had satisfied the requirements of an interdict.

5. The court erred in not upholding the respondent's contention that affected candidates should have been joined to the proceedings. In the absence of such joinder the application was fatally defective.

6. The court erred in ordering the respondent to pay the applicant's costs."

Applicant's urgent application

[3] On the 16 November 2012, the applicant launched an urgent application which was heard on the 20 November 2012, seeking an order to interdict the respondent in the terms of the application, as set out in paragraph [1] above.

[4] The applicant is the South African Municipal Workers Union (SAMWU), an established trade union in terms of the Labour Relations Act No 66 of 1995, acting on behalf of Nemo C, a shopsteward of SAMWU and 717 other members in the employment of the respondent municipality.

[5] In about October 2011, the respondent placed an advertisement in terms of its recruitment policy in local and national newspapers for vacant staff positions numbering about 80 positions ranging from senior management, middle management, COO (contractual), engineering technicians (water service), energy coordinator (village electrification), fire officers, secretaries, clerks, accountant (revenue), data capturer, protocol officer.

[6] The closing or cut-off date by which qualifying applicant's applications had to be submitted was 28 October 2011.

[7] The main grievance of the applicant is that more than a year after the closing date the respondent had not yet completed the short listing, the interviews, the recommendations and appointments. As an example, the applicant states that on or about 09 November 2012, it received an invitation to attend a short listing meeting to take place on 12 November 2012 to short list candidates for interviews for positions of (i) Risk Based Audit; (ii) Manager: Internal Audit; (iii) A&D Monitoring Reporting; (iv) Protocol Officer; (vi) Body Guard. The applicant contends that making appointments more than a year after the closing date of 28 October 2011 is severely prejudicing the applicant's members, as well as the general public for the following reasons:

7.1 there are members of the applicant who did not meet the job qualifications and requirements for particular jobs on the closing date and therefore did not apply. Those members however had during the past year obtained qualifications and experience relevant to the jobs. Due to the closing date having been fixed at 28 November 2011 but interviews being conducted now, they are excluded from participating in the recruitment process;

7.2 the same applies to members of the general public who did not qualify to apply for a particular job but have now the required job qualifications and skills to apply for a particular position;

7.3 the advertisement stated 'should you not receive any response within one month after the closing date, regard your application as unsuccessful'. A job applicant who qualified for a job but did not get any response by the closing date would regard his/her application as being unsuccessful and look elsewhere for employment, an extra burden for the job seeker; would not have an expectation to be called by the respondent; would go outside Limpopo province or South Africa to seek employment; would even change or lose his/her contact details and respondent would not be able to reach him/her. Thus he or she would have lost a good employment opportunity.

7.4 The above practice is open to nepotism and favoritism as the respondent may have deliberately closed applications on 28 October 2011 and do interviews in November 2012 so as to reserve the positions for its friends or relatives who were not able to take employment with respondent in 2011 or early 2012 for various reasons. So the applicant submits.

7.5 Finally, the applicant submits that this practice is contrary to section 195(1)(a)(g)(h)(i) and (2)(a) of the LRA and therefore falls to be interdicted. Further it would only be fair if the positions are re-advertised.

[8] In order to bring the urgent application, Mr Nemo being a shopsteward had to contact the Provincial Secretary of SAMWU to get instructions but the latter was away from 09 November 2012 until 12 November 2012. The Secretary gave authorisation to launch the application and Mr Mashabana travelled to Pretoria for consultations on the 13 and 14 November 2012 to prepare for this application. And so the urgency was not self-created according to the applicant.

[9] The applicant submits that as a recognised trade union it has a clear right to attend the short listing and interviews in order to observe that the whole recruitment process is just, fair and also in compliance with the Respondent's Recruitment Policy.

9.2 As an observer the applicant has a right to blow the whistle when there is an irregularity in the recruitment process.

9.3 The applicant's members are entitled to apply for the positions they are qualified to be considered for appointment and they qualify for those positions.

9.4 The applicant's members as well as members of the public have the right to fair labour practice as entrenched in Section 23 of the Constitution.

9.5 The applicant, acting on behalf of its members, has a right to approach this court to seek an order which will compel re-advertisement of the posts

and also to ask for an order to stop short listing, interviews and appointment of candidates on posts which must be re-advertised because of lapse of time.

[10] The applicant submits that should the application not be granted, the applicant's members and members of the public will suffer irreparable harm for the following reasons:

10.1 Members of the applicant's trade union who did not have the qualifications and experience for posts that they would have liked to apply for, now possess the required qualifications and skill for particular posts but are unable to apply and be considered as the closing date was more than a year ago but short listings are only taking place now.

10.2 The applicant's competent members will not be given an opportunity to compete with candidates who submitted CVs more than a year and have lost an employment opportunity.

10.3 The same conduct may happen in future and the applicant's members would again suffer.

10.4 Nepotism may manifest itself and competent and qualifying candidates would be excluded.

[11] If this application is granted, the process shall start afresh and the applicant's members as well as the public at large will be given a fair chance to form part of a pool of candidates within which competent job candidates will be selected. Furthermore, potential nepotism would be averted.

[12] The balance of convenience favours the applicant more than the respondent in that:

12.1 If this application is granted, the process shall start afresh and the applicant's members as well as the public at large will be given a fair chance to form part of a pool of candidates within which competent job

candidates will be selected. Furthermore, potential nepotism would be averted.

12.2 Should the application not be granted, competent and skilled members who did not apply more than a year ago will not have a chance to compete with other job applicants. The respondent on the other hand will proceed with short listing and interview of candidates on adverts which have lapsed because of the passage of time.

[13] The applicant has no other alternative remedy than to approach the Honourable Court through this application.

13.1 The issues before this court cannot be referred to the Bargaining Council as it has no jurisdiction to provide the relief sought in the notice of motion.

[14] The respondent has filed an answering affidavit in which it makes the following submissions *in limine:*

14.1 that the application is fatally flawed and stands to be dismissed in that on the face of the Notice of Motion , Mopani District Municipality is reflected as the Respondent whilst in paragraph 2.2 of the Founding Affidavit the applicant describes the respondent as Giyani District Municipality. Mopani District Municipality is a juristic person established in terms of the Section 12 Notice read with the provisions of the Local Government: Municipal Structures Act 117 of 1998, as amended. The entity called Giyani District Municipality is unknown to the deponent and therefore the application is defective;

14.2 that the persons referred to in prayers 3.1 and 3.2 of the Notice of Motion, ie persons already short listed and due to attend interviews for posts in annexure B of applicant's Founding Affidavit and persons already interviewed who have been successful and are due to be appointed by respondent have a direct interest on the outcome of the application as an order is sought interdicting the respondent from effecting their

appointments or interviewing them, as the case may be. Further, such persons who have a direct interest in the applicant's application, also have a Constitutional right to fair labour practices which in this instance require that they be interviewed after having been short listed or be appointed after having been recommended for appointment, as the case may be, the applicant has failed to join any of the said persons despite seeking relief which has a direct negative impact on their Constitutional rights if granted.

14.2.1 It is remarkable that the applicant having attended short-listings and interviews on 30 July 2012, 07 August 2012, 03 October 2012 for various positions referred to in annexure B of its Founding Affidavit and being aware of who the short-listed and the recommended candidates for appointments are, still did not join them to the proceedings. This non-joinder of the persons who are directly affected by the order of this court renders the applicant's application fatal and it ought to be dismissed. So the respondent contends.

14.2.2 Applicant has not made out a case for urgency and/or the alleged urgency is self-created and does not justify relaxation of the Rules of the Honourable Court in this instance. Applicant has been aware that respondent is continuing to short-list and interview candidates based on the advertisement which is annexure B to it Notice of Motion.

14.2.3 Furthermore, applicant attended the interviews and exercised observer status for the various positions which are based on the same advertisement on the dates mentioned in paragraph 14.2.1 above.

14.2.4 Applicant has therefore been aware on the dates mentioned above that the respondent is continuing to short-list, interview and recommend appointments of candidates based on the

advertisement which is annexure B to its application even prior to 09 November 2012. Applicant never objected to any of the aforesaid short-listings and/or interviews for the reasons mentioned in its Notice of Motion ie the respondent took too long to short-list and interview and its members have since the cut-off date qualified for the positions.

Respondent's submissions

[15] The respondent's submissions in support of its grounds of appeal can be briefly summarised as follows:

15.1 The respondent's advertisement for its staff vacancies attracted 31,188 applications by the cut-off closing date of 28 October 2011. Due to the sheer large number of applications that the Corporate Services Sector had to sort those that qualified to be shortlisted, interviewed, recommended for appointment and appointed took a long time and was interrupted by the festive season. Hence the first appointment of an Assistant Water Services Technician (Satellite Manager) was on 21 January 2012 to begin on 01 March 2012. The second appointment of the Manager: Legal: Department: Director Corporate Services on a five year contract to commence on 01 March 2012. The third appointment of Secretary: Executive Mayor's Office was on 24 January 2012 to commence on 01 February 2012. On 07 February 2012 Assistant Director: Infrastructure Planning: Department: Director Engineering Services to commence on 01 March 2012.

15.2 What is of importance to note about these appointments was that the union representatives of the applicant were notified of the dates of the interviews of the above mentioned candidates as well as their names and attended on all the occasions as observers. There were never any complaints that the short listing, interviews and appointments were late or that the whole process was slow.

15.3 On the 08 June 2012, the applicant was notified and invited to attend the short listing proceedings and interviews scheduled for 30 July 2012 for positions of EPWP Coordinator; Traditional Affairs: Children and Elderly Coordinator; Energy Coordinator. Mr CS Nemo attended on behalf of the applicant. There were five candidates to be interviewed that day. On 08 June 2012, the applicant was invited to attend the interview for the Municipal Manager vacancy to be held on 15 June 2012.

15.4 The respondent has short-listed, interviewed and recommended candidates for the positions of EPWP Coordinator; Traditional Affairs Coordinator as well as six Call Centre Operators. The said interviews took place on the 07 August 2012 and 03 October 2012, respectively. Mr S Mashabana represented the applicant in the interviews on 07 August 2012 while Mr M Mafumo represented applicant on 03 October 2012 interview. Applicant is, therefore, fully aware that there are recommended candidates whose appointments are pending.

15.5 Furthermore, applicant was invited for interviews for the positions of: Organisational Development and Work Study Officer to take place on 24 August 2012; Divisional Officer Fire Prevention: Training of Fire Fighting Officers scheduled for the 29 August 2012. The applicant is thus fully aware of the said interviews, recommendations are pending in this regard.

15.6 On 09 October 2012, the applicant was invited for the interviews for the position of Leading Fire Fighter scheduled for 10 October 2012. The applicant is also aware that respondent is proceeding to short-list the remaining candidates for the remaining vacant positions appearing on annexure B and will conduct interviews soon.

15.8 The applicant's representatives attended the short-listing and interview meetings referred to in the above paragraphs. The applicant is, therefore, being disingenuous and merely attempting to mislead the court in alleging in paragraphs 5.3 and 5.4 of their founding affidavit that no interviews

were conducted for positions listed in annexure B and advertised in October 2011.

[16] Furthermore, the respondent council contends that the applicant's members were involved in illegal and unprotected strike on 13 to 15 March 2012 which disrupted the operations of the respondent. The said strike only stopped after the said members and the applicant's Provincial Office were served with an ultimatum.

[17] During March 2012, the applicant launched an urgent application in the Labour Court in case number J786/12 to interdict interviews from taking place which respondent had scheduled in respect of the positions annexure B on the ground that it had not been invited, though in fact it had been. The matter was settled on the basis that applicant should be issued with another invitation to the interviews in order to avoid delay. However, this led to the postponement of the said interviews.

[18] During May 2012 the applicant's members embarked on an illegal and unprotected strike which disrupted respondent's operations. Respondent engaged its attorney of record to interdict the said illegal strike. The attorneys required a lot of information such as the names of applicant's members, their work stations, attendance registers during the strike which information could only be furnished by employees in the Corporate Services Department. Since the said Department had only a skeleton staff due to the illegal and unprotected strike, the Acting Director: Corporate Services utilised all available employees including the ones who deal with the recruitment for positions in annexure B to assist to collate all the information required by the attorneys as well as managing the strike. The Labour Court once again found against applicant and interdicted the illegal and unprotected strike with costs in case number J1085/12. This, however, delayed the process of arranging and holding meetings for the short-listing and interviews for the positions in annexure B.

[19] During June 2012, applicant served respondent with a Notice of Motion in case number J1516/12 to interdict the respondent from conducting interviews for the

position of Municipal Manager. Respondent's employees who co-ordinate interviews for positions in annexure B had to stop those arrangements and focus on providing information and records to enable respondent's attorneys to oppose applicant's notice of motion. Applicant lost the said application and was ordered to pay respondent's costs.

[20] Based on the aforegoing, the respondent submits that contrary to the wrong impression which the applicant is trying to create that the respondent deliberately did not interview and appoint candidates in annexure B since October 2011, it is evident that respondent has taken steps to finalise the said recruitment given the constraints and the disruptions as outlined above which it had to cope with.

Legal framework

Test for leave to appeal

[21] It is trite that the test of whether to grant or refuse leave to appeal is whether there are reasonable prospects that another court may come to a different conclusion. In *National Union of Metal Workers of South Africa v Jumbo Products CC*,[1] per Corbett CJ, with reference to *S v Ackerman en 'n Ander*[2] and *Botes and Another v Nedbank Ltd*[3] formulated the criterion to be applied in an application for leave to appeal as follows:

> '…the enquiry is whether there are reasonable prospects of success i.e. whether there is a reasonable prospect that the Court of Appeal may take a different view and hold the trial Judge that another Court may come to a different conclusion.'

[See also *North East Coast Forests v SAAPWAPU and Others* (1997) 18 ILJ 729 (LC); *NEWU v E LMK Manufacturing (Pty) Ltd and Others* [1997] 7 BLLR 901 (LC); *Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 ILJ 1442 (LC)]

[1] 1996 (4) SA 735 (A) at 742B.
[2] 1973 (1) SA 765 (A).
[3] 1983 (3) SA 27 (A) at 28D.

[22] In the case *in casu,* the respondent relies on six grounds of appeal. I will consider them in the order in which they were raised.

Lack of urgency

[23] The basis for allowing parties to dispense with the Rules of Court relating to time periods is to prevent the occasioning of an injustice, and involves the balancing of this consideration with that of the rights of parties to a considered opportunity to place their cases before the court.[4]

[24] On 9 November 2012, the respondent issued the applicant with an invitation to attend a shortlisting meeting which was to take place on 12 November 2012. The founding affidavit for the urgent application was deposed to on 16 November 2012, after authorisation had been given by the Provincial Secretary of the Union.

[25] The time from when the triggering event occurred and the launching of the application did not display any dilatoriness on the part of the applicant.

[26] Respondent argues that since the last interview process of October 2012, the applicant should have brought the urgent application before another interview process was scheduled. This argument ignores the central complaint of the applicants, that only once the delay in the interviews became excessive, did it become necessary to bring the application.

[27] If the interdict was not granted by way of urgent application, but instead of the normal time period, by the time the application would have been heard, the appointments would have been made.

[28] The respondent was afforded a considered opportunity to place their case before the court, and the circumstances justified the matter to be deemed urgent. The respondent did not complain of or request a postponement in order to fully deal

[4] See *National Police Services Union v National Commissioner of the National Police Services and Others* (1999) 20 ILJ 2408 (LC).

with the matter, the respondent was satisfied with the answering affidavit that it filled at the time. Furthermore, the matter before the court was a crisp and simple one, and, therefore, the time periods provided were sufficient. The applicants would not have been afforded substantial relief at a hearing in due course, if the matter had not been heard as a matter of urgency.

Authorised to act

[29] *In the matter of the ANC Umvoti Coucil Caucus and Others v Umvoti Municipality*,[5] it was held:

> "[24] …while the deponent made the averment that he was satisfied that he was authorized to make the affidavit, Fleming DJP held that, because the application was delivered under the name and signature of an attorney, there was no need to rely on proof that someone other than an attorney was also authorized. He went on to hold that authority had to be challenged on the level of whether that attorney in fact held empowerment. He made no findings concerning the averments in the affidavits relating to authority. His dealings with the manner in which to challenge authority were therefore not obiter.
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> [25] In *Gane's* case an attorney had put up an affidavit, together with the notice of motion, confirming his authority to represent the respondent. The court accepted that the proceedings had been authorized. Since the appellants did not avail themselves of the procedure provided in rule 7, no challenge to the authority of the attorney had been made, even though a challenge was made to the authority of the deponent to the founding affidavit, who was not the attorney. This case therefore also held that it is the authority of an attorney which must be challenged, and this must be done in terms of rule 7(1).
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> [26] In the *Unlawful Occupiers* case Brand JA, after stating that the procedure of dealing with authority on the affidavits should not be adopted, said:

[5] 2010 (3) SA 31 (KZP).

> "All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the Municipality with the knowledge of but against the advice of own director of legal services? The answer can, in my view, be answered only in the negative"'

In the context of the judgment Brand JA was, in making these comments, demonstrating, as one of the reasons for his earlier support of the procedure of using rule 7(1), the futility of wasting time and costs in the application when the rule 7(1) procedure had been available. In other words, this is not a finding on the papers which renders the dictum obiter, it is a further example of why he supports the approach of Flemming DJP endorsed earlier. Brand JA could not have put it more plainly than to say that 'a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter'. He clearly endorsed as correct the statement by Fleming DJP that the rule- maker had made a policy decision that rule 7(1) must be used to challenge authority. This is therefore binding authority for the procedure. I therefore consider that this court is bound by these decisions.

[27] Even if these dicta are obiter, they have strong persuasive force, given that they emanate from or are endorsed by the Supreme Court of Appeal, as well as their clear and unequivocal nature. With respect, the reasoning in these cases also appears to me to accord with sound legal principle. The deponent to an affidavit is merely a witness, as was pointed out by Streicher JA in Gane's case. It is the attorney of a litigant who, by signing a notice of motion and issuing application papers, signifies that that attorney has been authorized to initiate the application on behalf of the named litigant. Whether or not the litigation has been properly authorized by the artificial person named as the litigant should not be dealt with by means of evidence led in the application. If clarity is required, it should be obtained by means of rule 7(1), since this is a procedure which safeguards the interests of both parties. It frees the applicant from having to produce proof of what may not be in issue, thus saving an inordinate waste of time and expense in 'the many resolutions, delegations and

substitutions still attached to applications'. 16 It protects a respondent in that, once the challenge is made in terms of rule 7(1), no further steps may be taken by the applicant unless the attorney satisfies the court that he or she is so authorized. Of course, if the challenge is to the authority of the respondent's attorney in an application, these comments apply equally, but for the opposite reasons.

[28] I am therefore of the view that the position has changed, since Watermeyer J set out the approach in the Merino Ko-operasie Bpk case. The position now is that, absent a specific challenge by way of rule 7(1), 'the mere presence of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant' is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorized the initiation of application proceedings. Rule 7(1) must be used. This means that I disagree with Mr Gajoo's submission that rule 7(1) provides only one possible procedure and that, if a respondent elects to challenge the matter of authority on the application papers, the applicant is required to prove such authority on the papers.

[29] There was no challenge in terms of rule 7(1) in the application which is the subject of this appeal. The appropriate procedure was therefore not used by the appellants. It was accordingly not necessary for the applicant to prove the authority to initiate the application, nor appropriate to attempt to do so on the papers. It was also not necessary for the court a quo to make a finding relating to authority on the affidavits delivered in the matter. Since there was no challenge in the required manner required to the authority of the respondent's authority who signed the notice of motion and initiated the application in the accepted way, this court does not have to deal with the question of authority. I am therefore of the view that the appeal on this issue must fail.'

[30] Rule 11 of the Labour Court is 'in a sense a 'catch all' – it contemplates interlocutory applications; applications incidental to proceedings already

instituted and applications for direction from the court. In addition, the court itself is given extensive powers to act as it sees fit or to adopt appropriate procedures in situations for which the rules make no specific provision.'[6]

[31] The notice of motion in this matter was signed by the applicant's attorney and there was no challenge in the required manner to the authority of the applicant's attorney.

[32] Furthermore, the attack on the authority of the deponent not being authorized in terms of the applicant's own constitution, is merely a bald allegation without substance. The deponent is the Provincial Organiser and a Shopsteward for the respondent district and he attached a confirmatory affidavit.

Lack of jurisdiction

[33] In *Booysen v Minister of Safety and Security and Others*,[7] it was held that:

> 'Section 157 of the LRA must be interpreted as a whole to fully understand the intention of the legislature. The majority in *Chirwa* held further that the concurrent jurisdiction provided for in s 157(2) of the Act is meant to extend the jurisdiction of the Labour Court to employment matters that implicate constitutional matters.'

[34] The Labour Court has jurisdiction to interdict any unfair conduct. In this matter, I find that the conduct of the respondent is unfair and, accordingly, this court has jurisdiction to interdict the conduct.

[35] In the case of *DENOSA on behalf of Van der Merwe v Department of Health and Social Development*,[8] the applicant employee had not been short-listed for a particular post, had lodged a grievance and that that the respondent department had given an undertaking to grant the employee an opportunity to be interviewed for the post. The department once again eliminated the employee from the short-list without conducting an interview. In an application for an interdict to compel

[6] See Practice in the Labour Courts, Adolf A Landman, Andre van Niekerk and mark Wesley, Revision Service 7, 2003, D-51.
[7] (2011) 32 ILJ 112 (LAC) para 49.
[8] (J1282/09) [2010] ZALC 293 (30 August 2010).

the department to interview the employee for the post, the court granted the interdict.

Satisfied the requirement for an interdict

[36] The trade union and their members demonstrated a clear right:

36.1 the union had the right to attend the short-listings and interviews and observe if the process was just and fair. This was common cause between the parties.

36.2 the members had the right to apply for the positions, and to ensure that the procedure was just and fair.

[37] Section 23 of the Constitution grants 'everyone' the right to fair labour practices. The Labour Court has accepted that the LRA's definition of 'unfair labour practice' is not necessarily exhaustive; other forms may be recognised under the broader constitutional guarantee of fair labour practices.[9]

[38] Unfair labour practices are defined as follows in section 186(2) of the LRA:

> 'unfair labour practices 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 (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to the employee.'

[39] The failure to allow the applicant's to apply for the positions would amount to an unfair labour practice relating to their promotion. It is not a dispute of interest, but a dispute of right. Accordingly, the applicants were entitled to the relief I granted.

[9] See *Simelela and Others v MEC for Education, Province of the Eastern Cape and Others* (2001) 22 ILJ 1688(LC) and *National Entitled Workers Union v CCMA and Others* (2003) 24 ILJ 2335 (LC).

Non-joinder

[40] In the case of *Gordon v Department of Health: KZN,*[10] the SCA held that:

> '[9] The court formulated the approach as, first, to consider the third party would have *locus standi* to claim relief concerning the same subject matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties not joined in the proceedings then that party or parties have a legal interest in the matter and must be joined.'
>
> [10] All the cases I have referred to also illustrate the point that the order or judgment of the court is relevant to the question whether the party has a direct and substantial interest in the subject-matter of any proceedings. It is so that in the course of its reasoning a court makes findings and expresses views which do not form part of its judgment or order. An example in point in the employment arena concerns a potential finding by a court that a successful appointee was not suitable for appointment. The 'unsuitable' appointee has no legal interest in the matter if the order will be directed at the employer (the author of the unsuitable appointment) to compensate the 'suitable' but unsuccessful applicant. Of course the successful but 'unsuitable' appointee will always have an interest in the order to confirm his/her suitability for the job but this is not a direct and substantial interest necessary to found a basis for him or her to be joined in the proceedings. In a situation where a number of applicants compete for a position, they provide information to the prospective employer to influence the decision in their favour. That is as far as they can take it. Once the employer selects from amongst them it is up to the employer to

[10] (2008) 29 ILJ 2535 (SCA) at paras 9-10.

> defend its decision if challenged. This is because the employer, as the directing and controlling mind of the enterprise which is vested with the managerial prerogative to manage it, has a legal interest in the confirmation of its decision as it faces a potential order against it. The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests.'

[41] In this matter, the relief sought and granted does not affect the interviewed candidates as they do not have a right to appointment in law Furthermore, the interviewed candidates would not have to be re-interviewed in terms of the order granted.

[42] Finally, the applicant was not aware of or could not have been aware of which individuals have an interest, nor does the respondent list the individuals which it contends have a legal interest in the matter. The respondent is, accordingly, the only party that has a legal interest in the matter, as defined by the relief granted.

[43] Accordingly, I make the following order:

1 The application for leave to appeal is dismissed.

2 The respondent is to pay the applicant's costs.

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Kumalo, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate Riaan Venter
Instructed by:	Maenetja Attorneys
For the Respondent:	Advocate W Hutchinson
Instructed by:	Lebea and Associates