THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C 617 / 16

In the matter between:

ANDILE ALEXANDER ZOKUFA **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR

THE CHEMICAL INDUSTRY **First Respondent**

GAIL MCEWAN N.O. **Second Respondent**

PETRO SA (SOC) LTD **Third Respondent**

Heard: **24 May 2017**

Delivered: **8 December 2017**

Summary: Bargaining Council arbitration proceedings – review of arbitration award – test for review – s 145 of LRA 1995 – principles considered – reasonable outcome approach applied

Unfair labour practice – grading of position – nature of dispute considered – issue about application of grading – no case of incorrect grading made out –

arbitrator properly and rationally considering evidence relating grading – finding that no unfair labour practice committed sustainable and reasonable

Review application – consideration of evidence by arbitrator – arbitrator considering all evidence rationally and reasonably – award based on proper evidence – outcome arrived at reasonable

Bargaining Council arbitration proceedings – conduct of commissioner considered – application of Section 138 of the LRA considered – complaint of misconduct of arbitrator unfounded – overall considered arbitrator conducting proceedings in fair and proper manner – no misconduct found to exist

Review application – proper case not made out for review – application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] How far will one go in order to secure a salary increase? This case illustrates an answer to that question. The dispute arose from a contention by the applicant that the third respondent failed to apply its remuneration policy correctly to him, and thus committed an unfair labour practice towards him. In essence, the dispute concerns the issue of the correct grading of the applicant. The dispute was referred to the National Bargaining Council for the Chemical Industry (referred to in this judgment as 'the Council'), but remained unresolved following conciliation on 19 May 2016.

[2] Arbitration proceedings were convened before the second respondent as duly appointed arbitrator by the Council, on 22 August 2016. In an arbitration award dated 29 August 2016, the second respondent determined that the third respondent did not commit an unfair labour practice towards the applicant, and consequently dismissed his dispute.

[3] The applicant was dissatisfied with this determination of the second respondent and pursued a review application in terms of Section 145 as read with Section 158(1)(g) of the Labour Relations Act[1] ('the LRA'). The applicant's review application was filed in Court on 11 October 2016. With the second respondent's arbitration award having been handed down on 30 August 2016, the applicant's review application was therefore brought within the 6(six) weeks' time limit as contemplated by Section 145 of the LRA, and is thus properly before Court. I will now proceed to consider the applicant's review application, starting with the setting out of the relevant factual background.

The relevant background

[4] The applicant commenced employment with the third respondent on 1 August 2005. He started employment in Mossel Bay, but was later transferred to Cape Town as from 1 March 2007. At the time when this dispute arose, the applicant was employed as Client Manager in the HR department situated in Cape Town.

[5] The third respondent, where it comes to grading of employees, applies the EXECEVAL point based job evaluation system. The purpose of applying the system is to ensure that there exists internal equity (based on a peer comparison) and external equity (based on a comparison of the external market), where it comes to the remuneration of employees in the third respondent.

[6] When the applicant was transferred to Cape Town, he had a post grading of EX 17 in terms of the EXECEVAL system. It was agreed that this grading would remain unchanged in the course of the transfer. This also meant that his existing salary at the time of transfer would not be reduced as a result of the transfer.

[7] In and during 2010, the third respondent then conducted a complete regrading exercise relating to all manager positions in the HR department at the third respondent, under the auspices of an independent auditing firm, Deloitte. This

[1] Act 66 of 1995.

was necessitated as a result of operational changes that took place in the structure of the third respondent, as well as changes in the job contents attached to these positions. This regrading exercise had the result that certain positions were upgraded, but other positions were downgraded. Unfortunately, the applicant's position was one of those that attracted a downgrading. His position was downgraded from an EXECEVAL grade EX17 post with 2349 EXECEVAL points to a grade EX16 post with 2129 EXECEVAL points.

[8] However, this regrading was never actually implemented at the time, in 2010, because the third respondent embarked upon a restructuring process that placed implementation on hold. This restructuring process was completed by 2012 and on 16 November 2012, the third respondent's Richard Buhr ('Buhr') issued a memorandum *inter alia* to the effect that the applicant's position now be downgraded as recommended by the Deloitte regrading exercise. This memorandum was approved by all of the third respondent's relevant executives. Normally, such a downgrading would be coupled with a downgrading in salary.

[9] However, Buhr recommended in the same memorandum of 16 November 2012 that the applicant be permitted to retain his current grade, on the basis of what Buhr described as his 'personal grade'. What this meant, in effect, was not that the applicant's actual position still remain graded at EXECEVAL grade EX17 with 2349 Execeval points. After all, a position is a position no matter who the incumbent is. Referring to a 'personal grade' meant that the applicant would continue to occupy the position, despite it being grade EX16 with 2129 EXECEVAL points, as if it was an EX17. He would also retain his existing salary, accordingly.

[10] All the grading amendments pursuant to the Deloitte recommendations were implemented end 2012 / beginning 2013.

[11] Therefore, and as from 2013, the situation of the applicant was simply that he was occupying an EX16 position, but was continuing to be paid at EX17 level. In effect, he was overpaid for the job that he was in. Because the third respondent decided not to decrease his salary, he would continue to enjoy this advantage, but of course this change in grade would have an impact on salary

increases in the future. The fact is that future increases would be considered on the basis of an EX16 grading actually attached to the position.

[12] On 21 October 2014, the applicant was informed of a salary increase for the 2014 year, which appeared to be based on an EX16 grading, despite no reference to actual grading being made in the letter. Then, and on 3 September 2015, the applicant was informed by the third respondent that his salary would be adjusted to R1 463 109.00 per annum for the 2015 year, effective 1 July 2015. This salary adjustment was in line with an EX16 grading attached to the position at a parity level of 94% associated with such position's grading of EX16.

[13] The applicant was dissatisfied with this state of affairs. He wanted a salary adjustment based on a market parity of 86% based on an EX17 graded position (he later changed this demand to 100%). He filed a grievance with acting vice president: human capital, Omphile Mohapanele. He complained that his salary adjustment and consequent parity was not in line with the third respondent's remuneration policy. The applicant received a short answer from Mohapanele, being that all increases were on hold since September 2015.

[14] The applicant escalated his grievance to the acting group chief executive officer. The matter was then tasked to the group compliance manager, Linda Nene ('Nene') to deal with. She investigated, and concluded that there was no substance to the complaint that the remuneration policy had been incorrectly applied. She wrote a detailed report to this effect dated 10 March 2016, which will be dealt with in detail later in this judgment. The outcome of this escalated grievance was then conveyed to the applicant on 31 March 2016, and he was informed that his parity percentage was in fact correct and in line with the remuneration policy. He was also informed that his position had in fact been downgraded to an EX16 grade, and he was simply kept at EX17 only as a 'personal grade'.

[15] The applicant then pursued an unfair labour practice dispute to the CCMA on 12 April 2016, but because the Council had jurisdiction in this matter, the dispute was subsequently transferred to the Council. It remained, as referred to above, unresolved at conciliation stage, and proceeded to arbitration before the second respondent.

[16] The applicant's case at arbitration before the second respondent was that the third respondent had not applied its remuneration policy correctly. The basis of this case was an alleged lack of parity in terms of this remuneration policy. The applicant, in seeking consequential relief for this unfair labour practice, wanted to be remunerated at a 100% parity level for an EX17 graded position.

[17] The second respondent found against the applicant. She held, in effect, that the post he occupied was graded as an EX16 post. She accepted that the applicant was only permitted to keep his EX17 grade as a personal grade, and this did not change the actual grading of the position. She rejected the notion that the applicant was entitled to be graded, for the purposes of parity, at a level EX17 no matter what the grading of the post was that he occupied. She concluded that the applicant was not entitled to receive salary increases based on an EX17 grade and that the third respondent had thus not applied its remuneration policy incorrectly. She then dismissed the applicant's unfair labour practice claim. These findings led to the current review application. I will now proceed to decide this review application by first setting out the test for review.

The test for review

[18] Shortly, what the review applicant must show to exist in order to succeed with a review application is firstly that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. But even if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In order to succeed, therefore, there must be both an error or irregularity, and an unreasonable outcome. This review test is evident from the judgment in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] where it was asked:

[2] (2007) 28 ILJ 2405 (CC) 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.

> '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'

[19] As to when an outcome would be considered to be unreasonable, the Court in *Herholdt v Nedbank Ltd and Another*[3] 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.'

And in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[4] it was held:

> '…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[20] In the end, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[5] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator, as a

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[3] (2013) 34 *ILJ* 2795 (SCA) at para 25.
[4] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.
[5] See *Fidelity Cash Management* (*supra*) at para 102.

reasonable outcome.[6] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[7] it was held:

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

[21] It is however significant, as will be further elaborated on later in this judgment, that the applicant has raised, as part of his grounds of review, that the second respondent has committed misconduct in the conducting of the arbitration proceedings, depriving him of a fair hearing. This kind of a review is competent because of the supervisory duty the Labour Court has over the conducting of proceedings in the CCMA or bargaining councils[8]. The applicable review ground in this respect would be as listed in Section 145(2)(a)(i) of the LRA.[9] In such a review application, the reasonableness or not of the outcome is simply not a relevant consideration, because once this ground of review is found to exist, a party would be deprived of a fair hearing, and this in itself vitiates the outcome.[10] In *Bauer Research CC v Commission for Conciliation, Mediation and Arbitration and Others*[11] the Court held:

> ' … where it comes to an arbitrator acting ultra vires his or her powers or committing misconduct that would deprive a party of a fair hearing, the issue of a reasonable outcome is simply not relevant. In such instances, the reviewable defect is found in the actual existence of the statutory prescribed review ground itself and if it exists, the award cannot be sustained, no matter what the outcome may or may not have been. Examples of this are where the arbitrator should have afforded legal representation but did not or where the

[6] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[7] (2015) 36 ILJ 1453 (LAC) at para 12.
[8] See *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others* (2013) 34 ILJ 2347 (LC) at para 34; *Pep Stores (Pty) Ltd v Laka NO and Others* (1998) 19 *ILJ* 1534 (LC).at paras 23 – 25; *Deutsch v Pinto and Another* (1997) 18 *ILJ* 1008 (LC) at 1011 and 1018; *National Union of Metalworkers of SA and Another v Wainwright NO and Others* (2015) 36 ILJ 2097 (LC) at para 57.
[9] The Section reads: 'A defect referred to in subsection (1), means — *(a)* that the commissioner — (i) committed misconduct in relation to the duties of the commissioner as an arbitrator …'.
[10] See *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others* 2000) 21 *ILJ* 1151 (LC) at para 27; *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 658 (LC) at para 16.
[11] (2014) 35 *ILJ* 1528 (LC) at para 18. See also *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) at para 21; *Premier Foods* (*supra*) at para 15; *Chabalala v Metal and Engineering Industries Bargaining Council and Others* (2014) 35 *ILJ* 1546 (LC) at para 13.

> arbitrator conducted himself or herself during the course of the arbitration in such a manner so as to constitute bias or prevent a party from properly stating its case or depriving a party of a fair hearing. The reason for reasonable outcome not being an issue is that these kinds of defects deprive a party of procedural fairness, which is something different from the concept of process related irregularity.'

[22] As against the above principles and tests, I will now turn to deciding the merits of the applicant's review application.

Grounds of review

[23] In order to properly decide a review application, it is also important to identify the grounds of review upon which the application is founded. These grounds must be properly set out and identified in the founding affidavit. A review application can only be decided on the basis of the grounds of review so raised. As was said in *Northam Platinum Ltd v Fganyago NO and Others*[12]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[24] The first ground of review in the applicant's founding affidavit relates to what he contends to be misconduct on the part of the second respondent, being that the second respondent assisted the third respondent's witnesses, and unduly interfered in the conduct of the case. The second ground of review is a complaint about the manner in which the second respondent determined the documentary evidence, and in particular, the second respondent's exclusion of documentary evidence presented by the applicant pertaining to what his grading should have been. Other than a general reference that the second respondent failed to apply her mind to the material facts, and an attack of the credibility of Van der Merwe (the witness for the third respondent), the remainder of the grounds of review in the founding affidavit are in essence legal argument relating to the meaning and interpretation of the applicant's contract of employment.

[12] (2010) 31 ILJ 713 (LC) at para 27.

[25] In the case of review applications, the grounds of review in the founding affidavit may however supplemented, after the filing of the record of review, by way of a supplementary affidavit.[13] The applicant did seek to supplement his grounds of review. In a supplementary affidavit, the applicant adds a number of further grounds for review, summarized as follows:

25.1 The remuneration policy of the third respondent must be read with the job evaluation policy, as the latter policy presents the options available to the third respondent where a post is downgraded. The remuneration policy is silent on what would happen where the employee is allowed to retain a higher grade in the case of a downgrading of a post. According to the applicant, he had to continue to be remunerated at the higher grade, if the job evaluation policy is applied. In simple terms, the applicant had to be dealt on the basis of his personal grade, and not the position grade, in terms of the job evaluation policy, and the second respondent committed a reviewable irregularity in not appreciating this.

25.2 The second respondent misunderstood the applicant's case when finding that he could not expect to be remunerated on the EX17 grade forever, as this finding negates the applicant's personal grade which meant that he was in effect never downgraded.

25.3 The second respondent erred in failing to consider that the applicant's earlier salary adjustments had been made on the basis of the EX16 grade and not the EX17 grade, which prejudiced him.

25.4 The second respondent failed to understand the issues before her, in finding that much of the applicant's evidence was hearsay, when the finding the second respondent was called on to make could be competently made on what was in essence common cause evidence.

25.5 Finally, the applicant then elaborates on the ground of review in the founding affidavit about the misconduct of the second respondent, by

[13] See Rule 7A(8) of the Labour Court Rules; *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.

setting out further examples of conduct of the second respondent in the arbitration which according to the applicant shows this to be the case.

[26] I will now proceed to decide the applicant's review application based on these grounds of review, starting with the case of alleged misconduct by the second respondent.

The misconduct of the arbitrator

[27] Succinctly described, the complaints of the applicant where it comes to the conduct of the second respondent in the arbitration can be summarized as the second respondent assisting the third respondent in the conduct of its case, interfering with the applicant's conduct of his case, being ruse and sarcastic towards the applicant, and *mero motu* recalling a witness.

[28] The point of departure in deciding these complaints of the applicant is the considering of Section 138(1) of the LRA, which provides:

> 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities'.

[29] In terms of Section 138(1), it is thus clear that it is not expected of an arbitrator to remain impassive in the conduct of the arbitration proceedings, with the fear that any participation in the proceedings could be seen to be misconduct. In *CUSA v Tao Ying Metal Industries and Others*[14] the Court held as follows with specific reference to Section 138(1):

> '… the LRA permits commissioners to 'conduct the arbitration in a manner that the commissioner considers appropriate'. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously.

[14] (2008) 29 *ILJ* 2461 (CC) at para 65.

> And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.'

The aforesaid dictum in *Tao Ying Metal Industries* was applied in *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others*[15] as follows:

> 'I also appreciate that in terms of the aforesaid three objectives as defined by the Constitutional Court in a commissioner would be permitted to conduct the proceedings in what may be described as an inquisitorial manner, and not just leave it up to the parties to place the relevant material, evidence and issues before the CCMA. This being said, there is a fine line between conducting arbitration proceedings in an inquisitorial fashion and becoming involved in the proceedings to such an extent so as to constitute a descent into the arena by the commissioner. To descend into the area means that the commissioner becomes an active participant in the conduct of the case by one of the parties, and that is simply not fair play and completely negates the imperative of the conduct of fair arbitration proceedings as contemplated by law …'

[30] How should it be determined whether it can be said that an arbitrator took matters too far, descended into the arena (so to speak), and deprived one of the parties of a fair opportunity to state a case? This was also dealt with by the Court in *ZA One*[16], where the Court said:

> 'Commissioners therefore need to exercise their entitlement to conduct the proceedings in the manner he or she deems appropriate with the necessary circumspection and good sense. The reason for this is simple — the Labour Court is dependent on the typed transcript of the proceedings in order to determine whether or not the commissioner was simply being inquisitorial to the extent permitted by law, or had actually descended into the arena, and from this record the court would gather the intention of the commissioner in this respect. Perhaps an appropriate way to put it is that the record constitutes the picture the Labour Court looks at and the commissioner must therefore be careful how he or she paints the picture, because a picture of unfair arbitration

[15] (2013) 34 ILJ 2347 (LC) at para 41.
[16] (*supra*) at para 42. See also *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) at para 22; *Chabalala v Metal and Engineering Industries Bargaining Council and Others* (2014) 35 ILJ 1546 (LC) at para 19; *National Union of Security Officers and Guards and Another v Minister of Health and Social Services (Western Cape) and Others* (2005) 26 ILJ 519 (LC) at para 16.

> proceedings emerging from the record would render the conduct of the commissioner reviewable per se.

[31] The existence or not of misconduct by the arbitrator of the kind that would vitiate the arbitration proceeding is thus an enquiry of fact based on the transcript of the proceedings before the arbitrator, as a whole. It does not matter what the arbitrator's intentions or motivations may have been, and whether he or she may have thought Section 138(1) permitted the kind of interventions which could ultimately be seen to deprive a party of a fair hearing. The enquiry remains objective, and limited to what is found in the transcript of the proceedings. As said in *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others*[17], where the Court dealt with a situation where an arbitrator refused to allow the calling of further witnesses:

> 'I therefore conclude, based on the principles as set out above, that the second respondent's decision not to allow the applicant to call witnesses it wanted was procedurally unfair and actually deprived the applicant of a fair hearing. The fact that this decision was made in the context of s 138 simply does not matter. The moment the applicant was deprived of a fair hearing, as was the case in casu, this would be the end of the matter and the arbitration award must be reviewed and set aside. …'

[32] But this Court should always be mindful of the fact that over-supervision of the conduct of CCMA or bargaining council arbitrators is inappropriate. Once again, this is an issue of balance. Unfairness resulting from the arbitration proceedings must be clearly apparent from the arbitration record, and should not be readily inferred. Over-supervision will completely negate the very concept of flexibility, which is in my view, is essential in arbitration proceedings under the LRA. In *Pep Stores (Pty) Ltd v Laka NO and Others*[18] it was held as follows:

> 'As a matter of policy this court, as supervisor of the commission, must have some discretion to ensure that commissioners apply consistent and

[17] (2014) 35 ILJ 1528 (LC) at para 41.
[18] (1998) 19 ILJ 1534 (LC) at para 25. See also *ZA One* (*supra*) at para 38.

> reasonable standards of justice. As a matter of policy this court should be mindful not to over-supervise the commission to such an extent that it no longer has any discretion of its own. Commissioners should be allowed latitude and flexibility to apply the provisions of the Act.'

[33] Applying the aforesaid, I will now proceed to decide the review grounds of the applicant where it comes to the manner in which the second respondent conducted the arbitration, so as to determine whether the kind of unfairness that would vitiate the proceedings, exists.

[34] I will firstly deal with the contention that the second respondent was rude and sarcastic towards the applicant, and unduly interrupted him. I could find no evidence of this in the transcript. Whenever the second respondent interrupted the applicant, it was to clarify aspects of the evidence and ensure that she properly recorded the evidence. In fact, a proper consideration of all the questions the second respondent put to the applicant when he was testifying convinces me that what she was doing, and properly so, was to ensure that all the critical aspects of the applicant's case was dealt with by him, with proper reference to the documents concerned.

[35] Instances where the second respondent prevented certain evidence being led was when the applicant tried to refer to what was said during conciliation, and the second respondent interrupted, saying these proceedings were without prejudice. This is clearly correct, and the second respondent did nothing wrong. The example of interruption specifically referred to in the supplementary affidavit happened during cross examination, when the third respondent's representative, Petros Mahlangu ('Mahlangu') had asked the applicant a question, which the applicant then answered, and Mahlangu responded with 'Okay, thank you'. Before Mahlangu could move on to his next question, the applicant of his own accord, and not in answer to any question put to him under cross examination, sought to add evidence about performance, and second respondent stopped him, indicating that he could not do that under cross examination. Again, I see nothing wrong with what the second respondent did in this regard, as surely the applicant cannot *mero motu* add to his testimony during the course of cross examination, especially if it is not even in response to any question asked. There is simply no

substance in any complaint of undue interruption by the second respondent of the presentation of the applicant's case.

[36] In the supplementary affidavit, the applicant criticises the second respondent for failing to intervene when Mahlangu (the third respondent's representative) purportedly assisted the third respondent's witness, Gerhard Van Der Merwe ('Van Der Merwe'), by pointing out to where certain documents in the bundle were. I find this criticism rather opportunistic, considering that in the course of his own testimony, the applicant deals with the contents of a document and then says to Mahlangu: 'just refer the arbitrator to the page please Petros', and Mahlangu then obliges. So, and where it suits the applicant when he testifies, it is permissible for Mahlangu to identity documents, but when Van der Merwe testifies, it is not. This cause of complaint has no substance, and is clearly contrived. This in any event had no impact on the fairness of the process.

[37] It was contended by the applicant that the second respondent also assisted Van Der Merwe when he testified. I cannot accept this contention. The transcript shows that the second respondent treated Van Der Merwe in exactly the same manner she treated the applicant when he gave evidence. Again, all she did was to ensure that all the critical aspects of the third respondent's case was dealt with by Van der Merwe in evidence, with proper reference to the documents concerned. Because the third respondent had a representative, these questions of the second respondent were also far less than was the case with the applicant, with the second respondent mostly leaving all questioning up to Mahlangu. There is no indication that she assisted Van Der Merwe.

[38] Lastly, the second respondent's interference with the cross examination of Van Der Merwe, by the applicant, was virtually non-existent. During questioning about the downgrading of the position, the applicant persisted with questions about where it had been recorded that the position was downgraded, when it was common cause that it was contained in documents to this effect, which was part of the bundle. The second respondent simply retorted that the document was in the bundle. I cannot see how this can be a legitimate cause of complaint, considering the applicant himself had testified about this very document and the second respondent had seen it. I may add

that the applicant was in any event allowed to elaborate further on this question he asked, under further cross examination, despite the initial interjection by the second respondent, and he then said that what he wanted was the Deloitte report and where in that report was it said his post was downgraded. The applicant indeed put this question to Van der Merwe, and Van Der Merwe answered by pointing to the place in the bundle where the Deloitte report was. Another interruption took place when the second respondent simply asked when the bundle of documents before her had been prepared. There is, in my view, nothing in the transcript concerning the cross examination of Van Der Merwe by the applicant, to indicate that he was in any manner deprived of a fair opportunity to put his case to Van der Merwe and challenge his evidence.

[39] This then leaves only the issue of the second respondent deciding to recall Van Der Merwe. She explained that the reason why she did this was because there were a 'couple things' that was 'bothering' her, and on which she sought clarity. There is no indication on the transcript that the applicant ever objected to this. Importantly, this specifically related to the document the applicant sought to introduce about his grading and which seems to form a central part of his case. When I read the transcript, it is apparent to me that this document was never really properly explored with Van der Merwe in the course of his cross examination by the applicant. It made sense, in my mind, for the second respondent to recall Van Der Merwe to specifically deal with this document. Further, the applicant was then given an opportunity to further cross examine Van Der Merwe, based on the answers he provided to the second respondent, and he said 'I am not going to ask any question'.

[40] Overall considered, I am satisfied that there is nothing in the transcript to indicate that the second respondent unduly descended into the arena in a manner that would render the arbitration proceedings to be procedurally unfair. I am similarly satisfied that there is nothing to indicate that the applicant did not receive a fair and proper opportunity to state his case and challenge the case against him. In my view, the misconduct case of the applicant was clearly contrived, and nothing more than an unfounded attempt to try and bolster his review application. I would even go so far as to say the applicant is

grasping at straws. The second respondent simply did not deserve the criticism the applicant sought to dispense towards her.

[41] The applicant has therefore failed to make out any case of misconduct on the part of the second respondent as arbitrator, justifying intervention on review. All of the applicant's review grounds relating to such misconduct thus fall to be dismissed. That being the case, it is now appropriate for me to turn to the review grounds relating to the substance of the matter, and the second respondent's findings where it comes to the unfair labour practice case of the applicant.

Analysis: the unfair labour practice

[42] Considering that the applicant's case was founded on an unfair labour practice, the appropriate place to commence deciding the review application is by referring to Section 186(2)(a) of the LRA, which reads:

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

It has been accepted that this provision would include a case where an employee is in effect paid the wrong remuneration based on the application of a policy of the employer.[19] This was indeed the case brought by the applicant.

[43] Much of the essential factual matrix where it came to the unfair labour practice dispute of the applicant, was in essence common cause. In sum, the essential facts are that the applicant occupied an EX17 position, this position was regraded downwards, following a Deloitte review, to an EX16 position, but the applicant was allowed to retain an EX17 grade in that position as a 'personal grade' and his salary was not adjusted downwards but remained the same. The crisp question was simply what did this all mean where it came to remuneration increases of the applicant going forward? Were those future

[19] See *Mathibeli v Minister of Labour* [2015] 3 BLLR 267 (LAC) at para 19; *National Commissioner of the SA Police Service v Potterill NO and others* (2003) 24 ILJ 1984 (LC) at paras 11 – 20; *City of Johannesburg Metropolitan Municipality v South African Municipal Workers Union and Others* [2016] JOL 36592 (LC) at para 58.

increases to be determined at an EX16 grade, or an EX17 grade, based on the third respondent's remuneration policy?

[44] It was in the end also common cause that the applicant's remuneration increases for 2014 and 2015 were effected on the basis of the midpoint scale applicable to an EX16 position, and not an EX17 position. At the time when this dispute arose, the difference in salary was R1 463 109.00 at a midpoint scale for an EX16 position (which was afforded to the applicant), and R1 705 992.00 as the midpoint scale for an EX17 position. The applicant pursued an unsuccessful grievance seeking the midpoint scale of the EX17 position (and later even more).

[45] The case of the applicant at arbitration was that the third respondent had failed to apply the provisions of its own remuneration policy. His case, in short, was that because the third respondent decided to afford him a personal grade of EX17, the third respondent was not permitted to apply a post grade of EX16, and all his future increases had to be based on a midpoint scale applicable to an EX17 grade. Because the case is founded on the remuneration policy, it is important to determine what it says.

[46] The remuneration policy provides that the TASK Job Evaluation System will be used to determine the relative worth of jobs, and that the EXECEVAL system would be used to assess jobs at task grade 16 and above. It further provides for 96 – 110% parity where the employee concerned meets all the job requirements. It may be added that it was undisputed that in practice, the parity percentage that was applied to executives was 94% in these circumstances. The remuneration policy thus in essence provides for remuneration based on an employee's individual performance, as well as the grading of the particular position. EXECEVAL determines the grade of the position, and individual positioning is determined by parity relating to market midpoint. Significantly, the remuneration policy makes no provision for a 'personal grade' of an employee.

[47] In the supplementary affidavit, the applicant then chose to bring the job evaluation policy into play. He contends, as set out above, that the job evaluation policy provides that it was not permissible to keep the applicant at

an EX17 grade but determine his remuneration increases based on an EX16 grade, as this was not one of the three choices given to the third respondent as employer in the event of a downgrading of a position, in terms of the job evaluation policy. There is in my view an insurmountable difficulty with this case the applicant now seeks to advance. This difficulty is that such a case was never placed before the second respondent as arbitrator to decide. That is evident from a number of factors, which I will now set out.

[48] Firstly, the pre-arbitration minute makes it clear that 'The commissioner is expected to decide whether or not the Respondent is or is not complying with the Remuneration Policy.' The minute makes no reference whatsoever to the job evaluation policy and any implications it may have on the issue to be decided. Needless to say, the applicant is bound by the case as defined in the pre-arbitration minute.[20] As specifically said in *Filta-Matix* (*Pty) Ltd v Freudenberg and Others*:[21]

> 'If a party elects to limit the ambit of his case, the election is usually binding …'

And in *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another*[22], the Court held:

> 'It is true, of course, that a pretrial agreement is a consensual document which binds the parties thereto and obliges the court (in the same way as the parties' pleadings do) to decide only the issue set out therein...'

[49] Secondly, the applicant never testified about the job evaluation policy and what it meant. Similarly, this was never put to Van der Merwe under cross examination. And in the closing address the applicant makes no reference to it, and only refers to the remuneration policy. The job evaluation policy was in the bundle of documents before the second respondent, but no one referred to it or testified about it. The second respondent in fact specifically informed the applicant at the outset of his evidence as follows: 'If you want to point something in the bundle you must point the bundle cannot speak on its own' (sic), and the applicant answers 'Okay Commissioner'. In cross examination of the applicant,

[20] See *GE Security (Africa) v Airey and Others* (2011) 32 *ILJ* 2078 (LAC) at para 20 – 21.
[21] 1998 (1) SA 606 (SCA) at 614B-D.
[22] (2000) 21 *ILJ* 142 (LAC) at para 16. See also the judgment written by Zondo AJP (as he then was) at para 83.

Mahlangu specifically asks the applicant why he did not challenge the grading under the job evaluation policy, and he answers "I have finished the internal mechanism in the company', referring to his grievances. The point is that it is clear that he chose not apply the job evaluation policy or rely on it.

[50] The applicant needed to properly place all evidence about the job evaluation policy, what it meant and how it had to be applied, and that it was in fact relied upon, before the second respondent, in order for this issue to be decided. The applicant cannot simply seek to make out such a case for the first time on review. The third respondent raised a specific complaint to this effect in the answering affidavit, and properly so.[23] In my view, the following *dictum* from the judgment in *Rambar Construction (Pty) Ltd t/a Rixi Taxi v Commission for Conciliation, Mediation and Arbitration and Others*[24] is apposite:

> 'From this it is clear that the commissioner was not presented with the evidence that would support the applicant's case at the arbitration. Having looked at Cromhout's concessions above, it really baffles my mind how the commissioner can be criticized for failing to take into account any of the material evidence when that was not presented before her by Cromhout as he himself acknowledged. The applicant sought to introduce new evidence via a rescission application. By doing so it is clear to me that the applicant sought to have 'a second bite at the cherry…'

[51] In the end, because the second respondent was simply not called on to decide whether the third respondent has complied with the job evaluation policy, and no such case was placed before her, she can hardly be criticized for failing to consider or decide such a case. It is simply not permissible for the applicant to now raise this case as a ground of review in this application, not having raised it in arbitration. In *Albany Bakeries Ltd v Van Wyk and Others*[25] the Court similarly decided, where it was held:

> 'If the case made out in the Labour Court was that the demotion resulted in a repudiation of the contract of employment justifying cancellation by the first respondent in circumstances that had not made working for the appellant

[23] See para 92 of the answering affidavit.
[24] (2012) 33 *ILJ* 1911 (LC) at paras 37 and 42. See also *ZA One* (*supra*) at para 32.
[25] (2005) 26 ILJ 2142 (LAC) at para 25.

> intolerable, it had to fail for two reasons. Firstly, that was not the case that was advanced before the arbitrator and our courts are very strict on disallowing a litigant to argue a different case on appeal …'

Also, in *Brodie v Commission for Conciliation, Mediation and Arbitration and Others*[26] the Court similarly said:

> '… Reference is made to *Albany Bakeries Ltd v Van Wyk & others* (2005) 26 ILJ 2142 (LAC), where it was held that it was prohibited for a review applicant to raise on review a case never placed before the arbitrator. …'

[52] The second respondent in her award accepted that that the applicant's position was in fact independently re-evaluated, and as a result was downgraded. She held that the applicant failed to prove in what respects this downgrading was incorrect. Considering that the applicant has the *onus* to prove the existence of an unfair labour practice,[27] there can be little fault with this reasoning. In *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others,*[28] 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. …'

There is simply nothing on the record which shows that the third respondent in some way erred or acted unfairly in re-grading the position the applicant occupied, to an EX16 position. Although the applicant made much of this in the arbitration, even going so far as to say that there was no evidence that his position was actually re-graded, he no longer appears to take issue with this in the supplementary affidavit. The applicant has simply failed to discharge the

[26] (2013) 34 ILJ 608 (LC) at para 33. See also *Uthukela District Municipality v Khoza and Others* [2015] ZALCD 19 (20 March 2015) at paras 32 – 33.
[27] 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.
[28] (2004) 25 ILJ 248 (LAC) at para 73.

onus on him in this respect. The second respondent's finding that the position occupied by the applicant was properly re-graded to an EX 16 position is thus unassailable on review.

[53] Where does that then leave the case of the applicant? As the second respondent properly recognized, the true case was that because of the applicant's so-called personal grade, the applicant was entitled to rely on the midpoint scale of an EX17 grade where it came to salary increases, 'forever', no matter what the grade of the position was that he occupied. The second respondent however had a difficulty with this case, finding that it failed to account for the fact that job contents may change, and in the case of the applicant, did change. The second respondent recognized that anomalies may arise in re-grading, and in this case this led to the applicant at retaining his existing salary, but nothing more than that.

[54] As said above, it is undeniable that the applicant's position was re-graded by way of independent third party evaluation to that of an EX16 grade, and this re-grading was implemented by January 2013. This resulted in the position occupied by the applicant being downgraded from an EX17 post to an EX16 post. This scenario existed, as a matter of undeniable fact. In applying the remuneration policy to this scenario, it must be remembered that where it comes to the interpretation and application of this policy, the following principles in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[29] must be applied, where the Court said:

> '…. Interpretation is the process of attributing meaning to the words used in a document …. having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to

[29] 2012 (4) SA 593 (SCA) at para 18. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.

> one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. ….'

[55] The Court in *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others*[30] dealt with a situation where employees were translated into positions based on the actual work they were doing, no matter what the position was that they had been occupying. This translation was done by way of a policy contained in a collective agreement. The complaint raised by the employee in that instance was a case of an incorrect translation in terms of the policy.[31] In deciding whether the case had merit, the Court accepted that a proper interpretation of relevant policy was necessary, and this should be done on the following basis:[32]

> 'Of course, context is not a secondary consideration but is part of the very process required to resolve any linguistic difficulty. The words employed and the purpose of the speaker are inextricably linked. This follows inherently from the very concept of the language. In the same manner, the content of an ordinary conversation cannot, in general, be divined from the meaning of the sentences employed or even with the conversationalist's goals in saying what they did, so the content of a legal text cannot, in general, simply be determined by the ordinary or technical meanings of the sentences in the text or indeed with the policy goals motivating the drafting thereof.'

[56] Applying the above principles, and if the remuneration policy was to be applied as it stood, it meant that the applicant's salary had to be reduced commensurate to his position grading, even if he remained at full individual parity grading. This was because the remuneration payable to an employee was based on the application of both legs of the grading system, the one being the actual position grading (EXECEVAL grade), and the other being the individual grading (the 94% party grade). The applicant was already in the correct individual parity grade. But his position grade was reduced. It followed that his remuneration had to be reduced.

[30] (2016) 37 ILJ 1819 (LAC).
[31] See para 25 of the judgment.
[32] Id at para 33.

[57] But the third respondent decided not to reduce the applicant's salary. It is clear from the evidence, in my view, that this was in essence a gesture of goodwill. The gesture was articulated, as reflected in the memorandum of Buhr dated 16 November 2012 (approved by the executives of the third respondent), by saying that the applicant retained his current grade 'at a personal level'. This was clearly a once off and individual exception that was applied. In my view, this kind of decision could not have been made in terms of the remuneration policy. The simple reason for this is that the remuneration policy did not contemplate it, or allow for it. This once off and *ex gratia* gesture could not change the terms of the remuneration policy, which prescribed that an important component of remuneration was the actual position grading, irrespective of the circumstances of the person in that position.

[58] What then followed, at the time of next increases in 2014 and 2015, was the actual application of the remuneration policy. Although it is true that the increase letters of 21 October 2014 and 3 September 2015 were somewhat vague and even contradictory where it came to content, it was apparent that what was being applied in affording the applicant an increase was the EX16 position grade with an individual position grade of 94% parity. This is fully in line with the remuneration policy, as it stands, and was applied in exactly the same manner to all executives.

[59] The above being the case, it is difficult to understand how the applicant can say that what he called his 'personal grade' was contemplated by the remuneration policy where it came to determining his increases. As a matter of common sense and logic, this 'personal grade' was simply intended not to reduce the applicant's base salary, as a once off occurrence, despite the down grading of his position. But going forwarded, increases would be based on the base salary attached to the EX16 position grade. This would mean that ultimately, in due course, the situation would equalize, and the applicant would be paid the proper salary applicable to the EX16 position he occupied. The second respondent was right in concluding that what the applicant in effect wanted was a guarantee of an EX17 position grade no matter what the actual position was graded at. This is not a situation contemplated by the remuneration policy.

[60] In fact, the proposition advanced by the applicant makes a mockery of why a grading exercise is conducted in the first place. I cannot understand why an employer would go through the expense and efforts to have a grading exercise done by a third party specialist, and to then basically ignore the outcome of such exercise when it is delivered. The only way in which a 'personal grade' in such circumstances would make sense is that at least the employee is not prejudiced by a reduction in salary when this grading is applied, but where it comes to future increases, the actual grading is applied which would then in time equalize out to the correct salary for the correct grade.

[61] In sum, the applicant did not make out a case that his position was improperly or incorrectly graded at level EX16 and in any event, he did not pursue such a case on review. The applicant remained in the same post (Client Manager) throughout. The remuneration policy makes no provision for a personal grade attached to an individual employee. The remuneration policy only provides for the determination of remuneration based on a grade attached to the actual position, and a parity percentage level attached to the individual employee, considered jointly. These provisions of the remuneration policy were then applied to the applicant for the 2014 and 2015 remuneration increase periods. There is simply nothing unfair in any of this. In *Eskom Holdings SOC Ltd v National Union of Mineworkers obo Kyaya and Others*[33] the Court held, in comparable circumstances:

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

[33] [2017] 8 BLLR 797 (LC) para 89

were a T10 grade. Such disagreement simply cannot successfully found a case of an unfair labour practice.'

[62] In the end, the applicant's so-called personal grade had only one consequence. It saved him from a salary reduction in 2013. But it could not be seen to change what the remuneration policy provided for. This was in fact properly explained by Nene in her report dated 10 March 2016, prepared in order to specifically address the applicant's grievance. Nene's report is well reasoned and accounts for all the relevant facts. She explained the discrepancies in the increase letters and confirmed that the increases afforded were in line with an EX16 position grading and parity percentile of 94%. She also explained the meaning of the applicant's 'personal grade' and why it did not change the fact that his actual position grade of EX16 had to still be applied. She was even critical of the third respondent's executive in not properly conveying all of this to the applicant, and recommended that the remuneration policy needed to be amended to make specific provision (Nene called it 'explicitly spell out') for such eventualities. The applicant would have been well served to take the contents of the report by Nene to heart. It in my view constitutes cogent reasoning why the applicant's grievance has no substance, and why his allegation of a breach of the remuneration policy had no merit.

[63] The applicant was critical of the fact that the second respondent had concerns about the loose document the applicant sought to introduce into the arbitration reflecting his salary at 100% parity for an EX17 position. I share the second respondent's difficulties. The document is a one line spread sheet generated by someone unknown. There is no evidence as to the veracity of the content. The best the applicant could do was to say it came from the remuneration office at the third respondent. In short, this document was unproven, unsubstantiated, and properly and reasonably did not feature in the reasoning of the second respondent.

[64] The applicant even went so far as to require an increase in remuneration, as part of his unfair labour practice dispute, based on a 100% parity percentile for an EX17 position. There is no basis for such a case. The evidence was clear that all executives (save for one individual exception who was at 95%) were at

a 94% parity percentile. Also, and as the report by Nene properly records, the third respondent has a discretion in terms of the remuneration policy to pay variable parities. The applicant made out no case at arbitration that the third respondent exercised its discretion in such a manner so as to justify interfering with it on the basis of it being considered to be unfair.[34] There is simply nothing wrong, nor unfair, in the application of a 94% parity percentile to the applicant, individually.

[65] The second respondent was critical of the applicant's case on the basis that, according to her, it was to a large extent founded on hearsay and uncorroborated evidence. The applicant has taken issue with this finding as one of his grounds of review, contending that this finding is not supported by the evidence on record. The record shows that the applicant to large extent sought to rely on what a variety of other managers[35] had allegedly told him about his position grade and that it had come out after the re-grading as still being EX17, but without calling any of these managers as witnesses to corroborate his version. I may add that these references to verbal statements made by these managers are entirely at odds with what is contained in the documentary evidence, and in particular the report from Deloitte and the memorandum of Nene. I have difficulty in understanding how anyone could tell the applicant his grading would come out of the regrading exercise unaffected, where an independent organization determined otherwise and the memorandum of Buhr approved by all relevant executives also recorded otherwise. Whilst I accept that the applicant's testimony about what was said to him personally by other managers is not hearsay, nothing turns on this error by the second respondent, because what other managers may or may not have told the applicant changes nothing.[36]

[66] In conclusion therefore, the applicant has failed to make out any case of the third respondent having breached its remuneration policy, let alone acting in an unfair manner towards him. The manner in which the third respondent sought to apply the remuneration policy, in this case, to the applicant, was in

[34] See *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 1120 (LAC) at para 53**;** *Arries v Commission for Conciliation, Mediation and Arbitration and Others* (2006) 27 *ILJ* 2324 (LC) at paras 47 – 48.
[35] The applicant mentioned discussions with Darrin Arendse, Hewu Xoliswa, and Omphile Mohapanele.
[36] Compare *Eskom Holdings* (*supra*) at para 106.

line with what the policy envisaged and was in my view fair. As such, the second respondent's finding to this effect is rational, reasonable and resorts well within the bands of a reasonable outcome. The second respondent's award must thus be upheld on review.

Conclusion

[67] Therefore, and having regard to what I have set out above with regard to the merits of the applicant's review application, and based on the application of the review test as I have also set out above, I conclude that the second respondent's award and reasoning simply does not constitute any irregularity. The first respondent properly considered all material evidence, properly and rationally construed and applied the relevant legal principles, and provided proper reasons for the conclusion that she came to. In any event, her decision resorts well within the bands of what may be considered to be a reasonable outcome.

[68] As to the alleged misconduct of the second respondent as basis for the review application, I also conclude that there is no substance in this review case of the applicant. There simply exists no conduct on the part of the second respondent, discernible from the transcript of the arbitration proceedings, that could substantiate a conclusion that misconduct exists that would deprive the applicant of a fair hearing and thus vitiate the proceedings.

[69] The second respondent's award, therefore, must be upheld and her conclusion that the third respondent committed no unfair labour practice towards the applicant must be sustained and I, accordingly, so determine. The result is that the applicant's review application falls to be dismissed.

[70] In dealing with the issue of costs, both parties asked for an award of costs. I consider that the second respondent's award was a clear, concise and a properly reasoned award and it should have been apparent to the applicant that his review case had no merit, especially considering the contents of the grievance report submitted by Nene before this matter was even referred to the first respondent by the applicant. I also consider that the allegations of misconduct by the second respondent was in my view contrived and the

applicant tried to raise a new case on review never placed before the second respondent. Whilst it is true that the applicant and the third respondent are still in an employment relationship, I do not believe that in the circumstances this is sufficient to mitigate against the granting of a costs order against the applicant. In thus exercising my wide discretion I have in terms of the provisions of Sections 162(1) and (2) of the LRA, where it comes to the issue of costs, I do believe a costs order against the applicant is appropriate.

Order

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

1. The applicant's review application is dismissed with costs

_____

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant: Ms T Ralehoko of Cheadle Thompson & Haysom Inc

For the Third Respondent:	Mr B Conradie of Bradley Conradie Halton Cheadle Attorneys