THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 634 / 13

In the matter between:

THE PUBLIC SERVICE ASSOCIATION OF

SOUTH AFRICA OBO MEMBERS **Applicant**

and

MEC FOR AGRICULTURAL AND RURAL

DEVELOPMENT (NORTH WEST PROVINCE) **Respondent**

Heard: **19 April 2017**

Delivered: **12 October 2017**

Summary: Conduct by State as employer – application of performance management and development system – review of decision of employer in applying such system to employees – Section 158(1)(h) of LRA considered – principles applicable to such reviews considered

Review application – review application based on principle of legality – considerations applicable to legality review – principles considered

Nature of dispute – performance management and development system and consequent payment of bonuses – constitutes a benefit under the unfair labour practice jurisdiction – dispute should be dealt with by bargaining council under normal dispute resolution processes under Chapter VIII of the LRA – review under Section 158(1)(h) not appropriate

Extraordinary circumstances – principles considered – no extraordinary circumstances shown to justify departure from normal dispute resolution processes – alternative remedy available

Review application – no justification for consideration of review application – application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The current application is an application by the applicants in terms of Section 158(1)(h) of the Labour Relations Act[1] ('the LRA') to review and set aside a decision made by the respondent as employer in the public services sector. The review concerns a decision made by the respondent where it came to the application of the Performance Management and Development System in place at the respondent, and in particular, the payment of performance bonuses to employees in terms of that system. The applicants were unhappy about the manner in which such bonuses was determined, and then paid, for the 2010-2011 year.

[2] The application dates back to 2013. It was marred by objections *in limine* and point taking by both parties. The matter ultimately came before Van Niekerk J for case management on 7 February 2017, and in terms of an order made by the learned Judge on such date, it was recorded that the points *in limine* were withdrawn, the late filing of the answering affidavit was condoned, and the respondent was directed to file heads of argument. Van Niekerk J also enrolled

[1] Act 66 of 1995.

the matter for hearing on 19 April 2017, and it then came before me for determination.

[3] I will decide this matter by first summarizing the proper factual matrix upon which such decision is to be based. As these are motion proceedings, and insofar as there exists a factual dispute between the parties, I shall apply the *Plascon Evans Paints v Van Riebeeck Paints*[2] principles.

The relevant facts

[4] The respondent is the functionary responsible for the Department of Agriculture and Rural Development for the North West Province. The individual applicants are the members of the Public Servants Association ('the Association') on whose behalf the application has been brought and are all employed in that department. For ease of reference, I shall refer in this judgment to the respondent as 'the department'.

[5] In the public service, there are mechanisms in place that are intended to reward deserving public service employees for good performance, by way of a performance bonus, paid annually. The mechanism at stake in this instance, as touched on above, is the Performance Management and Development System ('PMDS'). The PMDS was executed under the Public Service Regulations.

[6] In the case of the North West Provincial Government, it implemented a PMDS policy as far back as 2003. There were five amendments to the PMDS policy over the years, with the latest applicable amendment being effected on 1 April 2010. This policy appears to apply to all the departments in the North West provincial government, including the department.

[2] 1984 (3) SA 623 (A) at 634E-635C ; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38. These principles were summarized in *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another* 2009 (3) SA 187 (W) para 19 aptly as follows: '…where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.'

[7] A consideration of the PMDS policy shows that it is not just aimed at individual performance of individual employees. It also has a group objective, with the first listed purpose of the policy being to enhance organizational/departmental performance against the strategic plan. The next listed purpose is to enhance individual performance against agreed upon objectives. It is recognized that good performance must be rewarded. The policy applies to all employees that are not senior management.

[8] In short, the PMDS policy prescribes that an annual performance bonus be paid to deserving employees in the department, based on the employees excelling where it comes to work performance. These bonuses are paid as a percentage of annual salary. It is however specifically prescribed that these performance bonuses paid to employees cannot be in excess of a total of 1.5% of the salary bill for the department.

[9] In order to determine if employees qualify for such a performance bonuses, there is an evaluation process in terms of the PMDS policy. It starts with an assessment of the employee's performance by his or her supervisor, which happens continuously during the annual bonus cycle. This is followed by an annual performance review, pursuant to which the employee is then given an 'assessment outcome' (the employee is entitled to challenge such an outcome, if dissatisfied with it). The employee is given a score in this annual performance assessment, which places the employee into one of five categories of performance, starting with 'unacceptable performance' and ending with "outstanding performance'. The particular category firstly determines if the employee qualifies for a bonus. Performance bonuses only accrue to employees in the categories of 'performance significantly above expectations' and 'outstanding performance'. For level 1 – 10 employees, and in the category of 'performance significantly above expectations', bonuses range from 5% to 17% of annual salary, and in the category of 'outstanding performance', the bonus is 18%. For level 11 – 12 employees, and in the category of 'performance significantly above expectations', bonuses range from 5% to 13% of annual salary, and in the category of 'outstanding performance', the bonus is 14%.

[10] This annual performance assessment is however subject to moderation by a moderating committee. The PMDS policy specifically records that the primary role of the moderating committee is to 'ensure equity and consistency in the application of the PMDS'. If the moderating committee identifies deviations or discrepancies in the performance assessments, it must remedy the situation through a moderation process to be submitted to the head of department for approval.

[11] The department also adopted a set of guidelines where it came to the application of the PMDS policy in the department. These guidelines record that all performance reports would be subject to moderation. Also provided for in these guidelines is what is called a 'committee of managers' that review the semester ratings by supervisors of employees, and this committee shall have the prerogative to recommend to the supervisor to either increase or reduce ratings. Following consultation with the supervisor, the committee shall then determine a final semester score.

[12] The guidelines however do recommend that if the cost of performance incentives exceed the prescribed maximum allowed, the head of department may scale it down. It is stated that the scaling down will be done on the amount due/applicable to the employee rather than on the percentage allocated based on the performance level.

[13] The evidence shows that the department for a number of years prior to 2010 / 2011 paid out performance bonuses to employees under the PMDS policy, without any issue or complaint from the Association or its members.

[14] For the 2010 – 2011 assessment period, the department decided to establish what it called a Centralized Moderating Committee. This committee had two purposes, the first being to standardize the different evaluation and scoring mechanisms adopted by the various directorates in the department in applying the PMDS policy, and secondly to ensure that all the different directorates stay within the limit of 1.5% of the total salary bill of the department where it came to paying out performance bonuses.

[15] According to the department, it has been experiencing difficulties with the different directorates evaluating performance bonuses, leading to what it

called bonuses 'way above' the budgetary limitation of 1.5% of the salary bill. The figure mentioned is that this budget limitation was exceeded by 38%. This Central Moderating Committee would ensure consistent application of the PMDS policy across all directorates, and ensure this would always be within the budgetary prescription.

[16] The problem with this approach of the department, as far as the Association was concerned, in establishing this Centralized Moderating Committee, is that the department deviated from the manner in which it had been applying the PMDS policy before this assessment year, and in particular, that this Central Moderating Committee was not provided for in the PMDS policy or accompanying regulations. As far as the Association was concerned, how the process was prescribed to work was that employees were assessed by their individual supervisors. These assessments by the supervisors would then be presented to the moderating committee. The moderating committee would then make the final determination where it came to performance bonuses, and that was that. This means, according to the Association, that there is no provision for further moderation.

[17] In the founding affidavit, the Association sets out one example of Orapeleng Motshwane ('Motshwane'). It is said that he was initially assessed, and then moderated, to qualify for a 13% bonus payment under PMDS policy. However, and due to a decision taken by the new Central Moderating Committee, the individual rating of Motshwane was decreased to 8%. The difficulty that the PSA has with this decision is that should it be necessary to decrease bonus payments so as to fall within the 1.5% of salary bill budget constraint, this could only be done by way of an across the board scaling down of bonus payments and the decreasing of individual ratings was not permissible, as contemplated by the guidelines.

[18] However, and save for Motshwane, the Association has not mentioned one single other example of an individual employee that has been assessed and then moderated for a certain bonus percentage, but then has had that percentage reduced by the Central Moderating Committee. The department has taken specific issue with this lack of particularity in its answering affidavit,

contending that it means that the applicants have failed to make out a proper case.

[19] The department, on the other hand, states that there is nothing in the PMDS policy or regulations that prohibits the establishment of a Central Moderating Committee. It said that this Committee fulfilled the important purposes set out above, and in particular, to ensure that bonus payments remain within budget, and that the policy is consistently applied in all directorates (in other words quality assurance). According to the department, individual performance scores of individual employees were not adjusted downwards or decreased, as contended by the PSA, but the overall ratings per directorate was scaled down to fit within the budgetary limit. In other words, although individual performance scores may have been adjusted downwards, this was done on the basis of an across the board scaling down per directorate, because the actual bonus payment is based on an actual percentage attached to the employee.

[20] Finally, the Central Moderating Committee determined that for the lowest level of employees, being those at levels 2 – 4, a standard across the board performance bonus of 10% would be paid, irrespective of individual ratings, provided the employees concerned of course qualified for a bonus payment *per se* following assessment and moderation. The rationale provided for this was that these level employees perform routine duties similar in nature, and in this context consistency was the overriding consideration. The department has also said that the bonus payments at these levels did not significantly contribute to the limit in respect of the salary bill percentage.

[21] In a letter dated 5 March 2012, the Association raised a complaint with the department contending that the conduct of the department was in contravention of the PMDS policy because it reduced the individual scores of employees, and afforded a fixed percentage to the lower level employees irrespective of the level of their performance. Significantly, it is recorded in this letter that the Association ‘understands’ the budgetary constraint of 1.5% and does not appear to take issue with the fact that this had to be adhered to and could lead to the reduction of performance bonuses.

[22] The department answered on 12 March 2012. It stated that the PMDS policy made provision for the establishment of Moderating Committees, and based on this, a Central Moderating Committee had been established. This letter set out the role and responsibilities of the Central Moderating Committee, which included the issues already discussed above. The Association was informed that the activities of the Central Moderating Committee revealed that the budgetary limit was being significantly exceeded and the performance curve was abnormal. The Association was also informed that the recommendations of the Central Moderating Committee had been accepted by the heads of department.

[23] Dissatisfied with the answer given, the Association then pursued the application which is now before me for consideration. As stated above, the application is a review application under Section 158(1)(h) of the LRA, and I will now commence deciding this application by first setting out the relevant review principles in an application of this nature.

Review principles

[24] Section 158(1)(h) provides as follows:

> 'The Labour Court may- … review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.'

[25] It is thus clear that the process of utilization of Section 158(1)(h) contemplates a review application. This being the case, the applicable basis of such a review has been described in *Hendricks v Overstrand Municipality and Another*[3], as follows:

> 'In sum therefore, the Labour Court has the power under s 158(1)*(h)* to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual

[3] (2015) 36 ILJ 163 (LAC) at para 20.

disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds 'permissible in law'.

[26] Following on, the Court in *Merafong City Local Municipality v SA Municipal Workers Union and Another*[4] similarly pronounced:

> 'The Labour Court is not precluded by the LRA from reviewing the decisions and acts contemplated in s 158(1)(h). It has the power (and jurisdiction) to review them on any grounds 'permissible in law'. Permissible grounds in law would include the constitutional grounds of legality and rationality and, if they constitute 'administrative action', on the grounds that are stipulated in PAJA …'

[27] In its founding affidavit, the applicants have relied on review grounds based on the principle of legality. The applicants have not relied on PAJA[5]. Dealing specifically with 'legality', the Court in *Hendricks*[6] said:

> '…. Legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law.'

[28] The Court in *Khumalo and Another v Member of the Executive Council for Education*: *KwaZulu-Natal*[7] also specifically dealt with the meaning of 'legality', in the context of a review application under Section 158(1)(h) of the LRA, and held:

> '… The principle of legality is applicable to all exercises of public power and not only to 'administrative action' as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational. …'

[4] (2016) 37 ILJ 1857 (LAC) at para 38.
[5] Promotion of Administrative Justice Act 3 of 2000.
[6] (*supra*) at para 28.
[7] (2014) 35 ILJ 613 (CC) at para 28.

[29] In *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena*[8] the Court held that the principle of legality had developed over the past decade, to the extent that a parallel system of review for actions which falls outside of the strict definition of administrative action, had developed. Having held so, the Court then proceeded to set out this development as follows:[9]

> '… Public functionaries are required to act within the powers granted to them by law. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) at para 58, furthermore, see the seminal judgment in *Pharmaceutical Manufacturers Association of SA & another*: *In re Ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC) at para 85, where the court laid down the core element of legality as follows:
>
> 'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.'

The Court in *Weder*[10] then proceeded to consider this component of rationality as part of the legality enquiry, and held:

> 'In later judgments the court has developed this concept of rationality requiring the executive or public functionaries to exercise their power for the specific purposes for which they were granted so that they cannot act arbitrarily, for no other purpose or an ulterior motive. See *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 47. Furthermore, in *Democratic Alliance v President of the Republic of SA & others* 2013 (1) SA 248 (CC) at para 39 Yacoob ADCJ held:

[8] (2014) 35 ILJ 2131 (LAC) at para 33.
[9] Id at para 34.
[10] Id at para 35.

> 'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.''

[30] In summary, where the applicants seek to challenge the decision taken by the department where it comes to the payment of performance bonuses under PMDS policy, on the basis of a review application in terms of Section 158(1)(h) of the LRA founded on the constitutional principle of legality, the applicants must show that the decision failed to meet the following essential requirements:

30.1 The decision of the department was rationally connected to the purpose for which the power was given to it, thus meaning that the decision would not be considered to be arbitrary;

30.2 The decision accounted for all the relevant facts informing the decision, to the extent that the decision made can be said to be rational;

30.3 The process giving rise to the decision was lawful and fair; and

30.4 The decision itself was lawful, meaning that it is not a decision that falls outside the scope of the power afforded to the department.

Should the applicants be able to show that any one of these requirements have not been satisfied, then the decision by the department would be reviewable in terms of Section 158(1)(h) of the LRA based on the principle of legality.

<u>Is the review appropriate?</u>

[31] There is no doubt that as a general proposition, the Labour Court has the jurisdiction, in terms of Section 158(1)(h) of the LRA, to consider the applicants' application to review and set aside the decision of the department relating to the payment of performance bonuses to employees, on the basis of

the test as summarized above. The Court in *Gcaba v Minister for Safety and Security and Others*[11] said that jurisdiction means:

> '… the power or competence of a court to hear and determine an issue between parties …'

And in *Merafong City Local Municipality v SA Municipal Workers Union and Another*[12] the Court held:

> **'**Section 158(1)(h) of the LRA refers to a jurisdictional power of the Labour Court. It specifically provides that the Labour Court 'may review any decision taken or any act performed by the State'. The only way the Labour Court is able to review is by hearing and determining an application for review of the acts and/or decisions contemplated in s 158(1)(h). That section should be read as not only conferring a power, but also jurisdiction upon the Labour Court.'

The Labour Court thus clearly has the power under Section 158(1)(h) to hear the applicants' application.

[32] But it is not as easy as that. The fact that the Labour Court has jurisdiction / power does not mean that the Court should exercise this power. In other words, and even thought the Court may have jurisdiction to consider such a review under Section 158(1)(h), it does not mean that it is appropriate for it to exercise such power, especially where there are other specifically prescribed means by way of which the issue can be resolved. The Court in *Madzonga v Mobile Telephone Networks (Pty) Ltd*[13] said:

> 'The issue is not one of jurisdiction. It is one of competence. As I have set out above, the Labour Court will by virtue of the provisions of Section 158(1) of the LRA always have jurisdiction to interdict any form of disciplinary proceedings or grant interim relief. …'

[11] (2010) 31 ILJ 296 (CC) at para 74.
[12] (2016) 37 ILJ 1857 (LAC) at para 36.
[13] [2013] ZALCJHB 232 (30 August 2013) at para 62.

[33] Skweyiya J in *Chirwa v Transnet Ltd and Others*[14] dealt with what was in essence an unfair dismissal dispute based on poor work performance, but which dismissal was challenged by the employee party on the basis of a case of the breach of her right to administrative justice, which is in essence an issue of legality. After accepting that such disputes are dealt with in Chapter VIII of the LRA, Skweyiya J then said:[15]

> '… The LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective of who the employer is, and includes the state and its organs as employers.
>
> Ms Chirwa's case is based on an allegation of an unfair dismissal for alleged poor work performance. The LRA specifically legislates the requirements in respect of disciplinary enquiries and provides guidelines in cases of dismissal for poor work performance. She had access to the procedures, institutions and remedies specifically designed to address the alleged procedural unfairness in the process of effecting her dismissal. She was, in my view, not at liberty to relegate the finely tuned dispute-resolution structures created by the LRA. If this is allowed, a dual system of law would fester in cases of dismissal of employees by employers, one applicable in civil courts and the other applicable in the forums and mechanisms established by the LRA.'

[34] The Constitutional Court in *Gcaba*[16] followed suit, with Van Der Westhuizen J applying the *dicta* in *Chirwa* as follows:

> 'Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasized in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees.'

It may be added that the issue before the Court in *Gcaba* concerned an employee party that challenged a failure to promote him as being an

[14] (2008) 29 ILJ 73 (CC).
[15] Id at paras 64 – 65.
[16] Id at para 56.

infringement of his right to just administrative action, and in this context, the Court said:[17]

> '… the failure to promote and appoint Mr Gcaba appears to be a quintessential labour related issue, based on the right to fair labour practices, almost as clearly as an unfair dismissal …'

[35] The Labour Appeal Court in *Hendricks*[18] specifically applied the aforesaid *dicta* in *Chirwa* and *Gcaba*, and concluded:

> 'These dicta of the Constitutional Court support the general proposition that public sector employees aggrieved by dismissal or unfair labour practices (unfair conduct relating to promotion, demotion, training, the provision of benefits and disciplinary action short of dismissal) should ordinarily pursue the remedies available in ss 191 and 193 of the LRA, as mandated and circumscribed by s 23 of the Constitution. …'

[36] Therefore in summary, the LRA has a very unique scheme where it comes to resolving disputes that arise within the scope of an employment relationship. This includes such disputes involving the state as employer.[19] The LRA creates a right to fair dismissal and the right to fair labour practice, and then provides for a prescribed dispute resolution process to give effect to such rights.[20] At the heart of this dispute resolution process lays the notion of fairness as between both employer and employee. This notion of fairness is not compatible with concepts such as unlawfulness, illegality or invalidity. At a level of policy, this Court should always strive to give primacy to this prescribed dispute resolution process of the LRA and the notions underlying it. These kind of policy considerations were evidenced in the judgment of the Constitutional Court in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*[21] where the Court dealt with the notion of

[17] Id at para 66.
[18] (supra) at paras 10 – 12.
[19] See *Chirwa* (*supra*) at paras 64 and 66; *Public Servants Association of SA on behalf of de Bruyn v Minister of Safety and Security and Another* (2012) 33 ILJ 1822 (LAC) at para 26.
[20] This is found in Chapter VIII of the LRA, and in particular Section 191.
[21] (2016) 37 ILJ 564 (CC)

challenging dismissals under the LRA on the basis of the dismissal being unlawful or invalid. Zondo J (as he then was), writing for the majority, held:[22]

> 'I think that the rationale for the policy decision to exclude unlawful or invalid dismissals under the LRA was that through the LRA the legislature sought to create a dispensation that would be fair to both employers and employees, having regard to all the circumstances, including the power imbalance between them. In this regard a declaration of invalidity is based on a 'winner takes all' approach. The fairness which forms the foundation of the LRA has sufficient flexibility built into it to enable a court or arbitrator to do justice between employer and employee.'

Having so held, the learned Judge then reflected on the dispute resolution process envisaged by the LRA, and said:[23]

> 'The scheme of the LRA is that, if it creates a right, it also creates processes or procedures for the enforcement of that right, a dispute-resolution procedure for disputes about the infringement of that right, specifies the fora in which that right must be enforced and specifies the remedies available for a breach of that right.'

[37] What this means, in my view, is that when this Court is confronted with an application seeking to challenge the decision of an employer on review under Section 158(1)(h) in the context of the employment relationship, this Court is duty bound to ascertain whether the decision taken is one that would normally resort under the definition of dismissal or unfair labour practice as defined in Chapter VIII of the LRA, irrespective of the fact that the applicant may label it as a legality challenge.[24] Thus, the classification of the dispute as one of an infringement of a Constitutional principle of legality and a challenge being launched on that basis, must be carefully scrutinized, so as to ascertain if it is a dispute capable of resolution under the proper prescribed processes under

[22] Id at para 116.
[23] Id at para 130.
[24] Compare *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC) at para.52; *Chirwa* (*supra*) at para 63; *Gcaba* (*supra*) at para 66; *Farre v Minister of Defence and Others* (2017) 38 ILJ 174 (LC) at para 17.

Chapter VIII of the LRA in the forum properly and specifically designated to deal with such a dispute. As said by Ngcobo J in *Chirwa*:[25]

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

Of proper practical illustration of this point is the following *dictum* from the judgment in *Public Servants Association of SA on behalf of de Bruyn v Minister of Safety and Security and Another*[26]:

> 'Therefore, the court a quo (although of the opinion that the application before it was in terms of s 158(1)*(g)* of the LRA) correctly proceeded to consider whether the LRA required the kind of dispute which existed between the appellant and the respondent to be resolved through arbitration. The court concluded that leave, including incapacity leave and temporary incapacity leave at the respondent's organization, is governed by the provisions of Resolution 5 of 2001 of the PSCBC, which is a binding collective bargaining agreement. This means that the dispute between the parties was required to be submitted to arbitration as it concerned the application and/or interpretation of the provisions of the PSCBC resolution …'

[38] I am alive to the fact that jurisdiction of the Court is determined by the case as pleaded by an applicant.[27] Accordingly, a pleaded case of infringement of the

[25] (*supra*) at para 124.
[26] (2012) 33 ILJ 1822 (LAC) at para 32. See also the conclusion reached by the Court at para 34 of the judgment.
[27] See *Gcaba* (*supra*) at para 75; *Mbatha v University of Zululand* (2014) 35 ILJ 349 (CC) at para 157; *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members* (2015) 36 ILJ 624 (LAC) at para 21; *Moodley v Department of National Treasury and Others* (2017) 38 ILJ 1098 (LAC) at para 37.

Constitutional right to legality will clothe the Court with jurisdiction to consider the case. But considering the case does not mean that the case must then be decided on its merits. The Court can still decline to decide the matter on the basis that the dispute should rather be dealt with in terms of the dispute resolution processes under Chapter VIII of the LRA. To describe it as simply as possible, the fact that the Labour Court has the power or competence to do something, does not mean that it should, especially where that something can be dealt with under the proper prescribed dispute resolution processes under the LRA. This was appreciated by the Court in *de Bruyn*[28] where it was held as follows:

> 'But it does not follow that because the remedy of judicial review may still exist for public servants that the Labour Court will entertain an application to review 'any act performed by the State in its capacity as employer' as a matter of course. Recourse to review proceedings, in terms of s 158(1)(h), takes place in the context of the law relating to judicial review as well as the other elements of the system of dispute resolution which the LRA has put in place …'

[39] But when should the Labour Court nonetheless exercise its powers under Sections 158(1)(h) of the LRA, in place of the prescribed dispute resolution processes under the LRA? The answer is under exceptional circumstances only. There are in fact a number of examples of this approach. One of these instances is intervention by the Labour Court in the case of disciplinary proceedings against employees. The Labour Court clearly has the jurisdiction to do this.[29] The Court in *Booysen v Minister of Safety and Security and Others*[30] held that:

> '…. the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view

[28] (*supra*) at para 28.
[29] See 158(1)(a) of the LRA which reads: 'The Labour Court may – make any appropriate order, including … (ii) an interdict … (iv) a declaratory order …'.
[30] (2011) 32 ILJ 112 (LAC) at para 54.

be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive.' (emphasis added)

[40] Another example is where the suspension of an employee is being challenged in the Labour Court. In *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[31] the Court equally confirmed the jurisdiction of the Labour Court to entertain an urgent application specifically relating to the uplifting of a suspension, but then said the following:[32]

'Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of s 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of s 158(1)*(a)*(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances …' (emphasis added)

Applying the aforesaid dictum in *Gradwell*, the Court in *Madzonga*[33] held:

'The above authorities make it clear that the issue of the alternative remedy of the referral of the dispute to the CCMA or bargaining council, and this remedy is actually prescribed by law, is an important consideration mitigating against not granting relief in urgent applications concerning the uplifting of suspensions. In my view the issue is actually more than just the existence of an alternative remedy. The simple reason for this is that the alternative remedy is not just an available alternative remedy but a statutory prescribed alternative remedy. This is where the issue of competence comes in. The primary consideration must always be that proper effect be given to the clear

[31] (2012) 33 ILJ 2033 (LAC).
[32] Id at para 46.
[33] (*supra*) at para 63. See also *Ida v Department of Co-Operative Governance Human Settlements and Traditional Affairs Limpopo Province and Another* [2016] JOL 37301 (LC) at para 53; *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 17.

terms of the statute, and for the Labour Court to entertain this issue would be contrary to the dispute resolution process clearly prescribed by such statute which should only be done with great circumspection and reluctance. In my view, and as a matter of principle, the Labour Court should only entertain urgent applications to declare suspensions unfair or unlawful or invalid on the basis of interim relief pending the final determination of the issue in the proper prescribed forum, and even then compelling considerations of urgency and exceptional circumstances have to be shown by an applicant for such relief. Whether or not compelling considerations of urgency and exceptional circumstances exist is a call the Court has to make on a case by case basis on the facts of the matter.'

[41] What thus clearly appears to be the central theme guiding the Labour Court in deciding whether or not to exercise the power afforded to the Court in terms of Section 158(1)(h) of the LRA, is the availability of a prescribed alternative process and accompanying remedies, and in particular the unfair dismissal and unfair labour practice dispute resolution process and remedies under Chapter VIII of the LRA. Apposite, in my view, is the following dictum of Skweyiya J in *Chirwa*:[34]

'It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.'

[42] But if exceptional circumstances dictate otherwise, this Court may still intervene, in place of the prescribed dispute resolution processes running their course. These exceptional circumstances must however be shown by the applicant to exist, with proper motivation for the contention, and a proper case

[34] (*supra*) at para 41. See also *Hendricks* (*supra*) at para 27; *MEC, Department of Education, KwaZulu-Natal v Khumalo and Another* (2010) 31 ILJ 2657 (LC) at para 26.

in this regard must be made out in the founding affidavit. In this regard the Court in *Minister of Labour and Another v Public Servants Association of SA and Another*[35] held:

> 'Features that serve to distinguish the exception from the general are, inter alia, the source and nature of the action, whether the action involves, or is closely related to the formulation of policy, or to the initiation of legislation and/or whether it has to do with the implementation of legislation. In *De Villiers* the Labour Court added the existence of alternative remedies as another factor to be considered, due to the importance attached to that aspect in both the *Chirwa* and the *Gcaba* decisions. …'

[43] It is useful to refer to some examples where such exceptional circumstances were found to exist. One of these is in fact the judgment in *Minister of Labour*[36] itself which dealt with the revocation of an employee's designation of Registrar of Labour Relations in terms of the LRA,[37] and his resultant removal from that position, for reasons that were entirely irrational and invalid and where there in reality was no alternative remedy. A further example is *Hlabangwane v MEC for Public Works, Roads and Transport, Mpumalanga Provincial Government and Others*[38] which concerned a case where the right to discipline the employee had been specifically removed by statute (the Public Service Act) as a result of a transfer of the employee. A final example is by now the well known matter of *Solidarity and Others v SA Broadcasting Corporation*[39] which concerned the dismissal and victimization of reporters for being critical of policy decisions by the SABC as public broadcaster, which conduct violated the Constitutional duties of the employees, and even infringed on the right of the public to be properly informed.

[44] Turning then to the instances where no alternative remedies exist, thus justifying an applicant party to resort to Section 158(1)(h), there is no better example than the issue of deemed terminations of employment under Section

[35] (2017) 38 ILJ 1075 (LAC) at para 52.
[36] (*supra*) at paras 53 and 92,
[37] See Section 108 of the LRA.
[38] (2012) 33 ILJ 1195 (LC) at paras 22 – 24.
[39] (2016) 37 ILJ 2888 (LC) at paras 65 – 66.

17 of the PSA.[40] In these cases, and because of a deemed statutory termination of employment in instances of absence of employees from the workplace in the public service, there is no opportunity for such an employee to resort to the dispute resolution processes under the LRA, as there is no dismissal. It has thus been consistently recognized that in these cases, this termination of employment can be challenged on review to the Labour Court under Section 158(1)(h) of the LRA.[41]

[45] To sum up *in casu*: This court has jurisdiction to entertain the applicants' application. But whether it is appropriate to exercise this jurisdiction and consider the application is dependent upon deciding, firstly, whether the issue in dispute is in reality not one relating to employment that should be resolved in terms of the dispute resolution processes under Chapter VIII of the LRA. If the issue in dispute is such, then as a matter of general principle this Court should decline to entertain the application. However, and even if the issue in dispute is such, the second consideration is deciding whether extraordinary circumstances exist justifying this Court to consider the merits of the application, irrespective of the fact that Chapter VIII would ordinarily have to find application. I will next turn to deciding these two issues.

Evaluation

[46] It is clear from the founding and replying affidavits submitted the applicants that the PMDS policy lay at the heart of the matter. It is undeniable that this is a policy that deals with the rewarding of employees for good performance, and applies not only in the department, but in the entire public service. There can be little doubt that this policy constitutes part of the conditions of employment of employees in the public service, and seeks to convey certain benefits onto them for excelling in the performance of their duties. This is, quintessentially, an employment issue, pointing in the direction of dispute resolution under the LRA needing to be applied. In *Aucamp v SA Revenue Service*[42] the Court had

[40] Public Service Act 103 of 1994. Prior to the Public Service Amendment Act 30 of 2007 this was dealt with in Section 17(5), and after these amendments in |Section 17(3).
[41] See *Public Servants Association on behalf of Smit v Mphaphuli NO and Others* (2014) 35 ILJ 2260 (LC) at paras 26 and 32; *Grootboom v National Prosecuting Authority and Another* (2014) 35 ILJ 121 (CC) at paras 12 and 45; *Weder* (*supra*) at paras 33 and 36 – 37.
[42] (2014) 35 ILJ 1217 (LC) at para 21.

opportunity to specifically consider a challenge by an applicant relating to the PMDS policy in the public service, and said:

> 'The regulatory provisions in the respondent on which the applicant seeks to rely are firmly founded in a collective agreement, being the PMDS policy and its empowering provision, the PMDS collective agreement. At the heart of the dispute lies a case advanced by the applicant of non-compliance with these provisions and as a result, non-compliance with the collective agreement. Added to this is a contention by the applicant that, even if the relevant regulatory provisions in the respondent were applied, they were either incorrectly or improperly applied …'

Having found this to be the case, the Court in *Aucamp* concluded:[43]

> 'The above being said, and if the factual basis of the applicant's case is considered, as he has identified and described it in his own statement of claim, it is clear that what he is in effect saying is that he was unfairly deprived of a benefit he was entitled to in terms of his contract of employment. The applicant is saying that because of unfair behaviour by the respondent relating to the application of the PMDS policy and the moderation (or lack thereof) of his performance score, he was deprived of his performance bonus, and this is unfair. This kind of dispute, as the applicant himself has articulated and put forward, is an unfair labour practice as defined in law. …'

[47] How do the applicants then seek to avoid their dispute being considered to be one of an unfair labour practice? The answer is simple. It is all about labelling. The applicants initiated this dispute before this Court under Section 158|(1)(h) of the LRA, by way of, in my view, an act of deliberate labelling. The applicants in essence labelled the dispute as an infringement of their Constitutional right to legality, as evidenced by a number of causes of complaint specifically dealt with hereunder, and they specifically steer away from relying on unfairness. But, and as I have dealt with above, the Court should not be bamboozled by this kind of labelling. In *Aucamp*[44] the Court said:

[43] Id at para 24.
[44] (*supra*) at para 18.

> '… it is the duty of the Labour Court to determine the true nature of the issue in dispute between the parties before court, no matter how an applicant may choose to label or describe the dispute. The court is not bound by the description of the dispute as may be articulated by an applicant. …'

The Court in *Aucamp* applied the following *dictum* from the judgment in *CUSA v Tao Ying Metal Industries and Others*[45] where the Court held:

> '…The labels that the parties attach to a dispute cannot change its underlying nature …'

[48] Despite how the applicants labelled the dispute, it remains at its core a dispute about the manner in which the department applied the PMDS policy. The applicants firstly say the terms of the PMDS policy did not permit the department to introduce an extra level of moderation in scoring employees for the purposes of being paid their performance bonuses. Secondly, and according to the applicants, even if the scores of employees were to be moderated downwards because of the specific requirement that these bonuses could not exceed 1.5% of the total salary bill, then there should have been a fixed moderation downwards across the board applicable to everyone, individual scores should not be moderated downwards, and in doing the latter the department acted unlawfully.

[49] In then looking beyond the label, I have little doubt that the dispute raised by the applicants is in fact one that fits quite comfortably in the confines of the unfair labour practice jurisdiction under Chapter VIII of the LRA. Section 186(2)(b) 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 (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.'

[45] (2008) 29 *ILJ* 2461 (CC) at para 66.

As I said above, the PMDS policy is in fact an employment benefit, as contemplated by this definition. It is a benefit that flows from a specific policy applied in the department in terms of which employees are rewarded, on a discretionary basis, for good work performance. This is not the payment of remuneration, as appreciated by the Court in *Aucamp*[46], where it was said:

> '… the performance bonus is clearly not remuneration. In fact, the qualifying provisions and terms of the PMDS policy and collective agreement make it clear that it is not remuneration. It is linked to performance objectives, all kinds of qualifying requirements, and several moderation levels which do not specifically relate to employees or their own individual performance. Also, what is declared as a bonus pool forming the very basis for the quantum of any such bonus, is also discretionary and dependent on a variety of factors. …'

[50] It does not matter that this benefit may be subject to the exercise of a discretion by the department. The fact is the manner in which the department may choose to exercise its discretion under the PMDS policy is always open to challenge under the unfair labour practice jurisdiction. In *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[47] the Court said:

> **'**The Labour Court pointed out that there are many employer and employee rights and obligations that exist in many employee benefit schemes. In many instances employers enjoy a range of discretionary powers in terms of their policies and rules. The Labour Court further pointed out that s 186(2)*(a)* is the legislature's way of regulating employer conduct by superimposing a duty of fairness irrespective of whether that duty exists expressly or implicitly in the contractual provisions that establish the benefit. The court continued and stated that the existence of an employer's discretion does not by itself deprive the CCMA of jurisdiction to scrutinize employer conduct in terms of the provisions of the section. It concluded that the provision was introduced primarily to permit scrutiny of employer discretion in the context of employee benefits. I agree with this conclusion.'

[46] (*supra*) at para 25. See also *City of Cape Town v SA Local Government Bargaining Council and Others* (2014) 35 ILJ 163 (LC) at para 22.
[47] (2013) 34 ILJ 1120 (LAC) at para 45.

Having so held, the Court in *Apollo Tyres*[48] then concluded:

> '… In my view, the better approach would be to interpret the term "benefit" to include a right or entitlement to which the employee is entitled (ex contractu or ex lege, including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in s 186(2)*(a)*of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion.'

In the end, any complaint by the applicants as to the manner in which the department exercised its discretion under the PMDS policy can be fully catered for under the auspices of the unfair labour practice jurisdiction, without having to resort to issues such as legality reviews, instead.

[51] One cannot overemphasize the fact that the review jurisdiction of this Court under Section 158(1)(h) flows from the LRA itself. As such, this jurisdiction must always be applied within the scheme of the LRA as a whole.[49] I mention this again because the Court in *Steenkamp*[50] when dealing with dismissals held that the LRA did not envisage unlawful or illegal dismissals, it was all about whether it was fair or unfair. As the co-inhabitant of dismissals in Chapter VIII of the LRA, this kind of principal consideration should equally apply to unfair labour practices. The point I make is that as soon as a dispute concerns an unfair labour practice claim, it must be pursued, and then considered, on the basis of what is fair. And when doing so, arbitration is clearly the most appropriate route to take. Legality is a winner takes all approach. Fairness is more than that, as it envisages flexibility, and ultimately protects the interests of both parties. In the whole scheme of the LRA, fairness must have preference over legality as a basis to resolve disputes. This

[48] Id at para 50. See also *Aucamp* (*supra*) at para 29; *Thiso and Others v Moodley NO and Others* (2015) 36 ILJ 1628 (LC) at paras 16 – 17; *Western Cape Gambling and Racing Board v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2166 (LC) para 18.
[49] See the *dictum* from the judgment of the Labour Appeal Court in *de Bruyn* quoted earlier in this judgment at para 38.
[50] See para 36 of this judgment, (*supra*).

approach should only be departed from in cases of extraordinary circumstances as discussed above.

[52] I must add that it seems to me that the Association, as one of the applicants in this matter, has a penchant for forum shopping where it comes to these kind of disputes. I will mention two reported arbitration awards specifically involving the Association and the PMDS policy, where the Association in fact pursued very similar disputes to the one *in casu* to the relevant bargaining councils as an unfair labour practice dispute. This is the kind of forum shopping that is entirely undesirable, as already discussed earlier in this judgment.

[53] In *PSA obo Sharp and Others v Dept of Health, GP*[51] the Association contended that the manner in which the employees were assessed for the financial year 2003/2004 was wrong and that the employees were entitled to a performance bonus under the PMDS policy. In that case, the arbitrator agreed, and held that the public service department indeed committed an unfair labour practice within the meaning of section 186(2)(a) of the LRA by not paying the employees their performance bonuses.

[54] Then, and in *Public Servants Association on behalf of Motsekoa v Department of Sports, Arts and Culture*[52] the Association again contended that the individual employee had an entitlement to a performance bonus under the PMDS policy.[53] In this case, the outcome was however not favourable for the Association. The arbitrator held that the PMDS policy entitled the public service department in that case to exercise a discretion, and it was up to the employee to show that this discretion under the PMDS policy was exercised capriciously, arbitrarily or for no justifiable reason, and because the employee failed to show this, no unfair labour practice was committed.[54]

[55] What this illustrates to me is that the Association knows that disputes about the PMDS policy and the manner in which a public service department seeks to apply it and / or exercise its discretion in terms of it, is a matter that can readily be dealt with in the applicable bargaining council under the unfair

[51] [2007] JOL 19729 (PHWSBC).
[52] (2015) 36 ILJ 808 (BCA). See also *Public Servants Association of South Africa obo Venter v Department of Health – Free State* [2014] 12 BALR 1216 (PHSDSBC) where a similar dispute was pursued by the Association as an unfair labour practice.
[53] See paras 25 and 28 of the award.
[54] Paras 27 and 30 of the award.

labour practice jurisdiction. Why the Association would consider it necessary, in these circumstances, to *in casu* re-label what is in reality the same kind of dispute and came directly to this Court, leaves me perplexed.

[56] That being said, it does appear that the Association has in the past come right in this approach of approaching this Court directly about the PMDS policy. In *Public Servants Association and Another v Director General: Office of the Presidency of South Africa and Another*[55] this Court entertained a legality review where it came to the application of the PMDS policy, brought by the Association. The Court however reaffirmed the principles that employment disputes between the state and its employees must be dealt with in terms of the LRA and that the remedies for employment disputes between the state in its capacity as an employer and its employees are found in the LRA.[56] The Court also accepted that the Court can depart from this general rule in 'appropriate cases'.[57] There can of course be nothing wrong with this reasoning, considering the discussion earlier in this judgment. However, and on the facts, the Court in *Director General: Office of the Presidency* held that there existed an appropriate case for departure from the general principle, because the employer had already exercised a discretion in terms of the PMDS policy to award employees bonuses, and then simply refused to pay because of an alleged lack of funds. The Court said:[58]

> 'In my view the excuse of non-payment of bonuses due to lack of funds is unsustainable. …'

[57] The point is that the Court in *Director General: Office of the Presidency* exercised its own discretion to intervene based on what it considered to be extraordinary facts calling for it. Even though it can be said that this distinguishes that matter from the case *in casu*, the further point I wish to make is that surely the Association had to be alive to the kind of case it needed to make out to justify intervention, in place of the normal dispute resolution processes under the LRA. But the Association did not do so, and

[55] [2015] 7 BLLR 700 (LC).
[56] Id at para 14.
[57] Id at para 15.
[58] Id at para 22. See also the conclusion reached in para 23 of the judgment.

the judgment in *Director General: Office of the Presidency* thus does not serve as precedent for its current approach *in casu*.

[58] I add that it may well be said that some of the reasoning of the Court in the judgment of *Director General: Office of the Presidency* actually lends support to what the department did *in casu*. It was common cause on the facts that the department moderated the scores downwards so as to comply with the 1.5% of salary bill limit on bonuses. The Court in *Director General: Office of the Presidency* held:[59]

> '… in the present instance the DG had the duty to ensure that 1.5% of the salary budget was allocated for the performance bonus. …'

The Court then held as follows as to what can legitimately be done where there is a lack of funds:[60]

> 'It is evident in this regard that the policy maker did anticipate the situation where there could be shortage of funds. The policy frame work provides a clear approach to be adopted by the DG, should such a situation arise. The approach does not include a refusal to pay the bonuses to those who qualified on the basis of lack of funds. The powers given to the DG in the event of lack of funds is limited to having to scale down whatever the amount was to be paid to those who qualified or tightening the criteria for qualifying to receiving the bonus. …'

As set out above, the department *in casu* did insert an extra level of moderation so as to ensure that the budgetary provisions have been complied with, and then moderated scores downwards to fit into this requirement. This is in my view the kind of conduct contemplated by the judgment in *Director General: Office of the Presidency* to be permissible. Whilst I need not decide this now, as it is an issue relating to the merits of the case, it certainly moves the matter out of the realm of extraordinary circumstances justifying intervention by this Court in place of the normal dispute resolution process under Chapter VIII of the LRA which should be applied to decide this.

[59] Id at para 21.
[60] Id at para 22.

[59] In *Public Servants Association of SA v Premier of the Free State and Others*[61], the Court also considered the PMDS and accepted that the upper limit of 1.5% of the salary bill actually limits performance bonuses to that amount. The Court then considered the PMDS policy framework, and said:[62]

> 'The policy framework offers a built in flexibility in the form of a right by moderating committees to scale down maximum percentages and allocate any percentage between the minimum and maximum percentages stipulated in order to meet the demands of the budget. …'

In *Premier of the Free State*, the Court dealt with three departments in the Free State province, and decided to intervene and set aside the decisions taken by these three departments relating to the PMDS policy in terms of Section 158(1)(h) of the LRA, for three different reasons. These reasons were that the moderating committee had moderated the bonuses to below the minimum percentage allowed by the PMDS policy, certain employees were excluded from receiving bonuses all together for ulterior purposes despite these employees qualifying for the same, and finally that a moderating committee did not take a decision at all.[63] The difficulty I have with the judgment in *Premier of the Free State* is that the Court had no regard at all to the kind of considerations that became relevant after the judgments of the Constitutional Court in *Chirwa* and *Gcaba*, and the Labour Appeal Court in *Hendricks*, discussed above. In my respectful view, and for this critical reason, the judgment in *Premier of the Free State* is to be distinguished as not being in line with current jurisprudence.

[60] In the end, whether or not the PMDS policy allows for a central moderating committee calls for an interpretation and application of the policy which in my view requires proper evidence to be led on all aspects of this policy, in arbitration, so as to satisfy all the requirements in order to properly interpret and apply such a written instrument as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[64]. Also, the relationship between the PMDS

[61] Unreported Case no 123 / 09 dated 15 March 2010 per van Niekerk J.
[62] Id at para 11.
[63] See paras 19 – 22 of the judgment.
[64] 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.

policy and the guidelines issued in terms thereof must be explored in evidence. Considering that it seemed to be undisputed that the performance bonuses prior to central moderation far exceeded the allowed limit, it has to be determined by way of proper evidence what exactly the department then did vis-à-vis each employee and if this conforms to what is envisaged by the policy and/or the guidelines. This, in my view, simply cannot be properly done in a review application such as the current one.

[61] In summary therefore: The dispute of the applicants is quintessentially an unfair labour practice dispute, and as a matter of principle it should not be decided on the basis of a legality review in this Court.[65] It should be decided in terms of the unfair labour practice dispute resolution process under the LRA on the basis of what is fair, ultimately by way of arbitration if it cannot be resolved amicably in the course of this process.[66] I am satisfied that the applicants' application has the effect of circumventing the prescribed dispute resolution processes under the LRA, which should be given primacy. It is inappropriate for the applicants to challenge the decisions taken by the department in the course of applying the PMDS policy on the basis of a legality review under Section 158(1)(h) of the LRA.

[62] The applicants are required to challenge these decisions on the basis of an unfair labour practice relating to benefits under Chapter VIII of the LRA. I am confident that should an arbitrator, after considering the much more comprehensive evidence that would come out in an arbitration, decide that the complaints made by the applicants as to the decisions taken by the department in terms of the PMDS policy have merit, an unfair labour practice should be found to exist, and the same kind of relief the applicants seek in this application can then follow.[67]

[63] This then leaves only the consideration of extraordinary circumstances. As already touched on above, and even considering the judgment in *Director General: Office of the Presidency*, there are none. The applicants have made

[65] Compare *Aucamp* (*supra*) at para 30.
[66] The dispute resolution process prescribes obligatory conciliation before the matter can proceed to arbitration – see Section 191(4) and (5) of the LRA.
[67] Section 193(4) of the LRA reads: 'An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable …'.

out no such case in the founding affidavit in any event. There is no grave injustice that will result if this matter is simply dealt with in the normal course in terms of the normal dispute resolution processes for an unfair labour practice under Chapter VIII of the LRA. And, as is apparent from the above, the applicants have an alternative remedy, which is not only perfectly viable, but actually the primary remedy.

[64] In conclusion, and for all these reasons as set out above, there is simply no need to decide the merits of the applicants' application, for the simple reason that it is not appropriate to do so. The applicants have to pursue their dispute by way of referring an unfair labour practice to the relevant bargaining council in the public service, where it can be fully ventilated, and then determined. This Court must give effect to the overall scheme of the LRA, and not allow the carefully crafted dispute resolution processes, which serve a specific purpose, to be bypassed by inappropriate labelling of a dispute and consequent utilization of powers afforded to the Labour Court in equally an inappropriate manner. The applicants' application is thus inappropriate, incompetent, and falls to be dismissed.

[65] Because of this conclusion I have come to, there is no need for me to make a finding on the other issues raised by the respondent, such as the identification of the other individual applicants and the specific particulars relating to them. Again, these issues are best dealt with in the course of the unfair labour practice proceedings, which would be much better served to ventilate these kind of considerations.

[66] This then only leaves the issue of costs. In terms of the provisions of Section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. Considering the ill-advised approach adopted by the Association, having regard to what I have set out above, I was tempted to make a costs order against the applicants. But I am mindful of the fact that as matters still currently exist, there is a continuing relationship between the Association, the individual applicants, and the respondent. In my view, a costs order against the applicants will unduly harm this relationship. I also consider that the dispute dates back some years, and to in essence resurrect it by way of the introduction of a costs order may cause unnecessary resentment on the part

of the individual applicants, should it be executed against them. In all these circumstances, it is my view that the appropriate order where it comes to costs, is to make no order as to costs.

Order

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

1. The applicants' application is dismissed.

2. There is no order as to costs.

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S.Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv F Van Der Merwe
Instructed by:	Martins Weir-Smith Inc Attorneys
For the Second Respondent:	Adv T Makgate

Instructed by: The State Attorney