IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 486/16

In the matter between:

DEPARTMENT OF JUSTICE AND	
CONSTITUTIONAL DEVELOPMENT	**First Applicant**
OFFICE OF THE CHIEF JUSTICE	**Second Applicant**
MEMME SEJOSENGWE	**Third Applicant**

and

GENERAL PUBLIC SERVICE SECTORAL	
BARGAINING COUNCIL	**First Respondent**
L DREYER *NO*	**Second Respondent**
PSA obo THEODORE MADODA SEFUBA	**Third Respondent**

Heard: **27 March 2018**

Delivered: **10 April 2018**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction

[1] This application was brought before the Court in terms of section 145 (1) read with section 158 (g) of the Labour Relations Act ('LRA')[1]. The first and second applicants seek an order reviewing and setting aside the arbitration award dated 27 November 2015 issued by the second respondent ('Commissioner') under the auspices of the first respondent ('GPSSBC'). In the award, the Commissioner had found that the first and second applicants had committed an unfair labour practice towards the first respondent ('Sefuba'). The review application is opposed.

Condonation for the late filing of the review application and the replying affidavit:

[2] The principles applicable to applications for condonation are well-established as articulated in *Melane*[2]*.* The first and second applicants had filed an application for condonation for the late filing of the replying affidavit. Sefuba had objected to condonation being granted in that regard.

[3] It was not in dispute that the delay in filing the review application was about 13 days, which can hardly be said to be excessive. The delay was attributed to the confusion caused because of receipt of the two awards, and further as a result of the internal workings of the office of the State Attorney regarding the appointment and briefing of counsel.

[4] The replying affidavit was filed some three weeks out of time. This delay is also not excessive, and was attributable to the confusion surrounding whether copies in that regard had been served and filed on time.

[5] Given the nature of the delay as indicated above in respect of both applications, I am satisfied that the explanations in that regard are reasonable and acceptable. Further having had regard to the parties' prospects of success on the merits, the prejudice to be suffered if condonation was to be declined, fairness to both parties, and the overall interests of justice, it is deemed appropriate to grant the applicants condonation in respect of the two applications.

[1] 66 of 1995
[2] *Melane v Santam Co Ltd* 1962 (4) SA 531 (A) at 532B-E.

Background

[6] Until 2010, the Office of the Chief Justice ('OCJ') was part of the first applicant ('DoJ & CD'). Sefuba was appointed as General Executive Manager in the OCJ by DoJ & CD in September 2004. The position was equivalent to that of a Chief Director, and on Sefuba's version, he reported to the late Chief Justices Arthur Chaskalson and Pius Langa. He also reported to Chief Justice Ngcobo.

[7] The OCJ was established as a national department with effect from 1 September 2010 by Proclamation Number 44 in 2010. There are material disputes of fact regarding the effect on the organisational structure and posts that were held by officials appointed in the OCJ whilst it was still part of DoJ & CD. What appears to be common cause however is that the key performance areas for the post of General Executive Manager in the OCJ and other posts in that office were absorbed into various other posts in the new organisational structure.

[8] In 2012, the OCJ put out advertisements for the post of Secretary General. Sefuba had applied for the post and it is common cause that he was not even shortlisted. He had then lodged an internal grievance relating to the OCJ's failure to shortlist or invite him for an interview. Aligned to his complaint was that he was not assessed or promoted since 2008/2009 whilst serving under DoJ & CD. When his grievance could not be resolved, he through the assistance of his union, PSA, referred an alleged unfair labour practice dispute to the GPSSBC on 19 December 2012.

[9] There is a dispute of fact as to what Sefuba's role was in the OCJ between 2010 to date. The applicants' version is that following the restructuring of the DoJ & CD, and the establishment of the OCJ, Sefuba was offered an opportunity by the third applicant ('Sejosengwe'), who was subsequently appointed as the General Secretary, to discuss his placement in the OCJ. Sefuba is alleged to have shunned the overtures, and had advised Sejosengwe to speak to his union instead. The applicants further contended that Sefuba at no stage lodged any grievance after the establishment of the OCJ and had instead sat idle, and had to date, not rendered any service.

The dispute before the GPSSBC:

[10] In his referral to the GPSSBC, Sefuba's case was four-pronged, viz, the alleged unilateral change to terms and conditions of his employment; failure by the employer to provide him with a contract of employment; failure to assess and promote him; and failure to invite him to an interview for the position of Secretary General in the OCJ.

[11] Following the failure of conciliation proceedings on 16 May 2013, the dispute was set down for arbitration before the Commissioner. The proceedings were a stop-start affair commencing from 19 August 2013 until 15 October 2015. The delays are attributable to repeated postponements as the parties attempted settlement of the dispute.

[12] No oral evidence was presented before the Commissioner as the parties had agreed that the dispute could be determined on the basis of documents and written submissions. Sefuba's submissions to the extent that they are relevant to these proceedings and as further considered by the Commissioner were as follows;

12.1 His case was based on certain undertakings allegedly made by the late Chief Justices Chaskalson and Langa when the OCJ was first established. These included that he would be made the administrative head of the OCJ; being informed that his official title would be that of Secretary of the Judiciary; and having been allocated an office at the Constitutional Court so as to be closer to the Chief Justice, to whom he reported.

12.2 Sefuba's alleged that his performance was assessed by the late Chief Justice Langa in 2007/2008 and 2008/2009; was found to be promotable and entitled to a salary progression, which the DoJ &CD nonetheless failed to implement. He further complained that since then, he had not been promoted or assessed, and had remained at notch 3 of level 14 after 15 years as a Chief Director.

12.3 According to Sefuba, when the late Chief Justice Langa retired in July 2009 and was replaced by Chief Justice Ngcobo, things turned for the worst for him, as he was informed that he would be deployed elsewhere. He nonetheless continued to work under Chief Justice Ngcobo until December 2009. In January 2010 he was then informed to vacate his office at the Constitutional Court and to relocate to downtown Johannesburg where members of the OCJ interim task team were based.

12.4 Attempts were made to integrate him in the Chief Directorate: Court Services of the DoJ & CD which was then headed by Sejosengwe, but the parties could not agree on a workable performance agreement and his job functions;

12.5 The OCJ was established with a new organisational structure and post establishment it comprised of seven directorates and two linked institutions being the Judicial Services Commission and the South African Judicial Education Institute (SAJEI). After he was not invited for interviews for the post of Secretary General, he was instructed to assume his role in another position and only became aware of Sejosengwe's appointment after he had referred a dispute for conciliation.

12.6 Pending a determination of a joinder application (to join Sejosengwe in the arbitration proceedings), Sefuba was in December 2014, offered a position in the SAJEI and was informed that if he failed to accept it in terms of a settlement agreement, a pre-dismissal hearing would be instituted. The position offered however was not on the same level as that of the Secretary General. The settlement discussions as a result yielded no result.

12.7 Following a joinder ruling, the matter came back before the Commissioner. Sefuba's contentions was that since the DoJ & CD had *inter alia* made certain concessions in earlier arbitration proceedings held on 3 October 2014 regarding the merits of the case and the fact

that there was no longer a working relationship, what was left for the Commissioner was to determine the quantum of compensation for him to exit the public service.

12.8 In regard to the failure to call him for an interview, Sefuba contended that he qualified for shortlisting as he met the minimum requirements. He contended that he had the necessary qualifications and experience and was not even furnished with reasons why his application was not considered.

12.9 He sought an order from the Commissioner, appointing him to the position of General Secretary, and to be remunerated as from the date that Sejosengwe was appointed, or in the alternative, that he be awarded compensation equivalent to the salary earned by Sejosengwe from the date of her appointment to the last date of her contract.

[13] The applicants' written submissions before the Commissioner were that;

13.1 Certain submissions made by Sefuba ought to be struck out on the basis that they were either based on hearsay evidence and not supported by proof, particularly in respect of the background facts as sketched out by him which it was denied was common cause, or that they were inconsistent with the documentary evidence that was presented.

13.2 Reference was made to a letter of offer of appointment in a position at the SAJEI, which contained details about how Sefuba was appointed when he first joined the OCJ during 2004, the establishment of the OCJ as a national department, the restructuring and creation of posts in the new establishment and how this had affected the post he was initially appointed into.

13.3 The establishment of the interim structure of the OCJ as an independent department constituted operational requirements within the meaning contemplated in section 213 of the LRA, and once the

interim structure was approved in 2010, this impacted on the key performance areas of Sefuba's original post of Executive Manager, as they were no longer linked to that post only but were spread across several others.

13.4 When Sefuba refused to take up a position at the SAJEI, it was indicated to him that the dismissal provisions in terms of the Public Service Act could be invoked since all obligations had been complied with.

13.5 At some point in June 2015, Sefuba had accepted the position at SAJEI after he acknowledged that the position he initially occupied was no longer in existence. His main complaint however remained that he needed to see a job description, which was subsequently forwarded to him.

13.6 In regard to the allegations of an unfair labour practice pertaining to the failure to shortlist Sefuba, it was contended that on its own, such a failure would not constitute an unfair labour practice as he needed to prove that he met all the requirements and that the shortlisting committee breached its own criteria. Furthermore, it was contended that any written request for reasons by Sefuba as to why he was not shortlisted was not received.

13.7 In regard to the alleged failure to assess performance, it was contended that Sefuba has not been performing any duties and had refused to enter into negotiations with a view of placing him in an alternative position. He had also rebuffed attempts to have his services utilised in the OCJ and had also rejected any offers to assist him. It was submitted that had he accepted the offer by the OCJ, he would have signed a performance agreement and would have been assessed accordingly.

The Commissioner's Awards

[14] It was common cause that the Commissioner had issued *two* awards. The first award dated 27 November 2015 was issued on 12 January 2016. In that award, the Commissioner had found that the DoJ & CD and OCJ had committed an unfair labour practice towards Sefuba. Regarding relief, the Commissioner made the following order;

> 'The Department of Justice and Constitutional Development and the Department of the Chief Justice (jointly and severally, the one to absolve the other) are hereby ordered to pay the applicant a severance package of R8 449 829.58 (eight million four hundred and forty-nine thousand eight hundred and ninety-two rands and fifty-eight cents) minus tax as directed by SARS within 30 days of receipt of this award' (Sic)

[15] Obviously, there is everything wrong with the above order particularly in light of the dispute and the issues the Commissioner was required to determine. A second award followed on 15 January 2016 and was dated the same as the first one. In the latest award, the Commissioner again found that an unfair labour practice had been perpetrated, and made the following order;

> 'The Department of Justice and Constitutional Development and the Office of the Chief Justice (jointly and severally, the one to absolve the other) are hereby ordered to pay the applicant compensation of R1 648 766.70 (one million six hundred and forty-eight thousand, seven hundred and sixty-six Rands and seventy cents (minus statutory deductions) within 30 days of receipt of this award'

[16] Out of concern, the applicants sent an e-mail to the GPSSBC to seek clarity as to which award should prevail. The GPSSBC through its official (Tiyane Makhubele) responded via e-mail and explained that the first award sent to the parties had not been quality controlled and was not supposed to have been sent, and that the last copy sent was the final version from the quality controller. Makhubele's further explanation was that the Commissioner's calculations regarding the amount of compensation in the first award was incorrect, and once the quality controller had pointed out the errors, the Commissioner had agreed with the corrections made. Makhubele further sent through a trail of e-

mails exchanged between the quality controller (Ms Y le Roux) and the Commissioner.

[17] In the applicants' Notice of Motion, an order was sought to set aside the two arbitration awards. It was submitted on behalf of the applicants at the commencement of these proceedings that the review was only being pursued in respect of the second arbitration award, as it was accepted that arbitration awards issued by the bargaining council had to firstly be quality controlled.

[18] Notwithstanding the above, I had still raised concerns surrounding the manner with which the final arbitration award is said to have been quality controlled, and I had invited the parties to address me on my concerns. Written submissions were made subsequent to the hearing of the matter as requested.

[19] In their submissions, both parties agreed that it was permissible for the commissioner to amend her award further to the quality control process; that the commissioner was not *functus officio* upon the release of the first award, because it was released in error, and was thus entitled to issue the second award. In the alternative, it was agreed that even if the commissioner was *functus officio*, she was entitled to vary the first award *mero motu*, and effectively did so; and that the second award was thus the binding award and properly the subject of the review application.

[20] The applicants accepted in this case that the only change brought on by the commissioner (following the quality control process) was to bring her award of compensation in line with the limits imposed by section 194 (4) of the LRA. Had it not been for the quality control process, the relief granted by the commissioner would – *ex facie* the award – have constituted an excess of powers in terms of section 145 (2) of the LRA. Accordingly, the applicants do not object to the corrections made by the quality controller.

[21] My concerns however remain whether it is correct that the only changes made by the quality controller pertained to the amount of compensation. Upon a reading of the two awards and the e-mail trail, I am not convinced that the initial award was merely corrected in regard to the calculation of compensation.

[22] The trail of e-mails[3] exchanged between Ms le Roux and the Commissioner fortifies my concerns. In the first e-mail, Ms le Roux *inter alia* raised the issue of what the Commissioner was required to determine, i.e., the unfair labour practice dispute, and the applicable remedy in terms of section 194 of the LRA. Thus far, the multiple concerns raised by Ms le Roux were on point, and within the ambit of permissible quality control processes. The Commissioner appreciated the input of Ms le Roux, conceding that she had slipped up (*My red face!,* as she put it.)

[23] A further e-mail sent to the Commissioner by Ms le Roux reads as follows;

> 'Hi Lynette
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> It was good to chat to you again after all this time.
>
> Please have a look at the attached document, specifically the paragraphs I added (highlighted in yellow) at the end of the award
>
> Hopefully this will give you an idea as to my train of thought- please amend as you deem fit'
>
> Regards
>
> Y le Roux'

[24] The Commissioner's response was as follows;

> 'Hi Yolande
>
> I am completely happy with what you wrote and have not changed anything besides adding my electronic signature at the end. You are correct and have improved the award and the insight will be remembered.
>
> Kind regards, Lynette'

[3] Annexure 'D' to the Founding Affidavit

[25] In *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another*[4] as referred to in the applicants' written submissions, it was held that:

> "An arbitrator is not entitled to delegate this function. He alone must perform the duties he has undertaken and with which he has been entrusted, unless the parties agree otherwise. Because of the essentially personal nature of his appointment he should be circumspect about utilising the services of an assistant. Making use of an assistant is not per se objectionable. … Failing agreement [otherwise], an assistant should not be allowed to perform tasks that may encroach on what would be regarded as the normal functions of an arbitrator. In no circumstances may the assistant be allowed to usurp the decision-making function of the arbitrator or act in a manner subversive of his independence. Ultimately the question to be asked, and answered, is whether the arbitrator exercised his own judgment in deciding the issues. This will depend upon the facts of each particular case."

[26] The process of quality control at the CCMA or Bargaining Councils is crucial for a variety of reasons. Chief amongst these are to ensure that awards issued by Commissioners are competent and enforceable, and to some extent, ensure uniformity or consistency in line with prevailing jurisprudence or CCMA/Bargaining Council good practices. At most, it is expected of Commissioner's awards to meet certain standards as set by the CCMA Guidelines[5].

[27] As to what the process of award vetting at the CCMA and bargaining councils should entail is not for this Court to prescribe. I am however not convinced that the process should be limited to mere editing in the form of '*formatting, language and research'* as suggested in *SA Nuclear Energy Corporation v CCMA and Others*[6]. What is important is that there should be some form of

[4] 2002 (4) SA 661 (SCA) at para 41

[5] CCMA Guidelines: Misconduct Arbitrations. Published by the CCMA in terms of Section 115(2)(g) of the LRA (effective from 1 January 2012)

[6] (JR963/2016) [2018] ZALCJHB 108 (15 March 2018) at para 19, where it was held that;

> "It is unclear why the CCMA introduced this so-called quality check if this leads to one's decision being second guessed by another and finally influenced to change. That does not become that commissioner's award as issued, but someone else's award who did the quality checking – or two persons' award, one heard the evidence and the other read the former's award and made his/her contribution. The only instance an award need quality checking is as

engagement between the quality controller and the Commissioner where serious concerns are raised after vetting. Furthermore, it is important that the quality controller should not be seen to usurp the statutory powers and duties of the Commissioner as the arbitrator of facts and evidence. Any vetting process cannot be seen to interfere with the substantive findings and conclusions made by the Commissioner on the facts so that in the end, the final product remains that of the Commissioner. There is however a fine line between genuine quality control/vetting and outright interference with an award. That fine line was crossed in this case as shall be illustrated below.

[28] A perusal of the two awards indicates that the original award was 13 pages long whilst the corrected version is 15 pages. Substantial corrections were not merely made in regard to the issue of calculations of the compensation, which calculation was incorrect in any event, as it was not based on Sefuba's salary, but on the Secretary General's post. It is therefore apparent from the second award that the Commissioner's analysis had to be aligned with the conclusions reached in regard to the varied quantum of compensation, hence the additional paragraphs added by Ms le Roux. To this end, a whole section on *'Remedy'* was added in the second award.

[29] To the extent that Ms le Roux' in her e-mail to the Commissioner had intimated that *she* had *specifically added paragraphs* at the end of the award, and further to the extent that the Commissioner had expressed her satisfaction with what Ms le Roux had added, and had not '*not changed anything besides adding my electronic signature at the end',* I am inclined to hold the view that this is not a case where the Commissioner had exercised her own judgment in deciding the issues surrounding compensation and justification in that regard. A decision on relief like the rest of the award is that of a Commissioner, and that function cannot be outsourced as it had happened in this case.

[30] There is every reason to believe that the process of quality control in this case exceeded permissible boundaries, and the second award cannot under the circumstances be said to be that of the Commissioner and hers alone. I do not

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far as format, language and research are concerned and not the substantive merit part of the award."

understand the role of the quality controller to be to re-write awards where errors are picked up. Those errors can only be pointed out to the Commissioner and it is for him or her to re-write the award or portions thereof in line with the corrections to be made.

[31] In my view, the Commissioner in this case had abrogated her responsibility to decide on her final award after material errors of law were pointed out to her by Ms le Roux. The Commissioner had simply and happily signed off the award after Ms le Roux's additions (instead of editions), and this had the effect of rending the award reviewable on the grounds of irregularity.

The grounds of review and evaluation:

[32] For the sake of completeness however, I will proceed to deal with other grounds of review in respect of the second award. In her analysis, the Commissioner reasoned that Sefuba had a legitimate expectation to be appointed to the post of Secretary General in the OCJ, and that no reason was proffered as to why he was not invited for an interview.

[33] The Commissioner reasoned that Sefuba was on the same level of expertise as Sejosengwe, particularly taking into account his good employment record, his experience and the fact that he was a good candidate. The Commissioner further found that Sefuba was not responsible for the breakdown in the employment relationship, was deprived of a career progression, and therefore entitled to the relief he seeks.

[34] It does not appear in the award that the Commissioner made any specific findings in regard to issues surrounding the alleged unilateral change to terms and conditions of employment, the alleged failure to provide Sefuba with a contract of employment, and the alleged failure to assess and promote him.

[35] The applicants contended that the award was reviewable on a variety of grounds including that;

a) It is not an award which a reasonable decision maker would make when presented with similar facts and evidence;

b) The Commissioner misconducted herself in relation to her duties as she came to an unreasonable award in concluding that Sefuba should have been appointed in the post of Secretary General had he been granted the opportunity of an interview due to his qualifications and experience

c) The procedure adopted by the Commissioner was grossly unfair to the extent that it prevented a fair ventilation of the issues

d) The Commissioner failed to take into account certain material evidence, including that Sefuba had since 2010, never worked to deserve any performance bonuses or to be assessed on the work done

e) The Commissioner failed to deal with the applicants' application to strike out certain submissions made on behalf of Sefuba in the written closing arguments

f) There was further no basis to order compensation of 12 months' pay when Sefuba was still in the employ of the OCJ

g) The 12 months' compensation was also incorrectly calculated as it was based on the salary of the Secretary General, and not at Sefuba's level and rate of pay.

[36] Sefuba disputed each and every ground of review relied upon by the applicants, and I do not deem it necessary to repeat same in this judgment. The enquiry into whether a Commissioner's decision falls within a band of reasonableness as postulated in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*[7] involves a consideration of:

(i) Whether in terms of her duty to deal with the matter with the minimum of legal formalities, did the process that the Commissioner employed give the parties a full opportunity to have their say in respect of the dispute?

[7] [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 20

(ii) Whether the Commissioner identified the dispute she was required to arbitrate;

(iii) Whether the Commissioner understand the nature of the dispute she was required to arbitrate;

(iv) Whether the Commissioner dealt with the substantial merits of the dispute;

(v) Whether the Commissioner's decision is one that another decision-maker could reasonably have arrived at based on the evidence

[37] Central to the grounds of review in this case is that the Commissioner failed to afford the parties an opportunity to fully ventilate the issues in dispute, and thus deprived them of an opportunity of a fair hearing. It follows that where the parties were not afforded an opportunity to fully ventilate the merits of the dispute, the Commissioner could not possibly have been in a position to deal with substantial merits of the matter, as none or not all were presented.

[38] It was common cause in this case as already pointed out that no oral evidence was led before the Commissioner, the parties having agreed to present documentary evidence and written submissions. The folly of this approach has been pointed out by the Labour Appeal Court[8] and this Court on numerous

[8]See PSA and Others v Minister of Correctional Service and Others [2017] 4 BLLR (LAC) at para 16; Arends and others v South African Local Government Bargaining Council and others (2015) 36 ILJ 12 00 (LAC); [2015] 1 BLLR 23 (LAC) where it was held that;

> "[15] … When parties desire to proceed without oral evidence in the form of a special case, it is imperative that there should be a written statement of the facts agreed by the parties, akin to a pleading. Otherwise, the presiding officer may not be in a position to answer the legal question put to him. Alternatively, without such a statement, the question put is in danger of being abstract or academic. … Where a question of legal interpretation is submitted to an arbitrator, the parties must set out in the stated case a factual substratum which shows what has arisen and how it has arisen. The stated case must set out agreed facts, not assumptions. The purpose of the rule is to enable a case to be determined without the necessity of hearing the evidence. An oral stated case predicated upon poorly ventilated and potentially unshared assumptions as to the facts defeats the purpose of the requirements of a stated case and, as this case shows, will lead to problematic results.
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> [16] Rule 20(1) of the Rules for the Conduct of Proceedings before the CCMA (which might be followed in proceedings before bargaining councils) allows for a pre-arbitration conference at which the parties must attempt to reach consensus *inter alia* on the agreed facts, the issues to be decided, the precise relief claimed and the discovery and status of documentary evidence. The parties in this case did not engage in a proper pre-arbitration process with the aim of agreeing a stated case. Although the CCMA Rules do not include provisions equivalent to the provisions of rule 33(1) and (2) of the Rules of the High Court, parties who prefer to proceed by way of a stated case at the CCMA or before a bargaining council, in my view,

occasions[9], but it appears that the practice nonetheless continues unabated, particularly in proceedings before bargaining councils.

[39] The benefits of affording the parties a full opportunity to state their respective cases are that Commissioners equally becomes fully appraised of the full merits of the case to enable them to come to an informed decision. The practice of cutting corners and presenting a case by simply making written submissions and burdening Commissioners with bundles of documents from which they are expected to make sense and issue rational and reasonable outcomes is in most instances inherently flawed. This is even more pertinent in cases where the question of onus is crucial, and also where material disputes of facts are either glaring or at most, should have been foreseen by the parties and the Commissioner[10].

[40] The message that comes out of the above authorities is clear. Thus,

a) When parties decide to proceed with matters without oral evidence, it is important that there should at least be a clearly articulated and signed pre-arbitration minutes, followed by written statement of the facts agreed by the parties, similar to a pleading (a stated case)

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should follow their prescriptions. These rules provide that the parties to any dispute may, after the institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court. Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties, their contentions thereon and shall be divided into consecutively numbered paragraphs. The parties must annex to the statement copies of documents necessary to enable the court to decide upon such questions.

[17] Practitioners must follow these rudimentary elements of good practice when intending to proceed on the basis of a stated case. An arbitrator faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request. In this instance, the arbitrator did not do that."

[9] See *Hillside Aluminium (Pty) Ltd v Mathuse & others* (2016) 37 *ILJ* 2082 (LC); Supt. MM Adams v The Safety and Security Sectorial Bargaining Council & others [Case no: JR832/11; Delivered: 25 September 2015]; *The South African Social Security Agency v Nehawu Obo Malizo Punzi and 13 Others* [(Case No.: C233/14) Judgment delivered: 30 April 2015] at para 8 where it was held that;

'In the absence of such a stated case, oral evidence should be led on the material facts in dispute at arbitrations in terms of the LRA. Commissioners and arbitrators should not condone an agreement between parties that no oral evidence be led unless such a stated case has been agreed, and on which they may draw legal conclusions. Although parties may regard submitting documents and argument as a fast way of resolving a dispute on the day of arbitration, it in fact renders the award issued susceptible to review. In the result, the principle of speedy resolution of disputes is ultimately sacrificed."

[10] See Moqhaka Local Municipality v SALGBC & Others Case no: JR 567/2013 (Unreported, delivered on 16 September 2015)

b) In the absence of such a stated case, oral evidence should be led on the material facts in dispute at arbitrations in terms of the LRA. Commissioners should not condone an agreement between parties that no oral evidence be led unless such a stated case has been agreed, and on which they may draw legal conclusions.

c) Although parties may regard submitting documents and argument as a fast way of resolving a dispute on the day of arbitration, it in fact renders the award issued susceptible to review[11].

d) Where material disputes of fact are bound to rise in a matter, especially in alleged unfair labour practice disputes or where the conduct of the employer is questioned, proceedings by way of a stated case irrespective of the wishes of the parties is a non-starter.

e) The ultimate decision as to how proceedings should unfold in any event is the exclusive preserve of the Commissioner as provided for in section 138 of the LRA, as it is his or her responsibility to ensure that disputes are fairly and fully ventilated, and that parties are afforded ample opportunity to state their respective cases.

f) Parties cannot insist on merely presenting documents and written arguments to the Commissioner as they do so at their own peril. They cannot, in the face of an adverse award, allege that the Commissioner ignored this or some other evidence, as documents on their own do not constitute evidence.

[41] In this case, no pre-arbitration conference was held, and as appears from the transcribed record, the suggestion to have the matter determined in the manner it ultimately was came from the Commissioner[12], who had nonetheless expressed her reservations with that approach[13].

[11] *SA Social Security Agency v National Education Health & Allied Workers Union on behalf of Punzi & Others* at para 8
[12] Page 297 at lines 19 – 25; Page 299 at lines 17 of the Index to the Record,
[13] Page 300 line 7 of the Record.

[42] It was apparent from the beginning that there were several material dispute of facts. These were clearly pointed out to the Commissioner by the applicants in their written submissions notwithstanding the agreement to present the case on the basis of documents and written arguments.

[43] Significant with the applicants' written submissions was that there was material from Sefuba's written submissions which ought to be struck out, but this did not seem to be an issue for the Commissioner as she completely ignored an application in that regard. Once there was an application to strike out certain portions of Sefuba's written submissions, and once it was apparent that there were glaring disputes of fact, there was an obligation on the Commissioner to reconvene the proceedings and to give further directives to the parties as to how to proceed. At most, the most sensible manner in the light of the glaring disputed facts would have been for the Commissioner to insist on oral evidence being led.

[44] Aligned to the above was the fact that it was raised with the Commissioner on behalf of the applicants that upon receipt of the submissions, she was to give further directions on the matter and she had agreed to do so, including asking specific questions. This was even more pertinent in circumstances where the Commissioner was informed by the applicants' counsel in the last sitting of the proceedings that it was not clear what Sefuba's case was all about. Given these set of circumstances, the failure to reconvene the hearing in the face of disputed facts in my view constituted an irregularity, as it was apparent that a fair and reasonable determination of the dispute could not have been possible in light of those disputed facts and the manner with which the case was presented.

[45] Other than the above irregularities, the Commissioner than proceeded to find that the OCJ and DoJ & CD had committed an unfair labour practice by failing to invite Sefuba for an interview or appointing him to the position of Secretary General. This was even though the recruitment process in respect of the position of Secretary General was under the auspices of the newly established OCJ. As to how the DoJ & CD was liable for an alleged unfair labour practice allegedly committed by a separate department is not fully explained by the Commissioner.

[46] In disputes pertaining to alleged unfair labour practices, the onus is on the employee to establish the existence of that unfair labour practice. This principle was long established in *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others*[14], where the Court held that:

> "…. An employee who complains that the employer's decision or conduct in not appointing him constitutes an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can then follow. This is not one of those cases such as disputes relating to unfair discrimination and disputes relating to freedom of association where if the employee proves the conduct complained of, the legislation then requires the employer to prove that such conduct was fair or lawful and, if he cannot prove that, unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of item 2(1)(b) matters, the Act does not say so because it was not intended to be so."

[47] Central to the Commissioner's conclusions was that the failure to shortlist or invite Sefuba for an interview in respect of the position of Secretary General constituted an unfair labour practice. It is nonetheless trite that in the light of the question of onus as explained above, such a failure on its own cannot be a basis for a claim of an unfair labour practice. More than a mere allegation in that regard was required.

[48] The Commissioner's conclusions in this regard was that since Sefuba qualified for the position by virtue of his experience, the same level of expertise as Sejosengwe, his employment record, and being a good candidate, he had a legitimate expectation to be appointed. Inasmuch as these factors are important in proving unfair conduct, the difficulty with the Commissioner's conclusions is that one struggles to find the basis thereof.

[49] It should be borne in mind that no oral evidence was led in this case, and there were serious material dispute of facts raised in regard to Sefuba's role in the

[14] (2004) 25 ILJ 248 (LAC) at para 73. See also *Sun International Management Pty Ltd v CCMA and Others* (LC) (unreported case no JR 939/14, delivered on 18 November 2016)

OCJ upon his appointment leading towards 2010. The Commissioner had accepted that there was a restructuring process after 2010 when the OCJ became a separate department. However, how the Commissioner could have concluded that the post of the newly created Secretary General was similar to the one that Sefuba occupied when he was Executive Manager in the previous OCJ in the face of disputed facts is beyond comprehension.

[50] The Commissioner proceeded to form the view that Sefuba had a legitimate expectation to be appointed to the position of the Secretary General. As to what the basis of that legitimate expectation is, and whether this was Sefuba's pleaded case remains unexplained. Even if in paragraph 62 of the award the Commissioner had concluded that Sefuba and Sejosengwe had the same level of expertise, it is not clear what the basis of that comparison is, and again, without oral evidence, it is difficult to appreciate how that comparison could have been made and conclusions reached in that regard. It again remains unexplained as to how such a conclusion could have been arrived at in the absence of oral evidence to establish that Sefuba met all the requirements of the post. A mere glance at a candidate's *curriculum vitae*, or that candidate's mere say-so cannot lead to a conclusion that the candidate is suitably qualified for a post.

[51] The Commissioner further made a finding that Sefuba was not furnished with the reasons leading to the failure to shortlist him, let alone invite him for an interview. It is accepted that candidates who fail to make a cut in respect of an advertised post may request reasons in that regard. Although it is disputed in this case that Sefuba had made a request for reasons, even if he was not furnished with same, that cannot on its own lead to a conclusion that an unfair labour practice had been perpetrated.

[52] Contrary to the Commissioner's conclusions as supported by Sefuba, I did not understand the principles set out in *De Nysschen v General Public Services Sectoral Bargaining Council & Others*[15] to be authority for the proposition that in every case where a candidate was not provided with reasons for the failure

[15] (2007) 28 ILJ 375 (LC)

to shortlist or appoint, that employee should be entitled to an appointment and commensurate remuneration. To hold such a view would lead to absurdity in that every unsuccessful candidate not furnished with reasons would be entitled to some form of relief. Compelling evidence (which was not presented in this case), is still needed to demonstrate that a candidate met the requirements of the post; that he or she was better than other candidates, and that the employer's conduct in not shortlisting, appointing or giving reasons was arbitrary, unreasonable or unfair. Thus, a mere application for a post cannot led to some entitlement.

[53] Given the circumstances of this, the material that was presented before the Commissioner, and the disputed facts raised therein, there was no basis for the Commissioner to come to a conclusion that Sefuba had demonstrated that he met the inherent requirements of the post of Secretary General in the OCJ; or that he was the best candidate for the post; and/or that the failure to shortlist or invite him for interviews for that post was unfair. On the whole, the process that the Commissioner employed failed to give the parties a full opportunity to have their full say in respect of the dispute. Consequently, the Commissioner could not properly have dealt with the substantial merits of the dispute, and in the end, her decision is one that another decision-maker could not reasonably have arrived at.

[54] Both parties were in agreement that in view of the irregularities pointed out, particularly in respect of the manner the arbitration proceedings were conducted, it would be best to remit the matter to the GPSSBC. I agree.

[55] I have further had regard to the requirements of law and fairness in regard to the issue of costs, and I am of the firm view that a cost order is not warranted in this matter.

[56] Accordingly, the following order is made;

<u>Order</u>

1. The late filing of the review application and the replying affidavit by the applicants is condoned;

2. The arbitration award issued by the second respondent under case number GPBC6-2013, dated 27 November 2015 is reviewed and set aside;

3. The dispute between the parties is remitted back to the first respondent ('GPSSBC'), to be heard *de novo* before a Commissioner (a Senior Commissioner) other than the second respondent;

4. Given the protracted nature of this dispute, the GPSSBC is directed to set-down this matter for arbitration on an expedited basis.

5. There is no order as to costs.

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E Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the 1st- 3rd Applicants:	A Myburgh SC with M Kgatla
Instructed by:	The State Attorney
For the Third Respondents:	Mr. T Ntshebe of Thabang Ntshebe Attorneys