**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG** **CASE NO JR393/2001**

In the matter between:

**CITY OF JOHANNESBURG (MIDRAND ADMINISTRATION)** Applicant

and

**M BEAN NO** First Respondent

**THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL, GAUTENG PROVINCIAL DIVISION** Second Respondent

**ID BEZUIDENHOUT** Third Respondent

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**JUDGMENT**

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**JAMMY AJ**

1. In this application, brought in terms of Section 33 of the Arbitration Act 42

of 1965, read with the relevant provisions of the Labour Relations Act 66 of 1995 ("the Act"), the Applicant seeks an order reviewing, correcting and setting side an award made by the First Respondent in arbitration proceedings conducted by her under the auspices of the Second Respondent. That award is dated 26 February 2001 and in terms thereof the First Respondent held that the Applicant's failure to appoint the Third Respondent to the position of Project Manager was an unfair labour practice. It is common cause that on 17 March 2001 and by way of a letter telefaxed by her to the Trade Union of which the Third Respondent was a member and copied to the Applicant's attorney and to the Second Respondent, the First Respondent conveyed what she referred to as "clarification" of her award dated 26 February 2001 by the addition of the following sentence:

"As a result of my finding that the employer committed an unfair labour practice the Applicant is to be appointed retrospectively to the position of Project Manager since the day he started acting in the post".

2. The grounds of review submitted by the Applicant are, in essence, that the First Respondent failed to apply her mind properly to the evidence before her and failed to appreciate the nature and extent of her powers, duties and responsibilities, thereby committing a gross irregularity as contemplated by Section 33(1)(a)(b) of the Arbitration Act. The conclusion reached by her, it is contended, cannot be regarded as justifiable in relation to the reasons given for it and the First Respondent accordingly exceeded her powers as contemplated by that Act read with Section 23(2), 33 and 195(1) of the Constitution and Section 6(2) of the Promotion of Administrative Justice Act.

3. The Third Respondent, who is still in the employ of the Applicant, has held the position of Recreation Officer at post level 6 in the Department: Environment and Recreation Management, since 1 October 1993. In March 1998 he was appointed as an Acting Project Manager, at a higher post level, in a post which had at that stage not yet been formally created but in respect of which, it is alleged, a proposal had been irregularly submitted to the Applicant's Council.

4. The process followed by the Third Respondent and the head of his department in that context was to endeavour to have the Third Respondent's existing post upgraded to that of Project Manager. That proved administratively not possible however and the Third Respondent was informed that he would need formally to apply for the post only once it had been created.

5. Albeit in what the Applicant submits was "circumvention of specific procedural requirements", the post of Project Manager in the Department: Environment and Recreation Management, was thereafter created and in May 1998 the Applicant advertised internally for applicants for that position. The Third Respondent was one of a number of candidates who applied, none of whom however was suitably qualified but of whom the Third Respondent, following tests and an interview, was found to be the most suitable. He was not however appointed to that position, the Applicant's Council exercising its prerogative not to make an appointment but rather to convert the post from a permanent position to a contractual one and to re-advertise it on that basis. Inherent in the decision not to appoint the Third Respondent was a funding factor, the alleged collusion between the Third Respondent and his head of department to create the

post and reserve it for the Third Respondent and, in addition, an objection to the Third Respondent's appointment to the post which had been lodged by the South African Municipal Workers Union and which was premised on the Applicant's employment equity programmes and what was alleged to be the undue favouring of the Third Respondent in that context.

6. The consequent declaration of a dispute by the Third Respondent was duly referred to the Second Respondent for conciliation, which proved unsuccessful, resulting in the reference of the matter to arbitration under its auspices, by the First Respondent. As has been stated, a finding of unfair labour practice was made by the First Respondent followed by a purported amendment which, in the Applicant's submission, was "not in the nature of a correction of a patent error or omission".

7. I have no difficulty with the Applicant's submission that the test to be applied to reviews of awards in terms of the provisions of Section 33 of the Arbitration Act are akin to those determined by the Labour Court in a number of instances to be applicable to reviews in terms of Section 145 of the Labour Relations Act. Simply stated, and has now been endorsed by the Labour Appeal Court in -

**Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others (2001) 9 BLLR 1011,**

that test is one of "justifiability", propounded in –

**Carephone v Marcus and Others (1998) 11 BLLR 1093 (LAC)**

and exhaustively examined and followed in a significant line of cases in this Court.

8. A fundamental aspect of this application is a challenge to the jurisdiction of the First Respondent to have heard the matter and her power to have made the award which she handed down. The First Respondent however, records the agreement between the parties stipulating her powers and her terms of reference as follows:

"1. The Respondent's failure to appoint (our member) Mr I D Bezuidenhout to the position of Project Manager as the selected successful candidate by the interview panel, without valid and substantiated reasons; and

2. The Respondent's actions undermine sound labour practices within the Local Government". *(sic)*

That dispute, she determined,

"… does not relate to an unfair dismissal. Therefore, it would have to be "classified" as an unfair labour practice dispute in terms of Schedule 7 of the Act".

That classification, the Applicant now contends, is incorrect and fatal to the validity of the award. The dispute, it is submitted, does not relate to an unfair labour practice as envisaged in the provisions of item 2(b) of Schedule 7. Those are defined as –

"… any unfair act or omission that arises between an employer and an

employee, involving … the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provisions of benefits to an employee".

The dispute, the Applicant suggests, may have been one of unfair discrimination and in that context capable of determination not by arbitration but only by this Court.

9. It is common cause however that the Applicant agreed to argue the matter on the basis that the dispute may have related to promotion, but this notwithstanding, the Arbitrator, it is contended, failed to appreciate the true nature of the dispute and therefore exceeded her powers in pursuing the matter.

10. That contention is challenged, in my view with justification, by the Third Respondent on the basis that it is irrelevant. The Third Respondent, it contends, was *dominus litis* and decided to pursue his remedies under Schedule 7 to the Act, the parties subsequently agreeing to that course of action and thus to the nature of the dispute and the Second Respondent's jurisdiction to deal with it. The Third Respondent was at all relevant times employed by the Applicant and what occurred in the process giving rise to the dispute was a matter of internal administration. He was not a job applicant, to whom the concepts of promotion, demotion, training or benefits would have no application. Quite apart therefore from the jurisdiction conferred on the First Respondent by agreement to deal with the matter, her classification of the dispute as one falling within the ambit

of Schedule 7 of the Act is not open to question.

11. The Applicant has presented an exhaustive review of case authority dealing with promotional disputes, emphasising the principle that unfair conduct in that context can involve “a failure to meet objective standards” and “arbitrary, capricious or inconsistent conduct”. Acknowledging the concept of managerial prerogative, and the wide discretion vested in an employer in that context, it argues for the right of the Applicant to have made any appointment it deemed fit, to stop the recruitment process, change the nature of the position and utilise an external process of application in the prevailing circumstances and financial constraints to which it was subject. Unfairness in that context, must extend not only to the non-appointment of someone manifestly qualified for the position in question but by the appointment of someone else in his or her stead. In the present instance no one was appointed and that requirement was therefore not satisfied. The relevant applicable principles in that context, although argued before the First Respondent, were not applied by her, it submits.

12. The Applicant proceeds thereafter to attack findings of credibility made by the First Respondent and the disregard by her of evidence alleged to be pertinent to the Applicant’s case. Her rejection of the evidence of specific witnesses identified by her as being biased, untruthful and acting in bad faith, “is unfounded and erroneous and constitutes an irregularity”. She failed, it is alleged, to apply her mind to the facts and arguments set out in heads of argument presented to her by the Applicant which negated any suggestion of unfairness on its part and which were not addressed by the First Respondent.

13. Finally and pertinently the relief which she purported to grant in the subsequent telefax of 17 March 2001 was, it is submitted, grossly irregular and in excess of her powers. In the first instance the order that the Third Respondent be appointed to the position in which he had been acting since the date he started acting in that post was not competent. At best for the Third Respondent had his application been successful, he could only have been appointed as at the date upon which it was considered. He could not be retrospectively appointed to a post which, at the time that he was acting in it, had not yet been formally created.

14. Secondly, once the First Respondent had handed down her award of 26 February 2001, she was *functus officio* in that that award was "complete in all respects and disposed of all the matters in dispute" –

**See Butler and Finsen : Arbitration in South Africa. p103**

Section 30 of the Arbitration Act vests in an Arbitrator the power to correct a clerical mistake or patent error arising from an accidental slip or omission but, the applicant argues, none such existed in this instance. The omission to specify the relief subsequently awarded by her did not constitute a clerical mistake or patent error. It was an omission to grant appropriate relief which could not be rectified by a subsequent ruling or determination, requiring that the award be remitted back to the Arbitrator for finalisation. Section 68(2)(f) of the Arbitration Act 1996 provides for the remittal or review and setting aside of an award containing serious irregularities and it is that relief for which the Third Respondent should, if he believed that grounds existed for him to do so, have properly applied. The First Respondent had no power to effect what was in essence an amendment to the award and in purporting to do so, she exceeded her

powers. Even had the Third Respondent adopted that course of action, it would have been open to challenge by the Applicant on the basis that no established grounds existed for such an order in the context of Section 32 of the Arbitration Act.

15. The heads of argument submitted by the Third Respondent's representatives to the First Respondent in the arbitration conclude with a prayer that the Third Respondent "should be appointed in the position of Project Manager which position still exists and which he still occupies". Conversely, specific relief in the form of an order that the Third Respondent's appointment as Acting Project Manager on a contractual basis should immediately cease and that he should "be required to with immediate effect revert to his former position of Recreation Officer" is sought in the Applicant's heads of argument to the First Respondent. Neither form of relief was granted and this was a patent omission which, in the subsequent telefax of 17 March 2001, the First Respondent sought to address.

16. Section 30 of the Arbitration Act, as I have said, empowers an Arbitrator to "correct in any award any clerical mistake or any patent error arising from any accidental slip or omission". The omission in question in this matter constituted, in my view, a failure on her part to determine one of the issues submitted to her in the form of the relief sought and rendered her award incomplete in that context. She was not yet, in that context, *functus officio* when she proceeded to do so in her subsequent augmentation of 17 March 2001. The sense and substance of her award as a whole was not affected and the tenor of her judgment was preserved :

**See Mervis Brothers v Interior Acoustics 1999(3) SA607 at 613**

**S v Wells 1990 (1) SA816 (AD) Firestone SA (Pty) Ltd v Genticuro 1977 (4) SA289 (A)**

17. The award as at 26 February 2001 did not dispose of all matters in dispute between the parties, of which the nature of any relief to which the Third Respondent might be entitled was one, and as such was not complete. The First Respondent was justified and entitled to address this omission as she subsequently proceeded to do without thereby impugning the validity of the award as a whole.

18. With regard to her assessment of the probative value or otherwise of the evidence presented to her and her evaluation of the credibility or lack of it of certain witnesses who testified in the hearing, the challenge mounted by the Applicant would appear to be more the stuff of appeal than review. The First Respondent, as is always the case where issues of credibility arise, had the benefit of direct visual and aural evaluation of the witnesses in question – the manner of the presentation of their testimony, their demeanour in the witness chair, their reaction to cross-examination, and so forth. Her evaluation of the substance of their evidence was necessarily subjective and any differences of perception in that regard do not constitute grounds for review.

19. There is furthermore no substance to the argument that unfairness on the part of the applicant would necessarily involve the appointment of someone else to the post in question. Whilst that might, all other elements being present, have constituted unfair discrimination, it was neither alleged nor pleaded in the circumstances of this case and is irrelevant to the basic issue of unfairness in terms of item 2(b) of Schedule 7 of the Act upon

which the Third Respondent bases his claims.

20. I have considered the substance of the First Respondent's award in the light of the specific challenges mounted thereto by the Applicant and find them to be unsustainable in the context of review. I can find no legitimate or valid grounds to support the contention that any aspect of her conduct of the hearing or her determination of the issues referred to her, merits interference by this Court. She was entitled to determine the issues in question on the evidence presented, both in the context of the substance of that testimony and of the credibility of the witnesses who testified. In my view there is nothing to support the contention that the findings made and conclusions reached by her were either unreasonable or unjustifiable on the conspectus of that evidence. The award, as I have stated, is not subject to appeal and, for the reasons which I have stated, is not in my view susceptible to review.

21. With regard however to the specific relief eventually granted by the First Respondent, there is in my opinion merit in the Applicant's contention that the effective date of the retrospective appointment of the Third Respondent to the position of Project Manager as ordered by the First Respondent cannot be earlier than what would have been the date of such appointment had his application been successful ab initio. That minor adjustment however will not, to my mind, justify any variation in this instance of the conventional principle that an award of costs in litigation of this nature should follow the result.

22. For all of these reasons, the order that I make is the following:

22.1 The words "since the day he started acting in the post" in the First

Respondent's telefaxed completion of her award on 17 March 2001, are deleted and are replaced by the following:

" with effect from what would have been the date of his appointment as such had his application been successful ab initio"

22.2 Save as provided for in 21.1 above, the application is dismissed.

22.3 The Applicant is to pay the Third Respondent's costs.

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**B M JAMMY**
**Acting Judge of the Labour Court**

**11 March 2002**

Representation:

**For the Applicant:**

Mr J Olivier : Brink Cohen Le Roux & Roodt Inc.

**For the Third Respondent**

Mr H F Kocks: Kocks & Dreyer Attorneys