IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C 1034/2015

In the matter between:

SHAUNA PATRICIA PAMPLIN **Applicant**

and

WESTERN CAPE EDUCATION DEPARTMENT **First Respondent**

EDUCATION LABOUR RELATIONS COUNCIL **Second Respondent**

GAIL McEWAN *N.O* **Third Respondent**

HILTON PALANYANDI **Fourth Respondent**

Heard: **14 September 2017**

Delivered: **9 May 2018**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The applicant (Pamplin) seeks an order reviewing and setting aside the arbitration award issued on 31 October 2015 by the third respondent (Commissioner) acting under the auspices of the second respondent (ELRC). The Commissioner dismissed Pamplin's referral and found that she had failed to discharge the onus to demonstrate that the failure by the first respondent (Department) to promote or appoint her to an advertised position constituted an unfair labour practice.

[2] Pamplin further seeks an order directing the Department to appoint her to the position of Principal of Delta Primary School with back-pay to the date of non-promotion, alternatively granting her 'protected promotion'. In a further alternative, she seeks an order remitting the matter for arbitration afresh by the ELRC before an arbitrator other than the third respondent. The Department opposed the review application.

Preliminary issues:

(i) Condonation – late filing of the answering affidavit:

[3] The Department filed the answering affidavit some two and a half months late. The delay is attributed to Pamplin having served a supplementary affidavit on the Department's attorneys of record on 6 December 2016, followed by the service of Pamplin's further supplementary affidavit on 14 December 2016.

[4] It was further submitted that the Department's representative at the arbitration proceedings, Girchwin Philander was on sick leave between 6 and 15 December 2016. A copy of his medical certificate was attached to the answering affidavit. On 15 December 2016, Philander then took leave until 4 January 2017, and between 9 and 13 January 2017. The deponent to the answering affidavit, Jason Fry, the Department's Deputy Director: Employee Relations also took leave during 15 December 2016 and 4 January 2016. It was submitted that the only available time that Philander and Fry were available to consult and settle the answering affidavit was on 22 December 2016 when they were both on leave. An agreement to extent

the time frames for filing the answering affidavit was also secured with Pamplin's attorneys of record.

[5] Pamplin did not oppose the application for condonation, and I am satisfied that upon a consideration of applicable principles, the Department had shown good cause for the late filing of the answering affidavit, which ought to be condoned.

(ii) Additional Supplementary affidavit filed by Pamplin:

[6] The Department further took issue with an additional supplementary affidavit filed by Pamplin, which essentially contains a voluminous report prepared by a ministerial task team appointed by the Minister of Basic Education into allegations of malfeasance in the appointment of educators by members of teachers' unions and department officials in various provinces. The Department pointed out that the report had no bearing on this matter as it was not placed before the Commissioner in the first place.

[7] To the extent that the report is indeed new material that was never placed before the Arbitrator, the Court ought to ignore it for the purposes of this review proceedings[1].

The dispute and arbitration proceedings:

[8] The dispute between the parties arose against the following background;

8.1. Pamplin, a female coloured educator with 37 years of experience in all three phases applied for a position of Principal at Delta Primary School in 2014. After a process of shortlisting and interviews, Pamplin and the fourth respondent (Palanyandi), a coloured male, were the only two out of six candidates recommended for appointment by the School Governing Body (The SGB) on 22 July 2014. Palanyandi was the first on the list of recommendations.

[1] See *Albany Bakeries Ltd v Van Wyk & others* (2005) 26 ILJ 2142 (LAC) at para 25.

8.2. In its recommendations, the SGB also indicated that equity considerations were not applied by the selection committee, and that this was left to the employer's discretion. The SGB further indicated that it supported the appointment of any one of the two candidates.

8.3. The final decision to appoint was therefore that of the Head of Department (HOD) Ms Penny Vinjevold. She appointed Palanyandi on 23 September 2014.

8.4. Aggrieved at her non-appointment, Pamplin made enquiries with the HOD as to the reasons she was not appointed. In the absence of a response, she then made a PAIA[2] application, to establish the reasons she was overlooked. Some documents were furnished to her in that regard, and still aggrieved, she then on 13 January 2015 approached the ELRC with an alleged unfair labour practice dispute referral. When conciliation failed, the dispute was referred for arbitration.

8.5. The arbitration proceedings were held over three days. The issues in dispute as captured by the Commissioner were whether the SGB and the HOD had failed to exercise their discretion fairly in terms of the Employment of Educators Act[3] and to apply the Department's employment equity plan in view of Pamplin falling within that category as a coloured female.

8.6. Pamplin testified in her case, whilst the Department called two witnesses, *viz*, Chantal Juries, the secretary of the SGB, and Kay Spears, the Departmental Inspector, who oversaw the interview process. The HOD was not called upon to testify, whilst Palanyandi, who was joined to the proceedings also testified.

8.7. Central to Pamplin's case was that in the absence of any reasonable justification, the decision not to appoint her was at best arbitrary, or at worst, motivated by impermissible reasons. Her contention was

[2] Promotion of Access to Information Act, 2000 of 2002
[3] Act 76 of 1998

that based on a variety of factors such as her necessary qualifications; skills and experience for the position; longer service; her high scores in the competency test and interview than Palanyandi, and the fact that the SGB was comfortable with her or Palanyandi, she ought to have been preferred especially under the Department's employment equity plan.

8.8. She contended that because all things being equal, she was to be the preferred candidate under the Department's equity plan, particularly since coloured females were under-represented at post level 4 (Principal), which factor the HOD failed to consider in exercising her discretion.

8.9. Pamplin further submitted that the failure to give her reasons for not appointing her demonstrated that HOD had failed to apply her mind, and that the decision was arbitrary and unfair. In addition, Pamplin complained of certain irregularities in the interview process, which raised a reasonable apprehension of improper conduct, including that full information might not have been placed before the HOD prior to her making her final decision.

8.10. In the light of the grounds of review as shall be dealt with below, I do not deem it necessary to repeat the summary of the evidence led during the arbitration proceedings as the Commissioner in my view adequately did so in her award. Most of the factual material in any event appears to be common cause. Any areas of conflict in the evidence of the witnesses including that of Pamplin shall be dealt with further in my evaluation to the extent necessary.

The Award:

[9] The Commissioner pointed out that the onus in such disputes was upon Pamplin to prove the unfair labour practice on a balance of probabilities. She proceeded to have regard to the requirements of the advertised post, in terms of which suitable candidates had to have appropriate teaching qualifications including a minimum four years diploma/degree recommended

and at least 10 years teaching experience of which three years should be as HOD or deputy level.

[10] The Commissioner observed that Pamplin had a three- year diploma and had credits, but that she had not yet applied for recognition of prior learning which also related to her experience on the job. Palanyandi on the other hand had a three-year degree. Furthermore, they both exceeded the minimum ten years' experience required, were allocated the same scores and were both equal opportunity/affirmative action candidates.

[11] The Commissioner referred to the short-listing score sheets which revealed that Palanyandi was scored at 69 and ranked first, whilst Pamplin was ranked fifth at a score of 62. Having had regard to the Department's Employment Equity Plan (2013- 2017), the Commissioner found that on the evidence of Spears and Juries, there was no fault in the manner that the SGB had carried out the shortlisting process.

[12] In regard to the interviews, there were six candidates for the post, and Pamplin had scored 42 whilst Palanyandi had scored 39. The Commissioner took note of Pamplin's concession in her evidence that a difference of three scores could be minimised through consensus as the gap in the scores was small in any event. The Commissioner further rejected Pamplin's evidence that she was told by one of the panellists, (Spears) during the interviews that she was the best candidate.

[13] The Commissioner accepted the testimony of Juris and Spears that Pamplin had during the interview, appeared to be extremely nervous, spoke a lot and lost herself in the need to keep talking. In the end however, the Commissioner found that even though some comments were missing from the available copies of the score sheets of both Pamplin and Palanyandi, nothing could be read into that omission, and Pamplin was not in any manner prejudiced in the light of her being nominated for consideration by the SGB.

[14] In regard to the competency test undertaken by both Pamplin and Palanyandi, the Commissioner took regard of the fact that the Psychometrist

did not testify, and that the results were not disclosed due to their sensitive nature and need to respect confidentiality. Notes however made available by the Psychometrist revealed that Palanyandi might not have been comfortable with the cognitive aspect of the job, but that overall, his behavioural preferences in the workplace indicated that he seemed comfortable with the required behavioural competencies of a school principal, and that he was a stronger match than Pamplin despite their scores being similar. The Commissioner concluded that there was nothing unfair about the competency testing or the results in that regard.

[15] In regard to the application of the Employment Equity Plan, the Commissioner observed that affirmative action measures as well as the manner in which they are applied must comply with the requirements of fairness, rationality and proportionality in order to escape the definition of an unfair labour practice. Upon a further consideration of what constituted fairness in the application of these measures, the Commissioner concluded that since it was common cause that Pamplin was suitably qualified for the job and that the gap between her and Palanyandi in terms of merit was not too significant or wide, she could not therefore complain of any unfairness in the manner the plan was implemented.

[16] The Commissioner had regard to the provisions of section 7(1) of the Employment of Educators Act[4], and found that redress/equity was applied once during the shortlisting stage as prescribed in the Department's employment equity plan, and there was nothing placed before her to indicate that the SGB could have done anything further to address the inequalities of the past. She concluded that Pamplin had no right to the promotion and was listed on the nominations by the SGB as the second preferred candidate.

[4] Act 76 of 1998

> Appointments and filling of posts-
> (1) In the making of any appointment or the filling of any post on any educator establishment under this Act due regard shall be had to equality, equity and the other democratic values and principles which are contemplated in section 195 (1) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), and which include the following factors, namely—
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> > (a) the ability of the candidate; and
> > (b) the need to redress the imbalances of the past in order to achieve broad representation.

[17] To the extent that other witnesses such as the HOD were not called, the Commissioner observed that the issue surrounded the conduct of the employer in failing to promote Pamplin. This implied that it was not the conduct of the SGB of nominating Pamplin as the second preferred candidate that was challenged as being unfair, but that of the HOD in not appointing her.

[18] The Commissioner concluded that to the extent that the HOD was the person who had made the final appointment from the list of candidates given to her by the SGB, she was not called upon to testify, and no reasons were given to explain why she was not subpoenaed. The Commissioner therefore drew an adverse inference and held that since Pamplin failed to subpoena the HOD to testify, she had therefore failed to show that the discretion exercised by the HOD to appoint Palanyandi could be said to have no rational or reasonable basis.

[19] Ultimately, the Commissioner concluded that Pamplin had on a balance of probabilities, failed to prove that she was the subject of an unfair labour practice when not appointed to the advertised position, and there was no evidence placed before her that the conduct of the SGB was unreasonable, irrational, capricious, arbitrary or unfair.

The grounds of review:

[20] Pamplin contends that the Commissioner misconstrued the nature of the enquiry, prevented a fair trial of the issues, misconducted herself in her evaluation and her application of the law, and arrived at a decision that was so unreasonable that no other reasonable decision maker would have arrived at. In this regard, she contends that;

a) The commissioner failed to evaluate the fairness of the employer's conduct in the light of the statutory provisions circumscribing the discretion to promote, thus failed to apply her mind to material issues, leading her to misconceive the nature of the enquiry;

b) The Commissioner failed to decide whether the decision of the HOD was fair or not, thus misconceiving the nature of the enquiry and denying her a fair trial of the issues, and wrongly concluded that the process was fair simply because the SGB had acted fairly, without looking at the conduct of the HOD;

c) In deciding the dispute on the basis that Pamplin failed to discharge the onus because she did not call or subpoena the HOD, the Commissioner not only misapplied the law regarding the burden of proof, but also breached the *audi alteram partem* principle, by failing to raise the issue with the parties. It was not incumbent upon Pamplin to subpoena the HOD to give evidence.

d) The conclusion that the non-promotion did not constitute an unfair labour practice in the absence of any evidence concerning the HOD's reasons and what he took into account in reaching her decision was unfounded arbitrary and unreasonable

e) The Commissioner misunderstood the relevance of the employment equity plan when considering the justifiability of affirmative action measures, instead of appreciating that Pamplin's case was that employment equity considerations were not taken into account in deciding not to promote her

The legal framework:

[21] The test applicable in review applications as elucidated in *Sidumo*[5] is trite. The enquiry remains whether the decision under review is one that a reasonable decision maker could not have come to in the light of the available material presented. To the extent that the grounds of review in this case centred around whether the Commissioner had misconceived the

[5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.

nature of her enquiry, or failed to afford the parties a fair trial of the issues, the review test was further explained in *Gold Fields*[6] as follows;

> 'In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.'[7]

[22] The enquiry however as further clarified in *Gold Fields* is not confined to a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the Commissioner. It is further not confined to whether the Commissioner misconceived the nature of the proceedings but extends to whether the result was unreasonable[8]. Thus, the questions to be asked are;

i. In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute?

ii. Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)?

iii. Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?

iv. Did he or she deal with the substantial merits of the dispute? and

v. Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?[9]

[23] The Constitution of the Republic guarantees everyone the right to fair labour practices, which right is further given effect through the provisions of section

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[6] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC).
[7] at para 16
[8] at para 14
[9] At para 20

186(2)[10] of the Labour Relations Act (LRA)[11] and the Employment Equity Act (EEA).[12] Despite the guarantees, it has been held that the LRA does not create a right or entitlement to be promoted, unless there is some agreement or law assuring the employee that right[13]. This bearing in mind that in accordance with the principles established in *Apollo Tyres South Africa (Pty) v CCMA and Others[14],* an employee who alleges a case of unfair labour practice relating to a promotion need not to prove that he has a right to promotion.

[24] The obligation in terms of section 186(2) of the LRA is to act fairly towards the employee in the selection and promotion process but taking into account that it is the prerogative of the employer to make appointments[15]. The exercise of that prerogative is nonetheless not immune from scrutiny, as instances of gross unreasonableness in its exercise may lead to drawing of inferences of bad faith[16]. To that end, it is trite that central to disputes pertaining to appointments or promotion of employees is the principle that that courts and commissioners alike should be reluctant, in the absence of good cause, to interfere with the managerial prerogative of employers in making such decisions[17]. Any form of interference should be with the objective of dispensing fairness to both parties.

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[10] Defined as;

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

[11] Act 66 of 1995 as amended

[12] Act 55 of 1998, as amended

[13] See *Department of Justice v CCMA & Others* [2004] 4 BLLR 297 (LAC); *De Nysschen v General Public Service Sectoral Bargaining Council & Others* [2007] 5 BLLR 461 (LC)

[14] *(2013) 34 ILJ 1120 (LAC)*

[15] *Justice v CCMA & others* (2004) 25 ILJ 248 (LAC); [2004] 4 BLLR 297; *Goliath v Medscheme (Pty) Ltd* [1996] 5 BLLR 603 (IC) at 609-610, where it was held that;

> 'Inevitably, in evaluating various potential candidates for certain position, the management of an organization must exercise discretion and form an impression of those candidates. Unavoidably this process is not a mechanical or mathematical one where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointment will not always be the correct one. However, in the absence of gross unreasonableness, which leads the court to draw an inference of mala fides, this court should be hesitant to interfere with the exercise of management's discretion.'

[16] See Law @work (4th Ed) A Van Niekerk et al (LexisNexis) at p205

[17] *George v Liberty Life Association of Africa Ltd* (1996)17 ILJ 871 (LC)

[25] The onus to establish that conduct complained of constitutes an unfair labour practice within the meaning of section 186(2) of the LRA rests on the employee[18]. The employee must therefore be able to lay the evidentiary foundation for his or her claim of an unfair labour practice. Mere dissatisfaction with the outcome of a recruitment or selection process is not sufficient to sustain that claim. In order to succeed with claim related to promotions or failure to appoint, an employee must *inter alia*, demonstrate that as against the successful candidate;

i. the/she met all inherent requirements of the position;

ii. he/she was the best candidate for the position;

iii. that not being promoted caused unfair prejudice to him/her;

iv. and that there is a causal connection between the unfairness complained of and the prejudice suffered[19].

[26] The mere fact that the employee has the required experience, ability and technical qualifications for the post is however not sufficient, nor is it sufficient for the employee to merely assert that he or she scored higher in the interview process or some other criterion linked to the selection process. There is still a burden on him/her to demonstrate that the decision to appoint someone else to the post in preference to him or her was unfair. Provided

[18] See *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others* (2013) 34 ILJ 1156 (LC) at para 19; *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 248 (LAC) at para 73, where it was 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..."

[19] See *Ndlovu v Commission for Conciliation, Mediation and Arbitration* (JR1855/14) [2016] ZALCJHB 133 (5 April 2016); *National Commissioner of the South African Police Service v Safety and Security Sectoral Bargaining Council and Others* [2012] 6 BLLR 596 (LC); (2012) 33 ILJ 1933 (LC); *Sun International Management (Pty) Ltd v CCMA And Others (LC)* (Unreported Case No Jr 939/14, 18-11-2016); *National Commissioner of the SA Police Service v Safety and Security Sectoral Bargaining Council and Others* (2005) 26 ILJ 903 (LC)

the decision by the employer to appoint one in preference to the other was rational, no question of unfairness can arise[20].

[27] In *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others*[21] it was also emphasised that the overall test is one of fairness, and that in deciding whether or not the employer had acted unfairly in failing or refusing to promote the employee, relevant factors to consider include whether the failure or refusal to promote was motivated by unacceptable, irrelevant or invidious considerations on the part of the employer; or whether the employer's decision was motivated by bad faith, was arbitrary, capricious, unfair or discriminatory; whether there were insubstantial reasons for the employer's decision not to promote; whether the employer's decision not to promote was based upon a wrong principle or was taken in a biased manner; whether the employer failed to apply its mind to the promotion of the employee; or whether the employer failed to comply with applicable procedural requirements related to promotions. The list is not exhaustive.

Evaluation:

[28] In terms of section 6(1)(b) of the Employment of Educators Act, the ultimate decision to make appointment is that of the HOD, after receipt and consideration of the recommendations of the SGB. Thus, for all intents and purposes, any reference to 'employer' for the purposes of a finding of unfairness should be in reference to the HOD as the statutorily mandated official who takes decisions on behalf of the Department. As I understood Pamplin's case, and further based on the two central grounds upon which a review is sought, it is the decision of the HOD which is under attack.

[29] To the extent that Pamplin sought to attack the decision of the SGB to recommend both her and Palanyandi, it is my view that such an attack as correctly found by the Commissioner was without merit. The SGB's position and recommendations were clear. Even if Palanyandi was the first recommended candidate on the list, the order on the list was meaningless,

[20] *Ndlovu v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1653 (LC) at 1655-6 (at paras 11-12)
[21] See also *Arries v CCMA & others* (2006) 27 ILJ 2324 (LC) at para 17

as the SGB had unequivocally stated that any of the two candidates would be acceptable for appointment. The SGB had specifically mentioned that it had not taken into account employment equity considerations in making its nominations, and that approach cannot equally be faulted in view of Pamplin and Palanyandi being almost equally or evenly matched, and both being in any event eligible for appointment under the Department's employment equity plan.

[30] As far as the two candidates were concerned, there were no other extraneous factors that can be said to have been overlooked by the SGB to reach a conclusion that Pamplin should or should not have been recommended. Both candidates were not as already pointed out, entitled to the appointment or promotion. Both had been given equal opportunities to compete for the post and irrespective of differences in scores in the criterion used, which were in any event satisfactorily explained by the Juries and Spears, nothing turned on these inconsequential differences as far as the SGB was concerned, moreso since the ultimate decision was that of the HOD.

[31] The issue is whether the HOD in exercising her discretion and appointing Palanyandi, acted rationally, or whether she was motivated by other irrelevant considerations. That evidence sadly was not before the Commissioner, as the Department elected not to call upon her to testify. Ms. Harvey in her submissions conceded that the evidence presented at the arbitration proceedings related to the SGB processes and there was no evidence in relation to the conduct of the HOD. To that end, there is therefore no merit in Pamplin's ground of review to the effect that the Commissioner failed to decide whether the decision of the HOD was fair or not. It cannot be said that the Commissioner misconceived the nature of the enquiry or failed to consider the evidence as to whether the discretion to appoint Palanyandi was exercised fairly, in circumstances where no evidence was presented for that determination to be made.

[32] Fundamental to the grounds of review raised is whether in deciding the dispute on the basis that Pamplin had failed to discharge the onus because

she did not call or subpoena the HOD, the Commissioner not only misapplied the law regarding the burden of proof, but also breached the *audi alteram partem* principle. Furthermore, the issue is whether it was incumbent upon the Commissioner to raise the issue of the testimony of the HOD with the parties prior to drawing adverse inferences, and/or whether it was incumbent upon Pamplin to subpoena the HOD to give evidence.

[33] The Commissioner had correctly pointed out that the decision of the HOD as to who to appoint had to be rational and fair. The difficulty nonetheless is that the Commissioner opined that the HOD ought to have placed significance weight on the order of preference of the SGB as it was the latter that had gone through the interview process and that best understood the candidates and the requirements of the position. This however cannot be so in that the SGB itself specifically mentioned that it would be comfortable with any of the candidates. The order on the list of recommendations was therefore irrelevant, and whether the HOD placed significance on any criteria is a fact not known.

[34] A further difficulty with the Commissioner's reasoning is that despite fully appreciating the approach that the HOD ought to have taken in making appointments from the list of the SGB recommendations, she appears to have concluded in the absence of evidence that indeed the HOD's decision was rational and fair. This however cannot be a correct or reasonable approach on the part of the Commissioner.

[35] The starting point is that upon the HOD not appointing her, Pamplin had sought reasons on 8 December 2014. As at the date of arbitration proceedings, no reasons were furnished. Amongst her concerns was the HOD could have made her choice without the benefit of interview sheets, thus prejudicing her. In regard to the failure to call or subpoena the HOD, it is appreciated from a long line of authorities that failure to produce a witness

who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn[22].

[36] The Commissioner than proceeded to draw adverse inferences against Pamplin, and it is my view that this approach was a misdirection and misapplication of the question of onus in such cases. In *Titus v Shield Insurance Co Ltd*[23], it was held that;

> 'It is clearly not an invariable rule that an adverse inference be drawn; in the final result the decision must depend in large measure upon "the particular circumstances of the litigation" in which the question arises. And one of the circumstances that must be taken into account and given due weight, is the strength or weakness of the case which faces the party who refrains from calling the witness.'

[37] The circumstances of the litigation in unfair labour practice disputes such as in *casu* is that despite the onus being on the complainant/employee to demonstrate that the failure to promote or appoint was unfair, the employer is in the same token, obliged to defend attacks on the substantive and procedural fairness of its decisions if it wishes to avoid a negative outcome. This therefore implies that there is an obligation on the employer to place evidence of the fairness of the process followed and the rationale for the appointment/non-appointment, to satisfy a tribunal that the appointment/non-appointment was rational and thus fair. The employer must demonstrate that it acted fairly, in good faith, and applied its mind to the selection. A conclusion that an employer acted fairly or in good faith in making an appointment cannot be reasonable nor rational in circumstances where that employer places no such evidence before a tribunal, irrespective of where the onus lies.

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[22] See *ABSA Investment Management Services (Pty) Ltd v Crowhurst* (2006) 27 ILJ 107 (LAC) at para 14; *UPUSA OBO Khumalo v Maxiprest Tyres (Pty) Ltd* [2008] JOL 22873 (LC) at para 30; Tshishonga *v Minister of Justice and Constitutional Development and another* (2007) 28 ILJ 195 (LC), where it was held that;

> "But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case."

[23] *1980 (3) SA 119 (A) at 133 E-F*

[38] In such circumstances and given the nature of the litigation before the Commissioner, if any adverse inference was to be drawn by the failure to call available witnesses, then it should have been drawn against the Department for its failure to call the HOD, not against Pamplin for failing to subpoena the HOD[24]. For the Commissioner therefore to have required of Pamplin to have subpoenaed the HOD to demonstrate that her decision was fair failing which an adverse inference was drawn against her is akin to requiring of her to call the HOD to rebut her own case. This approach is a misapplication of the question of onus and cannot therefore be reasonable.

[39] It is trite that Commissioners acting under the auspices of the CCMA or Bargaining Councils in terms of the LRA are expected to act inquisitorially or investigatively irrespective of the nature of representation at those proceedings. This obligation is placed on Commissioners by virtue of the provisions of section 138(1) of the LRA, which provides that Commissioners may conduct the arbitration proceedings in a manner considered appropriate in order to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute with a minimum of legal formalities. This approach places an obligation on Commissioners where necessary, to step into the arena and to direct the proceedings in the interests of justice[25].

[40] In this case, there is no suggestion from the record that Pamplin was also warned that such an adverse inference would be drawn against her for failing to subpoena the HOD (*albeit* she had no obligation to call the HOD). Furthermore, it does not appear that the Commissioner impressed upon the Department to call the HOD. Even if the Department did not wish to call the HOD, nothing prevented the Commissioner from acting within her powers in accordance with the provisions of section 142 (1) of the LRA, to issue a

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[24] See *Bargaining Council for the Furniture Manufacturing Industry, KwaZulu-Natal v UKD Marketing CC and Others* (2013) 34 ILJ 96 (LAC), where it was held that

> '…an adverse inference will be drawn against a party for failing to testify only if the evidence of the other party calls for reply. It is a prerequisite to the application of the rule that an adverse inference should be drawn from a party's failure to call a witness/es that the evidence that party faces must have been of such a nature that, at the time the other party closed its case, there was sufficient evidence to enable the court to say, having regard to the absence of any explanation, that the other party's version was more probable than not".

[25] See *Consolidated Wire Industries (Pty) Ltd v CCMA* [1999] 10 BLLR 1025 (LC); *Land Bank v Nowosenetz NO and Others* (2013) 34 ILJ 2608 (LC) at para 11

subpoena against the HOD. Given the nature of arbitration proceedings, it would not be in the interests of justice to draw inferences from a failure to call a witness without warning the parties, irrespective of the nature of representation at those proceedings.

[41] In the light of these glaring failures and irregularities, it cannot in my view be said on the explication of the review test in *Goldfields*, that the Commissioner afforded Pamplin in particular, a fair opportunity of a fair trial of the issues or dealt with the substantial merits of the dispute prior to drawing negative inferences against her.

[42] The Commissioner equally misapplied the law in regard to the issue of onus, and also unreasonably drew negative inferences against Pamplin. To that end, and in the light of this irregularities, it cannot be said that the decision reached by the Commissioner that Pamplin had not discharged the onus of proving that her non-appointment constituted an unfair labour practice falls within a band of reasonableness. The Commissioner's decision is not one that another decision-maker could reasonably have arrived at based on the evidence placed before her. To the extent that this is the case, it follows that the award ought to be set aside.

[43] Given the nature of these disputes and the omissions already outlined, there is essentially is no basis upon which this Court can substitute the decision of the Commissioner. The only alternative is for this matter to be remitted back to the ELRC for a reconsideration *de novo*.

[44] I have further had regard to the requirements of law and fairness, and I am satisfied that there is no basis for a cost order to be made against either party.

Order:

[45] Accordingly, the following order is made;

1. The late filing of the answering affidavit to the review application by the First Respondent is condoned.

2. The arbitration award issued by the Third Respondent is reviewed and set aside.

3. The dispute between the parties is remitted back to the Second Respondent to be heard afresh before a Commissioner other than the Second Respondent.

4. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Adv. S Harvey.
Instructed by:	Edmund Booth of Booth Attorneys
For the First Respondent:	Adv. B Joseph
Instructed by:	The State Attorney (Pam Mlapi)