REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable/Not reportable

Case no: D120/13

In the matter between:

UMGUNGUNDLOVU DISTRICT MUNICIPALITY	**Applicant**
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**First Respondent**
P LEVISOHN N.O	**Second Respondent**
SAMWU obo P MHLONGO AND 5 OTHERS	**Third Respondent**

Heard: **16 July 2014**

Delivered: **30 October 2014**

Summary: guidance placement policy – placement adopted by Resolution- organogram developed- subsequent placement - two years after placement notice of withdrawal of prior placement- requirements for the formation of a Collective Agreement- confirmed that a Collective Agreement need not be embodied in one single document.

JUDGMENT

FOUCHÉ AJ

Introduction

[1] This matter was brought to this Court in accordance with Section 145 of the Labour Relation Act 66 of 1995 ("LRA") as a Review matter. The matter before the Court deals with a jurisdictional ruling.

[2] At the outset it is noted that the Application for review was out of time. The award was handed down on 25 July 2012 The Application for review was noted on 12 February 2013, thus four months out of time. The due date for the lodging of the application for review was 10 September 2012.

[3] The Applicant's Notice of Application does not contain a prayer for the condonation of the late filing of the present application, but contains a prayer for other relief as seems appropriate. The Respondent opposed the application for condonation.

Relief sought

[4] The relief sought in this matter is that:-

1. the enforcement of the Arbitration Award of the second Respondent under case number: 091103("the award") be and is hereby stayed pending the finalisation of this application.

2. The proceedings held before the First Respondent under case number KPD 091103 in which the Applicant's point *in limine* in regards to

jurisdiction was dismissed and declaring the Applicant's actions of setting aside the placement of the employee as breach of a collective agreement of no force and effect as well as the costs order be reviewed and corrected or set aside.

3. The award made in the proceedings be reviewed and corrected or set aside.

4. The Award made in the proceedings be substituted with the following:

   4.1 The 2001 document issued by the South African Local Government Association ("SALGA") and subsequently ratified by the applicant is not a collective agreement;

   4.2 that the first respondent does not have jurisdiction;

   4.3 no order as to costs

5. In the alternative to paragraph 4 above, that the matter be remitted to the first respondent for rehearing.

6. That the costs occasioned by any opposition to this application for review, be paid any of the respondents, who oppose it.

7. That such other relief as seems appropriate to this Honourable Court be granted pursuant to the review.'

Facts

[5] The Applicant is Umgungunlovu District Municipality, a category C municipality as described in Section 155(1) of the Constitution of the Republic of South Africa[1]. It is established in terms of Section 12 of the Local Government Municipal Structures Act[2].

[1] Constitution of 1996.
[2] Act 117 of 1998(promulgated in GG 343 and 461 of 2000).

[6] The First Respondent is the South African Local Government Bargaining Council as envisaged in the LRA. The First Respondent relies on the Constitution of the South African Local Government bargaining Council[3] (hereinafter "the SALGA document").

[7] The Second Respondent is Levisohn J, who was instructed to arbitrate this matter. The Third Respondents are employees affected by the placement and were after two years in the allocated positions, served with withdrawal letters.

[8] The South African Local Government Bargaining Council[4] (SALGA) constitution was signed on 19 June 2007[5]. It lays down the procedures to be followed in respect of dispute referrals, arbitration, conciliation, jurisdiction and the formation of Collective Agreements.

[9] The dispute before this Court relates to the SALGA Constitution, the SALGA Umgungundlovu Placement Policy, and the minutes of the Full Council of the Umgungundlovu Municipality of Friday 28 August 2009.

Submissions by the parties

[10] The Applicant in making submissions, advanced three grounds before this Court. Firstly, the Commissioner's erroneous finding of the formation of a Collective Agreement, the Second ground, the Commissioner's refusal to allow the leading of evidence to confirm or reject the formation of a Collective Agreement and Thirdly, Rule 39(1) of the CCMA.

[11] On the First ground, the Applicant submitted that Rule 39(1) of the CCMA Rules should have been applied by the Commissioner. Accordingly, that the Commissioner erred by finding that a Collective Agreement was formed, in the absence of the Respondent leading evidence of the formation. This submission is

[3] Paginated bundle pages 97-132.
[4] Bundle I Paginated page 122.
[5] Page 132 of the paginated bundle.

based on the absence of the formation of a Collective Agreement between the parties.

[12] The Applicant referred to paragraph 23 of the award[6] and argued that when read with placement policy and the SALGA Constitution, it is clear that the Commissioner erred in finding that a Collective Agreement was formed. The Commissioner read the placement policy together with the UMGUNGUNDLOVU Council minutes of 7 September 2009 and held that constituted a Collective Agreement. In juxtaposition the SALGA Constitution records the procedure for the formation of a Collective Agreement between the Applicant and Respondent.

[13] According to the Organogram reflected on paginated page 116, the local labour forum (LLF) was a party to the placement policy document. It was argued that this is substantiated by the minutes of the full meeting[7] dealing with the placement policy and the approved organogram in the minutes of the council meeting[8].

[14] Page 94 of the SALGA Constitution reads as follows:-

> 'Accordingly, it was unanimously
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> RESOLVED
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> 1. That the Full Council approves and adopts the reviewed organisational structure.
> 2. That the Full Council approves that the filling of vacant posts will be managed such that the ratio of salaries to operating expenditure must not exceed 35% as per the national norm.

[6] Page 2 of the award, paginated page 11.
[7] Paginated page 91.
[8] Paginated page 93 para 6.

3. That the Municipal Manager, while noting the financial constraints of the Municipality, will ensure that the offices of the Office Bearers will be adequately resourced to ensure the discharge of their responsibilities.'

[15] The Applicant accordingly submitted that the SALGA Constitution does not deal with placements and is not a placement policy. Furthermore, it does not state that the placement document is incorporated into the minutes of the Council meeting.

[16] It was submitted that the Council on 7 September 2009 approved the placement policy of 2001[9]. The placement policy was compiled by the Applicant's Strategic Manager. Accordingly, the policy Third Respondent relied on is a previous version of the SALGA Document.

[17] The formation of a Collective agreement in accordance with the SALGA Constitution requires negotiations, consensus and a policy by the Council to that effect. Clause 17.3 of the SALGA Constitution requires two-thirds votes of the Employer Representatives and two thirds votes of the Trade Unions, for the negotiation of Collective Agreements. Clause 17.3 reads as follows:-

> 'At least two-thirds of the Employer Representatives on the one hand and two-thirds of the Trade Union Representatives on the other hand must vote in favour of a Collective Agreement for it to be binding on the Parties.'

[18] Section 213 of the LRA defines a Collective Agreement as follows:-

> 'collective agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-
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> (a) one or more employers;
>
> (b) one or more registered employers' organisations; or

[9] Paginated page 61.

(c) one or more employers and one or more registered employers' organisations; " council" includes a bargaining council and a statutory council'.

[19] On the Second ground, the Applicant submitted that the Commissioner erred by not affording the Applicant an opportunity to lead evidence before finding that a Collective Agreement was formed between the Applicant and the First Respondent[10]. In the award, the Arbitrator recorded that the letter of 26 July 2011 declared that the Third Respondents' placement were not in order as it was unlawful and led to an unfair promotion. This letter was addressed to Mrs PA Mhlongo. Paragraph 3 of this letter reads as follows:

'3. Following from the rigorous process, your placement was found not to be in order as it has led to an unfair promotion'

[20] Paragraphs 4 and 5[11] of this letter read as follows:

'4. As a Municipality in the local sphere of government, the District Municipality has an obligation to act lawfully and its decision should be rational and justifiable. It is our intention to rescind the earlier decision and to nullify the incorrect decision. This means the decision will no longer be of force and effect .

5. In view of the placement decision being nullified, kindly note that an objective process for the appointment of a competent individual to the relevant post will be undertaken and you are free to apply accordingly.'

[21] The Applicant referred this Court to the Constitution of SALGA where it is recorded that:

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

[10] Bundle III Paginated page 8.
[11] Bundle III Paginated page 125.

> 14.6 Subject to the discretion of the arbitrator as to the appropriate format of the arbitration proceedings, a Party to the dispute may give evidence, call witnesses, question the witnesses of any other Party, and address arguments to the arbitrator.'

[22] Clause 18.2 of the SALGA Constitution enunciates that every collective agreement shall contain a procedure for the arbitration of disputes. It reads as follows:-

> '18.2 Every collective agreement shall contain a procedure for the conciliation or arbitration of disputes relating to the interpretation or application of that collective agreement, and in the absence of a specific procedure, the person or Party referring the dispute, shall follow the procedure in this Constitution.'

[23] The Applicant submitted that a procedural unfairness occurred during the arbitration hearing as the arbitration addressed a jurisdictional ruling and not the merits of the declarator. The arbitration process set out in clauses 14 and 19 of the SALGA Constitution for the enforcement of Collective Agreements was not followed. Accordingly no Collective Agreement came into place[12].

[24] Applicant furthermore submitted that the placement policy is not a Collective Agreement as the placement policy does not comply with the minimum standards set by the SALGA Constitution. The placement document did not comply with the SALGA Constitution requirements for the formation of a Collective Agreement. It does not have a procedure for enforcement, alternative dispute resolution methods, procedure for the negotiation of collective agreements, application or interpretation of collective agreements. Clause 17.3 of the SALGA Constitution states that two thirds of the employer representative and two thirds of the two thirds of the employee employees, must be *ad idem* with the agreement. Applicant submits there is no conclusive proof of the *consensus*.

[12] Bundle I Paginated pages 121-122.

[25] Rule 39(1) of the CCMA Rules provides that the basis on which a commissioner may make an order in respect of costs in any arbitration, is regulated by Section 138(10) of the Act. Section 138(10) of the Act provides:

> 'The commissioner may make an order for the payment of costs according to the requirements of law and fairness in accordance with rules made by the Commission in terms of section 115(2A) (j) and having regard to -
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> (a) any relevant Code of Good Practice issued by NEDLAC in terms of section 203;
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> (b) any relevant guideline issued by the Commission.' [13]

[26] The Applicant submitted that the Arbitrator erred by awarding a cost order against the Applicant as at no time did the Applicant act either frivolous or reckless in pursuit of this matter.

[27] Lastly, the Applicant submitted on condonation that as the record was unavailable, the matter could not have been brought to this Court earlier[14]. Furthermore, before the matter was lodged at Court, the approval of Council had to be obtained. The Council only passed a resolution in January 2013, that the matter could be lodged at Court.

[28] The Applicant submitted that the Review Application to Court was only filed on 12 February 2013, thus one month after obtaining the permission of Council. The award was handed down on 25 July 2012 and this application should have been lodged on 10 September 2012. It was thus lodged nearly 6 months late[15]. Applicant however, submitted that the delay was not caused by over-caution, but

[13] Prior to amendment by Act 12 of 2002 subsection 10 read as follows:
'The commissioner may not include an order for costs in the arbitration award unless a party, or the person who represented that party in the arbitration proceedings, acted in a frivolous or vexatious manner
(a) by proceeding with or defending the dispute in the arbitration proceedings; or
(b) in its conduct during the arbitration proceedings."

[14] See Annexure B on pages 27-28 and Annexure C on page 29.

[15] See Founding Affidavit pages 15-18.

due to time spent awaiting the passing of the Council resolution to pursue the matter.

[29] In response, the Respondent submitted that the Applicant erred by not seeking a prayer for condonation in the Notice of Motion. According to Bundle 1, Annexure B1" the Applicant was searching for the transcript. The attempts to compile the record is reflected on 8 October 2012 in Annexure "C" No explanation was given of the time delay between 10 August 2012 to 8 October 2012. Paragraph 16 of the Founding Affidavit does not address these grounds. Then again on 31 October, the Applicant states they are still compiling the record. No explanation of time delay between 8 October to 12 November 2012 was given under oath.

[30] The Third Respondent submitted that as a result of the undue delay by the Applicant in this matter, condonation should be refused and the merits of this matter should not be visited by the Court. The Third Respondent made seven submissions on the merits of this matter.

[30.1] The Third Respondent submitted that the Commissioner was correct in making the jurisdictional ruling and the declaratory order[16]. It was submitted that, agreed facts were presented by both the Applicant and the Respondent. Accordingly no leading of evidence or the calling of witnesses was required[17]. The employees were placed in their respective positions, more than two years before recalling the placement. The placement policy provides a window period for the settlement of placement disputes within 10 days. Third Respondent submitted that this accordingly implied that these placements could no longer be reversed[18]. The Respondents received letters approximately two years after the placement, informing them that their placements were rescinded[19]. The Arbitrator inquired if

[16] Bundle I, page 19 of the award.
[17] Bundle III page 88 Lines 5-14; Lines 15-19; page 89 Lines 1-30; page 90 Lines 1-25; page 85 Lines 5-15.
[18] Bundle III page 90 Lines 14-15.
[19] Bundle III page 92 Lines 15-18.

the Applicant intended to lead any evidence, and it was the Applicant's failure not to place evidence before the arbitrator[20].

[30.2] The Third Respondent submitted that the arbitrator misread the organogram and the applicable dates. The organogram was compiled on 28 August 2009. The placement policy was compiled on 21 November 2001[21] and was not adopted on 28 August 2009 as stated by the arbitrator. The contention was that the arbitrator confused the date of the placement policy and the organogram. The Respondent submitted that this is immaterial as it had no influence on the outcome of the award.

[30.3] The Third Respondent submitted that it is material that the Applicant had not denounced the placement policy document[22]. The Applicant's version is that the placement policy is a SALGA guidance document and not a Collective Agreement[23].

[30.4] The Third Respondent submitted that Paragraph 17(3) of the SALGA Constitution was complied with and all parties were in agreement with the placement of the employees. As such the SALGA Constitution was complied with. The Respondent submitted that the Applicant was represented by three Councillors and one Council member whilst the Respondent was represented by IMATU. The Respondent accordingly submitted that the placement policy is a Collective Agreement which complied with the requirements set in the SALGA Constitution for the formation of Collective Agreements[24].

[30.5] The Third Respondent submitted that it was in the interest of all the litigants that the Arbitrator gave a final decision and not a ruling. To substantiate this Court was referred to Bundle III page 184 where it was clear that the parties were *ad*

[20] Bundle III page 98 Lines 20-25.
[21] Bundle111 pages 115-127.
[22] Bundle I page 61 paras 3.5 and 3.7.
[23] Para 17(3) of SALGA Constitution.
[24] Bundle I, paras 8, 19 and 20 of the answering Affidavit.

idem that once the arbitrator ruled that there was a Collective Agreement, such finding would make a jurisdictional ruling irrelevant.

[30.6] The Third Respondent submitted that the SALGA placement policy is a Collective Agreement as Clause 14 contains a dispute resolution process for employees[25]. Respondent submitted that the jurisdictional ruling must be upheld.

[30.7] The Third Respondent furthermore submitted that the arbitrator was correct on granting a costs order in favour of the Respondents. Third Respondent submitted that the application for review should be dismissed with costs[26].

Condonation

[31] The Third Respondent submitted that there was undue time delay in the prosecution of the matter and the application for review should be refused. In support this Court was referred to *Aboobaker v Cadbury South Africa (Pty) Ltd*[27] an unreported matter where my brother Steenkamp gave an expose of the applicable principles affecting condonation in these matters. Steenkamp J referred to *Melane v Santam Insurance Co Ltd* [28]where the principle for a condonation application was summarised as follows:

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides..'

[32] Aspects such as the importance of the issues of the case and the strong prospects of success could compensate for the long delay, provided that, the Respondent's interests are not overlooked. In *Superb Meat Supplies CC v*

[25]Bundle III page 119.
[26] SALGA placement policy para 14.2.3 on page 122. See also paras 34 and 46 of the answering affidavit.
[27] Case no C965/2008 delivered on 17 November 2010.
[28] 1962 (4) SA 531 (A) 532 B-C.

Maritz[29] it was held that when applicants advances an unacceptable explanation for the delay in lodging the matter at Court, it is unnecessary to deal with the prospects of the matter on success.

[33] This Court was furthermore referred to *Regal v African Superslate (Pty) Ltd*[30] where it was stated that:-

> '…this court came to the conclusion that the delay was entirely due to the neglect of the Applicant's Attorney...a litigant cannot escape the result of his attorney's lack of diligence…''

[34] After hearing both sides and evaluating the prospects of success, the importance of the issues, the formation of Collective Agreements and the rights of the employees involved herein, condonation is granted.

Applicable principles regarding the formation of Collective Agreements

[35] In *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others*[31] the Court confirmed the binding effect of a collective agreement. On page 879 C-E, the effect of the binding agreement is expressed as follows:-

> 'Since the union is a registered union, there can be no doubt that it was entitled to conclude a collective agreement with the first respondent to deal with the matter of mutual in interest. As the union was a representative union having majority membership in the first respondent's workplace, I conclude a collective agreement that was binding even on employees who were not its members. That is a benefit enjoyed by a registered trade union which has the majority of employees on a workplace as members'.

[29] (2004) 25 *ILJ* 96 (LAC).
[30] (1962) (3) SA 18 AD. See also: *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 at 141B; *NUM v Council for Mineral Technology* [1999] 3 BLLR 209(LAC) paras 10 and 11; *Rustenburg Platinum Mines Ltd v CCMA and Others* (1998) *ILJ* 327 (LC). See also: *Aboobaker* para 4.
[31] (2001) 22 *ILJ* 1575 (LAC) on 879 C-E.

[36] In *BUSCOR (Proprietary) Limited v Transport and Allied Worker Union of South Africa and Others*[32], Coetzee AJ found that:

> 'The Council's Constitution does not require the collective agreement to be signed. The collective agreement was concluded when the employer party and two of the unions agreed to a written document reflecting the terms of the agreement agreed amongst them.'

[37] It was submitted by the Respondent that the Applicant adopted the placement policy at a Council Meeting and subsequently send letters to each employee informing the employee of the new placement. The Applicant submitted that no collective agreement was concluded as it would not be in compliance with Section 213 of the LRA. During the arbitration hearing the Applicant submitted before the Commissioner that if, the Commissioner found the facts to prove a Collective Agreement, then jurisdiction will follow.

[38] On the other hand, it was agued by the Applicant that the SALGA placement policy is merely a guideline and not a Collective Agreement. It was furthermore submitted by the Applicant that the SALGA Constitution contains the procedure for the formation of a Collective Agreement. Most significantly, is the requirement that two-thirds of the Employer Representatives and two thirds of the Trade Union Representatives must vote in favour of the formation of a Collective Agreement[33].

[39] In *National Union of Metalworkers of SA and Others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd*) [34], Jammy AJ, correctly held that a Collective Agreement need not be contained in one single document. An exchange of letters where the union agreed to a certain pattern of behaviour could constitute a Collective Agreement, provided, that it falls within the parameters of Section 213 of the LRA. Jammy AJ held in that matter that:

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[32] (J2316/10) and (J1640/10).
[33] Clause 17 of the SALGA Constitution page 125.
[34](2003) 24 *ILJ* 2171 (LC) 2178A-B.

'…….There is nothing in the definition of 'collective agreement' in the Act which requires its terms to be recorded in one memorial provided that they concern 'terms and conditions of employment or any other matter of mutual interest'. There is no doubt in my mind that the recordal of 17 October 2002 falls comfortably within that ambit.'

Evaluation of the award

[40] The guidelines to the placement policy were compiled by SALGA on 21 November 2001. It does not bear any signatures. It is not an agreement but only guidelines to placements. The arbitrator correctly found in the award that the placement policy was adopted 28 August 2009. The Respondent's Counsel submitted to this Court that the arbitrator erred and that it was an incorrect premises.

[41] In the Report on the establishment of the placement Committee, which was compiled by the acting Strategic Executive Manager on an unknown date, it is stated that the Council approved the "placement policy 2001". It is not clear if this document refers to another placement policy and not the guidelines to a placement policy.

[42] The Arbitrator correctly found that the acting Strategic Executive Manager was tasked to approve the establishment of the placement committee and to designate council representation on this committee. The purpose of the report on the establishment of the placement committee are as follows:-

'1. PURPOSE

1.1 To request approval from the committee for the establishment of the Placement Committee

1.2 To present to the Committee the proposed names for the Placement Committee,

1.3 To solicit Council representation into the Placement Committee'[35]

[43] Paragraph 3.5 of the Report on the establishment of the placement Committee records that the Council has adopted the placement document, which as stated is attached to that report. The application submitted to this Court did not contain a copy of the placement copy which was to be attached to this Report[36].

[44] The Arbitrator found that an agreement was reached on the names of the union representatives and Council members who were tasked to attend the placement committee. Accordingly, that this proves compliance with the placement document. In the Council meeting of 28 August 2009, the organisational structure was discussed. The minutes refer to a report on the reviewed organisational structure[37]. The Council unanimously resolved to adopt the reviewed organisational structure. The documents placed before this Court did not contain a copy of this reviewed organisational structure. Significantly, the full Council moved to adopt Council policies during that hearing. Amongst the 25 policies adopted in that Council session, no further mention is made that neither the placement policy nor that the placement Committee was adopted by the full council[38].

[45] The Arbitrator correctly found that the placement process was approved by the Committee and implemented by the Municipal Manager. The letters sent to the affected Third Respondents, informs them that their "placement in the new organisational structure were approved by full Council on 28 August 2009". The effective date of these placements was 1 July 2010. On 26 July 2011, subsequent to the process of Appeals and examinations of placements, all unfair promotions were recalled[39].

[35] Award page 2 paginated page 21. See also: Bundle III pages 61-62 for establishment report.
[36] Award page 2 paginated page number 21.
[37] Paragraph 6 of the Council minutes.
[38] See: Minutes of Full Council of 28 August 2009 item 7 paginated page 95.
[39] See: Award pages 2 and 3 at paginated pages 21 and 22.

[46] The arbitrator found that the placement policy of 2001, read on its own, was not a Collective Agreement. It was a proposal which the Applicant accepted in 2009. Thereafter a placement Committee was formed. Both Trade Union members and the Applicants representatives took seat on this committee.

[47] On careful examination of the SALGA placement policy placed before this Court, it is clear that the Applicant followed due process by placing the Third Respondent in accordance with organogram and placement policy. The SALGA placement policy requires the conducting a job evaluation within 1 year of the completion of the placement. This job evaluation process was not intended to demote employees. Paragraph 5.1 of the SALGA placement document reads as follows[40]:-

> 'Within 1 year of the completion of the placement Job Evaluation Committee of the bargaining Council shall evaluate all the posts of the newly formed local authority in accordance with the agreed national job evaluation system the Task system of job evaluation.'

[48] From the facts, it is clear that what indeed occurred is that the Applicant used paragraph 5.1 of the SALGA placement document to conduct the "one year after placement" job evaluations, which led to the demotion of the Third Respondents. Accordingly, neither the letters notifying the Third Respondents of the demotion, nor the paragraph 5.1 job evaluation was procedurally fair.

Evaluation of the evidence

[49] Clause 12.1 of the SALGA Constitution prescribes that a dispute must be referred for conciliation to the Council in writing. This dispute serves before the Executive Committee prescribed by the General Secretary, provided that the dispute fell within the central council's jurisdiction or the appropriate division

[40] See: Bundle III paginated page 119.

when the dispute falls within such division[41]. The clause "dispute" means disputes which may be referred to the Council in terms of the LRA or any other legislation conferring jurisdiction on a bargaining council[42].

[50] Clause 14.6 of the SALGA Constitution records that an arbitrator may in its discretion determine the appropriate format of the arbitration proceedings. It further reads:

> '…a party to the dispute may give evidence, call witnesses, question witnesses of any other Party, and address arguments to the arbitrator.'[43]

[51] It further requires the arbitrator conducting the arbitration to address the substantive merits of the dispute with the minimum of legal formalities[44]. Clause 17 of the SALGA Constitution contains the procedure for the formation and the negotiation of a collective agreement. Clause 17.3 reads as follows:

> '17.3 At least two-thirds of the Employer Representatives on the one hand and two third of the Trade Union Representatives on the other hand must vote in favour of a Collective Agreement for .it to be binding on the parties.'[45]

[52] Disputes arising from the proposals for the conclusion of a collective agreement are to be adjudicated with reference to the LRA.[46] The SALGA Constitution defines a Collective Agreement as:

> '...a collective agreement as defined in the Act and shall include any decision on a substantive matter concluded in the manner contemplated in clause 17.'[47]

[53] The LRA defines Collective Agreements in Section 213 as follows:-

[41] Page 118 para 12.1 of the paginated bundle.
[42] Page 118 para 11.1 of the paginated bundle.
[43] Clause 14.6 on paginated page 122.
[44] Clause 14.5 on paginated page 122.
[45] Paginated page 125.
[46] Clause 17.4 on paginated page 125.
[47] Paginated page 100.

‘ collective agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

(a) one or more employers;

(b) one or more registered employers' organisations; or

(c) one or more employers and one or more registered employers' organisations; " council" includes a bargaining council and a statutory council; ‘

[54] Clause 17 of the SALGA Constitution sets the procedure for the negotiation of a collective agreement as follows:-

‘17.1 A procedure, forum and level of negotiations shall be determined by the Parties to the Central Council.

17.2 Any Party to the Council may introduce proposals for the conclusion of a Collective Agreement on appropriate subject matter and at the appropriate level.

17.3 At least two-thirds of the Employer Representatives on the one hand and two-thirds of the Trade Union Representatives on the other hand must vote in favour of a Collective Agreement for it to be binding on the Parties.

17.4 in the event of a dispute arising from the proposals for the conclusion of a Collective Agreement the Parties shall have the rights prescribed in the Act. ’

[55] Flowing from the above evaluation, it is clear that clause 17’s criteria were not met in the SALGA placement policy. The question is thus, is the combination of the SALGA policy, read together with the SALGA Constitution and the Placement policy, formed a Collective agreement as per the test set in *National Union of*

Metalworkers of SA and Others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd) [48].

[56] Molahlehi J found in *SA Post Office Ltd v Communication Workers Union Others*[49], that a party can be bound to a Collective Agreement, when the terms to that agreement is agreed to orally. It is stated that:-

> 'Thus similar to a commercial agreement, parties in a collective bargaining process may exchange offers, counter offers and finely in that process reach an agreement by way of accepting whichever the last offer may have been made. An offer may be accepted orally, or by signature of the proposed agreement or through conduct. When a collective agreement is concluded by way of conduct the action related to such acceptance must indicate the unequivocal intention to be bound by the agreement'.

[57] In *BUSCOR (proprietary) Limited v Transport and Allied Worker Union of South Africa and Others*[50], Coetzee AJ held that:

> 'The Council's Constitution does not require the collective agreement to be signed. The Collective agreement was concluded when the employer party and two of the unions agreed to a written document reflecting the terms of the agreement agreed amongst them'.

58] In juxtaposition it was held in *Communication Works Union v Telkom SA Ltd*[51], that Collective Agreements should be signed by the parties. In Labour Relations Law: A comprehensive guide, Du Toit *et al*[52] page 272, the learned authors opined that there is nothing in the LRA to suggest that a Collective Agreement must be signed in order to qualify as a collective agreement, nor does the law of contract require agreements to be signed as a validity requirement.

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[48] (2003) 24 *ILJ* 2171 (LC) 2178A-B.
[49] (2010) 31 *ILJ* 997 (LC).
[50] (J2316/10, J1604/10)
[51] 1996 19 ILJ 389 CCMA.
[52] Fifth edition Lexis Nexis by D Du Toit, D. Bosch, D. Woolfrey, S. Godfrey, C. Cooper, GS Giles, C. Bosh, J. Rossouw.

[59] In *SAMWU v WEDOGO*[53], it was held that Collective Agreements should at least have the basic form of an agreement wherein the parties are named and the terms of the agreement set out. It is accordingly clear that it was not necessary that a Collective Agreement be signed by the parties involved. To constitute a Collective Agreement requires a document or documents reflecting that the parties had reached consensus on the terms of the Collective Agreement. In the matter before this Court, it is clear that consensus was reached between the Applicant and the Third Respondent in respect of the placement policy.

The test for review

[60] The grounds for review set out in Section 145 of the Labour Relations Act are:-

> '1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
>
> (a) within six weeks of the date that the award was served on the applicant…;
>
> (2) a defect referred to in subsection (1) means-
>
> (a) that the commissioner-
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers; or
>
> (b) that an award had been improperly obtained'.

[53] 2000 10 BLLR 1160 (CCMA) at 1163.

[61] In *Carephone (Pty) Ltd v Marcus NO and Others*[54] , which was decided before the advent of PAJA, the Court enunciated the test for Section 145 of the Labour Court reviews as:

> '.....is there a rational objective basis for justifying the connection made by the administrative decision maker between the material property available to him and the conclusion he or she eventually arrived at?'

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> '.....is there a rational objective basis for justifying the connection made by the administrative decision maker between the material property available to him and the conclusion he or she eventually arrived at?'

[62] In *Rustenburg Platinum Mines Ltd (Rustenburg section) v Commissioner for Conciliation, Mediation & Arbitration and Others*[56], the Labour Appeal Court stated that Section 33 of the Constitution extended the scope of review to introduce a requirement of rationality in the outcome of decisions. Section 33 of the Constitution states that:

> '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

[63] In *Nampak Corrugated Wadeville v Khoza*[57], the Labour Appeal Court held that:

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[54] 1999 (3) SA 304 (LAC);(1998)19 ILJ 1425 LAC; [1998] 11 BLLR 1093 (LAC).
[55] 1999 (3) SA 304 (LAC);(1998)19 ILJ 1425 LAC; [1998] 11 BLLR 1093 (LAC).
[56] 2007 (1) SA 576 (SCA); (2006) 27 ILJ 2076 (SCA); [2006]11 BLLR 1021 (SCA).
[57] (1999) 20 *ILJ* 578 (LAC); [1999]2 BLLR 108 LAC.

> '.....this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable'.

[64] An objective inquiry must take place during the arbitration proceedings and be reflected in the Arbitrator's award[58]. The award must be rationally connected to the information before the arbitrator and the reasons entered on the record. It must be established if the arbitrator properly exercised the powers given to him in compliance with Section 3 of the Labour Relations Act and the Constitution. The rational objective test set out in *Carephone supra*, must thus be applied.

[65] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[59], Navsa AJ held that a Commissioner conducting a CCMA arbitration performs and administrative function and that the Promotion of Administrative Justice Act does not apply to arbitration matters in terms of the Labour Relations Act. The majority of the Constitutional Court in this matter held that Section 145 of the LRA must be "suffused" with the test of reasonableness in Section 33 of the Constitution and accordingly the essential question to ask in determining if the arbitration award should be reviewed is the following:

> 'Is the award one that a reasonable decision maker could not reach?'

[66] In *Herholdt v Nedbank Ltd*[60], the Court found that the test applicable to Section 145 LRA reviews recognizes that dialectical and substantive reasonableness is intrinsically interlinked and that latent process irregularities carry the inherent risk of causing a possible unreasonable outcome. The Court must scrutinize the Commissioner's reasons to determine whether a latent irregularity occurred,

[58] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paragraph 25.
[59] 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC)
[60] (2012) 33 *ILJ* 1789 (LAC) .

being an irregularity in the mind of the Commissioner, which is only ascertainable from the Commissioner's reasons. On page 1802 AJA Murphy in paragraph 39 stated:-

> 'There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of the inquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different'.

[67] It is clear that the Arbitrator had jurisdiction to adjudicate this matter. I am accordingly satisfied that the Arbitrator considered all relevant factors in this matter. In *Goliath v Medscheme (Pty) Ltd*[61] the Court applied the 'grossly unreasonable/mala fide' test to measure if there was substantive fairness in an appointment. Without citing any authority, the court at 609-610 stated:

> 'Inevitably, in evaluating various potential candidates for a certain position, the management of an organization must exercise a discretion and form an impression of those candidates. Unavoidably this process is not a mechanical or a 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.'

And at 614:

> 'It is not unfair or unreasonable for an employer to appoint a person with a view not only to immediate needs, but also with a view to future development. To hold otherwise would place unreasonable restraints upon an employer's prerogative to

[61](1996) 5 BLLR 603(IC); (1996) 17 *ILJ* 760 (IC) .

manage its business. In the absence of tangible evidence demonstrating that the employer was mala fide in its decision, this court will not readily interfere with the exercise of that prerogative.'[62]

[68] The decision made is one that a reasonable decision-maker could reach. I accordingly, hold that the Application for review is dismissed.

Costs

[69] Both the parties requested costs, the Applicant requested attorney client costs and the Third Respondent punitive costs in terms of Section 162(3) of the LRA. It is clear that the Applicant sought postponements during the arbitration which increased the arbitration costs.

[70] I have considered the requests of the parties. The matter before the Court is not a typical matter where the Court will order costs on such scales. The costs must follow the respective suits.

Order

[71] In the result therefore, it is ordered as follows:-

1. That the Applicant's application for review in terms of Section 145 is dismissed;

2. The Applicant is ordered to pay the costs of these proceedings on a party and party scale;

3. The Costs order is to be taxed within 30 days from the date of the order.

[62] See also: *Arries v Commission for Conciliation, Mediation and Arbitration and* Others (2006) 27 ILJ 2324 (LC) para 17; *Ndlovu v Commission for Conciliation, mediation and Arbitration and* Others (2000) 21 ILJ 1653 at paras11-12 and *Van Rensburg v Northern Cape Provincial Administration* (1997) 18 ILJ 14231 CCMA.

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Fouché AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

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For the Respondent	Tomlinson Mnguni James Attorneys