REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA1/11

In the matter between:

APOLLO TYRES SOUTH AFRICA (PTY) LIMITED	**Appellant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER ALMEIRO DEYZEL	**Second Respondent**
KURCHID GOOLAM HOOSEN	**Third Respondent**

Heard: **31 August 2012**

Delivered: **21 February 2013**

Summary: What constitutes "benefit" by virtue of section 186 (2) of the LRA- does the early retirement scheme initiated by the appellant constitute a "benefit" as contemplated in section 186 (2) of the LRA? - is "benefit" limited only to an entitlement which arises *ex contractu or ex lege?*- "benefit" in terms of the LRA means existing advantages or privileges to which an employee is entitled *ex contractu or ex lege* or granted in terms of a policy or practice subject to the employer's discretion.- *Hospersa, GS4 Security* and *Scheepers* not followed- early retirement scheme constituted a "benefit". Appeal dismissed with costs.

Coram: Musi AJA, Patel JA and Hlophe AJA (concurring)

JUDGMENT

MUSI AJA

[1] This is an appeal against the judgment of the Labour Court (Cele J). This judgment deals with the question whether an employee who alleges that his/her employer committed an unfair labour practice in relation to the provision of benefits will only have a remedy if such employee can prove that he/she has a right or entitlement to the benefits *ex contractus* or *ex lege.*

[2] The third respondent, Hoosen, was employed by the appellant. The appellant initiated an early retirement scheme for some of its employees. Hoosen applied but was refused entry into the scheme. She resigned and whilst serving notice she referred an unfair labour practice dispute to the first respondent (CCMA). The second respondent, acting under the auspices of the CCMA, ruled in her favour. The appellant unsuccessfully took that decision on review. A subsequent application for leave to appeal was refused. Leave to appeal was however granted by this Court.

[3] Hoosen commenced her employment with the appellant on 1 April 1984. The appellant, a tyre manufacturing company, not being immune to the economic pressures that affected many companies decided, in order to stay afloat, to reduce the number of its employees in the wake of the lower demand for its products.

[4] Dr Ceneviz, the Chief Executive Officer of the appellant, addressed various groups of its employees during 2008 and informed them about the early retirement scheme that the appellant intended to initiate. Dr Ceneviz requested all interested employees to approach their immediate seniors. Subsequent to these meetings, a notice relating to the scheme was placed on the notice board at the appellant's premises. The said notice stated that the

early retirement scheme (the scheme) only applied to monthly paid staff between the ages of 46 and 59. It also stipulated that a successful applicant will receive two months additional pay and an *ex-gratia* payment computed on a sliding scale depending on the age of the applicant, for example a 46 year old applicant will receive R95 000.00 while a 49 year old applicant will get R80 000.00 and a 59 year old R10 000.00. It further stipulated that the normal retirement benefits would be applicable and that entry into the scheme is subject to management's discretion.

[5] Hoosen showed interest in the scheme and consulted Mr Ramphal, her immediate senior. He informed her that he will discuss the issue with his senior. Ramphal, as agreed with Hoosen, discussed the matter with Mr Mittal, the Financial Director. Ramphal informed Hoosen that Mittal had refused and that she may discuss the matter with him. She approached Mittal and asked him why she was refused entry into the scheme and he referred her to the human resources department. Neither Ramphal nor Mittal told her that an applicant had to be between 55 years and 59 years in order to qualify.

[6] She approached the Human Resources Manager, Mr Coller, who was allowed to retire early in terms of the scheme, who referred her to Mr Basil Smith. When she approached Smith he told her that there is nothing that he can do if she had been refused entry into the scheme.

[7] On 8 October 2008, Hoosen sent an electronic mail (e-mail) to Ramphal wherein she stated the following:

> 'As per my discussions with you, my intention is to leave at the end of October 2008 and to take the 1st of October (sic) up to the 7th as unpaid leave. If you do not agree with this, I will make my last working day the 15th of November. Please let me know whether I would qualify for early retirement as per the HR notice on Early Retirements. Please note that I have been in Dunlop's employment for 24 years and 7 months. I will provide a letter to you once we confirm the above.'

It is common cause that 1st October should read 1st November.

[8] On 10 October 2008, Ramphal sent an e-mail to Douw Van der Walt (Van der Walt), the Human Resources Director, and stated that:

> 'Kay is 49 years old and she has asked if she qualifies for the early retirement package. Kay will be leaving on 15 November.
>
> She would also like to know if she qualifies for a proportionate amount of her Bonus.
>
> Please advice your recommendation and clearance from India of the Retirement package. Further, I would like to recommend that Kay gets a proportion of her bonus (since it is almost year end).'

Van der Walt responded thus:

> 'I have checked policy and past practise (sic). You need to be employed at 31 December 2008, to qualify for the bonus...so no bonus unfortunately. On the early retirement, she needs to be 55 to qualify for this and that is what we have applied in the business up to date.'

[9] Ramphal discussed Hoosen's request with van der Walt and *inter alia* informed him that Hoosen's duties would be distributed amongst other employees including Ms Cindy Narismulu, who was later requested to shadow Hoosen to see what work she was doing.

[10] After Ramphal informed her that her application had been refused she approached van der Walt and asked him if she could appeal against the refusal because she was unaware of the age (55) requirement. He said he had already made up his mind because she will have to be replaced. She told him that the phrase "subject to management's discretion" could be abused and asked him if he would mind if she procured legal advice on the phrase. He said she can go and see an attorney or if she wants to refer the matter to the CCMA she is welcome but if 'she touched him he would get her for that afterwards'. After the conversation she submitted her resignation letter on 13 October 2008 to Ramphal who accepted the resignation on 14 October 2008. She was to leave the appellant's employment on 14 November 2008.

[11] On 29 October 2008, she sent an e-mail to Ramphal wherein she requested him to review her request to be allowed into the scheme. She requested him to furnish her with reasons should she still not be allowed into the scheme. On 30 October 2008, he sent her the correspondence between him and van der Walt referred to above.

[12] Hoosen referred an unfair labour practice dispute to the CCMA. The referral documents were served on 11 November 2008 and came to the appellant's attention on 12 November 2008. The following day she was requested to leave and a farewell party that was arranged for her was cancelled.

[13] Ramphal confirmed that Hoosen's functions were given to other employees. Narismulu was given approximately 50% of Hoosen's functions and a slight increase in salary. He further confirmed that Hoosen was not replaced with the result that there was one less employee in his department which translated into a cost saving for the appellant. He further confirmed that two other employees who were below 55 were allowed into the scheme because of ill health.

[14] At the arbitration the appellant argued that the CCMA has no jurisdiction to arbitrate the dispute because there was no employment relationship at the time that the dispute was referred to it. This argument was rejected with reference to *Velimor v University of Kwazulu- Natal and Others.*[1]

[15] The second point raised at the CCMA was that the early retirement package was not a benefit in respect of which the CCMA has jurisdiction and in any event that it was not unfair not to grant Hoosen the early retirement package. The second respondent ruled that the CCMA has jurisdiction to arbitrate the dispute. He referred to and relied *on Protekon (Pty) Ltd v CCMA and Others*[2] *and Department of Justice v CCMA and Others*[3] for his conclusion. On the issue of fairness, he found that it was unfair to deny Hoosen entry into the scheme. He ordered the appellant to pay Hoosen R123 637.22 which represents what she would have received had she been granted the early

[1] (2006) 27 ILJ 177 (LC) at paragraph 16.
[2] [2005] 7 BLLR 703 (LC).
[3] [2004] 4 BLLR 297 (LAC).

retirement benefit *viz* two month's salary (R43 637.22) plus the amount of the *ex gratia* payment based on her age (R80 000.00).

[16] The appellant took the matter on review and argued that the second respondent determined the jurisdiction issue incorrectly. It was also argued that the Hoosen had disqualified herself from participating in the scheme, by resigning. During the arbitration proceedings, the second respondent refused an application by the appellant for a postponement to call van der Walt as a witness. The appellant argued that the refusal was unfair. Lastly it was contended that the refusal to allow Hoosen to participate in the scheme was not unfair.

[17] The court *a quo* rejected all the appellant's arguments and dismissed the application. The court *a quo* however found that the second respondent's ruling that the scheme was a benefit that falls within the purview of section 186 (2) (a) of the Labour Relations Act 66 of 1995 (the Act)[4] is a decision that fell within the band of reasonableness. The court *a quo* further said that the 'debate about which of the decisions of this court is (sic) correct or is to be preferred on what constitutes benefits as is embarked upon by the applicant belongs to an appeal and not a review'. In my view, the court *a quo* misinterpreted the appellant's argument. The argument was that the CCMA does not have jurisdiction to adjudicate the dispute because the scheme is not a benefit as contemplated in Section 186 (2) (a) of the Act. The question is therefore not whether the second respondent acted reasonably or reached a conclusion that a reasonable commissioner could not reach but whether his finding is wrong or right. Put differently the enquiry ought to be whether the second respondent was correct in ruling that the CCMA had jurisdiction to adjudicate the dispute. See *City of Cape Town v SAMWU obo Jacobs and Others.*[5]

[4] See paragraph 19 below.
[5] [2009] 9 BLLR 882 (LAC) at paragraph 28. The appellant in its petition and before us was of the view that the true question is whether the cause of action was a good one or not depending primarily, on whether the early retirement package constituted a benefit. Even on this construction the reasonableness test would not be applicable.

[18] In its petition the appellant states categorically that it does not seek to challenge in any material respect the factual findings of the Commissioner. It further stated that:

> 'The principal issues on which the Applicant seeks leave to appeal is whether the early retirement scheme initiated by the Applicant and for which Hoosen applied and was refused entry, constituted a benefit as contemplated in Section 186 (2) of the Labour Relations Act, 1995 (the Act).'

The petition was granted on this basis and the matter was argued on this basis. That is the issue that falls to be determined by this Court.

[19] Section 186 (2) (a) of the Act reads as follows:

> 'Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-
>
> a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;'

[20] There is no shortage of judgments and academic writings wherein it is endeavoured to capture the essence of and define the word " *benefit*" in the context of section 186 (2)(a) of the Act.[6] What is clear from all the judgments and academic literature is that the word is, in this context, imprecise and defies definition.

[21] In *Schoeman and Another v Samsung Electronics SA (Pty) Ltd*, the court discussed the meaning of the word "*benefit*" which is defined as 'Advantage or an allowance to which a person is entitled to under insurance or social security...'[7]. It concluded that:

> 'Commission payable by the employer, forms part of the employee's salary. It is a *quid pro quo* for services rendered just as much as a salary or a wage. It

[6] See *SA Chemical Workers Union* v *Longmile United* (1999) 20 ILJ 244 (CCMA) and *IMATU obo Verster* v *Umhlathuze Municipality* [2011] 9 BLLR 882 (LC) footnote 7. Section 186(2)(a) replaced Item 2(1)(b) of schedule 7 of the Act.
[7] The concise Oxford Dictionary 6th ed: JB Sykes ed.

> is therefore part of the basic terms and conditions of employment. Remuneration is different from "benefits." A benefit is something extra, apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contract.'[8]

[22] In *Northern Cape Provincial Administration v Commissioner Hambidge NO and Others*, the court found that remuneration is an *essentialia* of a contract of employment and that other rights or advantages or benefits accruing to an employee by agreement are termed *naturalia* to distinguish them from the *essentialia* of the contract of employment.[9]

[23] In *Sithole v Nogwaza and Others*, the views expressed in *Hambidge NO and Longmile* were endorsed. The learned Judge went on to say that the benefit must have some monetary value for the recipient and be a cost to the employer. A benefit is, according to the Judge, something which arises out of a contract of employment.[10]

[24] These decisions were influenced by policy considerations in order to keep the distinction between disputes over rights and conflicts of interests pure and in separate compartments. This consideration is important because such a categorization and separation purport to give meaning to Section 65(1) (c) which proscribes industrial action over disputes that the parties can refer to arbitration or the Labour Court i.e. disputes over rights.[11] A wide definition of benefits would, so it is said, undermine the right to strike which is constitutionally entrenched.[12] In *Gaylard v Telkom SA Ltd* it is stated:

> 'If the term 'benefit' is so generously interpreted so as to include any advantage or right in terms of the employment contract, even wages, item 2 (1) (b) would all but preclude strikes and lock-outs. This was plainly not what

[8] [1997] 10 BLLR 1364 (LC) at 1368 G-H.
[9] (1999) 20 ILJ 1910 (LC) at paragraph 13.
[10] (1999) 20 ILJ 2710 (LC) at paragraph 47.
[11] Section 65(1)(c) reads as follows: 'No person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if the issue in dispute is one that a party has the right to refer to arbitration or in the Labour Court in terms of this Act".
[12] Section 23(2)(c) of the Constitution of the Republic of South Africa 1996 reads: 'Every worker has the right to strike.'

> the legislature had in mind. Therefore wages and salaries, in other words remuneration should be excluded from the term 'benefits.'[13]

[25] The distinction that the Courts sought to draw between salaries or wages as remuneration and benefits is not laudable but artificial and unsustainable. The definition of remuneration in the Act is wide enough to include wages, salaries and most, if not all extras or benefits. Remuneration is defined as:-

> 'Remuneration means any payment in money or in kind made or owing to any person in return for that person working for any other person, including the State, and remunerate has a corresponding meaning.'[14]

[26] Many benefits that are payment in kind form part of the *essentialia* of practically all contemporary employment contracts. Many extras are given to employees as a *quid pro quo* for services rendered just as much as a wage is given as a *quid pro quo* for services rendered. The cost to employer package has become, for many employees and employers, a standard contract of employment. PAK Le Roux points out that extras are often important issues during the negotiation of contracts of employment and the link between salaries or wages and benefits or extras is illustrated by the fact that contributions to medical aid schemes and pensions and provident schemes are often agreed to on the basis of a 'salary sacrifice' because this is a tax effective way of structuring an employment package.[15]

[27] PAK Le Roux further points out that it appears to be illogical to prevent employees and employers from embarking on a strike or lock-out on the issue of a pension scheme or medical aid scheme (which could have considerable value for an employee and substantial costs for an employer) and compelling them to submit such disputes to arbitration, while allowing them to strike over a commission which could form a relatively small part of the total "package" or a car allowance.

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[13] (1998) 19 ILJ 1624 (LC) at paragraph 22, See also *Hospersa and Another* v *Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) at para 9 and 10 with which I deal with at paragraphs 33 to 35 *infra*.

[14] Section 213 of the Act.

[15] PAK Le Roux: 'Preserving the Status Quo in Economic Disputes in Contemporary' *Labour Law* Vol 6 no 11 June 1997 par 93 at p97.

[28] In *Protekon (Pty) Ltd v CCMA and Others*, it was correctly, in my view, stated that the concern that a wide definition of 'benefit' might curtail the right to strike needs not persist. According to the learned Judge, one must look at the nature of the benefit dispute in order to decide whether it is a dispute that must be settled by way of industrial action or adjudication. This is so because disputes over the provision of benefits may fall into two categories: firstly where the dispute concerns a demand by employees that a benefit be granted or reinstated irrespective of whether the employer's conduct in not agreeing to grant or in removing the benefit is considered to be unfair. This kind of dispute can be settled by way of industrial action. Secondly, the dispute may concern the fairness of the employer's conduct. This kind of dispute may be settled by way of adjudication. This in my view also puts paid to Mr Pretorius' argument that the wide construction would delineate some items of remuneration as benefits thereby sacrificing clarity. The learned Judge also pointed out with reference to *Maritime Industries Trade Union of SA and Others v Transnet Ltd and Others*,[16] that there are many types of disputes in respect of which parties enjoy an election whether to resort to industrial action or to seek adjudication.

[29] Having decided that employees in disputes over benefits may choose to engage the employer in the collective bargaining arena rather than try to demonstrate unfairness in the sense contemplated in the unfair labour practice definition, the learned Judge stated that the Act does not appear to preclude employees from doing both at the same time. This might be true but it is clearly contrary to what was said in *Maritime Industries*[17] that:

> 'However, if a dispute about a unilateral change of conditions of employment can properly fall within the provisions of item 2 (1) (b) of Schedule 7, it will nevertheless be arbitrable. "Strikeable" and arbitrable disputes do not necessarily divide into watertight compartments. Although in relation to dispute resolution the Act contemplates the separation of disputes into those that are resolved through arbitration, those that are resolved through adjudication and those that are resolved through power-play, there are

[16] (2002) 23 ILJ 2213 (LAC).
[17] At paragraph 106.

disputes in respect of which the Act provides a choice between power-play on the one hand, and arbitration on the other as a means for their resolution.'

[30] In *Monyela and Others v Bruce Jacobs t/a LV Construction,* Zondo J (as he then was) pointed out that a dispute about a unilateral change of an employee's terms and conditions of employment is a right dispute in respect of which a strike would be permissible under the LRA because it is not hit by the provisions of section 65 (1)(c) of the LRA.[18] So, although the Act seems not to preclude employees from engaging the employer in the collective bargaining/ industrial action arena and the arbitration/adjudication forum, it is clear that the whole scheme of the Act as stated in *Maritime Industries* is to give employees an election. Having employees involved in strike action and resorting to arbitration or adjudication at the same time over the same dispute would throw the whole system in disarray and create unnecessary confusion and uncertainty.

[31] Mr Pretorius argued that an employee may not rely on the provisions of section 186(2)(a) to create a right that does not exist and that the section is intended to give an employee recourse in cases of unfair conduct in respect of an existing right. According to him, fairness and clarity dictate that unfair conduct should be impeachable only in relation to existing rights. His submission was that *Hospersa* provides clarity, it respects the rights/interest divide which permeates the Act, it avoids a situation where new rights may be created by recourse to the unfair labour practice jurisdiction and it successfully avoids a duplication of remedies.

[32] Mr Purdon, on the other hand, argued that section 186(2)(a) was meant to come to the rescue of employees such as Hoosen who have no other remedy in the LRA or the common law. According to him, if the term benefit is construed wider than mere contractual entitlements it will be in sync with the purpose and effect of the residual unfair labour practice jurisdiction. He argued that *Hospersa* was wrongly decided.

[33] In *Hospersa* it was said that:

[18] (1998) 19 ILJ 75 (LC) at 85. He also refers to other such rights disputes that may give rise to a lawful strike.

'[9] It appears to me that the legislature did not seek to facilitate, through item 2(1)(b) , the creation of an entitlement to a benefit which an employee otherwise does not have. I do not think that item 2(1)(b) was ever intended to be used by an employee, who believes that he or she ought to enjoy certain benefits which the employer is not willing to give him or her, to create an entitlement to such benefits through arbitration in terms of item 2(1)(b) . It simply sought to bring under the residual unfair labour practice jurisdiction disputes about benefits to which an employee is entitled ex contractu (by virtue of the contract of employment or a collective agreement) or ex lege (the Public Service Act or any other applicable Act). The appropriate example of such benefits cited by Mr Tip is that of an employer who has established a provident fund for the benefit of his employees and who for one reason or another decides to deny his employees the benefits of such a provident fund or to terminate some employees' membership or to deny membership to new employees notwithstanding the fact that it is a condition of their employment that they would automatically qualify for membership and the benefits flowing from it. In those circumstances an employee would have a right to the benefits in question which she or he would be entitled to enforce in terms of item 2(1)(b) . The dispute relating to what the second appellant claims seems to be a dispute of interest whereas item 2(1)(b) was designed only for disputes of right. As I shall presently demonstrate the second appellant has not established any right to the acting allowance.

[10] A dispute of interest should be dealt with in terms of the collective bargaining structures and is therefore not arbitrable. A dispute of interest should not be allowed to be arbitrated in terms of item 2(1)(b) read with item 3(4)(b) under the pretext that it is a dispute of right. To do so would possibly result in each individual employee theoretically cloaking himself or herself with precisely the same description of the dispute that is the true subject-matter of collective bargaining. And if such an individual employee could legitimately insist on his or her particular case being separately adjudicated, whether through arbitration or otherwise, the result would inevitably be a fundamental subversion of the collective bargaining process itself. (See by way of example *Public Servants Association & others v Department of Correctional Services* (1998) 19 ILJ 1655 (CCMA) at 1669C-E and 1674D-E.) If individuals can properly secure orders that have the effect of determining the evaluation of differing interests on the merits thereof, then the distinction

between disputes of interest and disputes of right would be distorted and the collective bargaining process self-evidently would become undermined. The following extract as well as the definition not only explain the meaning of a dispute of interest and a dispute of right, but also highlights the correct procedure to be followed in their resolution.

[11] "Broadly speaking, disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (or ''economic disputes') concern the creation of fresh rights, such as higher wages, modification of existing collective agreements, etc. Collective bargaining, mediation and, as a last resort, peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interests, while adjudication is normally regarded as an J appropriate method of resolving disputes of right." Rycroft & Jordaan A Guide to *SA Labour Law* (Juta 1992) at 169. This is consistent with what I have said above.'

[34] *Hospersa* has been followed in numerous judgments of this Court and the Labour Court. It has been criticised by this Court. It was not followed by the Labour Court in at least two judgments.

[35] *Hospersa* was cited with approval *in Gauteng Provinsiale Administrasie v Scheepers and Others.*[19] This matter was decided based on the provisions of the Public Service Act 103 of 1994 and the Public Service Labour Relations Act 105 of 1994 (PSLRA) which did not provide for the right which Scheepers wanted to enforce. The court rejected the argument that an unfair labour practice included a broad general "right" not to be unfairly treated because all practices which were unfair would, under the PSLRA, have qualified as "unfair labour practices". The court found that the PSLRA makes it clear that for an unfair labour practice to be justiciable, it had to involve a dispute of right. Importantly, however, the Court said:

'Moreover, unfair labour practice, as traditionally understood, involved the infringement of a right, that the right (one thinks for example of the entitlement

[19] (2000) 7 BLLR 756 (LAC) at paragraph 6. Mr Pretorius did not refer us to this matter and did not rely on it.

> of an employee to be heard before dismissal for misconduct) was judicially created pursuant to the powers given to the Industrial Court by statute, and not by contract or legislation did not make it less of a right.'[20]

The Court clearly recognised that the unfair labour practice dispensation does create rights. This is a significant shift from the notion espoused in *Hospersa* that the right to a benefit must be derived from statute, contract or a collective agreement.

[36] In *GS4 Security Services (SA) (Pty) Ltd v NASGAWU and Others*, an unreported judgment of this Court which was delivered on 26 November 2009, after the *Department of Justice v CCMA and Others* matter, the approach set out in *Hospersa was* unconditionally accepted.[21] The Court quoted paragraphs 9 and 10 of *Hospersa* and concluded as follows:

> 'My understanding of what Mogoeng AJA is *inter alia* saying is that, in order for respondents to bring a successful claim under item 2(1)(b) of Schedule 7 they have to show that they have a right arising ex contractu or ex lege. It is only then that having established the right, that the commissioner would have jurisdiction to entertain the dispute as a dispute of right.'

[37] It is unfortunate that the Court in *GS4 Security Services* did not consider what was said in both the majority and minority judgments in the *Department of Justice v CCMA* matter. In both judgments it is categorically stated that item 2(1)(b) creates a right not to be treated unfairly in relation to promotion, demotion, disciplinary action short of dismissal, training and the provision of benefits.[22]

[38] The proposition that the unfair labour practice dispensation created rights as explained in *Scheepers* was also not considered by the court in *GS4 Security Services.* The unreserved acceptance of *Hospersa* by this Court in *GS4 Security Services* to the exclusion of other cases where a different view was enunciated renders it difficult for me to embrace the judgment or to endorse it in the wake of the criticism to which the *Hospersa* judgment was subjected, as

[20] At paragraph 11.
[21] Unreported judgment case no DA3/08.
[22] See paragraphs 53 and 54 of majority and paragraph 17 of minority judgment.

I will demonstrate presently. *GS4 Security Services* is therefore susceptible to and deserving of the same criticism visited upon *Hospersa.*

[39] In *Eskom v Marshal and Others,* the Labour Court reluctantly followed *Hospersa.*[23] The learned Judge opined that employees might have a justiciable legitimate expectation to a substantive right but did not make a definitive finding on the issue because *Hospersa* was binding on him. This case represents an attempt to break free from the rigid approach which *Hospersa* represented**.** Our law relating to the doctrine of legitimate expectation does however not support the notion that substantive rights may be acquired on the strength of the doctrine. One can, at this stage of our jurisprudential evolution, only acquire procedural rights based on the doctrine of legitimate expectation.[24]

[40] In *Department of Justice v CCMA,* the issue of whether an unfair labour practice is confined to disputes of right created *ex contractu* or *ex lege* only was raised. The majority said the following:

> 'Counsel for the Department also submitted that a dispute such as the one in the present matter was a dispute of interest and not a dispute of right and that item 2(1)(b) contemplated disputes of right and not disputes of interest. The right he was referring to is a right ex contractu or ex lege. He submitted that an unfair labour practice is confined to disputes of right created ex contractu or ex lege. The answer to this argument is simply that item 2 of Schedule 7 is one of the statutory provisions that seek to give content to the constitutional right to fair labour practices which is entrenched in the Constitution. It creates a statutory right not to be subjected to an unfair labour practice that takes the form of conduct spelt out therein. Item 2(1)(a) confers on both an existing employee and an applicant for employment a right not to be subjected to an unfair labour practice taking the form of unfair discrimination. Item 2(1)(b) confers on an existing employee a right not to be subjected to an unfair labour practice that takes the form of conduct relating to promotion, demotion, training of an employee, disciplinary action short of dismissal and the provision of benefits to an employee.

[23] (2002) 23 ILJ 2251 (LC).
[24] See *Mayer* v *Iscor Pension Fund* (2003) 5 BLLR 439 (SCA) at paragraphs 25-28.

> The obligation that item 2(1)(a) places on an employer is an obligation not to act unfairly towards an employee and an applicant for employment by way of conduct constituting unfair discrimination. The obligation that item 2(1)(b) places on an employer is not to act unfairly towards an existing employee in relation to promotion, demotion, disciplinary action short of dismissal, the training of an employee and the provision of benefits to an employee. The right that an applicant for employment and an employee have under item 2(1)(a) and the right that an employee has under item 2(1)(b) are rights conferred on them ex lege. For that reason a dispute concerning whether the conduct of an employer relating to promotion is an unfair labour practice is a dispute of right and not a dispute of interest. Accordingly I am unable to uphold the contention by Counsel for the Department in this regard'.[25]

[41] Mr Pretorius argued that the majority was guilty of circular reasoning. I disagree. It is also clear from the reasoning in the majority and minority judgment and the judgment of *Scheepers* that the unfair labour practice dispensation creates rights and that an employee has an *ex lege* right created by section 186 (2)(a) not to be treated unfairly in relation to promotion, demotion, training and the provision of benefits.

[42] Section 23(1) of the Constitution provides that: 'everyone has the right to fair labour practices'. It has been said that our Constitution is unique in constitutionalising the right to fair labour practices and that the concept is incapable of precise definition. It was further stated that:

> 'The concept of fair labour practice must be given content by the legislature and thereafter left to garner meaning, in the first instance, from the decisions of the specialist tribunals including the Labour Appeal Court and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to section 23(1).'[26]

This is exactly what was done in *Department of Justice v CCMA.* The majority judgment did not overrule the assertion in *Hospersa* that the source of a

[25] See paragraphs 53 and 54. The majority judgment was written by Zondo JP with Mlambo AJA concurring.
[26] per Ngcobo J as he then was in *NEHAWU v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) at paragraph34.

benefit must be found to exist *ex contractu* or *ex lege.* Mr Pretorius argued, correctly in my view, that the *Department of Justice* matter still begs the question as to whether a benefit is confined to a contractual benefit or not.

[43] The minority judgment broke ranks with *Hospersa* and found its assertion that the entitlement to a benefit must be grounded in contract or legislation to be wrong. Goldstein AJA, in his minority judgment *in Department of Justice v CCMA*, said the following:

> 'Whatever the position it seems to me, respectfully that the view expressed in paragraph [9] that item 2 (1) (b) provided only for rights which arose *ex contractu or ex lege*, is clearly wrong. If that were so, the provision would have been redundant since such rights would have been enforceable in the absence of item 2 (1) (b). It is significant that item 3 (4) (b) expressly provided for a dispute referred to, inter alia, in item 2 (1) (b) to be resolved through arbitration. It is significant too that the introductory words in item 2 (1) and the cardinal words in item 2 (1) (b) concerned on unfair labour practise and unfair conduct. Just as the LRA provides for disputes arising from unfair dismissals in respect of which there are no contractual remedies or remedies at common law, to be resolved by arbitration, so was item 2 (1) (b) designed for situations where neither the contract of employment nor the common law provided an employee with a remedy.'[27]

[44] This issue, whether the benefit must be an entitlement which arises *ex contractu or ex lege* was considered by the Labour Court in *Protekon (Pty) Ltd v CCMA and Others.* The Labour Court correctly stated that *Hospersa* is authority for the view that the unfair labour practice jurisdiction cannot be used to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided for by the employer. The Labour Court then stated that it does not follow from this that an employee may have recourse to the CCMA's unfair labour practice jurisdiction only in circumstances in which he/she has a cause of action in contract law.[28]

[27] See paragraph 14.
[28] At paragraphs 32 and 33.

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

[46] I also agree, with qualification, with the Labour Court's conclusion that there are at least two instances of employer conduct relating to the provision of benefits that may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.

[47] The first instance is in sync with the *Hospersa* approach. The second instance calls for qualification. Mr. Pretorius argued that the effect of the judgment is that there must be contractual terms even in instances where the employer exercises a discretion. If that is indeed what the Labour Court meant, then I cannot agree with it. I am of the view that the Labour Court used the words "contractual terms" loosely. It did not mean that the source of the discretion must be found in a contract. It is in my view clear that if one has regard to the context of the whole judgment and the Labour Court's conclusion that it actually meant when the employer exercises a discretion under the terms of the scheme conferring the benefit. Therefore even where the employer enjoys a discretion in terms of a policy or practice relating to the provision of benefits such conduct will be subject to scrutiny, by the CCMA, in terms of section 186 (2) (a).

[48] The facts of this matter clearly illustrate that the *Hospersa* approach, that the benefit must be an entitlement that is rooted in contract or legislation, is untenable. Hoosen had, in terms of her employment contract, a right to retirement benefits. The contract did not make provision for a right to voluntary early retirement benefits. She would therefore, on the *Hospersa* approach, be able to challenge, by way of arbitration, any unfairness relating to the ordinary retirement benefits. When the appellant decided to accelerate the existing contractual benefits and retained a discretion to grant the accelerated benefits, the benefits would strangely morph into something less than benefits because according to the *Hospersa* approach she does not have a contractual right to the accelerated retirement benefits. The employer would then have a license to act with impunity. She would thus not have recourse in the civil courts, because no contract came into being, nor would she have a remedy in terms of section 186 (2) (a) of the Act to challenge the patent unfairness because there is no underlying contractual right to the benefits. Being a single employee she would in accordance with *Schoeman v Samsung* not have the right to strike.[29] Clearly the notion that the benefit must be based on an *ex contractu or ex lege* entitlement would, in a case like this, render the unfair labour practice jurisdiction sterile.

[49] In *South Africa Post Office Ltd v CCMA and Others***,** the Labour Court found the reasoning in *IMATU* persuasive but considered itself bound by the authority of the Labour Appeal Court with reference to *Hospersa, Scheepers and GS4 Security Services.*[30]

[50] In *IMATU obo Venter v Umhlathuze Municipality,* the Labour Court followed the *Protekon* approach. It then concluded that:

> 'The more plausible interpretation is that the term "benefits" was intended to refer to advantages conferred on employees which did not originate from

[29] *Supra* at 1367. See however the persuasive argument of Grogan to the effect that a single employee has the right to strike. Unfair conduct the meaning of "benefits" Employment Law Journal March 1998 page 11 at p12.
[30] (C293/2011) [2012] ZALCCT 23 (18 June 2012) at paragraph 29.

> contractual or statutory entitlements, but which have been granted at the employer's discretion.'[31]

It seems to me that the court in *IMATU* was concerned that if benefits include a statutory or contractual right or entitlement, the right to strike may be curtailed. As pointed out above employees will have an election to strike or go the arbitration/adjudication route in respect of many rights disputes. In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu or ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in section 186 (2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion. In as far as *Hospersa, GS4 Security* and *Scheepers* postulate a different approach they are, with respect, wrong.

[51] This approach will also put paid to the anomaly created by *Hospersa.* An employee who wants to use the unfair labour practice jurisdiction in section 186 (2) (a) relating to promotion or training does not have to show that he or she has a right to promotion or training in order to have a remedy when the fairness of the employer's conduct relating to such promotion (or non-promotion) or training is challenged. On the other hand where an employee wants to use the same remedy in relation to the provision of benefits such an employee has to show that he or she has a right or entitlement sourced in contract or statute to such benefit.

[52] The early retirement benefit in *casu* was initiated by the employer and offered to all monthly paid employers between the ages of 46 and 59. It is not in dispute that Hoosen was 49 years old and was paid a monthly wage. It is common cause that she did not have a contractual entitlement to the early retirement benefits and that the benefits were to be granted at the employer's discretion. The issue that remains to be considered is whether that discretion was exercised unfairly.

[31] At para 21.

[53] It has been said that unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.[32]

[54] When the CEO addressed the employees, only two criteria *viz*: age and being a monthly paid employee were mentioned as criteria for eligibility subject to management's discretion. The notice was also to the same effect.

[55] When Hoosen enquired from and applied *via* Ramphal he did not know of any other criteria except the two mentioned in the preceding paragraph. When Hoosen spoke to Mittal and later to Coller neither of them told her about any disqualifying factor that made her ineligible.

[56] It is only when Ramphal escalated her application to Van der Walt that the first disqualifying factor, i.e. that she had to be between 55 years and 59 years old to qualify, was mentioned. When she enquired why two employees who werse below 55 were allowed to go on early retirement she was told that in order for an employee under 55 to qualify that employee must also suffer from ill-health.

[57] When she approached Van der Walt he told her that her application was refused because she will have to be replaced. This was clearly not true because Ramphal told him that her duties and responsibilities will be distributed amongst other employees. It is common cause that this was indeed done. It is also common cause that she was not replaced.

[58] Mr Pretorius argued that her post was not redundant because Cindy Narismulu had to do most of her work after she resigned. That is beside the point. The question is whether her position was retained in the same form and shape with the same duties and responsibilities. The answer to this question is clearly in the negative. When Narismulu took over Hoosen's position it had far less duties and responsibilities because the other duties and responsibilities were distributed amongst other employees. Her post, as it was when she was in the applicant's employ, was no more. Her post was clearly

[32] Du Toit et al: *The Labour Relations Act* of 1995 2nd ed at 443.

redundant and she was not replaced. This translated into a saving for the appellant.

[59] It is clear that the appellant kept on shifting the goal posts. This was in all probability done in order to make sure that she is given an "acceptable" reason why she does not qualify for the scheme. It is clear that there is no acceptable, fair or rational reason why she was not allowed to participate in the scheme. The employer did not exercise its discretion fairly. It is significant that another seemingly healthy employee who was under 55 also applied. Whether he was allowed entry into the scheme is irrelevant. The fact is he too did not know about the further requirements that he had to suffer from ill-health if he is under 55 and that there must be no need to replace him if he wants to be admitted into the scheme.

[60] In my view, Hoosen qualified to participate in the scheme and was unfairly disallowed to participate therein. In my judgment the appellant committed an unfair labour practice by not allowing her to go on early retirement.

[61] The quantum of the award of the second respondent is not in dispute. The only issue that remains to be considered is costs.

[62] The appellant acted in a deplorable manner towards Hoosen. When she approached Van der Walt and asked him whether she could get a legal opinion on the issue of managerial discretion he threatened her, no he in fact intimidated her. When the referral documents were served on the appellant, she was told to leave with immediate effect. So despicable was its conduct that a farewell party that was arranged for her was cancelled. That is not the way to treat an employee who has, by all accounts, given more than 24 years of dedicated and excellent service. The appellant ought to be mulcted in costs.

[63] I accordingly make the following order:

(a) The appeal is dismissed.

(b) The appellant is ordered to pay the costs of the appeal.

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CJ MUSI AJA

I agree

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Patel JA

I agree

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Hlophe AJA

APPEARANCES:

FOR THE APPELLANT: Mr Pretorius SC

Instructed by Farrel Inc Attorneys (Durban)

FOR THE FOURTH RESPONDENT: Brett Purdon Attorneys (Durban)