



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: JR 2209/13

In the matter between:

N M THISO & 6 OTHERS

Applicants

and

T MOODLEY N.O.

First respondent

CCMA

Second respondent

RAND WATER

Third respondent

Heard: 6 November 2014

Delivered: 2 December 2014

Summary: Review – ULP – CCMA jurisdiction – LRA s 186(2)(a).

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicants referred an unfair labour practice dispute to the CCMA¹ in terms of s 186(2)(a) of the LRA.² The commissioner³ ruled that the CCMA did not have jurisdiction because the dispute, involving the regrading of the applicants' posts, concerns a "matter of mutual interest" that should be resolved through collective bargaining and that the CCMA did not have jurisdiction to resolve it through arbitration as an unfair labour practice in terms of s 186(2)(a). The applicants seek to review that ruling.

Background facts

- [2] The seven applicants are all employed by the third respondent, Rand Water, as "process controllers – desludging" in job category A3. A job evaluation committee recommended that the position be upgraded to A2. Rand Water appealed successfully with the result that the jobs remained on A3.

The referral and the ruling

- [3] The applicants were unhappy with this outcome and referred an unfair labour practice dispute to the CCMA in terms of s 186(2)(a) of the LRA. Although they described the dispute as one concerning promotion, both parties' representatives in the hearing before me accepted that it related to benefits. The relief that the applicants sought at the CCMA was that their jobs be upgraded from A3 to A1.
- [4] The arbitrator had to determine whether the CCMA had jurisdiction to determine the unfair labour practice dispute. He ruled that it did not. He reasoned as follows:

"It is common cause that the dispute concerns the grading/upgrading of the applicants' positions. The applicants seek an upward grading of their positions from job category A3 to A1.

¹ The Commission for Conciliation, Mediation and Arbitration (the second respondent).

² The Labour Relations Act 66 of 1995.

³ Commissioner T Moodley (the first respondent).

The crisp issue for determination is whether the matter concerns a dispute of right which falls to be determined by means of arbitration or whether the dispute should be dealt with through the collective bargaining process between the parties.

In determining whether the grading of a post is a dispute of right or interest, the Labour Court in *Polokwane Local Municipality v SALGBC & Others* [2008] 8 BLLR 783 (LC) held as follows:

'In failing to distinguish between a dispute of right and of interest in as far as the issue of upgrading of the position from level 8 to 6, the commissioner committed a fundamental error in law. The grading or evaluation of a post is a matter of mutual interest, there is no agreement between the parties that provides otherwise.'

A dispute concerning regarding of a post thus does not fall within the provisions of section 186(2)(a).

The CCMA has no jurisdiction to arbitrate the dispute."

[5] It is that ruling that the applicants seek to review.

The appropriate test

[6] Both messrs *Maseko* and *Mofokeng* assumed that the *Sidumo*⁴ test applies, i.e. whether the decision reached by the arbitrator is so unreasonable that no reasonable arbitrator could have come to the same conclusion. That is not correct. As the Labour Appeal Court pointed out in *Apollo Tyres*⁵, the question that this Court must answer, sitting on review of a jurisdictional ruling, is simply whether the arbitrator was right or wrong.

Condonation

[7] The application is about one month and fifteen days late. The main reason is that the individual applicants did not have money to instruct attorneys. They are not supported by a trade union. Given the view I have taken of their prospects of success, I deemed it in the interests of justice to grant

⁴ *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

⁵ *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC) para [17]. See also *SARPA v SA Rugby (Pty) Ltd* (2008) 29 ILJ 2218 (LAC); *South African Post Office v CCMA & Ors* [2011] 11 BLLR 1183 (LC); *SARS v Ntshintshi* (2014) 35 ILJ 255 (LC), [2014] 9 BLLR 923 (LC) para [33].

condonation, having considered and weighed up the factors set out in *Melane v Santam Insurance Co Ltd*.⁶

Evaluation

- [8] Although the applicants framed their dispute as one concerning the failure to promote, in oral argument both counsel characterised it as an unfair labour practice dispute relating to 'benefits'. It is common cause that, should the job be upgraded, the applicants will be entitled to better benefits.
- [9] When the arbitrator heard the review on 15 July 2013, and when he referred to Labour Court authority dating back to 2008 in reaching his conclusion, it appears that he was not referred to the recent authority of the Labour Appeal Court in *Apollo Tyres*⁷. It was, no doubt, eminently reasonable for the arbitrator to refer to – and to consider himself bound – by the Labour Court authority in *Polokwane Local Municipality*⁸. But the question is whether that is still good law in the light of *Apollo Tyres*.
- [10] Mr Mofokeng, for Rand Water, submitted that it was. But in support of his argument, he cited two cases: *HOSPERSA v Northern Cape Provincial Administration*⁹, to which he referred as the "leading case"; and *G4S Security v NASGAWU*.¹⁰ But both of those cases were unequivocally overruled and held to be "clearly wrong" by the LAC in *Apollo Tyres*.
- [11] In *Apollo Tyres*, the LAC held that a 'benefit' for the purposes of section 186(2)(a) is not limited to an entitlement that arises *ex contractu* or *ex lege*. Musi AJA held:¹¹

"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

⁶ 1962 (4) SA 531 (A).

⁷ *Supra*. That judgment was handed down on 21 February 2013 but only reported after July 2013.

⁸ *Supra*.

⁹ (2000) 21 ILJ 1066 (LAC).

¹⁰ Unreported case (DA 3/08), 26 November 2009.

¹¹ *Apollo Tyres (supra)* para [50].

been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgement '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. Insofar as *Hospersa*, *G4S* and *Scheepers* postulate a different approach they are, with respect, wrong."

[12] This Court followed a similar approach in *SARS v Ntshinshi*.¹²

[13] Similarly, in *Trans-Caledon Tunnel Authority v CCMA*¹³ the court held:

"As pointed out in the *Protekon* and *IMATU* judgments, there would be no need to create a special equitable jurisdiction to determine the unfair labour practices specified in s 186(2) in order to protect employees from unlawful employer conduct in breach of a legal or contractual obligation. This could not reasonably have been the intent of the section. A legally enforceable benefit can be enforced by the employee in the usual way in the civil courts or Labour Court in terms of s 77(3) of the BCEA. The protection afforded by the section is also not couched in the form of enforcement of benefits to which the employee is contractually entitled. The nature of the protection afforded by the section is against 'unfair employer conduct relating to the provision of benefits', a quite different concept from unlawful employer conduct in respect of which ample civil remedies already exist in our law. In creating an equitable jurisdiction based on fairness, the legislature could only have had in mind the redressing of employer conduct which, although lawful in that it does not involve a breach of any agreement or law, is found to be substantively or procedurally unfair to the employee. As pointed out in *Protekon* and *IMATU*, the obvious situation that comes to mind here, is one involving the lawful exercise of a discretion by the employer against awarding the benefit or promotion sought, lawful inasmuch as the employee does not enjoy a legally enforceable right *ex contractu* or *ex lege* to the benefit or promotion. The conclusion is that the ULP jurisdiction created by the section, being a special one founded in equity or fairness and not legal enforceability, is aimed precisely at addressing the situation where the employee does not necessarily enjoy a legally enforceable right to the benefit, but where the employer's refusal to confer it is found by the arbitrator to be unfair."

¹² *South African Revenue Services v Ntshinshi & ors* (2014) 35 *ILJ* 255 (LC); [2013] 9 *BLLR* 923 (LC).

¹³ (2013) 34 *ILJ* 2643 (LC) para [20].

[14] The parties agreed that the employer in this case had a discretion whether to upgrade the positions. If that is so, the arbitrator is correct that the applicants could strike in support of that demand. It is a matter of mutual interest. But where he is wrong, is in finding that that option excludes arbitration of an unfair labour practice dispute in terms of s 186(2)(a).

[15] As the LAC clarified in *Apollo Tyres*¹⁴:

“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.

...

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.”

[16] In this case, it may be that the applicants could have elected to follow the collective bargaining route. But they elected to refer an unfair dismissal dispute to the CCMA in terms of s 186(2)(a) of the LRA. It is clear from the *dictum* in *Apollo Tyres* that they were entitled to do so.

Conclusion

[17] The CCMA does have jurisdiction to arbitrate the unfair labour practice dispute that the applicants referred in terms of s 186(2)(a) of the LRA. The commissioner’s award to the contrary must be reviewed and set aside.

[18] With regard to costs, I take into account that the applicants are still employed by Rand Water and that they have an ongoing relationship. I also take into account that Rand Water was brought to court to defend an

¹⁴ *Supra* paras [50] - [51].

arbitration award in its favour. On the other hand, the applicants have been successful. They are individual employees at a relatively junior level. They do not have deep pockets. They are not supported by a trade union. Had Rand Water considered the authority in *Apollo Tyres*, overruling the authorities that its counsel relied upon, it may have reconsidered its opposition. In law and fairness, I deem it appropriate for the unsuccessful party to pay the applicants' costs.

Order

[19] I therefore make the following order:

19.1 The jurisdictional ruling of 26 July 2013 under case number GAJB 6010-12 is reviewed and set aside.

19.2 It is replaced with a ruling that the CCMA does have jurisdiction to arbitrate the unfair labour practice dispute in terms of s 186(2)(a) of the LRA on its merits.

19.3 The third respondent is ordered to pay the applicants' costs.

A J Steenkamp
Judge

APPEARANCES

APPLICANT: I D Maseko
Instructed by Johan Gouws, Pretoria.

THIRD RESPONDENT: T Mofokeng
Instructed by Mokonyane Inc, Johannesburg.