REPUBLIC OF SOUTH AFRICA

Not reportable
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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 377/2012

In the matter between:

RAINBOW FARMS (PTY) LTD	**Applicant**
and	
CCMA	**First Respondent**
COMMISSIONER D I K WILSON	**Second Respondent**
SOLIDARITY	**Third Respondent**
MOGAMAT SALIE & 4 OTHERS	**Fourth and further respondents**

Heard: **27 May 2015**

Delivered: **29 May 2015**

Summary: Review – jurisdiction – not bound by description in referral to conciliation. LRA s 186 – ULP relating to benefits. Conclusion on merits not so unreasonable that no other arbitrator could have reached same conclusion. Application dismissed.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Rainbow Farms, applied to have an award by the second respondent (the commissioner) reviewed and set aside. The commissioner found that the process leading to five employees not receiving a bonus was an unfair labour practice. He ordered the company to pay each of them compensation equivalent to one month's wages.

Background facts

[2] The five employees (who are cited as the fourth and further respondents, represented by their trade union, Solidarity) are employed as halaal slaughters. Each time they slaughter a chicken, they have to utter the words, "Bismillah Allah u Akbar". The company pays discretionary bonuses. In 2011 the five did not receive bonuses as they were rated below 3 out of 5 points awarded by the company.

[3] The employees referred a dispute to the CCMA. They indicated that the dispute is about an unfair labour practice , but in summarising the facts of the dispute, they said:

> "[The] employer engaged in an arbitrary discriminatory employment practice in its selection of which employees receive annual and/or performance bonuses. [The employer] unfairly and unlawfully discriminated and/or employ [*sic*] discriminatory employment practices against the applicant employees on one or more of the prohibited listed grounds, especially on the grounds of nepotism, alternatively arbitrary grounds."

[4] Conciliation was unsuccessful. The employees, now represented by Solidarity, referred the dispute to arbitration. They described the issue in dispute as follows:

> "Respondent [the employer] committed an unfair labour practice relating to benefits. Respondent arbitrarily and unfairly decided not to award the applicants performance bonuses."

[5] At the arbitration, the company raised a point *in limine* that the CCMA did not have jurisdiction. Its main argument was that the employees had

referred an unfair discrimination dispute and, failing conciliation, it had to be referred to the Labour Court for adjudication. The arbitrator held that the real dispute was about an unfair labour practice and that the employees had abandoned any reliance on an allegation of discrimination. He held that the CCMA did have jurisdiction.

[6] The arbitrator then dealt with the company's argument that the awarding of a bonus was not a 'benefit' and could not be arbitrated as an unfair labour practice dispute. He referred to *IMATU obo Verster v Umhlatuze Municipality*[1] and ruled that the discretionary bonus was an advantage granted at the employer's discretion, and thus a 'benefit', referring to the following *dictum*:

> "The more plausible interpretation is that the term 'benefits' was intended to refer to advantages conferred on employees which did not originate from contractual or statutory entitlements, but which have been granted at the employer's discretion."

[7] Turning to the merits, the arbitrator summarised the evidence of the five employees, Messrs Mogamat Salie; Gilmee Adams; Abdoeragmaan Frantz; Omarsharif Frantz and Yunus Johnson. He also considered the evidence of the two witnesses called by the company, Mr Rushdie Solomon (the team leader in charge of the slaughterers); and Mr Chris Esterhuysen (the processing manager to whom Solomon reported).

[8] The arbitrator considered the process envisaged by the company's "talent management toolkit" setting out its performance management system. He came to the conclusion that the process envisaged by this document was not followed in the case of these five employees.

[9] The arbitrator came to the following conclusion:

> "I'm satisfied that the process conducted by the respondent [i.e. the company] leading to the applicants [the employees] not receiving a performance bonus was seriously flawed and amounted to unfair conduct by the employer relating to the provision of benefits to the employees. In other words, the respondent has committed an unfair labour practice.

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[1] [2011] 9 BLLR 882 (LC) para 30.

> I note that I have only dealt with the process followed by the respondent. I am in no position to say whether the ratings given to the applicants were correct or not, and if incorrect, what the correct writing should have been. I'm therefore unable to say whether the applicants should have received a bonus if the process had been correctly followed.
>
> I am entitled to award compensation to the applicants for the commission of the unfair labour practice, and I am of the opinion that compensation in the sum of one month's pay would be appropriate."

[10] The arbitrator ordered the company to pay each of the employees one month's wages, subject to standard PAYE deductions.

Evaluation / Analysis

[11] The applicant firstly takes issue with the commissioner's finding on jurisdiction. Alternatively, it argued that the commissioner misconceived the nature of the enquiry; and that he reached an unreasonable conclusion.

Jurisdiction

[12] The test to consider whether the ruling on jurisdiction is reviewable is simply whether the arbitrator was right or wrong.[2] The reasonableness test in *Sidumo*[3] does not apply.

[13] It is so, as Mr *Kirby-Hirst* was at pains to stress, that the employees referred to a "discriminatory employment practice" in their initial referral to conciliation. But, at that stage ready, they referred to their dispute as an unfair labour practice dispute. And when the dispute remains unresolved and they referred it to arbitration – this time with the assistance of their trade union – they made it clear that the dispute was that of an alleged unfair labour practice relating to the provision of benefits as envisaged by s186(2)(a) of the LRA.[4]

[2] *SARPA v SA Rugby (Pty) Ltd* [2008] 29 BLLR 845 (LAC) paras 39-41; *South African Post Office v CCMA* [2011] 11 BLLR 1183 (LC).

[3] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[4] Labour Relations Act 66 of 1995.

[14] The arbitrator quite correctly referred to the decision of the Labour Appeal Court in *NUMSA v Driveline Technologies (Pty) Ltd*[5] to say the parties are not bound by the manner in which the conciliated Commissioner characterised the dispute on the certificate of outcome. He also followed the authority of this court in *Bombardier*[6] that a certificate of outcome has no bearing on jurisdiction. That conclusion cannot be faulted.

'Benefit'

[15] The arbitrator's ruling that the discretionary 'bonus could be included under the term 'benefit' in s 186(2)(a) is also not open to review. The approach in *Umhlatuze Municipality*, to which he referred, has now been endorsed by the LAC in *Apollo Tyres:*[7]

> "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."
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> …
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> "In my judgment 'benefit' in s 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."

[16] On this aspect, too, the arbitrator correctly found that the CCMA had jurisdiction to arbitrate the unfair labour practice dispute.

Merits

[17] The sole ground of review raised on the merits is that:

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[5] [2000] 1 BLLR 20 (LAC).

[6] *Bombardier Transportation (Pty) Ltd v Mtiya N.O.* [2010] 8 BLLR 840 (LC). See also *Mickelet v Tray International (Pty) Ltd* (2012) 33 ILJ 661 (LC) para 19 and *BMW SA (Pty) Ltd v NUMSA* (2012) 33 ILJ 140 (LAC) para [5].

[7] *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC); (2013) 34 *ILJ* 1120 (LAC) para [46].

> "The arbitrator has overlooked the evidence of Esterhuysen who testified that he effectively confirms consistency and objectivity of the process and had been satisfied that the answers under the "How" section had been consistently dealt with. Furthermore that everyone in the company was subject to the appraisal system which incorporated a subjective element by the individual supervisors which is a discretionary part of the process which, by its very nature, cannot be challenged most certainly at the forum chosen by the [employees]", i.e. the CCMA.

[18] In his oral submissions, Mr *Kirby-Hirst* elaborated on this ground by arguing that the employees had complained about the result, not the process; yet the arbitrator's finding was based on the process.

[19] There are two answers to this submission. Firstly, as Mr *Van der Hoven* pointed out, the unfair process led to an unfair result. As the company's witness, Solomon, conceded: "With more insight and closer working with the slaughterers, I believe there would be a better outcome". And secondly, the arbitrator did consider Esterhuysen's evidence. He noted that Esterhuysen had agreed that the ratings in the "how" section of the appraisal was subjective. Esterhuysen stated that the elements rated were measurable, but he did not explain how this was to be done. The arbitrator found this subjective process to be unfair. Whether this Court agrees or not, is neither here nor there. It is not a conclusion that is so unreasonable that no other arbitrator could have come to the same conclusion.

[20] In short, the arbitrator considered the principal issue concerning an unfair labour practice relating to benefits before him; he evaluated the evidence; and he came to a conclusion that was reasonable.[8] Having found that the employer had committed an unfair labour practice, he decided to award each of the employees compensation equivalent to one month's wages. That was within his discretion and is not so unreasonable that no other arbitrator could have made the same award. The award is not open to review, as opposed to appeal.

[8] Cf *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mines) v CCMA* [2014] 1 BLLR 20 (LAC); *Herholdt v Nedbank Ltd* (2013) 34 *ILJ* 2795 (SCA).

Conclusion

[21] The arbitrator correctly found that the CCMA had jurisdiction to hear the unfair labour practice dispute. Having heard and evaluated the evidence, he came to the conclusion that the employer had committed an unfair labour practice. He ordered the employer to pay the employees in an amount that fell within his powers. The award is not so unreasonable that no other arbitrator could have made it.

[22] With regard to costs, I take into account that the employees are still employed by the company; and that they were ably represented by their trade union, thus obviating the need for legal fees. In law and fairness, a costs order is not appropriate.

Order

The application for review is dismissed.

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Steenkamp J

APPEARANCES

APPLICANT:	G Kirby-Hirst of MacGregor Erasmus (attorney).
THIRD RESPONDENT:	H van der Hoven of Solidarity (trade union official).