REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR2219/11

In the matter between**:**

PUBLIC SERVANTS ASSOCIATION **First Applicant**

LINAH MATLAKALA **Second Applicant**

and

DIRECTOR GENERAL: OFFICE OF THE

PRESIDENCEY OF SOUTH AFRICA OFFICE **First Respondent**

THE PRESIDENCY OF SOUTH AFRICA **Second Respondent**

Heard: **19 November 2014**

Delivered: **05 March 2015**

Summary: **Review application in terms of S 158(1) (h) of the LRA. Review of the decision of State as employer. Refusal/failure to pay bonus to employees. Review administration acting/legality of the decision.**

JUDGMENT

MOLAHLEHI, J

Introduction

[1] In this review application which is brought in terms of section 158(1)(h) of the Labour Relations Act (the LRA),[1] the applicants seek an order reviewing and setting aside the decision made by the first respondent in his capacity as the Director General (the DG) of the second respondent. The decision relates to the refusal to pay performance bonuses to those employees who qualified during the financial year 2009 and 2010.

Background

[2] It is common cause that during May 2007, the second respondent established and implemented a Performance Management Development System Policy ("PMDS") for levels 1-12 in line with the provisions of section 3(5) (c) of the Public Service Act (the Act),[2] which provides the executing authority with powers amongst others to establish performance management system.

[3] The Public Service Regulation ("the regulations"), of 2001 also gives the executing authority the power to develop a system of performance management and development for employees in the department.

[4] The Minister of Public Service Administration ("the Minister") issued the Incentive Policy Framework (the policy frame work) which provides in terms of Clause 18 that the department may not spend more than 1.5% of their annual

[1] Act 66 of 1995.
[2] Act 103 of 1994.

remuneration budget on departmental financial performance incentive scheme as contemplated in Chapter 1 Part 8F of the regulations

[5] The policy framework provides further under Clause 29 that should a situation occur where a budgeted amount (that is 1.5% of the annual remuneration budget for performance bonuses) is insufficient to award the maximum of 18% to deserving staff members, the department will have to manage the situation by scaling down the applicable percentage to be granted or setting tighter standards for granting of the performance awards.

[6] The second respondent has in line with the above legal frame work developed the PMDS system for level 1-12. Clause 10.6 of the PMDS provides that the performance cycle is a one year period running from 1 April to 31 March of the following year. In order to comply with the incentive policy frame work issued by the Minister, the second respondent "must budget" as follows:

a. 1% of the wage bill for effecting pay progression for salary levels 1-12; and

b. 1.5% of the remuneration budget for the allocation of performance bonuses for salary levels1-12.

[7] During the month of May 2010, the officials of the second respondent conducted performance assessment in respect of the employees employed within the second respondent in levels 1 to 12. The outcome of that assessment was that employees who qualified received salary notch progression but did not receive performance bonuses.

[8] The officials of the first applicant engaged with various management officials of the second respondent regarding the non-payment of performance bonuses to those employees who qualified.

[9] On 1 March 2011, the second respondent's office informed members of the first applicant that the second respondent would not be paying performance bonuses

because of lack of funds. Thereafter several discussions were held between the parties seeking a solution to the problem to no avail.

Grounds for Review

[10] The applicants seek to have the decision of the respondents reviewed (the decision not pay the bonuses) on the grounds that such a decision was arbitrary, unfair and irrational in that:

> "24.1 The Second Respondent's officials failed to adhere to the provisions of the PMDS and the Incentive Policy Framework and as such, are in transgression of the PMDS in that they failed to budget for performance bonuses as required by the PMDS;
>
> 24.2 Furthermore, the Second Respondent's official's failure to consider other alternatives other than the monetary payment for performance bonuses as stated in the PMDS;
>
> 24.3 No reasons and/or insufficient reason were provided by the officials of the Second Respondent on why they failed to budget for performance bonuses as required by the PMDS and the Incentive Policy Framework.
>
> 24.4 The officials of the Second Respondent failed to apply their minds to the provisions of the Incentive Policy Framework issued by the Minister of Public Service which provides that in the event where the budget proves to be insufficient to award the maximum of 18%, as it is this case, the Department will have to manage the situation by scaling down the applicable percentages to be granted;
>
> 24.5 The reason given by the Second Respondent's officials not to pay performance bonuses to deserving employees is not justifiable in terms of the reason given for such decision in that it demonstrates that the officials of the Second Respondent ignored and/or failed to take into consideration the provisions of the Second Respondent's policies."

It was further contended that the decision made was irrational, capricious unjustifiable and unfair to the members of the First Applicant and other employees within the department.

Points raised by the respondents

[11] In contending that the decision not to award bonuses is not reviewable the respondents have in their answering affidavit raised the following points:

a. The decision which the applicants are seeking impugned does not constitute an administrative action.

b. The decision in question is discretionary and therefore the applicants have no right to claim payment of the bonuses.

c. The applicants' claim is in the form of an interest rather than rights dispute.

The issues for determination

[12] The issues for determination in this matter are the following:

a. Does the decision not pay performance the bonuses for those who qualified constitute an administrative action?

b. Is payment of the performance bonuses discretionary?

c. Are the applicants entitled to the payment of bonuses as matter of right or their demand to be paid bonuses is a matter of interest?

[13] The difficult question of whether the decision by the state as employer, which give rise to a labour dispute, constituting an administrative action received a detailed consideration in *De Villiers v Western Cape Department of Education*.[3]

[3] (2010) 31 *ILJ* 1377 (LC).

In that case the court answered the question in the affirmative. The question in that case arose in the context of a review concerning a refusal by the state to reinstate the employee whose contract of employment had been terminated in terms of section 14 (1) of the Educators Employment Act ("the EEA").

[14] It is generally accepted that the conduct of the state in its capacity as an employer does not constitute an administrative action. Accordingly the employment disputes between the state and its employees must be dealt with in terms of the LRA or other labour related legislation. The authorities are in agreement that in this regard the remedies for labour disputes between the state in its capacity as an employer and its employees are found in the relevant labour legislation.[4]

[15] The Court may however in appropriate cases as stated in De Villiers depart from the general rule. In determining whether to depart from the general rule the court will consider the source and nature of the power exercised by the state in its capacity as an employer. The inquiry in this regard involves determining whether the power exercised was in terms of a contract or a statute. The existence of alternative remedies is also a consideration to take into account when weighing the need to intervene in a review application involving the conduct of the state in the labour related dispute.[5]

[16] It was on the basis of the above that the court in De Villiers found that the conduct of the state as the employer in refusing to reinstate the employee in terms of section 14 (2) of the EEA constituted an administrative action and it was also for that reason that the court found that it was entitled to exercise its review jurisdiction.[6]

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[4] *See Chirwa v Transnet Limited and Others 2008 (4) SA 367 and Gcaba v Minister of Safety and Security and Others* (2010) 31 ILJ 296 at para 67 and 68.

[5] See paragraph 19 of De Villiers.

[6] The same approach was adopted in *Wede v MEC for Department of Health, Western Cape* [2013] 34 *ILJ* 1315 (LC), where the court after accepting that the dismissal of a public servant is not an administrative action, held that it however decided to review the decision in terms of section 157 [1] [h]

[17] The court further found that even if it was to be found that the decision did not amount to an administrative action it could still be reviewed in terms of section 158 (1) (h) of the LRA. In terms of section 158 (1) (h) of the LRA the conduct of the state in its capacity as an employer can be reviewed on grounds permissible in law. In other words the court has the power to review the decisions made by the state in its capacity as an employer on the grounds of legality.

[18] In *Public Servants Association of SA v Premier of the Free State and Others,*[7] the court in dealing with the review under section 158(1) (h) of the LRA and confirming the approach that had been adopted in De Villiers held that:

> "This Court recognised that in exceptional circumstances, action by the state as employer might constitute administrative action [thus rendering the decision susceptible to review] and that the action on the review does not constitute administrative action, s 157 [1] [h] empowers this Court to review the decision taken by the state in its capacity as employer, on such grounds as permissible in law. In the decision taken by the respondent in relation to the implementation of the PDMS were administrative action.... (and I will presume for the purposes of this judgment that they were not), this Court retains the review jurisdiction on the ground of legality, which incorporates most, if not all, of the grounds of review relied upon by the applicant in its founding affidavit. In applying the facts to the law the Court found that the decisions taken by the state as an employer, of not paying levels 9 to 12 the bonuses were inconsistent with the provisions of the PDMS, and thus was irrational, arbitrary and capricious. It was for this reason that the court found that the decisions were reviewable."

[19] The same approach was adopted in *MEC Department of Education KwaZulu Natal v Khumalo* and another,[8] where in dealing with the extent of the remedy under section 157 (1) (h) of the LRA the court had held that:

> "26. Section 158(1)(h) is available when no other process is available or special circumstances exist to review an act of the State as employer. It

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of the LRA. On the merits of the case the court found that the decision by the MEC not to reinstate the employee was reviewable.

[7] Unreported judgement – case number J123/09 dated 15 March 2010.

[8] [2010] 31 *ILJ* 2657 (LC).

> is not a safety net to process disputes in public employment that should have been channelled through some other prescribed provision. Nor is it a licence to bypass the prescribed conciliation, arbitration and review procedures when an applicant has missed the time limits."

[20] In the *Public Servants Association v Premier of the Free State*, the case whose circumstances are not different to those of the present case, the MEC for Health, who was the third respondent, had decided to award bonuses to employees in salary levels 1 to 8 and not to those at levels 9 to 12. Similar to the present case the reason for not awarding levels 9 to 12 performance bonuses was stated as "a lack of funds."

[21] I align myself with the above decisions and accordingly find that in the present instance the DG had the duty to ensure that 1.5% of the salary budget was allocated for the performance bonus. It is also clear that in terms of the PMDS, which as indicated earlier is based on the provisions of the Act, the DG has a duty to pay the bonuses to those who after the performance assessment qualified. It has to be noted that the duty to pay the bonuses to those who qualified has its in source in legislation, regulations and the policy of the second respondent.

[22] In my view the excuse of non-payment of bonuses due to lack of funds is unsustainable. It is evident in this regard that the policy maker did anticipate the situation where there could be shortage of funds. The policy frame work provides a clear approach to be adopted by the DG, should such a situation arise. The approach does not include a refusal to pay the bonuses to those who qualified on the basis of lack of funds. The powers given to the DG in the event of lack of funds is limited to having to scale down whatever the amount was to be paid to those who qualified or tightening the criteria for qualifying to receiving the bonus.

[23] It accordingly follows that in refusing to pay the bonuses to those applicants who qualified the DG exercised the power he did not have. It also follows that the excuse of lack of funds is also not sustainable and can also not be a valid

reason for not paying the bonuses. The decision is therefore illegal and thus susceptible to review.

[24] The other point raised by the respondents is that the issue of payment of bonuses has to do with an attempt to create a right and thus it is interest based. In this regard they contend that the applicants' claim can be resolved though collective bargaining and not adjudication.

[25] The question of what constitutes a dispute of right or interest is answered by Rycroft and Jordan,[9] in the following terms:

> "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 (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 appropriate method of reserving disputes of rights."

[26] It is clear in the present instance that the applicants are not seeking to create a right to receive bonuses but that right has its source as indicated earlier in the legislation, the regulations and the policy of the second respondent.

[27] In light of the above analysis I am of the view that the applicants have made out a case whose facts and circumstances dictates that the Court should intervene and review the decision made by the respondents. I do not however belief that I should allow cost to follow the results in circumstances where there is on-going relationship between the parties.

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[9] See A Guide to SA Labour Law (1992) at page 169.

Order

[28] The following order is made:

1. The decision of the first respondent not to pay bonuses to the Second to Further Applicants, taken during March 2011, is reviewed and set aside.

2. The matter is referred back to the Second Respondent to consider the payment of the bonuses of those who qualified.

3. There is no order as to costs.

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E, MOLAHLEHI

Judge of the Labour Court, Johannesburg

Appearances:

For the Applicant:	Advocate L. Malan
Instructed by:	Thabang Ntshebe Attorneys
For the Respondent:	Advocate R Beaton SC
Instructed by:	The State Attorney