

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: 2698/2016

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED.
DATE: <u>19/03/18</u> SIGNATURE: <u>[Signature]</u>	

In the matter between:

KOLE MACK MOLEPO & 8 OTHERS

APPLICANTS

And

HOD, DEPARTMENT OF EDUCATION

RESPONDENT

LIMPOPO PROVINCE

JUDGMENT

KGANYAGO J

- [1] The applicants have brought an application seeking an order that the respondent be ordered to pay them incentives in terms of clause 8 of the Government Gazette no 30678, volume 511 dated 18 January 2008 retrospectively. All the applicants are educators at Gowe Primary School in Driekop village, employed by the Department of Education Limpopo Province.
- [2] According to the applicants, Gowe primary school falls under quintile 1, and as such they are eligible for incentives in terms of clause 8.1(b) of the gazette.
- [3] The respondent is the Head of the Department of Education, Limpopo Province who has been cited in his official capacity. The respondent is opposing the applicants' application and has raised four points *in limine*. The first point *in limine* is that there is a dispute of fact; the second one is that this Court has no jurisdiction to hear this matter; the third one is that the applicants have failed to exhaust internal remedies before approaching this court and the fourth one is that the applicants' application is defective.

- [4] I will deal with the second point *in limine* first as the parties must first establish jurisdiction before their matter could be heard. According to the respondent, the applicants' claim relate to an unfair conduct relating to provision of benefits in terms of section 186(2) of the Labour Relations act No.66 of 1995 ("the LRA"). The respondent therefore contends that such claim falls within the exclusive jurisdiction of the Public Service Coordinating Bargaining Council.
- [5] The applicants did not file a replying affidavit, but opted to file a supplementary affidavit without the leave of the court. In terms of Rule 6(5) of the Uniform Rules of Court (the Rules), three sets of affidavits are permitted, which are the founding affidavit, answering affidavit and a replying affidavit. Any further affidavits should be with the leave of the Court.
- [6] Rule 27 (3) makes provision for a party who has failed to comply with the Rules to make an application for condonation. However, the applicants have failed to invoke the remedy provided in that Rule. Since the applicants' supplementary affidavit was filed without the leave of the Court, and there was no condonation application for non-compliance

with the rules, the Court has rejected the applicants' supplementary affidavit.

[7] The applicants' counsel argued from the bar that the incentive that the applicants' are claiming does not amounts to a benefit, but amounts to a contractual dispute. The counsel for the applicants contends that the applicants' dispute is not based on the LRA and therefore the Court has jurisdiction to entertain their claim.

[8] The question which must first be determined by this Court is whether the incentive as stated in clause 8.1(b) of the Gazette can be classified as a benefit.

[9] In **Northern Cape Provincial Administration v Hambidge No & Others [1999] 7 BLLR 698(LC)** at paragraph 12-14 Landman J said:

"[12] It is unnecessary for me to consider the meaning of the term benefit exhaustively. It was not argued in detail. For a useful compilation of the authorities and opinions on the meaning of benefit see SA Chemical Workers Union v Longmile/ United (1999) 20 ILJ 244 (CCMA) at 248-253.

“[13] A salary or wage or payment in kind is an essential element in a contract of service. See Basson et al Essential Labour Law Vol 1 at 22-23. The definition of remuneration read with the definition of employee in section 213 of the Act makes this clear. “Remuneration” in section 213 means: “any payment in money or kind or both money and in kind...” remuneration is an essentialia of a contract of employment. 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. Some naturalia are subject of individual or collective bargaining. Others are conferred by law. In my view a benefit may be part of the naturalia. It is not part of the essentialia. Some support for this distinction may be derived from the definition of fringe benefits in the shorter Oxford Dictionary. It reads:

“Fringe benefits- a perquisite or benefit paid by an employer to supplement a money wage or salary”.

[14] The ILO Wages – A worker’s Education Manual (1988) at 70 makes point that a fringe benefit is a supplement for which no work is done. Labour Law (1987) at 158 speaks of wages and non-wage benefits. The word “benefit” in item 2(1)(b) means, at least, a non-wage benefit. The decision of my sister Revelas J in Samsung case is to the same effect. She says at 1102 J – 1103 A:

“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 employment contract”.

- [10] These incentives were published in the government gazette of the 18th January 2007. The heading of the covering letter of the Minister is titled:

“Improvement in conditions of service for Educators employed in terms of the Employment of Educators Act, 1998: Teachers incentives”.

- [11] This incentives is applicable to employees who meet a certain criteria, and it is also conditional upon an employee signing an incentive contract. Upon the incentive contract been signed, in my view that incentive contract will now form part of the terms and conditions of employment.

- [12] Clause 12 of the government gazette state that the employer must pay the incentive in the form and to the extent of a non-pensionable allowance, in cash or in kind. In other words this incentive is an

allowance for employees working in remote schools that meet the criteria set out in the government gazette. Therefore, in my view that incentive is a benefit.

[13] In terms of section 186(2) (a) of the LRA, unfair labour practice means any unfair act or omission that arises between an employer and an employee... relating to the provision of benefits to an employee. As I have already held that the incentive in this matter is a benefit, it then follows that it is a dispute that falls within the ambit of section 186(2) of the LRA.

[14] In **Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC)** at paragraph 125 Ngcobo J said:

“...a dispute concerning the alleged non-compliance with the provisions of the LRA is a matter which under the LRA, must be determined exclusively by the Labour Court. This result cannot be avoided by alleging, as the applicant does, that the conduct of Transnet violates the provisions of the LRA in question and violates a constitutional right to a just administrative action in s33 of the constitution and is therefore reviewable under PAJA”.

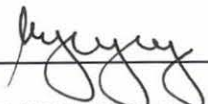
[15] Disputes between employer and employee that falls within the provisions of the LRA must be resolved within the dispute resolutions mechanisms provided for in the LRA. In **Gcaba v Minister for Safety and Security 2010 (1) SA 238 (CC)** the court held that labour issues are to be dealt within the specialized fora and pursued through the purpose-built mechanisms established by the LRA.

[16] I have already held in paragraph 12 *supra*, that the applicants' dispute is a benefit that falls within the ambit of section 186(2) (a) of the LRA. Section 35 of the LRA empowers the public service to establish a Bargaining Council. The Department of Education is a sector that falls within the public service, and the bargaining council of the public service as a whole is the General Public Service Sectoral Bargaining Council (GPSSBC). In my view the appropriate forum to deal with the applicants' dispute is the GPSSBC. The respondent's point *in limine* of jurisdiction stands to be upheld. This point alone disposes the applicants' dispute and I don't find any reason to deal with the other points *in limine*.

[17] **In my result I make the following order:**

17.1 The respondent's point *in limine* that this court lacks jurisdiction to entertain the applicants' dispute is upheld.

17.2 The applicants' application is dismissed with costs.


MF KGANYAGO J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE

Appearances

- | | | |
|------------------------|---|-----------------------------|
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| 4. For the Respondents | : | Adv S Mphahlele |
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| 7. Date of Argument | : | 27 February 2018 |
| 8. Date of Judgment | : | 20 th March 2018 |