



REPUBLIC OF SOUTH AFRICA

LABOUR OF SOUTH AFRICA COURT, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2947/2010

In the matter between:

SOUTH AFRICAN POST OFFICE LIMITED

Applicant

and

Q GUNGUBELE N. O

COMMISSIONER K G MNGEZANA N.O

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

SOUTH AFRICAN POSTAL WORKERS UNION

OBO WAYNE COETZEE

Third Respondent

Date of hearing: 6 September 2013

Date of judgment: 25 February 2014

Summary: Review application. Commissioner finding that acting allowance was a benefit and the employer committed an unfair labour practice. Employee claiming payment of acting allowance after 14 months. Benefit as

envisaged in section 186(2) of the LRA defined as “existing advantage or privileges to which an employee is entitled as a right or granted in terms of policy or practice subject to the employer’s discretion.”

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside an arbitration award made by the first respondent (the Commissioner) under case number GATW 10336-10 in terms of which the applicant was ordered to pay the third respondent compensation for an alleged unfair labour practice.
- [2] The third respondent has applied for condonation for the late filing of the heads of argument. The heads of argument were one day late. It is for that reason alone that I am of the view that interest of justice supports the view that condonation should be granted.
- [3] The unfair labour practice which was the subject matter of the dispute concerned both the non-appointment and payment of the acting allowance for the third respondent. The third respondent lodged the grievance after the appointment of the incumbent on the basis that the applicant had committed an unfair labour practice in making him to act in the managerial position for 14 months and further that the acting created an expectation that he would be promoted to that post.
- [4] The third respondent referred the dispute to the CCM A after the grievance proceedings failed to yield the results he expected. The Commissioner found that the applicant had committed an unfair labour practice in terms of section 186 (2) of the Labour Relations Act.

The grounds for review

- [5] The applicant contends that the arbitration award is reviewable on the grounds that the Commissioner:
- a. had no jurisdiction to determine the dispute as the acting allowance was not a benefit and therefore its non-payment, and could not constitute an unfair labour practice.
 - b. committed a gross irregularity and misconduct in determining the matter when she did not have jurisdiction to do so.
 - c. misconstrued the issue before her in finding that the third respondent was entitled to be paid an acting allowance on the basis of a policy that had been repealed.

The arbitration proceedings

- [6] The following were common cause facts during the arbitration proceedings:
- a. Mr Coetzee was required to act as a manager for a period of 14 months.
 - b. Mr Xaba, also acted in the same position prior to Mr Coetzee and for the same period.
 - c. Both Mr Coetzee and Mr Xaba were not paid any acting allowance for the period that they acted as managers.
 - d. The position in which both Mr Coetzee and Mr Saba acted in was later advertised externally and Mr Gaybba was appointed.
 - e. The applicant raised a point *in limine* and contended that the CCMA did not have jurisdiction to entertain the dispute as it did not fall within the provisions of section 186(2) (a) of the Labour Relations Act of 1995 (the LRA).
- [7] In dealing with the point *in limine* raised by the applicant regarding jurisdiction, the Commissioner, relying on the case of *Protekon (Pty) Ltd v*

*CCMA and Others*¹, found that the concepts of "remuneration and benefits" cannot be mutually exclusive.

- [8] The Commissioner found on the facts that the non-appointment of the third respondent did not constitute an unfair labour practice. In relation to the new policy which the applicant relied on in refusing to pay the acting allowance for the third respondent the Commissioner found that the policy had not been circulated and communicated to the employees.

Evaluation

- [9] The CCMA derives its jurisdiction to determine unfair labour practice from the provisions of section 185 read with section 186(2) of the LRA. In terms of section 185(b) of the LRA every employee has the right not to be subjected to unfair labour practice. The unfair labour practice concept is defined in section 186(2) of the LRA reads as follows:

- (2) 'Unfair labour practice' means an 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*’.

- [10] The third respondent based his cause of action on two issues, namely non-appointment to a senior manager's position and non-payment of the allowance for the 14 months that he acted as a manager. In essence the complaint of the third respondent is that he should have been promoted to the position of a senior manager after he acted in that position for a considerably long period. The dispute as farmed by the third respondent ordinarily falls within the jurisdiction of the CCMA as it constituted a complaint about the conduct of the applicant in failing to promote the third respondent in the position in question. The issue of promotion does not arise in the present

¹(2005) 26 ILJ 1105 (LC).

matter as the Commissioner found that the third respondent failed to make out a case of promotion.

- [11] The third respondent framed the second issue of non-payment of the acting allowance as a benefit which he claimed he was entitled to in terms of the policy of the applicant. The question of whether a benefit exists depends on whether there is a right, a privilege or an advantage which the employee enjoys, either in terms the provisions of a contract, policy or practice. In the present instance, as stated earlier the third respondent relied on the policy in asserting his claim to payment of the acting allowance.
- [12] In my view the two issues raised by the third respondent falls within the definition of unfair labour practice as envisaged by the above definition quoted from section 186 (2) (b) of the LRA. It follows that the CCMA did have jurisdiction to entertain the two issues in dispute referred to it by the third respondent. The Commissioner was accordingly correct in entertaining the dispute as formulated by the third respondent.
- [13] As indicated earlier the third respondent was unsuccessful with regard to the non-appointment to the senior manager's position. He was however, successful as concerning the issue of the acting allowance.
- [14] The issue that needs to be determined, having made the above findings, is whether the Commissioner misconstrued the evidence concerning the complaint that the third respondent was entitled to be paid the acting allowance as a benefit.
- [15] In dealing with what constitutes a "benefit," Labour Appeal Court in the recent *Apollo Tyres South Africa (Pty) Ltd v CCMA and Others*,² held per Musi AJA that:

'...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 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 advantage or privileges to which an employee is entitled as a right or granted in terms of policy or practice

²[2013] 5 BLLR 434 (LAC).at para 50.

subject to the employer's discretion. Insofar as Horspesa, G4S and Scheepers (*supra*) postulate approach they are, with respect, wrong'.

- [16] The version of the applicant, in the present instance, during the arbitration proceedings was that the third respondent was not entitled to the acting allowance in terms of policy and the circumstances within which he was appointed to act in the senior manager's position. In this respect Mr Kotse, the manager of the unit in which the third respondent was employed in at the time, testified as to the circumstances within which the third respondent was appointed to act.
- [17] Mr Kotse testified that at the time of assuming the responsibility as the manager of the unit he discovered that the position in question did not formerly exist. He thereafter with the assistance of the third respondent and Mr Xaba developed the job profile for the position. They also worked on the job grading process for the position.
- [18] After the completion of the job grading he took a decision not to fill in the position immediately because he wanted to afford the managers in the unit an opportunity to develop so that they could compete fairly at the point of advertising the position. The first person to be appointed to act was Mr Xaba who acted for 13 months and thereafter the third respondent. One of the managers in the unit indicated that he was not interested in acting in the position.
- [19] The third respondent on the other hand testified that he acted in the position in question for 14 months without being paid the acting allowance. He further testified that because of the length of time he acted in the position he developed a legitimate expectation that he would be appointed into that position. He felt aggrieved when Mr Gaybba, an outside, was appointed in the position. He accordingly, filed a grievance in terms of which he complained that he should be appointed into the position as legitimate expectation was raised in making him act in the position for 14 months. He also demanded that he be paid an acting allowance.
- [20] The critical aspects which the Commissioner, with due respect, failed to take into account when assessing the probabilities are the concessions made by the third respondent during cross examination. He firstly conceded that the person to act in the position before him was Mr Xaba. He also conceded that

he was aware that Mr Xaba was never paid for the 13 months that he acted in the position. The probabilities in this regard supports the version of Mr Kotse that acting arrangement was to afford the managers in the unit the opportunity to develop.

- [21] The other point which the Commissioner failed, with due respect, to take into account in assessing the probabilities, is the answer given by the third respondent why he waited for 14 months to claim payment of the acting allowance if at all that existed as a right, privilege or a practice. The answer given by the third respondent was that but for his non-appointment into the position he would not have claimed payment of the acting allowance.
- [22] The above answer and the length it had taken the third respondent to claim the acting allowance simply supports the view that he knew that he was not entitled to an acting allowance. This is even so when account is taken of the fact that he failed to produce the policy that he sought to rely on in this regard. The probabilities in this regard supports the version of applicant that acting allowance was not paid to people acting in managerial positions since 2000 and that acting in a senior position was aimed at developing managerial skills for senior employees of the applicant.

Conclusion

- [23] In my view, the decision of the Commissioner is one that no reasonable Commissioner could have reached and thus rendering the arbitration award reviewable. I do not however believe that it would, in the circumstances of this case be proper to allow costs to follow the results.

Order

- [24] In the premises, the following order is made:
1. The arbitration award made under case number GATW 10336-10 is reviewed and set aside.
 2. The arbitration award is substituted with the award to the effect that the Applicant did not commit an unfair labour practice in not paying the Third Respondent an acting allowance.

Molahlehi.J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Adv Maunatlala

Instructed by: Medupi-Lehong Inc

FOR THE THIRD RESPONDENT:

Advocate Prinsloo

Instructed by: Rooth Wessels Attorneys