REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1272/2011

In the matter between:

CHARLIES, HEINZ CONALD **Applicant**

and

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY **First Respondent**

WABILE, KATLKOLO N.O. **Second Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Third Respondent**

Heard: **09 January 2014**

Delivered: **13 May 2014**

Summary:

JUDGMENT

NAIDOO AJ

Introduction

[1] This is an application to review and set aside a jurisdictional ruling under case number GAJB 31691-10, delivered on 28 April 2011wherein the second respondent (the "Arbitrator") found the Commission for Conciliation Mediation and Arbitration (the "CCMA") lacked jurisdiction to hear the applicant's dispute.

[2] The first respondent sought condonation for the late filing of its answering affidavit. Although initially opposed, the applicant did not persist in opposing condonation. Having regard to the relevant legal principles, I am of the view that it would be in the interest of justice that condonation under these circumstances be granted.

<u>Background</u>

[3] On or about 6 November 2010, the applicant referred an unfair labour practice dispute to the third respondent.

[4] The matter came before the arbitrator on 28 April 2011. On a pro forma document, the arbitrator described the dispute as one involving a claim for pay progression and bonus and on this basis found the CCMA lacked jurisdiction to hear the matter. The arbitrator further directed the applicant to refer his dispute to this Court for relief. It is noteworthy that the arbitrator does not provide any reasons as to how or why he arrives at the decision he took.

[5] The applicable test when reviewing jurisdictional rulings is an objective test and as such, I shall set out the parties respective arguments as presented to this court.

<u>Applicant's argument</u>

[6] The applicant's claim centres on the alleged failure of the first respondent to follow its own performance appraisal policy as set out in a document titled 'Performance Management Policy for Employees'. In terms of this policy an employee's performance would be assessed four (4) times a year by their supervisor and an average rating would be calculated at the end of the financial year. The policy set out the various possible ratings an employee could score and the associated bonus and pay increment employees who received specific ratings would be eligible for.

The applicant scored a rating that made him eligible for a bonus of 11% his annual remuneration and a two notch pay increase.

[7] Despite this, the first respondent advised the applicant that he would receive a single notch increase in his remuneration. According to the applicant he was of the view other employees who had obtained a similar rating as what he did, were given their bonus and salary increase in accordance with the first respondent's policy. The applicant lodged a grievance which to date had not been addressed, thereafter he referred an unfair labour practice dispute to the third respondent seeking his bonus and further that his remuneration be increased by one (1) salary notch.

First Respondent's argument

[8] The first respondent raised 3 arguments.

The first was that in terms of its grievance policy any grievance associated with the implementation of anyone of its policies must first be brought before a senior manager, who having heard both parties must resolve the dispute within 30 working days from date the grievance was lodged. Thereafter, should the party initiating the process be dissatisfied with the senior manager's decision, he or she must follow the grievance procedure applicable to employees working in the Public Service Sector. The applicant, as argued by the first respondent, did not follow this prescribed process in that he failed to lodge any grievance before referring the matter to the third respondent.

The second argument goes to the heart of the ruling. The first respondent argued that for purposes of s186, a benefit is excluded from the definition and scope of what can be defined as remuneration and following this, the applicant is precluded from relying on section 186(1)(b), more particularly that relating to benefits for the simple reason that his dispute is in fact a claim for remuneration.

In keeping with the issue of jurisdiction, the first respondent further argued that in his referral to the CCMA, the applicant described his dispute as a refusal by the first respondent to comply with the Reward Recommendation Policy. However, at arbitration the applicant claimed an unfair labour practice in terms of benefits and in doing so, changed the nature of the dispute as originally referred and conciliated.

The third argument rested on the fact that the applicant had, subsequent to the ruling under review being delivered, referred the same dispute to the CCMA whereby another commissioner ruled the CCMA had no jurisdiction to hear his claim. This argument was abandoned once the first respondent conceded that the second referral to the CCMA pertained to a different cycle i.e. the 2009/2010 period whereas *in casu* the applicant's dispute centred on a cycle prior to that mentioned.

Evaluation

[9] For convenience, I shall address the argument that benefits must be mutually exclusive from remuneration as raised by the first respondent. The Labour Appeal Court in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others*[1] put to rest the debate as to whether a benefit is excluded in the definition of remuneration. On this point the Court held;

> ' The distinction that the courts sought to draw between salaries or wages as remuneration and benefits is not laudable but artificial and unsustainable. The definition of remuneration in the Act is wide enough to include wages, salaries and most, if not all extras or benefits. Remuneration is defined as:
>
> "[R]emuneration" means any payment in money or in kind made or owing to any person in return for that person working for any other person, including the State, and "remunerate" has a corresponding meaning.'
>
> Many benefits that are payment in kind form part of the essentialia of practically all contemporary employment contracts. Many extras are given to employees as a quid pro quo for services rendered just as much as a wage is given as a quid pro quo for services rendered..;.

With regard to the CCMA 's jurisdiction to hear disputes of this nature, the LAC went on to say;

[1] (2013) 34 ILJ 1120 (LAC) at paras 25 to 26.

> '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. In my judgment "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.'

[10] Around the same time as the Labour Appeal Court handed down judgment in *Apollo (supra),* the Labour Court in *Trans-Caledon Tunnel Authority v Commission for Conciliation, Mediation & Arbitration and Others*[2] held the following when faced with a similar argument as that raised by the first respondent in *casu;*

> 'I respectfully associate myself with the views expressed by my brother judges in *Protekon* and *IMATU* differing from the court's approach in *Samsung Electronics* that remuneration as defined in the LRA does not include benefits contemplated in s 186(2)(a) which were held in that case to be 'something extra', apart from remuneration. Thus, whilst I accept that employee's claim to entitlement to the full bonus falls under the head of remuneration in the employment contract and in terms of the LRA definition, this does not, in my view, serve to bar him from referring a ULP claim relating to benefits to arbitration in terms of the section.'

The Court went on to affirm the view that the CCMA has the jurisdiction to call upon any employer to justify the fairness of exercising his or her discretion, emanating from either a policy or practice and under circumstances where an employee is denied a benefit .

[11] More recently the court in *SA Revenue Services v Ntshintshi and Others*[3] in following the decision of *Apollo* found that a travel allowance falls within the broad definition of benefits and as such, the CCMA had the necessary jurisdiction to hear a dispute where the employee lays claim to this allowance.

[2] (2013) 34 ILJ 2643 (LC) at para 30.

[3] (2014) 35 ILJ 255 (LC)

[12] In light of these authorities, the first respondent's argument that benefits and remuneration are mutually exclusive stands to fall and with that, the arbitrator's findings on jurisdiction must further fall away.

[13] It is worth mentioning that in finding the CCMA does have jurisdiction to hear the applicant's claim, specifically relating to whether the applicant is entitled to a further notch increase in his salary, does not imply, nor should it be interpreted to imply, that if successful in his claim, the applicant has established a right to further increases in salary. As pointed out in *Apollo* the focal point at arbitration would be limited to whether or not the employer's decision not to award the employee the benefit claimed, if fair or not. Should an arbitrator find the first respondent has failed to provide adequate and just reasons as to why it did not give the applicant a salary increase and on the strength of this order it to increase the applicant's remuneration by a further notches, does not mean the applicant has established a future right to the same increase in the years to come. If the applicant does not meet the required performance standard in the future, the first respondent would be justified in not increasing his remuneration, likewise if the applicant did meet such standard in the future and the first respondent does on that occasion provide a fair reason why it has not rewarded the applicant with the structured increase, an arbitrator could do little but to find the applicant did has not suffer an unfair labour practice.

It is also worth mentioning that on the merits before me, the salary increase sought is intrinsically linked to the first respondent's performance policy. If this were not the case, the applicant would be prevented from referring his dispute to arbitration.

[14] With regard to the argument that the applicant has changed the nature of the dispute, I fail to see any merit in this argument. The first respondent alleges that the applicant, in his referral forms, categorised the dispute as the first respondent's failure to follow its own policy and that the applicant sought the first respondent to comply with the said procedure.

In my view the nature of the dispute has not changed in any material manner. The applicant referred an unfair labour practice dispute to the CCMA claiming his bonus and pay increase; it was the very same dispute that came before the second respondent. On a reading of *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another*[4], the first respondent's argument on this point bears no merit.

[15] The last issue deals with whether or not the applicant, by not following a prescribed grievance procedure, was premature in referring his dispute to the CCMA. The first respondent alleged that the applicant did not file a grievance as required of him before referring the matter to the CCMA. This is factually incorrect – annexed to the applicant's supplementary affidavit is a copy of the grievance he lodged on 9 August 2010. The applicant thereafter referred his dispute to the CCMA on 6 November 2010, this well after the 30 day period afforded to the first respondent to address any grievance. On these facts alone, I accept the applicant did file a grievance and in the absence of the first respondent addressing his issues raised, his referral to the CCMA was not premature.

[16] In the absence of any reasons forwarded by the first respondent as to why it did not reward the applicant in terms of its own policy, this Court is not in a position to make any finding as to whether the first respondent's conduct was fair or not.

<u>Order</u>

[17] In the premises the following order is made:

17.1 The first respondent's late filing of its answering affidavit is condoned.

17.2 The second respondent ruling under GAJB 31691-10 is set aside and replaced with a finding that the third respondent does have jurisdiction to hear the applicant's dispute.

17.3 The third respondent is directed to set the matter down for arbitration.

17.3 There is no order as to costs.

[4] 2000 (4) SA 645 (LAC); (2000) 21 ILJ 142 (LAC).

Moksha Naidoo

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Hitchings: Instructed by Martins Weir-Smith Inc.

For the Third Respondent: Advocate MW Dlamini: Instructed by The State Attorney