



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR2821/2010

In the matter between:

POLOKWANE LOCAL MUNICIPALITY

Applicant

and

M.M. MASEKO NO.

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

IMATU OBO SAENEGO AND 13 OTHERS

Third Respondent

Heard: 14 January 2014

Delivered: 20 May 2014

**Summary: Section 199 of the Labour Relations Act 66 of 1995 as amended.
Applicants accorded lesser benefits compared to other employees.**

Applicability of collective agreements to the Applicant's. No rationale demonstrated why collective agreements not applicable to the Applicants. Review application dismissed.

JUDGMENT

SNIDER AJ

[1] This is a review application in terms of which the Applicant seeks the setting aside of the following award made by the First Respondent –

- ‘1 The respondent is ordered to allow the applicant (sic) to belong to the accredited pension and medical aid schemes subject to rules of the schemes and to comply with all the applicants’ leave and benefit entitlement as per the SALGBC agreements: conditions of employment agreement: Transvaal 1994 and the main collective agreement 2004.
2. The respondent is further ordered to credit applicants all leave days not enjoyed from 1999 until 2009 December’.¹

[2] This application relates to a group of individuals (“the Employees”) who became employed by the Applicant during the period from 1998 to 2005 and were still in its employ when the arbitration which preceded this application took place.

[3] The Employees worked two hours a day Monday to Friday. The Employees were employed as points-men outside various schools within the Applicant’s geographic jurisdiction.

[4] The Applicants did not work during school holidays, neither were they paid during school holidays.

¹ Pleadings bundle pages 31 bottom onto page 32

- [5] The question before the Commissioner was, in essence, whether or not the relevant collective agreements, being the conditions of service collective agreements inclusive of the old Transvaal collective agreement of 1994 and the current agreement of 2004 applied to the Employees.
- [6] The matter was heard by the First Respondent (“the Commissioner”), acting under the auspices of the Second Respondent by way of a referral of an unfair labour practice dispute by the Employees represented by their trade union, IMATU.
- [7] The salient portion of the referral² is –
- ‘The issues in dispute (sic) are ... interpretation and application of the collective agreement in that the employer has appointed the Applicants as point duty officers with less or not the same conditions of service as all other employees thereby limiting them to not receive the same benefits as other employees for many years’.
- [8] The relief sought by the Employees was
- ‘1. The employer must put the applicants on the same conditions of service as other employees of the employer and make sure they receive the same benefits as others retrospectively.
 2. The employer must compensate the applicants for the loss they have suffered for being subjected to the lesser benefits or conditions of service. (sic)
 3. The employer the applicants on a permanent basis or position’.
- [9] There was no oral evidence given at the arbitration of the matter. It was decided on the basis of documents, argument and heads of argument submitted by the parties.

² Page 22 of the pleadings bundle

[10] The Commissioner made his award, as set out above, based on the following reasoning –

10.1 In terms of section 199 of the Labour Relations Act³ (“the LRA”) Contracts of employment are not allowed to waive or ignore any collective agreement and accordingly, the Applicants argument that the Employees can’t claim any rights except those in the BCEA is inconsistent with the provisions of the LRA; and

10.2 The Employees have successfully proved that the rights claimed are as per the BCEA and the collective agreements referred to above.

[11] The grounds of review advanced by the Applicant in this matter are set out below together with findings in respect thereof.

[12] The first apparent ground of review, and the grounds are by no means easy to discern, advanced by the Applicant is that in making his award to the effect that the Respondent is ordered to allow the Employees to belong to the “accredited pension and medical aid schemes subject to the rules of the schemes ...” the Commissioner was making an order which constituted - “a well Knight (sic) impossibility for Applicant to translate into practice ...”

[13] This is simply not a ground for review and the Applicant gives no evidence whatsoever in this regard. It is simply the “view” of the deponent who does not qualify himself as an expert in the field of medical aid and pension funds in any manner whatsoever.

[14] The second ground of review appears to be that the dispute which was arbitrated was a dispute of interest, which should be the subject of negotiations in industrial action, and not a dispute of right, which is subject to the unfair labour practice jurisdiction of the Second Respondent.

[15] I find this ground of review completely unsupportable. The dispute is clearly

one in terms of which the Employees assert that they have rights in terms of the collective agreements and the question for determination by the Commissioner was whether or not the said collective agreements applied to them. In my view it is a classic unfair labour practice dispute where they Employees allege that the failure of the Applicant to accord them the same benefits as its other Employees, on the basis that the collective agreements referred to above apply equally to the Employees, is simply unfair.

- [16] It may be argued that the dispute is really one relating to the interpretation and application of a collective agreement but, in any event, the dispute will have followed the same path through the bargaining council but in terms of section 24 of the LRA.
- [17] Nevertheless, the Applicant has sought to review the dispute which indicates its view that the matter was adjudicated, reviewably or reasonably, as an unfair labour practice dispute.
- [18] Notwithstanding the distinctions referred to above, it simply is not an “interest dispute”.
- [19] An interest dispute is to be distinguished from a “matter of mutual interest” which gives rise to, ultimately, industrial action. This dispute is clearly not of that nature but one that is arbitrable in terms of what are asserted to be rights by the Employees.
- [20] The next ground of review appears to be that the claim did not relate to “benefits” as set out in section 186(2)(a). There is a plethora of jurisdiction on this point. The Employees, in their heads of argument, refer to the decisions in *Protekon (Pty) Ltd v CCMA and Others*⁴ which is clearly to the effect that benefits of the nature dealt with in this matter fall within the ambit of section 186(2)(a) of the LRA. Todd AJ, in *Protekon (supra)* also refers to the *locus classicus* in this particular area of the law, *HOSPERSA*

³ 66 of 1995 as amended

*and Another v Northern Cape Provincial Administration*⁵ and comments, with respect, correctly, that⁶-

[32] What the Labour Appeal Court clearly does say in *HOSPERSA* is that the unfair labour practice jurisdiction cannot be used to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided by the employer. To permit that would allow an employee to use the unfair labour practice jurisdiction to establish new contractual terms, something which the LRA clearly contemplates should be left to a process of bargaining between the parties.

[33] It does not, however, follow from this that an employee may have recourse to the CCMA's unfair labour practice jurisdiction only in circumstances in which he has a cause of action in contract law. If that was the case there would have been little purpose in introducing the specific unfair labour practices contemplated in section 186 of the LRA'

[34] The establishment of the CCMA's unfair labour practice jurisdiction specifically in relation to benefits is, it seems to me a legislative response to the complexity of the reciprocal employer and employee rights and obligations that exist in many employee benefit schemes. In typical employee benefit employee schemes (such as pension funds and medical aid schemes) the employer's obligations frequently extend beyond the simple payment of money to the employee or a third party in return for services rendered by the employee. The employer obligations are typically regulated by separate policies or rules. In many instances the employer enjoys a range of discretionary powers in terms of those policies or rules. The Legislature has clearly considered it necessary to regulate employer conduct in those circumstances by superimposing a duty of fairness irrespective of whether that duty exists expressly or

⁴ (2005) 26 *ILJ* 1105 (LC) per the judgment of Todd AJ.

⁵ (2000) 21 *ILJ* 1066 (LAC).

⁶ At paras 32 to 38.

impliedly in the contractual provisions that establish the benefit....’

- [21] This ground of review is difficult to comprehend from the Applicants affidavit and heads of argument. It does however seem to relate indirectly to the “rights” “interests” debate. The Applicant appears to say that the First Respondent could not have found that the Employees claim was either *ex contractu* or *ex lege*. I accordingly reject this ground of review on the same basis that I rejected ground of review relating to the “rights” “interests” ground of review. The claim arises out of an assertion that the Employees are entitled to have the benefit of the relevant collective agreements.
- [22] What is apparently the last ground of review is that the Commissioner failed to discern a distinction between the contractual benefits the Employees were entitled to under the contract and the statutory benefits accruing to them *ex lege*.
- [23] Section 199 of the LRA effectively elevates any contract of employment, in respect of remuneration and benefits, if same are lower in the relevant employment contract, to at least those provided for in the relevant collective agreement. Accordingly this ground of review is, similarly, without merit.
- [24] The Applicant does argue, at paragraph 7.8 of its heads of argument, that the Employees “were not covered by the terms and conditions” of the relevant collective agreements. I can see no basis for this submission.
- [25] The 2004 agreement states, under the heading “*Scope of Application of Agreement*” that “this agreement shall apply to all employees and employers who fall within the registered scope of the council in the Republic of South Africa.”
- [26] It does not seem to me that any anomalies at all would arise by the application of the relevant collective agreements to the Employees and, to the extent that difficulties may arise, there is comprehensive exemptions process set out in the 2004 agreement at paragraph 14.

[27] On the basis of what is set out above, I am of the view that the Commissioner came a reasonable conclusion within the meaning of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.⁷

[28] It may well be that practical difficulties arise in the implementation of the Commissioner's award. That such difficulties may arise does not detract from the reasonableness of the award.

[29] In the premises, I make the following order -

1. The application is accordingly dismissed.
2. I make no order as to costs.

Snider, A J

Acting Judge of the Labour Court of South Africa

⁷ [2007] 12 BLLR 1097 (CC).

APPEARANCES

For the Applicant: None

For the Respondents: L de Beer

LABOUR COURT