



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 614/11

In the matter between:

NUM obo GWANA KHAYA AND 6 OTHERS

Applicant

and

ESKOM HOLDINGS SOC LIMITED

First Respondent

COMMISSIONER DUMISANI SONAMZI

Second Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

Heard: 6 August 2013

Delivered: 15 October 2014

Summary: The Labour Court maintains the distinction between reviews and appeals when adjudicating review applications.

JUDGMENT

LALLIE J

Introduction

- [1] In this application the applicant seeks an order reviewing and setting aside an arbitration award of the second respondent ('the commissioner') in which he found that he lacked the necessary jurisdiction to arbitrate the applicant's unfair labour practice dispute. The applicant applied for condonation of the late filing of the review application. Both applications are opposed by the first respondent.

Factual background

- [2] The individual applicants were employed by the first respondent on different dates as Assistant Officer Investigators at level T09. The applicant alleged that the first respondent committed an unfair labour practice in relation to promotion firstly, because Mr Koti ("Koti") the first respondent's manager promised the individual applicants that they would be upgraded to level T12 before April 2010, thus creating an expectation that they would be promoted. Secondly, they have in fact been working as investigators who are employed at level T12. Aggrieved by the first respondent's failure to upgrade the individual applicants, the applicant referred an unfair labour practice dispute in relation to promotion to the third respondent. It was not resolved at the conciliation stage. In preparation for arbitration the applicant and first respondent concluded a pre-arbitration minute. As the first respondent had raised a point in *limine* that the third respondent ('the CCMA') lacked jurisdiction to arbitrate the dispute as it fell outside the realm of unfair labour practice related to promotion, the applicant and the first respondent agreed that the point in *limine* be determined first. The commissioner upheld the point in *limine* prompting the applicant to launch this application to have the commissioner's decision reviewed and set aside.

Condonation

- [3] The explanation forwarded by the applicant for launching this application outside the prescribed period of six weeks is that the local official of the applicant union had to seek the individual applicant's mandate to launch it. He also had to go through the applicant union's procedures for enlisting the

services of legal practitioners. When it was granted and after the documents were presented to their attorneys, a need arose for consultation with some of the individual applicants. Opinion was sought from counsel and on its receipt counsel was briefed to draft the founding papers which were filed out of time. The applicant submitted that it has good prospects of success.

- [4] Opposing the application, the first respondent submitted that part of the explanation provided by the applicant does not justify the granting of condonation because the applicant union is large and has sufficient resources to enable it comply with the time periods prescribed in the Labour Relations Act 66 of 1995 ('the LRA'). It further submitted that the applicant's attorney was in a position to draft the founding papers on time or within reasonable time.
- [5] The review application is late by about a month. In its explanation for the delay the applicant has disclosed that, at all relevant times it took active steps to pursue the review application. The first respondent's submission that the applicant's attorney could have drafted the founding papers and filed the application on time does not assist the first respondent. The applicant has a right to elect that its founding papers be drafted by counsel and the first respondent may not compel the applicant to change its election especially when it does not result in unreasonable delay and prejudice. The delay is not excessive and its explanation is reasonable. It did not prejudice the first respondent and the applicant is not without reasonable prospects of success. In the premises, the condonation application must succeed.

Grounds for review

- [6] The applicant mounted its attack on the award on two broad grounds, namely, process related grounds and the absence of the basis for the conclusion that the commissioner had no jurisdiction to arbitrate the dispute before him. The commissioner's decision was, according to the applicant wrong.

The award

- [7] The commissioner found that the reason the applicant perceived its dispute to be one involving promotion is that although they were employed as Assistant Officers, Investigations, they were referred to a Investigators and performed components of Investigators' duties. Their manager, Koti, promised them at the 2009 end of the year function that they would be placed on grade T12. All these facts created an expectation that they would be graded at T12. The commissioner found that the applicant's case was lacking in a number of respects to fall within the realm of the unfair labour practice disputes relating to promotion. He cited the absence of the advertisement for a position, selection and the appointment process which would earmark the process of promotion, selection criteria, interview process or recruitment process which could be examined to determine the fairness or otherwise of the promotion and a successful incumbent who had been preferred over the individual applicants. He relied on authority, which permit the CCMA to interfere in the exercise of managerial prerogative in circumstance where the process relating to promotion is flawed. He found that the dispute stems from the application or implementation of re-grading as the individual applicants wanted to be placed on grade T12 because they were doing components of the T12 grade. The expectation created by Koti's promise was found not to be legitimate because he was not acting on the instructions of the first respondent. The promise was not a product of a resolution of a recognised structure like the Corporate Job Evaluation Committee or Central Consultative Forum. He concluded that the dispute fell outside the realm of unfair labour practice relating to promotion and upheld the point *in limine*.
- [8] The first respondent submitted that the CCMA lacked jurisdiction to determine the dispute on the basis that the applicant referred the dispute outside the period prescribed in section 191 of the LRA and did not apply for condonation. The applicant expressed the view that the correct forum to entertain the issue of the CCMA's jurisdiction or lack thereof based on the ground raised by the first respondent is the CCMA. The applicant's argument is consistent with the

decision in *Bombardier Transportation (Pty) Ltd v Mtiya NO and Others*¹ where it was held as follows:

‘In the absence of any relevant and prior jurisdictional ruling made by a conciliating commissioner, any party to a dispute referred to arbitration may raise any challenge to the CCMA’s jurisdiction at that stage, and the challenge must be dealt with by the arbitrating commissioner in terms of section 138(1).’

[9] When the first respondent formed the view that the applicant should have applied for condonation of the late referral of its dispute to the CCMA, a duty arose on the first respondent to raise the issue clearly with the commissioner for him to make a ruling on the issue. I am not convinced that this court is at liberty to determine the issue, which has to be determined by the CCMA in terms of section 138 of the LRA.

[10] The test for review of jurisdictional rulings is whether the commissioner’s ruling is correct. It is an objective test because a forum either has or lacks jurisdiction. It is expressed thus in *SA Rugby Players Association (SA RPA) and others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another*²

‘The question before the court *a quo* was whether, on the facts of the case, a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary’.

[11] The applicant also sought to rely on the submission that the commissioner made a number of errors in the conduct of the arbitration which rendered his award unreasonable.

¹ [2010] 8 BLLR 840 (LC) at 849 B-C

² [2008] 9 BLLR 845 (LAC) at para 41.

[12] The first respondent submitted that the commissioner's ruling that the CCMA lacked jurisdiction to arbitrate the dispute before him as it was not an unfair labour practice relating to promotion was correct. It was argued on behalf of the applicant that although the individual applicants were employed as Assistant Investigators, they were in fact employed as Investigators. The position of an Investigator is higher than that of an Assistant Investigator. Awarding the individual applicants the positions of Investigators would constitute promotion. They were, in addition promised the positions of Investigators by Koti. The applicant relied on cases which adopted a broader view of disputes which may be arbitrated under the banner of the unfair labour practice. They re-affirm the view that the unfair labour practice definition is not confined to existing rights conferred *ex contractu* or *ex lege*.³

[13] It was argued on behalf of the first respondent that authorities dealing with disputes which may be arbitrated under the jurisdiction of unfair labour practice are inconsistent. However, in a number of decisions the Labour Appeal Court has adopted the narrow approach which is expressed thus:⁴

'It appears to me that the legislature did not seek to facilitate, through item 2(1)(b), the creation of an entitlement to a benefit which an employee otherwise does not have. I do not think that item 2(1)(b) was ever intended to be used by an employee, who believes that he or she ought to enjoy certain benefits which the employer is not willing to give him or her, to create an entitlement to such benefits through arbitration in terms of item 2(1)(b). It simply sought to bring under the residual unfair labour practice jurisdiction dispute about benefits to which an employee is entitled *ex contractu* (by virtue of the contract of employment or a collective agreement) or *ex lege* (the Public Service Act or any other applicable Act).

[14] In *HOSPERSA (supra)*, the Court expressed the view that the unfair labour practice jurisdiction was not created to grant what employees have no right to. The individual applicants entered into contracts of employment in terms of

³ *IMATU obo Verster v Umhlathuze Municipality and Others* [2011] 9 BLLR 882 (LC) at 887 H-888C
United National Public Servants Association of SA v Digomo NO and Others [2005] 12 BLLR 1169 (SCA) at para 4.

⁴ *Horspersa and Another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) at para [9].

which they were appointed as Assistant Officer Investigators at level T9 and at a particular rate of remuneration. In terms of their contracts of employment they are not entitled to be Investigators and to be remunerated at the rate due to Investigators. They did not rely on any document which created a right to be promoted to the positions of Investigators and be remunerated accordingly. No reasons were forwarded by the applicant for this court to follow the wide approach adopted in the Labour Court decisions instead of the narrow one adopted by the Labour Appeal Court. I have considered the *United National Public Servants Association of SA (supra)* which the applicant sought to rely on. In that matter the SCA expressed the view that remedies that the LRA provide against conduct that constitutes an 'unfair labour practice' are not exhaustive of the remedies that might be available to employees in the course of employment. It was further held that particular conduct might constitute both an unfair labour practice and might give rise to other actions. This decision does not detract from the narrow approach. It provides that a remedy for conduct which may be perceived as an unfair labour practice may be provided by legislation other than the LRA.

[15] The applicant sought to rely on the promise made by Koti in 2009 that the individual applicants would be promoted to the positions of Investigators before April 2010. The promise, so submitted the applicant, created a legitimate or reasonable expectation. The applicant attacked the commissioner's finding that their allegation of legitimate expectation to be promoted was without merit on the basis that whether their claim was good or bad was irrelevant to the question whether the CCMA had jurisdiction to entertain the merits of the dispute they had referred. The applicant relied on *Eskom v Marshall and Others*⁵ where it was held that a spes can constitute an unfair labour practice.

[16] The first respondent submitted that the applicants could not make a promise binding on the first respondent in the face of clear rules indicating that grading has to take place in terms of its policies. The first respondent argued that the commissioner correctly found that the applicant could not rely on a promise

⁵ [2003] 1 BLLR 12 (LC) at paras 20 and 21.

made by a manager in 2009 without the necessary authority. The first respondent relying on *Department of Justice v CCMA and Others*⁶, argued that it was necessary for a post to be advertised before a promotion dispute can arise.

- [17] In *Eskom (supra)*, the Court explained that in labour law, disputes are categorized as either disputes of rights or disputes of interest. The LAC in the *HORSPESA* case held that disputes of right fall within the unfair labour practice jurisdiction while disputes of interest are properly the subject of negotiation on an individual or collective basis. The Court expressed the following view on disputes arising from a spes:

‘However, in my view there is middle ground between the poles. This is the position occupied by a spes as regards the enjoyment of a benefit. This spes could be described, in the word of E Riggs 1988 (36) American Journal of Comparative Law 395, as a private interest is a status less than a legal right. The spes must be more than a hope or a wish. It must be, in modern parlance, a legitimate expectation to a benefit. Importantly this benefit (some advantage or privilege as comprehended by the normal concept of a benefit) must be a concrete one which exists. It must be an ascertainable advantage or privilege which has been created by the employer concerned; or one which the employer has declared it will consider conferring upon employees’.

[21] Although legitimate expectation is better known in the context of a fair hearing or procedure in administrative law, it also has application as regards substantive matters. Corbett CJ in *Administrator Transvaal, & others v Traub & others* 1989 (4) SA 731 (A) at 756 H-J quotes the following remarks of Lord Fraser in *Council of Civil Services Unions and others v Minister for the Civil Service* [1984] 3 ALL ER 935 (HL) at 943J-944A:

‘As these cases and the quoted extracts from the judgments indicate, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonable expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at others times in terms of a legitimate expectation

⁶ [2004] 4 BLLR 297 (LAC)

to be accord a hearing before some decision adverse to the interests of the person concerned is taken. As Prof Riggs put it in the article to which I have referred (at 404):

‘The doctrine of legitimate expectation is construed broadly to protect both substantive and procedural expectation.’

[18] The following dictum in *Department of Justice v CCMA and Others*⁷ is instructive:

‘Counsel for the *Department* also submitted that a dispute such as the one in the present matter was a dispute of interest and not a dispute of right and that item 2(1)(b) contemplated disputes of right and not disputes of interest. The right he was referring to is a right *ex contractu* or *ex lege*. He submitted that an unfair labour practice is confined to disputes of right created *ex contractu* or *ex lege*. The answer to this argument is simply that item 2 of Schedule 7 is one of the statutory provisions that seek to give content to the constitutional right to fair labour practices which is entrenched in the Constitution. It creates a statutory right not to be subjected to an unfair labour practice that takes the form of conduct spelt out therein. Item 2(1)(a) confers on both an existing employee and an applicant for employment a right not to be subjected to an unfair labour practice taking the form of unfair discrimination. Item 2(1)(b) confers on an existing employee a right not to be subjected to an unfair labour practice that takes the form of conduct relating to promotion, demotion, training of an employee, disciplinary action short of dismissal and that provision of benefits to an employee.’

[19] Although the *Department of Justice* decision (*supra*) is based on the repealed Item 2 of Schedule 7 to the LRA it is of relevance to the matter at hand as the provision governing unfair labour practice relating to promotion has not changed. Koti’s promise that the individual applicants would be promoted constitutes conduct relating to promotion. It is therefore sufficient to bestow on the CCMA authority to arbitrate the dispute in terms of its unfair labour practice jurisdiction. Jurisdiction is the authority to determine a dispute. In terms of the *Department of Justice* matter (*supra*), the individual applicant’s right not to be subjected to an unfair labour practice has been conferred on

⁷ [2004] BLLR 297 (LAC) at para 53.

them *ex lege*. The question whether they will be successful in proving their case is of no moment at this stage. Therefore, contrary to the first respondent's submissions, the dispute the applicant referred to the CCMA is not a dispute of interest but a dispute of right. As the applicant's referral is a dispute of right the CCMA is obliged to arbitrate it in terms of the *HOSPERSA* decision (*supra*).

- [20] The applicant submitted that the award stood to be reviewed and set aside on the grounds that the commissioner reached an unreasonable decision in concluding that the individual applicant's expectation of promotion was unreasonable as Koti had no authority to make it and it was made in breach of the first respondent's recruitment policies. For purpose of determining jurisdiction it was not necessary for the commissioner to determine the reasonableness of the expectation as such enquiry would be relevant in determining whether the applicant had proved that the first respondent had committed an unfair labour practice against the applicant. The enquiry whether the CCMA has the power to determine the dispute is different from the enquiry whether the applicant proved their case of an unfair labour practice.
- [21] The arbitration award could not stand the objective test for review of jurisdictional awards in that it is wrong.
- [22] I am not convinced that the first respondent acted unreasonably in opposing this application. A costs order in the circumstances will not be appropriate.
- [23] In the premises the following order is made:
- 23.1 The application for the late filing of the review application is granted.
- 23.2 The arbitration award issued by the second respondent under case number ECEL608/11 and dated 4 October 2011 is reviewed and set aside.
- 23.3 The matter is remitted to the third respondent for the issue of the late referral of the dispute to the third respondent and the issue whether the

third respondent has jurisdiction to determine the dispute referred by the applicant to be determined by a commissioner other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Eijen

Instructed by: Wesley Pretorius & Associates

For the First Respondent: Mr Patel of Cliffe Dekker Hofmeyr Inc

LABOUR COURT