



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable

Case no: JR197/14

SOLIDARITY obo MEMBERS

Applicants

and

SFF INCORPORATED ASSOCIATION NOT FOR GAIN

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

COMMISSIONER STEPHAN CLOETE NO

Third Respondent

Heard: 20 March 2014

Delivered: 13 February 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an unopposed application to review and set aside a jurisdictional ruling issued by the Third Respondent (Commissioner) on 7 August 2013 under case number WECT 10752/13. In his ruling, the Commissioner had held that the Commission lacked jurisdiction to determine the dispute before him.

Background:

- [2] This dispute is in respect of 24 of Solidarity Members listed in paragraph 3.2 of its founding affidavit who are in the employ of the First Respondent. They

were issued with letters on 5 July 2013 informing them that the First Respondent had erroneously made overpayments in respect of performance bonuses for the financial year 2010/2011. The employees were further informed of the exact amount allegedly overpaid, and were notified that the First Respondent intended to recover those amounts by making reductions from their salaries. The employees had then submitted a grievance, which however could not be resolved.

- [3] Solidarity held the view that the First Respondent had acted negligently and arbitrarily by insisting that the employees should pay back the amounts, especially since the payments in respect of the incentive bonus were made in 2011. It then referred an unfair labour practice dispute to the CCMA. A con/arb hearing held on 27 July 2013 was unable to resolve the dispute, resulting in a certificate of outcome being issued.

The arbitration proceedings and the award:

- [4] At the arbitration proceedings, the Commissioner had identified the issue to be determined as whether the First Respondent's intention to deduct from the employees' salaries an overpayment made in terms of an incentive bonus amounted to an unfair labour practice. The First Respondent had raised a preliminary point to the effect that the CCMA lacked jurisdiction since the dispute did not relate to an unfair labour practice.
- [5] In considering the preliminary point, the Commissioner had regard to the definition of an unfair labour practice in section 186 (2) (a) of the LRA, and concluded that from the evidence of the parties, the dispute fell outside of that definition. The Commissioner also held that the recovering of amounts that were overpaid to an employee must be dealt with in terms of section 34 of the Basic Conditions of Employment Act, and thus the CCMA lacked jurisdiction.

The review application:

- [6] In terms of the Applicants' Notice of Motion, it was contended that this review application was brought before the Court in terms section 145 and/or section 158 (1) (g) of the Labour Relations Act ("the LRA") on the basis that several

defects existed in the ruling. In this regard, it was further contended that the Commissioner exceeded his powers, committed gross irregularities, did not properly or rationally and justifiably apply his mind to the facts and the law, did not properly apply the provisions and the principles of the LRA, and further that he did not reach conclusions as would have been reached by a reasonable decision maker.

- [7] The Applicants' main contention was that the Commissioner had dealt with one aspect of the dispute before him by enquiring whether the dispute related to an unfair labour practice or not, and whether the Commission had the necessary jurisdiction. It was further contended that the Commissioner incorrectly held that it was clear that the dispute fell outside of the definition of an unfair labour practice or that the CCMA lacked jurisdiction.

The applicable test:

- [8] In regards to the review test applicable in respect of jurisdictional rulings, the Labour Appeal Court had long held that the test is simply whether or not the ruling was correct, and that the rationality or reasonableness test does not apply¹. This test was recently restated by the Labour Appeal Court in *Phaka and 19 others v Commissioner Ronnie Bracks and others*² in the following terms:

'The appellants sought review of the award of the arbitrator on the basis that the conclusion reached by him was not a decision that a reasonable decision-maker or arbitrator in that position could have reached. This is an incorrect approach. When the jurisdiction of the arbitrator is in question the issue is whether he objectively had jurisdiction in law and fact. The arbitrator's finding was that as the appellants were not employees he had no jurisdiction to determine their referrals of unfair dismissal and unfair labour practice disputes to the bargaining council. The court on review in such an instance is required to determine whether that finding was correct. The arbitrator either had jurisdiction or he did not. A finding that he had jurisdiction because he might reasonably have assumed as much is wholly untenable in principle. No legal

¹ *Sanlam Life Insurance Ltd v CCMA* [2009] 30 ILJ 2903 (LAC)

² Case no: JA 3/2014 at para 29

power may be exercised without authority. The standard of review enunciated in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2008 (2) SA 24 (CC) that in order to succeed in a review, the applicant must establish that the award was one that could not have been made by a reasonable decision-maker, applies only to the review of determinations of the fairness of a dismissal or labour practice. It has no application to the determination of jurisdiction.'

- [9] Thus the proper inquiry in this case is whether the Commissioner was correct in finding that he lacked jurisdiction because the dispute before him did not pertain to an unfair labour practice as contemplated in section 186 (2) (a) of the LRA. The Constitutional Court in *Gcaba v Minister for Safety and Security and Other* held that jurisdiction means '*the power or competence of a court to hear and determine an issue between parties*'³. In *SA Rugby Players Association and Others v S A Rugby (Pty) Ltd and Others*⁴, the Labour Appeal Court held that:

'The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court..... The CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties...'

- [10] It follows from the above principles that the CCMA can only determine disputes that fall within its jurisdiction as enjoined by the provisions of the LRA and other applicable pieces of legislation. In determining whether it has jurisdiction, the CCMA is not confined to how the parties wish to label their

³ (2010) 31 ILJ 296 (CC) at paras 74 – 75.

⁴ (2008) 29 ILJ 2218 (LAC) at para 40 . See also *Benicon Earthworks and Mining Services (EDMS) BPK v Jacobs NO and Others* (1994) 15 ILJ 801 (LAC) at para 804 C to D.

disputes⁵, but rather whether the claim is one which it competent to hear and determine. It further follows that where the CCMA or Baragining Council assumes determines disputes which do not fall within their jurisdiction, any outcome in that regard will become a nullity.

[11] In determining whether the decision arrived at by the Commissioner in declining jurisdiction was correct, the facts placed before him have to be looked at. It was the Applicants' case that the intention or decision of the First Respondent to deduct from employees' salaries the amounts allegedly overpaid amounted to an unfair labour practice. In his analysis, the Commissioner had correctly indicated that he was required to satisfy himself that he had the necessary jurisdiction to hear the matter before him by having regard to the definition of unfair labour practice as contemplated in section 186 (2) (a) of the LRA. Having concluded that the dispute did not fall within this definition, he had then had regard to the provisions of section 34 (5) of the Basic Conditions of Employment Act and concluded that the recovering of amounts must be dealt with in terms of this provision.

[12] It is not apparent from the Applicants' submissions or pleadings for that matter as to on what basis it is alleged that the dispute fell within the realm of an unfair labour practice. Section 186(2) of the Labour Relations Act (LRA) defines "Unfair labour Practice" as;

"any 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 dismissals of probationers) or training of an employee or relating to the provision of benefits to an employee);*
- (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;*
- (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and*

⁵ See *National Union of Metal Workers of SA and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC) at para [13].

- (d) *an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 on account of the employee having made a protected disclosure defined in that Act.”*

[13] The uncertainty surrounding the scope of what the term “benefits” in section 186(2)(a) of the Labour Relations Act entails has hopefully and finally been resolved by the Labour Appeal Court in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*⁶ where Musi AJA held 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 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. In as far as Hospersa, GS4 Security and Scheepers postulate a different approach they are, with respect, wrong.’

[14] In the letters received by the employees in respect of the repayment of the overpaid performance bonus, they were specifically informed⁷ that the amounts were to be recovered in terms of ‘section 34 (5) (b)’ of the Basic Conditions of Employment Act as payments were made in error. The employees were afforded four different options as to how they sought to make the repayments. I did not understand the Applicant’s case to be that they were indeed entitled whether *ex contractu* or *ex lege* to more than the bonuses they had legitimately received. Their only concern was that the First Respondent intended to deduct these overpayments from them, moreso since some of the payments were made in 2011. They viewed the First Respondent’s conduct as arbitrary.

⁶ (2013) 34 ILJ 1120 (LAC) at para 50

⁷ See Annexure “C1” to the founding affidavit

- [15] It is accepted that any deductions to be made to employees' remuneration must be subject to the procedural constraints in section 34 of the BCEA, which provides:-

“(1) An employer may not make any deductions from an employee’s remuneration unless –

- a) subject to sub-section (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or*
- b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.*

.....

5) An employer may not require or permit an employee to –

- (a) repay any remuneration except for overpayments previously made by an employer resulting from an error in calculating the employee’s remuneration; or*
- (b) acknowledge receipt of an amount greater than the remuneration actually received.”*

- [16] The fact that the First Respondent seeks to make deductions from employee's remuneration to reverse wrongly overpaid amounts will not render such deductions an unfair labour practice, more especially since an overpayment cannot for all intents and purposes be an entitlement. There is clearly a distinction between payments to which an employee is entitled and payments where there is no such entitlement. The latter category usually involves payments made to employees in error, and employers would ordinarily be entitled to adjust payments made so as to reflect what the employee is legitimately entitled to. It further follows that where there is a dispute as to whether the deductions should be made or not, and which deductions can only be made in accordance with the provisions of section 34 of the BCEA, any such disputes must be adjudicated by the Labour Court, in terms of Section 77 of the BCEA which provides that:-

'Jurisdiction of the Labour Court

- (1) *Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92'*

[17] In the light of the above, the decision of the Commissioner to decline jurisdiction in this case was correct both on the facts and the law. There is therefore no justifiable basis to interfere with the ruling and the application should thus be dismissed.

Order:

- i. The application to review and set aside the ruling issued by the Third Respondent on 7 August 2012 under case number WECT 10752-13 is dismissed.



Tlhotlhamaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: H Perry, Solidarity Official

For the First Respondent: No appearance