THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR428/16

In the matter between**:**

JOHANNESBURG WATER (SOC) LIMITED **Applicant**

and

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

DANIEL DU PLESSIS **Second Respondent**

CYRUS TAVARIA **Third Respondent**

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION **Fourth Respondent**

Heard: **7 December 2017**

Delivered: **08 February 2018**

Summary: **Section 186(2)(a) review application – jurisdictional issue of condonation cannot be raised for the first time during review. Payment of bonus – the employer is bound by the Policy – decision to deviate must not be arbitrary and capricious.**

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] This review application turns on the interpretation of the applicant's (Johannesburg Water) Remuneration Policy in respect of the exercise of its discretion to selectively pay performance bonuses. Johannesburg Water is a public entity meant to render basic service of water delivery to the citizenry of Johannesburg. It has a grading system comprising of 29 bands, with 29 being the highest band. The third respondent (Mr Tavaria) is currently in the employ of Johannesburg Water as a Financial Manager, a position placed on grade 27.

[2] In December 2014, the Board of Directors of Johannesburg Water (the Board) made a decision to pay performance bonuses to all qualifying employees with the exclusion of employees occupying positions in grades 27 to 29, referred to as members of management. According to Johannesburg Water, the rationale behind the decision not to pay performance bonuses to grades 27 to 29 for the financial year 2013/2014, was due to the fact that the overall performance of the organisation had been declining and that decline could only be attributed to the members of management, specifically the incumbents of the positions in grades 27 to 29.

[3] Mr Tavaria together with the colleagues who fell within the affected grades, were not paid the performance bonuses. The Board's decision was communicated to the affected employees on 19 December 2014.

[4] On 8 July 2015, the fourth respondent (IMATU), on behalf of Mr Tavaria, referred the unfair labour practice dispute in terms of section 186(2)(a) of the Labour Relations Act (the LRA)[1] to the Commission for Conciliation Mediation and Arbitration (the CCMA) claiming that the dispute arose on 23 June 2015. The issue of condonation was never raised during the CCMA proceedings.

[1] Act 66 of 1996 as amended.

[5] The second respondent (the commissioner) found that Johannesburg Water committed an unfair labour practice in relation to provision of a benefit by failing to pay Mr Tavaria a performance bonus for the financial year 2013/2014.

Review

[6] Johannesburg Water seeks an order reviewing and setting aside the award issued on 11 February 2016 by the commissioner under case number GAJB14278-15 in terms of section 145 of the LRA.

[7] The application is hinged on two main grounds of review.

7.1. Firstly, that the commissioner committed a misconduct and/or a gross irregularity in the proceedings. Johannesburg Water argued that the commissioner placed undue weight on the evidence that it did not consult with the affected employees before making its decision not to pay bonuses whilst disregarding the evidence to the contrary; he misconstrued the Remuneration Policy; and failed to take due cognisance that the decision not pay bonuses was not capricious or unreasonably applied only in respect to Mr Tavaria, but to all employees within grades 27 to 29.

7.2. Secondly, the commissioner exceeded his powers by determining the dispute without the requisite jurisdiction owing to the fact that the dispute arose on 19 December 2014 and IMATU referred the dispute on 8 July 2015 without applying for condonation.

[8] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others,*[2] the Labour Appeal Court (the LAC) as per Waglay JP contextualised the review test as

[2] [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 14.

postulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] and stated that:

> '[14] *Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.'

[9] In *Head of the Department of Education v Mofokeng*,[4] the LAC, endorsing the above judgment, stated that:

> '[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, … this court in *Gold Fields* … held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in the setting aside of the award. It must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…

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[3] (2007) 28 ILJ 2405 (CC).

[4] *Mofokeng* [2015] 1 BLLR 50 (LAC) at paras 30 to 33; see also *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

[31] … Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] … To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result …

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order.'

<u>Evaluation</u>

[10] I deal first with the second ground of review. It is apparent from the record that the issue of late referral and condonation application was never raised during the arbitration proceedings. It is raised for the first time in the founding affidavit launching these proceedings. Clearly, this Court is bound by the LAC's decision in *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others*,[5] which is still good law. The LAC stated that:

'[12] In my view the language employed by the legislature in s 191 is such that, where a dispute about the fairness of a dismissal has been

[5] [2000] 12 BLLR 1389 (LAC) at para 12; see also *SABC v CCMA and Others* [2002] JOL 9838 (LAC).

referred to the CCMA or a council for conciliation, and the council or commissioner has issued a certificate in terms of section 191(5) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute. That the dispute may have been referred to the CCMA or council for conciliation outside the statutory period of 30 days and no application for condonation was made or one was made but no decision on it was made does not affect the jurisdiction to arbitrate as long as the certificate of outcome has not been set aside. It is the setting aside of the certificate of outcome that would render the CCMA or the council to be without the jurisdiction to arbitrate' (Emphasis added).

[11] Similarly, in the present case, the fact that the dispute was referred outside of the statutory period of 90 days in terms of section 191(1)(b)(ii) of the LRA did not unclothe the CCMA its jurisdiction to arbitrate the matter.

[12] Coming to the first ground of review, the Remuneration Policy provides that:

'11. Short Team Incentive

Johannesburg Water will provide a performance related incentive bonus for the reward of high level performance

Johannesburg Water budgets 3.5% of the payroll budget for performance bonuses. Performance bonuses are however only payable if Johannesburg Water achieves the performance hurdle based on the overall organisations Corporate Scorecard. The setting of budgets and the evaluation of Corporate Scorecard will be conducted by the Board. Should the agreed target be achieved or exceeded the Board mat declare that bonuses be payable up to 3.5 of the payroll based on each individual employees' performance rating. The benchmark is that the company has to achieve at least 85 percent of its performance target before any funds for bonus payment are released. The release of funds will be at the discretion of the Board of directors and will include prorating the amount based on the maximum

> of 3.5 percent of the payroll and the Company scare based on its Balanced Score Card Results...
>
> Should a situation occur where the budgeted amount (i.e. 3,5% of the annual remuneration budget for performance bonuses) or that allocated by the Board of directors prove to be insufficient to reward deserving staff at that levels mentioned above, Johannesburg Water will have to manage the situation by scaling down the applicable percentages to be granted or setting tighter standards for the granting of the performance rewards…'

[13] It is common cause that Mr Tavaria did qualify for the performance bonus as he had achieved a performance rating score of 107% which was 'clearly outstanding' and qualified for 8% allocation in terms of the Remuneration Policy. it is also common cause that Johannesburg Water had reached the organisational performance benchmark of 85%.

[14] The commissioner found that the affected employees were presented with a *fait accompli* as the decision not to pay the bonuses was not preceded by any consultation. He further found that, once the benchmark of 85% has been achieved, the Board had no discretion to decide not to pay performance bonuses to qualifying employees like Mr Tavaria as its discretion was limited to the amount of bonuses to be allocated. He also rejected the reason that provided by Johannesburg Water that the employees in grades 27 to 29, were subjected to a collective punishment for the unsatisfactory organisational performance.

[15] The performance bonus is clearly meant to incentivise the individual performance subject to the organisational performance on the threshold set by the Board. In the event, the organisation fails to meet the performance threshold of 85%, no bonus would be paid. Also, even if the organisation performance threshold is met, if there are budgetary challenges, Johannesburg Water has a discretion to reduce the percentage to be allocated or set tighter standards for the granting of the performance reward.

[16] In my view, the interpretation accorded to the Remuneration Policy by Johannesburg Water is inconsistent with its letter and spirit and was correctly rejected by the commissioner.

[17] The Remuneration Policy does not provide for any other mechanism of incentivising performance. If the Board wished to introduce a new standard of performance for employees in management, it ought to have notified them in time and, where applicable, consult with them or their trade unions. Fairness dictates that the affected employees should have been given the opportunity to perform in terms of the new standard.

[18] Mr Tavaria could not have known that he was going to be held responsible for the performance of his colleagues in grades 27 to 29. It is inescapable that the decision not to pay the bonuses to grades 27 to 29 was injudicious as it deprived deserving employees like Mr Tavaria a well-entrenched benefit as defined in *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others.*[6] Pertinently, the LAC stated that:

> '[50] 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.'

[19] To sum up, the Board's decision not to pay Mr Tavaria his performance bonus for the financial year 2013/2014 is patently arbitrary, capricious and inconsistent with the Remuneration Policy and constitutional imperatives.[7]

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[6] [2013] 5 BLLR 434 (LAC) at para 50.

[7] *Supra* at paras 42 and 53. See also *NEHAWU v University of Cape Town and Others* 2003 (2) BCLR 154 (CC) at para 34.

Conclusion

[20] In all the circumstances, the commissioner's findings cannot be faulted and as such the application stands to be dismissed.

[21] On the issue of costs, IMATU was not legally represented and in any event, this Court is reluctant to award costs in instances where the parties are involved in persisting collective bargaining relationship.

[22] In the premises, I make the following order:

Order

1. The review application is dismissed with no order as costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Advocate T Navsa
Instructed by:	Bowman Gilfillan Attorneys
For the fourth respondent:	Mr M Steyn (union official)
From:	IMATU