



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2004 / 15

In the matter between:

SOLIDARITY obo K OELOFSE

Applicant

and

ARMSCOR (SOC) LTD

First Respondent

COMMISSIONER W KRUGER N.O.

Second Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

Heard: 8 June 2017

Delivered: 21 February 2018

Summary: CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA – application of review test set out – determinations of arbitrator compared with common cause evidence and legal principle – arbitrator's decision regular and sustainable – award upheld

Unfair labour practice – benefits – meaning of benefits – performance bonus subject to a discretion constitutes benefit

Unfair labour practice – exercise of discretion by employer – consideration of principles as to when such discretion would be fair – exercise of discretion fair

Unfair labour practice – double jeopardy – whether prior disciplinary followed by decision not to pay performance bonus constitutes double jeopardy – principles considered – discipline and performance bonus two different issues – double jeopardy does not apply

Unfair labour practice – inconsistency in bonus payment – principles considered – no inconsistency shown or case made out

Review application – no case made out to successfully challenge discretion of employer – decision not to pay employee a performance bonus not unfair – review application dismissed

JUDGMENT

SNYMAN, AJ

Introduction

[1] What is before me to decide in this instance is a review application by the applicants to review and set aside an arbitration award made by the second respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration ('the third respondent'). This application has been brought in terms of Section 145 of the Labour Relations Act¹ ('the LRA').

[2] This matter has as its origin an unfair labour practice dispute referred by the applicants to the third respondent, which dispute concerned the refusal of the first respondent to pay the individual applicant, Karen Oelofse ('Oelofse') a performance bonus. This dispute came before the second respondent as arbitrator, on 7 September 2015, for arbitration. In an arbitration award dated 15 September 2015, the second respondent concluded that the applicants'

¹ Act 66 of 1995.

claim for the payment of a performance bonus to Oelofse, be dismissed. It is this determination of the second respondent that gave rise to the current review application.

- [3] The applicants having received the arbitration award on 17 September 2015, the review application was then filed on 3 November 2015, and was thus brought within the 6 (six) weeks' time limit under Section 145² of the LRA. The review application is accordingly properly before this Court for determination. I will commence deciding this review application by first summarizing the relevant background facts.

The relevant background

- [4] The basic facts to be considered in deciding this matter were common cause in the arbitration. Oelofse was sworn in by the second respondent to testify, and she in essence repeated all that the facts that were contained in a pre-trial minute that had been concluded between the parties. Oelofse also introduced the agreed bundles of documents into evidence. Both parties submitted argument. From this chosen method of conducting the arbitration, I will now distil the common cause facts.
- [5] Oelofse commenced employment with the first respondent on 1 July 1990, and occupied the position of chief contract officer: soldier support at the time when this dispute arose. In this capacity, she dealt directly with suppliers to the first respondent.
- [6] The first respondent had a policy in place in terms of which employees, that qualified for this based on a number of prescribed criteria, could earn a performance bonus. This policy was called the Remuneration Practice (number A-PRAC-2025), and was adopted on 14 June 2010. This policy will be referred to in this judgment as 'the remuneration practice'.
- [7] The qualifying criteria where it came to the payment of a performance bonus to employees is found in clause 15.6.3.7 of the remuneration practice. In

² Section 145(1)(a) reads: 'Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award - (a) within six weeks of the date that the award was served on the applicant ...'

summary, these include, as relevant to this case, an individual performance score of at least 90%, the employee must be in employment on the last day of the financial year for which the payment is calculated, the employee must have more than 6(six) months' service, and the employee must not have been absent from work for longer than 6(six) months. The remuneration practice, in clause 3.13, also specifically provides that 'Performance remuneration is an annual non-guaranteed, discretionary payment to employees based on the attainment of organizational, departmental, divisional / team and individual goals ...'.

- [8] The remuneration practice however specifically incorporates and refers to what is called the Performance Management Practice (number A-PRAC-2023), hereinafter referred to as 'the performance practice', which was adopted on 13 November 2013. In clause 5.16.3.6(e) of the remuneration practice, it is recorded that 'Individual performance will be measured as described in the Armscor Performance Management Practice ...'. In turn, clause 3.2.15 of the performance practice provides that 'Performance is defined as the attainment of specific results/outputs through specific actions, while being consistent with the Armscor values and objectives'.
- [9] In 2014, Oelofse was subjected to disciplinary proceedings by the first respondent. She was charged on 3 July 2014 with four individual charges relating to a failure declare gifts received from suppliers and unauthorized use of company resources. It was alleged that she undertook a trip to Victoria Falls and Livingstone in October 2010, the expenses of which were paid for by Impie Truck Centre, a contractor to the first respondent. It was further alleged that since October 2010, she had been administering bookings made for accommodation at Piccolo Self-Catering Unit, using the first respondent's e-mail facilities and doing so during working hours.
- [10] The disciplinary proceedings against Oelofse were convened before an independent chairperson from TOKISO, and took place over a number of days in January 2015 and ultimately concluded on 2 February 2015. The chairperson found Oelofse guilty of the charges relating to non-declaration of the trip paid for by the contractor and administering her private accommodation. She was thus found guilty of part of charge 1, charge 2 and charge 4. After considering the issue of an appropriate sanction, the

chairperson in a written finding dated 19 February 2015, recommended that a final written warning be issued to Oelofse. This final written warning was then issued 23 February 2015, valid for 12 months.

- [11] Against the above background, the issue of Oelofse's performance bonus for the 2013 / 2014 financial year came up for consideration. Where it came to the qualifying criteria for being paid this bonus, she obtained a performance rating of 107.7%, which was thus in excess of the minimum qualifying rating of 90%. Oelofse also met the other qualifying requirements relating to being employed at the time when bonuses were awarded, and attendance at work.
- [12] On 28 August 2014, the first respondent's board of directors approved the payment of performance bonuses to qualifying employees. These bonuses were then paid on 19 September 2014, but Oelofse was not paid her bonus. Her performance bonus would have been R24 402.00. At this time, she was still subject to the disciplinary proceedings as set out above.
- [13] As stated above, Oelofse challenged this failure to pay her performance bonus as an unfair labour practice dispute to the CCMA, in terms of Section 186(2)(a) of the LRA. Oelofse also lodged an internal grievance in this respect. Ultimately, and on 10 April 2015, pursuant to this grievance, the first respondent gave written reasons for refusing to pay her performance bonus. In particular, it was recorded as follows:
- '... It is however clear that Ms Oelofse's conduct was contrary to the values of the organization. Compliance with the organizational contributes to performance, rather than merely meeting the performance objective stated in the individual's balanced score card. At the heart of an employment relationship there is a duty of good faith. It is a common law duty of an employee to work in the best interest of it employer. ... Therefore, it makes no sense to reward an employee who has been found guilty of serious misconduct, and who has breached that duty, by paying the employee a performance bonus.'
- [14] When deciding the unfair labour practice dispute, based on the reasons for refusing to pay the bonus as set out above, the second respondent found against Oelofse, finding that the first respondent did not act unfairly in refusing

to pay her performance bonus, for these reasons. This led to the current review application.

The test for review

[15] Little time need be spent on the applicable review test. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,³ Navsa AJ held that the standards as contemplated by Section 33 of the Constitution⁴ are in essence to be blended into the review grounds in Section 145(2) of the LRA, and remarked that 'the reasonableness standard should now suffuse s 145 of the LRA'. The learned Judge held that the threshold test for the reasonableness of an award was: '...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'⁵

[16] What *Sidumo* means is that in order to succeed with a review application, a review applicant must first show that there is a failure or error on the part of the arbitrator (an irregularity). If this cannot be shown to exist, then the review fails. If the irregularity is however shown to exist, the review applicant must secondly show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the irregularity, the review application similarly fails. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*⁶ the Court said:

'... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

³ (2007) 28 ILJ 2405 (CC).

⁴ Constitution of the Republic of South Africa, 1996.

⁵ Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 96.

⁶ (2013) 34 ILJ 2795 (SCA) at para 25.

Succinctly described in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁷, the enquiry is:

‘.... 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 a reasonable decision maker could come to on the available material.’

- [17] Thus, all the evidence and issues before the arbitrator must be considered so as to ascertain whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.⁸ In turn, this necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material and issues can, or cannot, sustain the outcome arrived at by the arbitrator. As said in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*⁹:

‘.... the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.’

- [18] Against the above principles and test, I will now proceed to consider the applicants’ application to review and set aside the arbitration award of the second respondent.

⁷ (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

⁸ See *Fidelity Cash Management (supra)* at para 102.

⁹ (2015) 36 ILJ 1453 (LAC) at para 12.

Grounds of review

- [19] The applicant's case for review must be made out in the founding affidavit, and supplementary affidavit.¹⁰ As was said in *Northam Platinum Ltd v Fganyago NO and Others*¹¹:

'.... The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

Whilst the applicants have raised a number of individual review grounds in the founding affidavit, these can all be summarized into the broad categories set out below.

- [20] The applicants have contended that the second respondent misconstrued the evidence by failing to consider that Oelofse had been punished more than once for the same misconduct, being a final written warning and the non-payment of the bonus. The applicants have also made mention in the review application about further punishment in the form of a wrong article in Beeld, but in my view nothing turns on this article, because surely it cannot be seen to be punishment meted out by the first respondent. The proper point the applicants sought to make is that Oelofse qualified for a performance bonus, and having received a final written warning for the misconduct, it was double jeopardy to refuse to pay her performance bonus based on the same misconduct.
- [21] The applicants have also raised an inconsistency issue in the founding affidavit, contending that the second respondent had no regard to such issue, thus committing a reviewable irregularity. This review ground is based on a contention that other managers were dismissed by the first respondent for misconduct, but they still received their performance bonuses in instances where they met the qualifying criteria for the bonus payments.

¹⁰ See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Songoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27. The applicants did not file a supplementary affidavit, and simply filed a Rule 7A(8) standing by their notice of motion.

¹¹ (2010) 31 ILJ 713 (LC) at para 27.

- [22] A further ground of review is that the second respondent failed to properly consider and evaluate the remuneration and performance practices themselves, and also exceeded his powers in this respect, in that he did not conclude that disciplinary action against an employee was not a legitimate criterion for the refusal to pay a performance bonus. The applicants in essence contended that the first respondent did not have a discretion to refuse to pay a performance bonus in the case where the qualifying criteria were met.

Evaluation

- [23] The task in deciding this review is fortunately simplified by the fact that the relevant factual matrix was undisputed, as was the provisions of the performance and the remuneration practices. As said, the applicants have contended that the two practices do not afford a discretion to the first respondent to refuse to pay a performance bonus to an employee, where the qualifying criteria in the remuneration practice (clause 15.6.3.7) have been met. For the reasons to follow, I simply cannot agree with this contention.
- [24] A holistic consideration of the two practices at stake reveals an organizational imperative as an important component of performance rewards. In clause 1.1 of the remuneration practice it is stated that the objective of remuneration in terms of this practice is not only to recognize employees individually for the value they add, but also to reinforce alignment with Armscor's (first respondent) vision, mission and objectives. In general terms, as reflected in clause 1.1.4(a)(ii), the right kind of performance must be rewarded. As referred to above, clause 3.13 of the remuneration practice also specifically recognizes organizational goals in performance remuneration. Read with this, clauses 3.2.15 and 3.2.17 of the performance practice provide that an integral component of 'performance' and 'performance pay' is the attaining of the first respondent's values and objectives. The standards applicable to performance management in clause 5.2 of the performance practice is permeated with organizational vision and objective requirements. My view is that it is clear that it is not just about individual performance objectives and individual qualifying criteria. Any rewarding must be consistent with the first respondent's company objectives and values.

- [25] The point can be illustrated by perhaps an extreme example. Assuming an employee is dismissed for defrauding the first respondent of R100 million, but that same employee achieved the individual performance objectives and qualifying criteria for the preceding financial year, for the purposes of the payment of a performance bonus. Can it now be legitimately argued that such an employee should be rewarded by being paid a performance bonus despite what the employee did? Surely not.
- [26] In interpreting and applying the practices, the following principles in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹² must be considered, where the Court said:

‘.... Interpretation is the process of attributing meaning to the words used in a document having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.’

As summarized above, the documents (practices) as a whole contemplates that the performance remuneration and rewards is not just based on individual performance, but that of a broader organizational objective and value is equally at stake. The purpose is to reward the right kind of performance, which includes aspiring to organizational values. These organizational aspirations are determined by way of the exercise of a discretion. This kind of interpretation and application is in my view certainly the most sensible and business like, in the circumstances.

¹² 2012 (4) SA 593 (SCA) at para 18. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.

[27] In the end, and what is clear from both these practices is that despite the objective qualifying criteria prescribed, that must be met by an employee, the decision whether or not to pay a performance bonus to an employee was always subject to the exercise of a discretion by the first respondent as employer, in order to ensure adherence to organizational objectives and values as well. The second respondent, in his award, accepted this to be the case. In my view, he cannot be faulted in this regard.

[28] That being said, and as the second respondent properly appreciated, the first respondent still had to act fairly in exercising this discretion. Simply put, and in employment law terms, and under the auspices of the unfair labour practice jurisdiction,¹³ there is no such thing as an unfettered discretion. It is now trite that the exercise of the discretion must always be subject to being tested against basic tenets of fairness. In *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁴ the Court held:

‘... Therefore even where the employer enjoys a discretion in terms of a policy or practice relating to the provision of benefits such conduct will be subject to scrutiny, by the CCMA, in terms of s 186(2)(a).’

A similar approach was followed in *Aucamp v SA Revenue Service*¹⁵ where it was said:

‘Even if a benefit is subject to conditions and the exercise of a discretion, an employee could still, as part of the unfair labour practice proceedings, seek to have instances where the employee then did not receive such benefit adjudicated. So therefore, even if the benefit is not a guaranteed contractual right per se, the employee could still claim same on the basis of an unfair labour practice if the employee could show that the employee was unfairly deprived of same. An example would be where an employer must exercise a discretion to decide if such benefit accrues to an employee, and exercises such discretion unfairly.’

¹³ In this regard, Section 186(2)(a) of the LRA reads: “Unfair labour practice’ means any unfair act or omission that arises between an employer and an employee involving — unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee.’ (Emphasis added)

¹⁴ (2013) 34 ILJ 1120 (LAC) at para 47.

¹⁵ (2014) 35 ILJ 1217 (LC) at para 29.

[29] I am satisfied that the payment of a performance bonus in the circumstances *in casu* would constitute such a benefit as contemplated by Section 186(2)(a) and the *dicta* in *Apollo Tyres* and *Aucamp*. In *Apollo Tyres*¹⁶ the Court specifically considered the unfair labour practice jurisdiction under Section 186(2)(a) relating to the concept of “benefits” and said:

‘... 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 s 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.’

Of direct application *in casu*, the Court in *Aucamp*¹⁷ specifically considered a case of whether the payment of a performance bonus to an employee would be a benefit under the unfair labour practice jurisdiction, and held as follows:

‘The issue of the applicant's performance bonus, and the case that he has been unfairly deprived of the same, is clearly an unfair labour practice case relating to benefits. On the facts of this matter, the performance bonus is clearly not remuneration. In fact, the qualifying provisions and terms of the PMDS policy and collective agreement make it clear that it is not remuneration. It is linked to performance objectives, all kinds of qualifying requirements, and several moderation levels which do not specifically relate to employees or their own individual performance. Also, what is declared as a bonus pool forming the very basis for the quantum of any such bonus, is also discretionary and dependent on a variety of factors. ...’

[30] With the performance bonus *in casu* thus being a benefit, and the discretion to be exercised by the first respondent in awarding or not awarding such a benefit being subject to scrutiny based on what would be considered to be fair,

¹⁶ (*supra*) at para 50. See also *SA Revenue Services v Ntshintshi and Others* (2014) 35 ILJ 255 (LC) at paras 35 – 37; *Thiso and Others v Moodley NO and Others* (2015) 36 ILJ 1628 (LC) at paras 11 – 12; *Western Cape Gambling and Racing Board v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2166 (LC) at para 18.

¹⁷ (*supra*) at para 25.

the next most obvious question to answer is under what circumstances the exercise of the discretion could indeed be seen to be unfair. The Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*¹⁸, in dealing with the challenge of discretions in general, decided that a discretion would be open to successful challenge if the discretion was not judicially exercised and in particular:

‘... had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles’

- [31] In *Apollo Tyres* the Court applied these general principles applicable to the challenge of the exercise of discretion on the basis of being unfair, as follows:¹⁹

‘... unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.’

- [32] There are a number of authorities dealing with the issue of unfairness, where it comes to the discretion exercised by an employer when deciding whether or not to promote employees, with promotion also being part of the same unfair labour practice jurisdiction in Section 186(2)(a). In this respect, it has been said that the discretion of the employer was not to be lightly interfered with,²⁰ but despite this, the general theme that emerges is that the discretion would be considered to have been unfairly exercised if it was, similarly to what the Court said in *Apollo Tyres*, exercised in a manner that was arbitrary,

¹⁸ 2000 (2) SA 1 (CC) at para 11.

¹⁹ Id at para 53.

²⁰ See *Provincial Administration Western Cape (Department of Health and Social Services) v Bikwani and Others* (2002) 23 ILJ 761 (LC) at paras 29 – 30; *SA Police Service v Safety and Security Sectoral Bargaining Council and Others* (2010) 31 ILJ 2711 (LC) at para 15.

capricious, mala fide, irrational or grossly unreasonable.²¹ As was said in *Ncane v Lyster NO and Others*²²:

‘... the discretion of an arbitrator to interfere with an employer’s substantive decision to promote a certain person is limited and an arbitrator may only interfere where the decision is irrational, grossly unreasonable or mala fide ...’

I see no reason why the exact same considerations cannot be applied when evaluating whether the exercise of an employer’s discretion where it comes to the awarding, or not awarding for that matter, of benefits, would be fair or unfair.

- [33] When applying all of the above *in casu*, the appropriate point of departure is establishing exactly why the first respondent decided not to pay Oelofse the performance bonus. Fortunately, the first respondent had committed this reason to writing, in the grievance outcome of 10 April 2015, saying that Oelofse contravened her duty of good faith towards the first respondent and acted contrary to the values and objectives of the first respondent as an organization, and as a result of the serious nature of the misconduct she had committed and been found guilty of.
- [34] Is this approach adopted by the applicant then irrational, capricious, grossly unreasonable or *mala fide*? In deciding this, it is in my view appropriate to consider the facts in *Apollo Tyres*, as a basis for comparison to the contrary, so to speak, to the matter *in casu*. In *Apollo Tyres*, the dispute concerned early retirement benefits which could to be granted to employees at the employer's discretion, and what had to be considered in deciding whether that discretion had been exercised unfairly.²³ The Court reasoned as follows, in ultimately deciding that the discretion was indeed exercised unfairly:²⁴

²¹ See *Arries v Commission for Conciliation, Mediation and Arbitration and Others* (2006) 27 ILJ 2324 (LC) at paras 47 – 48; *National Education, Health and Allied Workers' Union obo Manyana and another v Masege NO and Others* [2016] JOL 35711 (LC) at para 55; *Nainaar v Department of Works, KwaZulu-Natal and Others* [2015] JOL 33268 (LC) at para 33.

²² (2017) 38 ILJ 907 (LAC) at para 25.

²³ (*supra*) at para 52.

²⁴ *Id* at para 59.

'It is clear that the appellant kept on shifting the goal posts. This was in all probability done in order to make sure that she was given an 'acceptable' reason why she did not qualify for the scheme. It is clear that there is no acceptable, fair or rational reason why she was not allowed to participate in the scheme. The employer did not exercise its discretion fairly.'

In casu, there was no shift of position on the part of the first respondent where it came to deciding not to pay the performance bonus. It simply applied the same criteria and considerations as contained in the remuneration and performance practices as it existed at the time. Even if the first respondent may have been wrong in interpreting and applying these practices, that will not render to the discretion unfair, considering what needs to be shown in this regard. It is also beyond doubt that Oelofse had actually been disciplined, found guilty, and given a final written warning for what was serious misconduct, which was considered by the first respondent in exercising its discretion. It is not a fabricated scenario, but an objective fact that existed.

[35] In *City of Cape Town v SA Local Government Bargaining Council and Others*²⁵, employees were paid a vehicle cost benefit which had as a requirement that employees had to submit log sheets. Because some employees were paid while they had not submitted log sheets, this benefit scheme was terminated. The employee in this matter was one of those that did not submit log sheets. The Court held:²⁶

'When Esau stopped submitting log sheets to the city, he stopped being entitled to the benefit. It was not unfair of the city to stop payments in those circumstances.'

The direction that can be extracted from this judgment is that it would not be unfair if the existence of an objective fact forms the basis of the exercise of the discretion, provided of course it is relevant to the purpose for which the discretion is exercised.

²⁵ (2014) 35 ILJ 163 (LC) at para 24.

²⁶ *Id* at para 27.

[36] The concept of fairness is not one sided, but a two-way street, and must involve considerations of fairness to both the employer and the employee. In this case, and in my view, the second respondent as arbitrator was very much alive to this. The nub of his reasoning was that it would not be fair for Oelofse to be rewarded by giving her a bonus, considering the serious misconduct she committed. I tend to fully agree with this. I believe Oelofse was lucky to escape dismissal. The misconduct she committed was serious, and considering her position in the first respondent, entirely at odds with her duty of good faith towards the first respondent as her employer. One can hardly do any better than to refer to the following dictum in *Schwartz v Sasol Polymers and Others*²⁷:

‘The employment relationship obliges an employee to act honestly, in good faith, and to protect the interests of the employer so as to avoid conflicts of interest that may arise which may breach this duty. The appellant was employed in a senior position as an engineering manager. His calculated silence in the face of a duty to speak amounted to a fraudulent non-disclosure or concealment of the true state of affairs in circumstances in which gifts and benefits earned secretly fell to be disgorged by him with ‘little room ... to avoid that consequence’. His conduct was by its nature dishonest in circumstances in which he was obliged to act with honesty, diligence and good faith towards his employer and not to allow his own interests to prevail over those of Sasol. ...’

The comparison to the conduct of Oelofse is clear. How can it be suggested that in such circumstances, Oelofse should be rewarded by way of a discretionary bonus meant to recognize and reward employees that are exceptional and excel. Such a proposition is to me simply beyond comprehension. For the first respondent to in these circumstances exercise its discretion in favour of not rewarding Oelofse, can in my view simply not be seen to be unfair.

[37] It was always undisputed that Oelofse achieved the qualifying requirements to be paid a performance bonus. But, and in my view, there is little doubt that the discretion whether to award an employee a performance bonus is not just

²⁷ (2017) 38 ILJ 915 (LAC) at para 20.

based on meeting certain objective deliverables. If that was indeed so, then why would there even be a need for a discretion. Simply put, if an employee makes 90% or target as required, is employed at the time of the bonus award, and has more than minimum service required, the payment of a bonus follows. There would be no discretion in it. It must therefore follow that the fact that it is specifically provided in the practices that the payment of the performance bonus is subject to a discretion, has to mean something more than just meeting specified qualifying requirements. It must mean that it is still up to the first respondent to decide whether or not an employee, even if that employee does meet the qualifying criteria, should indeed get a performance bonus, and in doing so, the first respondent must act fairly. The second respondent in his award properly appreciated this to be the case.

[38] I thus cannot accept the applicants' argument that simply meeting the objective criteria in the remuneration policy is the only *quid pro quo* for getting paid a performance bonus. It is my view that there is another general requirement, being whether the first respondent in its discretion considers it appropriate to pay that bonus on the basis of, as described above, the employee concerned adhering to the first respondent's values and objectives. As fully dealt with above, it can hardly be said that the first respondent acted unfairly or even unreasonably in deciding that the misconduct Oelofse was found guilty of meant that she did not meet these values and objectives. In my view, and overall considered, this was a fair position to adopt.

[39] Whilst it may be so that applicants disagreed with the manner in which the first respondent chose to exercise its discretion, such disagreement simply cannot substantiate a case for interfering with the discretion. It takes a lot more than disagreement to upset the exercise of a discretion. In *Eskom Holdings SOC Ltd v National Union of Mineworkers obo Kyaya and Others*²⁸ the Court held, in comparable circumstances, when dealing with an unfair labour practice dispute:

'It is difficult to understand, in the above context, now it can be said that the applicant acted unfairly towards the individual respondents. The fact that the

²⁸ [2017] 8 BLLR 797 (LC) para 89.

individual respondents may disagree with the grading attached to their positions because of the nature of the work and the duties they fulfilled simply does not matter. There was no evidence by the individual respondents or even any case that the grading of T10 attached to their positions was improperly arrived at, wrong, or for example in breach of the applicant's policies. What matters, beyond doubt, is that this grading was properly considered and debated by all stakeholders, agreed to, and then graded by the Job Evaluation Committee accordingly, leading to a grading of the individual respondents' positions at T10. Accordingly, the high water mark of the individual respondents' case is that they did not agree that their positions were a T10 grade. Such disagreement simply cannot successfully found a case of an unfair labour practice.'

- [40] In the end, the second respondent's conclusion cannot be faulted. He considered the basis upon which the first respondent exercised its discretion not to pay a performance bonus to Oelofse. According to the second respondent, Oelofse should not be rewarded based on performance where she in fact committed serious misconduct, and the first respondent did not act unfairly in so deciding. On the basis I have discussed above, it is my view that this conclusion arrived at by the second respondent resorts well within the bands of what would be considered to be a reasonable outcome, and is unassailable on review.
- [41] This then brings me to the 'double jeopardy' argument of the applicants. As set out above, the applicants argued that because Oelofse had already been given a final written warning for her misconduct, depriving her of her performance bonus based on in essence the same misconduct is tantamount to punishing her again for this, and this would be double jeopardy. The second respondent rejected this argument, finding that this was not a case of Oelofse being punished twice, but rather her not being rewarded.
- [42] In deciding whether the double jeopardy conclusion of the second respondent is reviewable, it is perhaps best to start with considering what exactly 'double jeopardy' is. In common law, this kind of defence is commonly known as

autrefois convict. In the context of criminal proceedings, the Court in *Lelaka v S*²⁹ held:

‘It is a general rule of the common law that a person may not be punished twice for the same offence. This common-law rule is now entrenched in the provisions of section 35(3)(m) of the Constitution. In terms of the rule, an accused may raise the plea of *autrefois convict* or *acquit*. This principle is grounded in the maxim that no person is to be brought into jeopardy more than once for the same offence. This principle finds expression in the rule of law that if someone has been either convicted or acquitted of an offence he or she may not later be charged with the same offence or with what was in effect the same offence. ...’

[43] The Constitutional Court considered the principle as well in *S v Basson*³⁰ and said:

‘An accused person is only protected against prosecution in a second prosecution, if he or she was in jeopardy of conviction in the first. Stratford JA enunciated this principle in *R v Manasewitz* in the following terms:

“I accept, for the purpose of these reasons, the following requisites to establish a plea of *autrefois acquit*, namely that the accused has been previously tried (1) on the same charge, (2) by a Court of competent jurisdiction and (3) acquitted on the merits. Obviously an accused so tried must have been in jeopardy. The proposition is sometimes stated slightly differently thus: That the accused has been previously indicted on the same charge, was in jeopardy, and was acquitted on the merits. If so stated it is necessary to add that if the indictment was invalid or the Court had no jurisdiction the accused was not in jeopardy. Again, if after conviction a superior Court quashes an indictment as bad *ab initio* the accused cannot on retrial rely upon the previous-ultimate-acquittal. This view can be justified either on the ground that the crime alleged in the subsequent, good, indictment is not that alleged on the previous, bad indictment, or on the ground that the accused was never (legally) in jeopardy or that the acquittal was not on the merits.”

²⁹ [2016] JOL 35986 (SCA) at para 6. See also *Plaatjies v Director of Public Prosecutions, Transvaal* [2014] JOL 31739 (SCA) at para 13.

³⁰ 2005 (12) BCLR 1192 (CC) at paras 254 – 255.

[44] What emerges from the above *dicta* is that what must be shown to exist for double jeopardy to apply, is that a person must not be charged again for the same offence that person had already been found guilty of. In the context of employment law, this would mean that an employee cannot be charged in disciplinary proceedings for the same misconduct, based on the same facts, if already subjected to disciplinary proceedings and found guilty of that misconduct with punishment dispensed.³¹ Applying what was said in *Lelaka* and *Basson* – the employee must be in the same jeopardy in the first proceedings as the employee would be in, in the second proceedings.

[45] But the Labour Appeal Court has however decided that the principle of *autrefois convict* cannot simply be applied in employment law without any reservation. In *BMW (SA) (Pty) Ltd v Van der Walt*³² the Court held:

‘... It is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res iudicata* ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick. ...’
(emphasis added)

This principle was equally applied by the same Court in *Branford v Metrorail Services (Durban) and Others*³³.

[46] In my view, and in the light of the above considerations, this is not a case where the applicants can successfully raise double jeopardy as a basis for challenging the fairness of the first respondent’s decision not to by Oelofse a performance bonus. There are a number of reasons why this would be the case. The first is that two separate disciplinary proceedings on the same charge simply do not exist. Where it comes to the performance bonus issue, it is simply not a disciplinary matter. There is no charge for which Oelofse faced

³¹ See *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 860 (LAC) at para 18 footnote 2.

³² (2000) 21 ILJ 113 (LAC) at para 12.

³³ (2003) 24 ILJ 2269 (LAC) 7. See also *Metropolitan Health Risk Management v Majatladi and Others* (2015) 36 ILJ 958 (LAC) 23 – 24 ; *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO and Another* (2008) 29 ILJ 1707 (LAC) at paras 13 – 14; *Armstrong v SA Civil Aviation Authority* (2011) 32 ILJ 2487 (LC) at para 14; *Solidarity/MWU on behalf of Van Staden v Highveld Steel and Vanadium and Another* (2005) 26 ILJ 2045 (LC) at para 13.

the same kind of jeopardy as in the case of the initial disciplinary proceedings, being the possible loss of her job (which fortunately turned out to be a final written warning). Secondly, the performance bonus is not an issue concerning conviction, for the want of a better description, and punishment. This is echoed in the performance practice in clause 5.2.17, where it is said that 'Performance management is not seen as a punitive process ...'. The performance bonus is an issue of the employee being rewarded for being exceptional. Determining whether the employee is exceptional for the purposes of a reward is simply not the same enquiry as in the case an employee being guilty of a charge of misconduct and being punished. In simple terms, it cannot be a case where Oelofse is punished twice for the same offence following separate disciplinary proceedings.

- [47] A comparison can be drawn to the instances where an employee was convicted in a criminal court for an offence, and then based on the same facts and same conduct, the employee is then subjected to internal disciplinary proceedings in an employer. It has been consistently held that this is not a case of *autrefois convict*, in essence because it is not the same kind of proceedings and the same jeopardy is not faced.³⁴
- [48] This is simply a case where the existence of a disciplinary record, as a matter of objective fact, has adverse consequences to an employee. This does not mean that such consequences that flow from the existence of such a disciplinary record, constitutes punishment for the same offence all over again. There are in fact many examples in employment law where the existence of a final written warning may be considered in the case of an employer declining to promote an employee. This was for example recognized in *Noonan v Safety and Security Sectoral Bargaining Council and Others*³⁵. This situation clearly does not mean that the employee is pushed twice for the same misconduct.
- [49] The distinction can be further properly illustrated by the facts in the judgment in *Lelaka*³⁶. In that case, the accused was convicted of assault. Following the conviction of assault, the victim then became deceased. Because it was the

³⁴ See *Muremi v SAPS and Others* [2009] JOL 23237 (LC); *Moahlodi v East Rand Gold and Uranium Co Ltd* (1988) 9 ILJ 597 (IC)

³⁵ (2012) 33 ILJ 2597 (LAC) at para 35.

³⁶ (*supra*) at para 8.

exact same facts and events that gave rise to both the assault, and the victim later becoming deceased, the question was whether the accused could now be charged for murder as well. In specifically considering the defence of *autrefois convict*, the Court said:

‘... When the appellant was convicted the deceased was still alive. It was thus not possible at that stage to charge him with murder. A case on all fours with the present case is that of *R v Stuurman* (1863) 1 Roscoe 83. In that case an accused had been convicted of common assault and the man assaulted subsequently died. It was held that this conviction was no bar to his subsequent trial and conviction for culpable homicide.’

In my view, the following comparison to the matter *in casu* is apparent. At the time when the disciplinary proceedings against Oelofse was being conducted, and she was subsequently found guilty, the issue of her performance bonus was simply not up for consideration, nor part of the disciplinary proceedings. It would not have been competent for the chairperson in those disciplinary proceedings to deal with the issue of her performance bonus and make any determination whether it should be paid or not. There should accordingly be no bar to the first respondent later considering this issue, in line with the practices, and then exercise a discretion in that respect, provided of course that it is fair.

[50] But even if it can somehow be suggested that *autrefois convict* as a matter of principle could find application in this instance, that is still not the end of the issue. As said in *BMW*, fairness always remains the ‘yardstick’. As I have already dealt with above, it is simply not unfair for the first respondent to have decided that the prior misconduct and actual disciplining of Oelofse meant she could not be rewarded by way of a performance bonus. So therefore, even on the basis of this ‘yardstick’, the applicants’ case has no substance.

[51] Only the inconsistency issue remains. In this regard, it must always be remembered that the duty to prove the existence of inconsistency would rest on the applicant (‘employee party’), and that the case for inconsistency must be made out in sufficient particularity, identifying the other employees

involved, so as to enable the employer to provide a proper answer to it.³⁷ And even then, should it be shown that employees have been treated differently, a number of further requirements must still be satisfied in order to successfully make out an inconsistency case. These are first, that a like for like comparison must be conducted.³⁸ Even if a like for like comparison points to possible inconsistency, it must then still be shown that the employer's conduct in treating employees differently was not motivated by arbitrariness, *mala fides*, capricious conduct or a discriminating management policy.³⁹ So even if an employer may have erred in acting against some employees and not others, it does not follow that an inconsistency case succeeds, in the absence of the aforementioned considerations. As said in *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd*⁴⁰:

‘... If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.... ‘

[52] Considering the above principles, the applicants' inconsistency case faces a number of insurmountable obstacles. Firstly, I could find no evidence of a proper like for like comparison being conducted. The pre-arbitration minute only makes a cursory reference to it being a common cause fact that other unidentified managers were dismissed for misconduct but still received a

³⁷ See *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 ILJ 2406 (LAC) at para 39; *Banda v General Public Service Sectoral Bargaining Council and Others* [2014] JOL 31486 (LC) at para 49; *Comed Health CC v National Bargaining Council for the Chemical Industry and Others* (2012) 33 ILJ 623 (LC) at para 10; *SA Municipal Workers Union on behalf of Abrahams and Others v City Of Cape Town and Others* (2011) 32 ILJ 3018 (LC) para 50; *Minister of Correctional Services v Mthembu No and Others* (2006) 27 ILJ 2114 (LC) at para 13.

³⁸ See *Banda (supra)* at para 53; *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) at para 11; *Minister of Correctional Services v Mthembu NO and Others (supra)* at paras 8 – 9.

³⁹ See *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para 29; *Banda (supra)* at para 57; *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1707 (LC) at para 19; *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others* (2010) 31 ILJ 2836 (LAC) at para 20.

⁴⁰ (1999) 20 ILJ 2302 (LAC) at para 29.

performance bonus, where they met the qualifying criteria. In her testimony, Oelofse makes no reference to this. The applicants' written argument presented to the second respondent refers a number of documents in the bundle in this respect, but all of these documents were never ventilated in evidence and were not proven. The applicants' argument makes specific reference to three individuals, A C Van der Spuy, D J Viljoen and P A Meiring, merely alleging they were dismissed in 2012 but received their performance bonus for the 2011/2012 period. The simple fact remains that there is no indication of the particular circumstances of such mentioned cases, followed by a comparison to the current case. There is equally no evidence as to what may have motivated the first respondent in paying these bonuses to these employees, despite their misconduct. This must mean the end of any inconsistency case, as the applicants have simply dismally failed to discharge the duty on them to establish such a case.

[53] The above being said, the first respondent nonetheless sought to offer an explanation as to what the applicants were complaining about. It explained that prior to 13 November 2013, when the performance practice as it stood at the time of this matter was adopted, there was a *lacuna* in the practices where it came to the organizational requirements, objectives and norms, as part of the performance bonus discretion. The first respondent explained that this *lacuna* was remedied by the adoption of the performance practice referred to, and after this, no employee was ever paid a performance bonus where these organizational requirements were not met. The performance bonus applicable in this case related to such period when the performance practice in its current form applied. There was nothing to contradict this explanation of the first respondent, which in any event is consistent with the undisputed documentary evidence. This explanation would defeat any inconsistency case brought by the applicants.

[54] To sum up, the second respondent simply cannot be faulted where he found that the first respondent did not act unfairly in deciding not to reward Oelofse by way of a performance bonus, considering the misconduct she had committed. Similarly, the second respondent cannot be faulted for finding that this was not a case of double jeopardy. In the end, the applicant failed to make out a case that the discretion exercised by the first respondent was exercised

in such a manner so as to open it up for intervention. No proper case of inconsistency has also been made out. The applicant has therefore failed to justify a proper basis on which this Court should interfere with the award of the second respondent.

Conclusion

[55] In *Gold Fields Mining*⁴¹ the Court said:

‘.... The questions to ask are these: ... (ii) Did the arbitrator identify the dispute he was required to arbitrate....? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? .. (iv) Did he or she deal with the substantial merits of the dispute? and (v) is the arbitrator’s decision one that another decision-maker could reasonable have arrived at based on the evidence?’

In casu, all these questions must clearly be answered in the affirmative, and this can only lead to an ultimate conclusion that the second respondent’s award must be upheld.

[56] Therefore, and for all the reasons set out above, I conclude that the second respondent’s arbitration award is not reviewable. I am satisfied that there is nothing untoward or irregular in the first respondent’s evaluation and determination of the matter. Insofar as the issue of the outcome arrived at by the second respondent may be considered on the basis of it being reasonable or unreasonable, there is in my view no doubt that it would comfortably resort within the bands of reasonableness as required, in order to be sustainable on review. The applicants’ review application accordingly falls to be dismissed.

[57] This then only leaves the issue of costs. The first respondent has pressed for a costs award. But I am unable to accede to this request. The parties are still very much in an employment relationship with one another. Although the applicants in the end could not make out a case, I do consider that Oelofse’s dissatisfaction about the fact that she did not receive the performance bonus where she actually met the qualifying criteria was understandable, even if

⁴¹ (*supra*) at para 20 – 21.

misplaced. The issue of whether a discretion has been fairly or unfairly exercised is often complex, and would justify proper consideration by this Court, and I thus cannot fault the applicants for bringing the case. Exercising the wide discretion I have under Section 162 of the LRA, I consider it appropriate that no costs order be made against the applicants.

Order

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

1. The applicants' review application is dismissed.
2. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant: N Ras – Union Official

For the First Respondent: Adv G Fourie

Instructed by: Bowman Gilfillan Attorneys