



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1225/2014

In the matter between:

PSA obo SP MHLONGO

Applicant

and

First Respondent

**THE GENERAL PUBLIC SERVICE
SECTORAL BARGAINING COUNCIL**

Second Respondent

COMMISSIONER MARLEZE BLIGNAUT N.O

Third Respondent

DEPARTMENT OF DEFENCE

Heard: 30 May 2017

Delivered: 3 July 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] In this opposed application, the applicant (Mhlongo) seeks an order reviewing, setting aside and replacing the award of the second respondent (Commissioner) issued on 4 May 2014. In her award, the Commissioner held

that the decision by the third respondent to terminate Mhlongo's allowance, did not constitute an unfair labour practice within the meaning of section 186 (2)(b) of the Labour Relations Act¹ (LRA).

[2] Mhlongo's claim of an allowance before the Commissioner was grounded in the provisions of Annexure B, Part XIX of the PSCBC Resolution 3 of 1999 (The Resolution)². In June 1999, Mhlongo was transferred from the

¹ 66 of 1995, as amended.

² 'XIX. Allowances for personnel serving executive authorities

1. Aim

In some cases, the employer shall provide an allowance for personnel directly serving executive authorities

2. Existing allowances

If an employee received an allowance for serving an executing authority on March 1 1999, the employee shall continue to pay the allowance until

- 2.1 the employer and employee negotiate a change in line with the requirements of the Labour Relations Act
- 2.2 parties in a bargaining council that includes the employee in its scope negotiate a change in the system of allowances, or
- 2.3 the employee leaves the position that she or he occupied on March 1 1999.

3. Eligibility

3.1 The employer may pay the allowance to an employee who serves an executing authority

- (a) Either directly or by working for an employee who reports to the executing authority, and
- (b) In terms of a Cabinet decision on Ministerial staffing

3.2 The employer shall pay an employee the allowance if the employee's executing authority considers it necessary to compensate for

- (a) undertaking duties that lie outside the employee's primary career or profession;
- (b) overtime;
- (c) travelling; and/or
- (d) inconvenience

4. Determination of allowances

4.1 Clothing and overtime

- (a) ...
- (b) ...
 - (i) ...
 - (ii) Payment of overtime
 - (i) ...
 - (ii) ...

4.2 Compensation for inconvenience and for work outside of an employee's main career

- (a) An executing authority may pay an eligible employee an allowance equal to a maximum of R2150 a month for inconvenience and work outside of the employee's main career
- (b) The employer and employee shall pay normal pension contributions on the allowance
- (c) The Minister may revise the maximum amount annually, based on the overall increase in the Consumer Price Index
- (d) Up to the maximum amount,
 - (i) Parties in a bargaining council may negotiate the allowance for a particular position that falls within the scope of the council, and

Department of Housing to the third respondent as an Assistant Director of Personnel Management. At the Department of Housing, he was entitled to the allowance in terms of the provisions of the Resolution, which he had continued to receive upon his transfer to the third respondent.

- [3] In August 2012, Mhlongo was placed on precautionary suspension with full pay pending investigations and finalisation of a disciplinary enquiry into allegations of misconduct. The third respondent continued to pay the allowance until January 2013, when the Director of Administration in the third respondent instructed the Financial Department to cease payments with retrospective effect from September 2012. Payment of allowances to Mhlongo was then terminated on the basis that his suspension disqualified him. A further instruction was issued for any over payments made to Mhlongo to be recovered from him.
- [4] A deduction was then made to Mhlongo's April 2013 salary in the amount of R33 565.00. The third respondent refused to reverse the deductions despite requests from Mhlongo's Union. In June 2013 an unfair labour practice dispute was then referred to the first respondent, the General Public Service Sectoral Bargaining Council (GPSSBC) in respect of the precautionary suspension that took effect in August 2012. It is common cause that Mhlongo has since been dismissed based on the allegations of misconduct.

The arbitration proceedings and the award

- [5] Central to Mhlongo's referral of the dispute and his evidence at the arbitration proceedings was that the termination of the allowance, which he considered to be a benefit, constituted an unfair labour practice. As apparent from his referrals for both conciliation and arbitration to the GPSSBC, he only sought the reinstatement of the allowance³, and it does not appear from those referrals that he sought the upliftment of his suspension.

(ii) If no collective agreement affects a position, the executing authority shall determine the amount of the allowance.

³ Annexures 'M13' and 'M15' to the Founding Affidavit

- [6] Mhlongo's case as summarised by the Commissioner was essentially that he had been entitled to the allowance since 2004 when he was still at the Department of Housing. With a transfer to the third respondent, that benefit was always due to him as it was part of his remuneration package, effectively becoming a term of his contract of employment. Further to the extent that he was placed on precautionary suspension with full pay, he was still entitled to the allowance, notwithstanding that suspension.
- [7] His further contention was that the termination of the allowance was a form of 'punishment'. He had nonetheless conceded that during his suspension, he was not required to travel, to work overtime, to perform extra functions outside of his normal scope of duties, and/or that he was not subjected to any inconvenience, within the meaning and requirements of clause 3.2 of the Resolution.
- [8] The third respondent relied on the evidence of its Director: Administration, Mr Freddy Khumalo. His testimony was essentially that it was discovered that a number of employees within the third respondent were being paid allowances even when they did not qualify in accordance with the provisions of the Resolution. This had caused a strain on the third respondent's expenditure, and he had then issued an instruction for such payments to be stopped, and for overpayments to be recovered from the individual employees concerned.
- [9] Khumalo confirmed that no consultations were held with the concerned individuals before the payments were stopped. He however testified that not every employee was paid the allowance as one had to meet the necessary requirements in terms of the provisions of the Resolution. Thus, payment could be stopped even in respect of those employees that had previously qualified, depending on the nature of the duties they performed. In this case, Mhlongo did not meet the criteria for payment during his period of suspension.
- [10] According to Khumalo, the allowance under the Resolution was only payable in circumstances outlined therein, and was different from other benefits/allowances such as housing, service bonus or medical aid, which Mhlongo had continued to receive even after his suspension.

- [11] In his award and in regards to the contention that the allowance formed part of the terms of Mhlongo's contract of employment, the Commissioner rejected that argument on the basis that he (Mhlongo) had not produced evidence of that contract, and in the absence of such proof, the allowance was merely paid out as provided for in the Resolution.
- [12] In regard to the argument that the allowance was a benefit forming part of a 'full salary' for the purposes of the suspension, and further that termination of the payment constituted an unfair labour practice, the Commissioner had regard to the third respondent's counter arguments, which were that:
- 12.1 The dispute did not fall under section 186 (2) (a) or 186 (b) of the LRA, but rather under section 24 of the LRA;
- 12.2 The Resolution provided for dispute procedures pertaining to any interpretation and/or application of its provisions, and for such disputes to be referred to the PSCBC;
- 12.3 The GPSSBC thus had no jurisdiction to determine the dispute.
- [13] In arriving at her conclusions, the Commissioner took into account that Mhlongo was essentially challenging the termination of the payment of allowances despite his suspension, and that such payments in accordance with the provisions of the Resolution were subject to certain conditions incidental to the work performed by him prior to his suspension.
- [14] The Commissioner appreciated that the Resolution created rights in respect of payment of an allowance but subject to the discretion of the employer and the criteria set out therein. She further appreciated that the allowance had a distinct purpose, which was mainly to compensate employees for inconvenience during the performance of their functions in serving executive authorities.
- [15] The Commissioner accepted Mhlongo's argument that the right to an allowance in accordance with the provisions of the Resolution became a

'conditional' benefit within the meaning of section 186 (2)(a)⁴ of the LRA. She however found that upon Mhlongo's suspension, it could not be said that he had suffered any inconvenience as contemplated in clause 3.2 of the Resolution, and he therefore could not claim entitlement to the allowance, hence the decision to discontinue it did not constitute an unfair labour practice.

- [16] Equally so, the Commissioner further found that the decision of the third respondent not to inform Mhlongo that the allowance would be discontinued could not on its own constitute an unfair labour practice.

The grounds for seeking a review

- [17] Mhlongo contends that the Commissioner's award is reviewable on the grounds that

17.1 The Commissioner misconceived the true nature of the enquiry, and further erred in the application of the provisions of section 186 (2)(a) and (b)⁵ of the LRA. In this regard, it was alleged that despite being required to determine the dispute in terms of section 186 (2)(a) of the LRA relating to benefits, she nonetheless determined it in accordance with the provisions of section 186 (2)(b) relating to suspension. This was in circumstances where Mhlongo's case was essentially that the allowance was a benefit he was entitled to.

17.2 The Commissioner thus erred in finding that the allowance did not form part of Mhlongo's remuneration to which he was entitled to despite his suspension which was on full pay.

⁴ **186. Meaning of dismissal and unfair labour practice**

(2) "Unfair labour practice" means 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 disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

⁵ (b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

17.3 The Commissioner should have recused herself from the matter having previously considered other preliminary points raised in the matter.

[18] Central to the third respondent's opposition to the review application was that upon his suspension, Mhlongo was no longer entitled to the allowance as he was no longer executing the duties that entitled him to that allowance. This was the case with other employees identified in the third respondent. The continued payment of the allowance as attested to by Khumalo should in accordance with the provisions of the Resolution be paid against certain set of criteria which Mhlongo did not meet subsequent to his suspension.

[19] It was further submitted that since Khumalo had no knowledge of who Mhlongo was, the termination of the allowance was not effected with the intention of punishing him as he had alleged. The respondent proceeded to deal with Mhlongo's grounds of review, which I propose to attend to with in the course of my evaluation as below.

Evaluation

[20] The test applicable in review proceedings of this nature is trite, and it is not whether the Commissioner was right or wrong, but whether the decision made by the Commissioner is one that a reasonable decision-maker could not have made. It is also trite that if the Commissioner misconstrues the nature of the inquiry and that has an impact on the outcome of the arbitration, that would constitute a reviewable irregularity⁶.

[21] The starting point is that Mhlongo's claim of an allowance is grounded in the provisions of the Resolution. Prior to the commencement of the arbitration proceedings, the third respondent had raised a preliminary point to the effect that the GPSSBC lacked jurisdiction to determine the dispute as it ought to have been referred to the PSCBC in terms of the provisions of section 24 of the LRA, and further in accordance with the dispute resolution provisions of the Resolution⁷. Mhlongo had opposed the preliminary points, and argued that

⁶ See *Mahlakoane v South African Revenue Service* [2018] 4 BLLR 337 (LAC); (2018) 39 ILJ 1034 (LAC) at para 24.

⁷ Clause 8 of Resolution which provides that;

the termination of the allowance pending a disciplinary enquiry was on its own, disciplinary action, thus his dispute fell under section 186 (2)(a) of the LRA.

- [22] In a ruling issued in November 2013, the same Commissioner had found that since the third respondent had not pursued the preliminary point, it would be appropriate to determine that point together with the merits of the claim in arbitration proceedings.
- [23] In the arbitration award however, this preliminary point seems to have escaped the attention of the Commissioner, despite her conclusions that the allowance was paid in accordance with the provisions of the Resolution⁸. The basis of the Commissioner's decision to determine the dispute under the provisions of section 186 (2)(b) of the LRA was that Mhlongo was *dominus litis* and had elected to pursue a dispute pertaining to the allowance in accordance with those provisions. The Commissioner, in the light of that fact, concluded that Mhlongo's claim ought therefore to be measured against those provisions.
- [24] It is trite that Bargaining Councils, like the Commission for Conciliation Mediation and Arbitration (CCMA), cannot decide upon their own jurisdiction⁹. Equally so, there is an obligation on a Commissioner to satisfy him/herself that the Council has the requisite jurisdiction to determine a dispute, irrespective of how it was referred and the election of a party to pursue a particular path in respect of that claim. Furthermore, jurisdiction is not

'If there is a dispute about the interpretation or application of the agreement or this resolution, any party may refer the matter to the council for resolution in terms of the dispute resolution procedure of the council.'

⁸ At para 26 of the award. Annexure 'M1' to the founding affidavit.

⁹ *South African Rugby Players Association (SARPA); SA Rugby (Pty) Ltd and Others; v SA Rugby Players Union and Another* [2008] 9 BLLR 845 (LAC) at para 40, where it was held that;

'As a general rule [the CCMA] cannot decide its own jurisdiction. I 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.

...

This means that...., 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 when it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that its decision on such an issue is not binding in law on the parties.'

assumed on the say-so of the parties, or the failure of a party to raise any such jurisdictional points where appropriate.

[25] In *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal*¹⁰, the Labour Appeal Court had reiterated that:

“An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined. This Court in *Wardlaw v Supreme Mouldings (Pty) Ltd (Wardlaw)*, addressed directly the question of whether the employees characterisation of a dispute should enjoy deference and rejected that approach. Distinguishing the formalistic school of thought from that of the substantive school of thought, this Court held that the latter should prevail. As a result, in *Wardlaw*, an arbitrator was held to have incorrectly assumed jurisdiction over a dispute that was about an automatically unfair dismissal, a category of dispute reserved for adjudication by the Labour Court. The Constitutional Court disposed of this issue in *CUSA v Tao Ying Industries and Others*

‘A commissioner must, as the LRA requires, ‘deal with the substantial merits of the dispute’. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The

¹⁰ [2016] 7 BLLR 649 (LAC); (2016) 37 (ILJ) 1839 (LAC).

dispute between the parties may only emerge once all the evidence is in.¹¹
(Authorities omitted)

- [26] The above principles therefore confirm that despite Mhlongo having framed his dispute in a particular manner, it was still for the Commissioner to satisfy herself that the dispute fell to be determined by way of section 24 or section 186 (2) (b) of the LRA. It was therefore incorrect for the Commissioner to determine the dispute simply in accordance with the manner with which Mhlongo sought it to be determined, specifically after she had established that the allowance in question was governed by the provisions of the Resolution.
- [27] Once the Commissioner had established that the allowance was payable in terms of the provisions of the Resolution, she was obliged to determine how disputes emanating from any interpretation or application of its provisions were to be resolved. In this case, clause 8 of the Resolution specifically makes provision for resolution of disputes pertaining to its provisions, and the Commissioner ought therefore to have found that the GPSSBC lacked jurisdiction to determine the dispute.
- [28] Even though the above conclusions would have disposed of the claim, they are nonetheless not central to this review application. In view of Mhlongo's insistence that the termination of the allowance was punitive for the purposes of a section 186 (2)(b) claim, and further that the Commissioner was supposed to deal with that dispute as pertaining to benefits as contemplated in section 186 (2)(a) of the LRA, his argument in that regard was that the allowance was part of the terms of his contract of employment.
- [29] Even if the dispute was to be determined in accordance with the provisions of section 186 (2)(a) of the LRA as Mhlongo had submitted, the fact of the matter is that clause 3 of the Resolution made provision of the circumstances under which such an allowance could be due. It was correctly pointed out on behalf of the third respondent that any determination in terms of section 186 (2)(a) of the LRA could not be divorced from the interpretation of the provisions of the

¹¹ At para 16

Resolution and those of the Directive¹² which governed the allowance. It being common cause that Mhlongo was on suspension at the time that the allowance was terminated, it is incomprehensible as to how he could have expected the payment of the allowance to continue at the time when he clearly was not eligible under clause 3.2 of the Resolution. Thus, even if there was merit in the argument that the allowance was a part of conditions of service, there were conditions attached prior to it being due, which Mhlongo clearly did not meet.

[30] It follows from the above that to the extent that Mhlongo viewed the allowance as a benefit within the meaning of section 186 (2)(a) of the LRA, he could not have been entitled to any payment in that regard as he had not established before the Commissioner that he met the criteria for the payment in the light of his then suspension. Equally without merit is the contention that the termination of the allowance was punitive, and this was in circumstances where Mhlongo had not sought the upliftment of his suspension. In a nutshell, the payment of the allowance depended on the services that an employee rendered, and Mhlongo at the time was not rendering any.

[31] In regards to other grounds of review raised, there is no merit in the contention that the Commissioner ought to have recused herself simply because she had dealt with the preliminary point raised in the matter. A perusal of her ruling in that regard indicates that in the end, that preliminary point was not pursued and effectively, the Commissioner had not dealt with the merits of the claim. There is no basis laid out in the founding affidavit as to the reason the Commissioner ought to have recused herself in the matter.

[32] I do not deem it necessary to deal with Mhlongo's allegations that the Commissioner committed misconduct during the process of a reconstruction of the record of proceedings subsequent to the review application being launched. That is a matter that falls outside of the determination of this review application, particularly where it is not established by Mhlongo as to how the

¹² Directive on Collective Agreement XIX: Allowances For Personnel Serving Executive Authorities, issued by the Minister of the DPSA in July 2012.

reconstruction of the record process prejudiced or impacted on the final determination of the review application.

[33] To conclude, Mhlongo's grounds of review are to be rejected as they are lacking in merit. To the extent that the Commissioner had determined the matter in accordance with the provisions of section 186 (2)(a) or (b) of the LRA, a case had not been made out that Mhlongo was entitled to the allowance as a benefit, or that the termination of the allowance constituted a form of discipline short of a dismissal within the meaning of section 186 (2)(b) of the LRA. Accordingly, there is no basis for a conclusion to be reached that the award of the Commissioner is one which a reasonable arbitrator could not have arrived at in the light of the material before her.

[34] In regards to costs, even though I am of the view that this review application was ill-considered, upon a consideration of the requirements of law and fairness, I am of the view that each party must be burdened with its own costs.

[35] In the premises the following order is made:

Order:

1. The applicants' application is dismissed;
2. Each party is to pay its own costs.

E Tlhotlhamajje

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Ms A Davies of Johanette Rheeder

Inc.

For the Respondent:

Adv. PC Pio

Instructed by:

The State Attorney

LABOUR COURT