THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS102/14

In the matter between:

NATIONAL UNION OF MINEWORKERS obo MEMBERS **Applicants**

and

CULLINAN DIAMOND MINE
A DIVISION OF PETRA DIAMOND (PTY) LTD **Respondent**

Heard: **19-22 February 2019**

Delivered: **01 March 2019**

Summary: A referral in terms of which the applicant alleges unfair discrimination on arbitrary grounds – A claim for payment of any form of a bonus is justiciable in the CCMA under its unfair labour practice jurisdiction. It does not matter that the alleged unfair conduct has elements of discrimination and or alleged victimisation. As long as the relief sought is that of payment of a bonus – the Labour Court lacks jurisdiction. Section 5 of the Labour Relations Act provides a protection to employees. The only dispute that this court may entertain is about interpretation or application of section 5, much the same way as a dispute in terms of section 24 of the LRA. The discrimination contemplated in section 5 (1) of the LRA is not the same as one contemplated in section 6 of the Employment Equity Act (EEA). Where an employee alleges unfair discrimination on an arbitrary ground, the alleged arbitrary ground must be pejorative and somewhat linked to any of the listed grounds. Paying a bonus to certain employees and not to others for reasons related to operational requirements does not amount to discrimination as

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contemplated in section 5 (1) of the LRA. Held: (1) The applicant's entire claim is dismissed. (2) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a referral in terms of section 10 (6) (a) of the Employment Equity Act[1] (EEA) read with section 10 (4) of the Labour Relations Act[2] (the LRA). The applicant alleges that by paying a bonus[3] to non-striking employees, the respondent has unfairly discriminated the striking employees. Further, the applicant alleges that such a conduct offends the provisions of section 5 of the LRA. The respondent disputes any unfair discrimination and/or infringement of the provisions of section 5.

Background facts

[2] Given the nature of the dispute between the parties it is not necessary to give some detailed background facts of this matter. Suffice to mention that around July 2013, the respondent and the applicant trade union were engaged in wage negotiations. Around August 2013, the parties deadlocked and the trade union called its members to a protected strike action. Some members of the trade union did not participate and production at a reduced rate continued. Prior to the commencement of the strike action, employees were looking forward to a payment of an annual production bonus that gets approved by the Head Office

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[1] 55 of 1998.
[2] 66 of 1995, as amended.
[3] The applicant's contention being that this was the annual performance bonus disguised as exceptional performance reward.

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every year and payable in September of every year. In an attempt to avert participation in the looming strike action, the management advised employees that the annual production bonus may be lost and not be paid as a result of the strike action which would impact on production. All of that did not deter the applicant's members.

[3] During the strike action, certain employees worked, and the management took a decision to reward them for exceptional work they performed during the strike action. This bonus was termed "exceptional performance reward or bonus". It was paid in October 2013 a month after the strike action dispute was resolved. The applicant trade union contended that the so-called exceptional performance bonus was in fact a contrived annual performance bonus, which excluded employees who participated in the strike action. A view was held by the trade union that the actions of the respondent contravened section 5 of the LRA. Soon thereafter a referral was made to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute referred could not be resolved and the applicant approached this Court for a relief. In this Court, the applicant alleged unfair discrimination within the meaning of section 6 of the EEA and the breach of section 5 of the LRA. They also claimed payment of the so-called exceptional performance bonus to the striking members.

Evidence Led

[4] The parties agreed in a pre-trial meeting that the applicant shall commence with the leading of evidence. Two witnesses were led in support of the applicant's case. Mr Makhura has been in the employ of the respondent since 2008. At the relevant time, he was a branch secretary of the trade union. Since 2008, every September, employees of the respondent at the Mine are paid a performance bonus. At the level which he gets involved, there is no approval of the payment of the performance bonus. However, with reference to various documents he is of the view that the performance bonus was approved by the Head Office for payment.

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[5] In his understanding of the various documents written to the workforce, the General Manager was intimidating employees not to partake in the lawful actions of the trade union. The strike commenced on 29 August 2013 and lasted for two weeks or so. On their return certain employees who did not participate in the strike action were paid an exceptional performance bonus, something that was never done before and was never repeated thereafter. He believes that this exceptional performance bonus was actually a contrived ruse. In truth, it is the annual performance bonus which was due to them as employees. The exceptional performance bonus set out in pages 48-54 of Bundle D is nothing but the annual performance bonus. It is not even a type of a bonus contemplated in the employers' policy in Bundle E.

[6] A dispute of unfair labour practice was referred by the trade union and the CCMA declined jurisdiction. In cross-examination, he agreed that the payment of the bonus depends on the approval of the Head Office. He disputed a version that the annual performance bonus was never approved by the Head Office. In his evidence it was approved but cancelled and replaced with the exceptional performance bonus which was paid contrary to the provisions of the LRA. The relief he still persists with in this court is for the payment of the exceptional performance bonus.

[7] Mr Moyo also testified. Other than testifying about his duties and the fact that he participated in the strike action, he did not contribute much to the issues relevant to this dispute. He saw pages 48-54 of Bundle D for the first time and in his understanding there is a difference between the two bonuses. He was not cross-examined.

[8] Mr Kemp was the only witness for the respondent. He is the General Manager of the Cullinan Diamond Mine, which is a division of Petra Diamonds. During the wage negotiations, he made all the attempts to avert participation in a strike action as that would affect production, which ultimately would affect the anticipated annual production bonus. He testified about the process of justifying the bonus payment to the Head Office. Payment of that bonus is more a privilege than a right. He wrote a number of updates to the employees

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leading to the commencement of the strike action. Ultimately, the Head Office did not approve the payment of the annual bonus as anticipated. Nobody was paid an annual performance bonus. During the strike action about 38 % of the workforce attended to production. With the 34% of the available man-hours, those employees managed to achieve 52% of the carat. He considered that to be exceptional performance. A reward for such exceptional performance was designed and a particular formula was applied as set out in Bundle D pages 48-54 to pay those employees. Some employees who deserted the strike action and participated in production were also rewarded. There was no differentiation applied. The reward was designed different from the annual performance bonus. Bundle E was more a guideline. The 50% was a base, which got ameliorated by the point system as agreed to by the Head Office. There was no discrimination. Once a person performed work, he or she would be rewarded.

[9] In cross-examination, Mr Kemp remained steadfast to his evidence. He clarified on numerous occasions the basis upon which the exceptional bonus was paid. He introduced Bundle F, after being probed. Bundle F demonstrated that prior to 2013 exceptional performance bonus was paid on the same principles, however the 2013 payment was of a different magnitude. I pause to comment that I did not understand the basis upon which this damaging evidence was probed or elicited. Having achieved a common cause fact, the applicant through their counsel probed and brought to light evidence which waters down the admission of fact. This approach in my view was unnecessary, since the parties had agreed on what was common cause. Therefore, this Court has no choice but to consider the evidence in Bundle F.

<u>Evaluation</u>

[10] The applicant's case is pegged on two legs. Firstly, it relates to the application and interpretation of section 5 of the LRA. Secondly, it relates to alleged unfair discrimination, within the contemplation of section 6 of the EEA.

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Alleged Contravention of section 5 of the Act

[11] Section 5 is located in a chapter that deals with freedom of association and general protections. This location is important when one interprets any section in the chapter. In order to provide a clear understanding of this section, the starting point, as always, is the Constitution of the Republic of South Africa[4] (the Constitution). Section 23 (2) of the Constitution provides that every worker has the right to form and join a trade union; participate in the activities and programmes of a trade union and to strike. The right to strike is a separate and distinct right that accrues to a worker. Section 18 of the Constitution grants everyone, worker included, the right to freedom of association. Section 4 of the LRA seeks to expatiate on the freedom of association for employees. It creates a right to participate in forming a trade union or federation of trade unions and to join a trade union, subject to its constitution. The section further creates a right to an employee, which is subject to the constitution of that trade union, to participate in its lawful activities.

[12] The lawful activities of the trade union do not, in my view, mean participating in a strike action. A strike action is not an activity of a trade union but a constitutional right of a worker. As defined in section 213 of the LRA a strike means the partial or complete concerted refusal to work, or the retardation or obstruction of work by persons who are or have been employed by the same employer or by different employers, for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory. It shall be observed from the definition that there is no reference to a trade union and or its constitution. Therefore, to my mind, when an employee participates in a strike action he or she is not participating in the lawful

[4] 108 of 1996.

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activities of the trade union. It may well be so that a trade union may call its members to join a protected strike action, but if an employee does so, he is not carrying out the activities of the trade union but is exercising a right guaranteed in the Constitution. In any constitution of any trade union one shall never find as an activity of a trade union striking as defined in the LRA. Closer examination of section 95 (5) of the LRA reveals that a constitution of a trade union must amongst others provide that before calling a strike it must conduct a ballot and that members may not be disciplined for failure or refusal to participate in a strike. On this point I am fortified by the fact that only a member and not a worker has the right to participate in the activities of a trade union. Section 4 (2) makes reference to a member and not an employee. In order to understand what lawful activities mean, one can think of participating in a ballot, elections for leadership and functions contemplated in section 14 (4) of the LRA. Taking the point further, section 64 (1) grants an employee the right to strike as guaranteed in the Constitution.

[13] Section 67 provides separate protection for exercising the right to strike. For instance, immunity from delict and breach of contract. To conclude, an employee when participating in a protected strike is not advancing the constitutional activities of a trade union but exercises a constitutionally guaranteed right. For these reasons I part ways with my brother Francis J when he said the following in *NUM v Namakwa Sands – A division of Anglo Operations Ltd*[5]:

> [33]…Section 4(2) of the LRA grants every member of a trade union the right subject to the constitution of that trade union to participate in the lawful activities of that trade union. The right to strike is one such right[6].

[14] Having said that, I now turn to the provisions of section 5. Section 5 (1) protects an employee from discrimination for exercising any right conferred by this Act. I immediately point out that the discrimination referred to in this section is not the unfair discrimination as referred to in the EEA and the

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[5] [2008] 29 ILJ 698 (LC).
[6] Page 718H-J of the judgment.

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Constitution. Section 9 (4) of the Constitution prohibits unfair discrimination, so does section 6 of the EEA. Discrimination in this section is to be given its ordinary grammatical meaning. As a verb, it means make or constitute a difference in or between; distinguish, differentiate[7]. For these reasons I disagree with Acting Justice Arendse when he concluded in *FAWU v Pets Products (Pty) Ltd*[8] thus:

> [20] In my view, where a person (such as the respondent employer in this case) discriminates against employees (such as the individual applicants) for exercising their right to strike which is conferred by this Act, then the unfairness of that discrimination is presumed although the contrary may still be established. In this regard it is analogous to discrimination on one of the grounds specified in the Constitution, the unfairness of which is presumed until the contrary is established.

[15] On this aspect, I find persuasion from the binding judgment of the Labour Appeal Court (LAC) in *SAFCOR Freight (Pty) Ltd t/a SAFCOR Panalpina v SA Freight & Dock Workers Union*[9]*,* where the LAC said the following:

> "As far as the anti-discrimination clause in the Constitution (section 9(3)) is concerned, it prohibits discrimination on the grounds listed therein, or on analogous grounds. Union membership is not listed in the Constitution (nor in the EEA) and it is unlikely to be considered an analogous ground because such discrimination does not involve an injury to human dignity as contemplated, and adequate legislative protection is in any event available in section 5 of the LRA…"

[16] The LAC went further and said:

> Simply put, the provisions of s5 of the LRA constitute a prohibition against 'anti-union discrimination'. Although section 5(1) does not qualify the term discriminate with the adverb 'unfairly', our constitutional and anti-

[7] See: Shorter Oxford English Dictionary.

[8] [2000] 21 ILJ 1100 (LC)

[9] [2013] 34 ILJ 335 (LAC)

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> discrimination jurisprudence generally require that discrimination be unfair and or unjustifiable in order to constitute an infringement or violation. Differentiation which is fair and or reasonable will not amount to discrimination. A contravention of section 5(1) therefore comprises two elements: discriminatory conduct or action and such being unjustifiable because it is irrational, lacking in proportionality, unreasonable or actuated by improper or illegitimate motives.

[17] I understand the LAC to be saying that the discrimination contemplated in section 9 (3) of the Constitution and section 6 of the EEA is one that goes to the human dignity and the one in section 5 is not such a discrimination. If my understanding is correct, it would be wrong to presume in section 5 the discrimination contemplated in the Constitution. I further understand the LAC to be saying that the discrimination contemplated in section 5 is one that questions a conduct that is irrational, improper or tainted with illegitimate motives. I may add, in my understanding of the section, if an employee is differentiated simply because he participated in a protected strike action, such a differentiation is illegitimate, improper and unjustifiable. I therefore cannot agree with Mr Molotsi, appearing for the applicant, when he submitted that unfairness should be read in in section 5 (1). There is no need to read in unfairness, the protection is enough. Reading in is an interpretative tool. It can only be invoked if there is ambiguity and or absurdity. I do not see such in section 5(1). Lord Reid in *Federal Steam Navigation Co v Department of Trade and Industry*[10] had the following to say:

> "the Judge may read in words which he considers to be necessarily implied by words which are already in the statute and he has a limited power to add to alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute"

[18] The above being the grammatical meaning of the word discrimination as employed in this section, in my view, an employee should not be differentiated

[10] 1974 2 All ER 97.

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for exercising a right in terms of the LRA. For instance, an employee may not be differentiated for participating in a strike action. In order for an employee to invoke this right, he or she must prove facts that, firstly, a person has differentiated him or her by a particular conduct and secondly that the conduct infringed the provisions of section 5 (1) in that it was perpetuated on him or her because of exercising a right conferred. My sister Whitcher AJ, (as she then was) in *Ngcobo Lungile and six others v Chester Butcheries*[11] had the following to say about the section:

> "[7] …This section protects employees from victimisation for having exercised a right under the Act. The right to strike falls within the ambit of this provisions. If the employer's conduct has the effect of discriminating, it will fall foul of the protection offered by section 5."

[19] I agree with the above statement. The stubborn facts in this matter are that certain employees worked during the protected strike action and others did not. By simply not working, an employee does not necessarily exercise a right in terms of the LRA. However, if an employee participates in a strike action, he or she is exercising a right in terms of the LRA.

[20] Section 5(1) employs the word *'for'*. This word is used to indicate the object, aim, or purpose of an action or activity. It calls for a causal link between the differentiation and the exercise of the right. Differently put, the employees must have been differentiated for having participated in a strike action. It is important to note that the legislature does not use words like directly or indirectly. Therefore, if the reason for differentiation is something else other than participating in a strike action, then section 5 (1) is not infringed. Whitcher AJ in *Ngcobo supra* went to the extent of saying the following:

> "I say so, first, taking note of the concessions made by the applicant's witness under cross-examination to the effect that striking members of the union at other outlets were indeed paid bonuses. This, as a matter of logic,

[11] Case D268/2011 delivered on 08 May 2012

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> puts paid to the applicant's complaint under section 5 of the Act that the strike was the cause of bonuses being withheld from them."

[21] Section 9 of the Act sets out a procedure to deal with the dispute. The only dispute should be about the interpretation or application of any provision of the chapter. This type of a dispute is also found in section 24 of the Act. Therefore, in *casu,* the dispute between the parties is about interpretation and application of section 5 of the LRA. Section 10 states that a party who alleges that a right or protection conferred by this chapter has been infringed must prove facts of the conduct and once the facts are proven, then the alleged guilty party (employer) must prove that the conduct did not infringe any provisions. In relation to this part of the case, the applicant had to first prove the alleged conduct[12]. The evidence of Makhura suggests that the respondent failed to pay the striking employees an annual performance bonus. This being the conduct, the applicant had the onus to prove that the respondent indeed failed to pay the annual performance bonus and the reason for that is that the employees participated in a strike action. There is overwhelming evidence that no employee was paid any annual performance bonus. Makhura's evidence is that the respondent actually cancelled the payment of an annual performance bonus and replaced it with something else. In his letter to Johan Dippenaar, he stated the following:

> "6. After the strike the bonus has been cancelled and management has introduced an exceptional performance rewards for non-striking workers…"

[22] Regard being had to this evidence; it must follow that the vital organs of the applicant's case collapsed from this point. If the annual performance bonus was cancelled, there is not even a basis to differentiate. Nobody was paid the annual performance bonus, that being the respondent's case anyway. What then remains for the applicant is perhaps an unfair conduct in relation to

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[12] This Whitcher AJ referred to as a *prima facie* case that would put the respondent to a defence. She said at paragraph 9 of the judgment that in this regard, they were required to establish only a credible possibility that the non-payment of their bonuses was based on the fact that they had participated in the strike in question.

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provisions of benefits, which is an unfair labour practice claim. This Court lacks jurisdiction to entertain disputes about unfair labour practices. I must state that even if the employees allege victimisation, if the relief they claim is that of payment of a bonus, this court lacks jurisdiction. The true dispute in this case is that the employees are unhappy about the cancellation of the annual performance bonus. It is not the applicant's case that the bonus was cancelled because they participated in a strike action. Their case is one that suggests that the annual performance bonus was contrived as exceptional performance rewards. This case has no basis at all. On Makhura's own version, the two are different. This was corroborated by Moyo. The one was cancelled and the other was introduced. Even if I were to give credence to the contrivance argument, on Makhura's own version, the annual production bonus is approved at the Head Office level and he is not privy to the processes that unfolds leading to the approval. Therefore, his evidence that the annual performance bonus was approved by the Head Office, only to later be cancelled by the respondent, is weak and lacks probative value.

[23] If for any reason, I have the appetite to entertain the version that the exceptional performance reward is a ruse, the overwhelming evidence would thwart that appetite immediately. The annual performance bonus is based on a fixed percentage applied across the board. The percentage can only be reduced by having regard to the issues of conduct of employees and so on. On the other hand, pages 48-54 of Bundle D sets out a different type of a bonus. Any attempt to suggest that the guidelines in Bundle E having not being followed to the letter, thus the bonus paid is not an exceptional performance reward is without any merit and it is thus rejected.

[24] On the other hand, the evidence of the applicant failed to show a causal link between the payment of a bonus and the participation in an industrial action. Makhura's evidence was that the trade union had at the relevant time approximately 800 members and about 500 employees participated in a strike action. Although Makhura was not challenged on this, his evidence does not assist the applicant. What the applicant did in Annexure A to the statement of

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case was to annex the list of its entire membership. The list contains more than 500 employees. There is no evidence as to who out of the 800 employees listed, participated in a strike action. This creates a difficulty on the causal link issue. Only employees who participated in a strike action can rely on section 5 (1).

[25] The list in pages 48-54 of Bundle D also contains almost 500 employees. The unchallengeable evidence of Mr Kemp was that some employees who participated in the strike action deserted the strike at some point and participated in production. This evidence clearly exudes that the reason for non-payment of the bonus cannot be participation in a strike action. The employees who returned from the strike action and worked towards the achieved target were rewarded. It may well be so that Mr Kemp does not have direct evidence that some employees were from a strike action or not, however, the probabilities are that employees who worked for 1 to 2 days must have on the other days participated in the plus minus two weeks strike action. Accordingly, in my view, the applicant has failed to prove the facts of the conduct that allegedly infringed section 5 (1) of the LRA.

[26] Let me also consider the provisions of section 5 (2) (c) (vi). The applicant contends that the conduct of the respondent also infringes this section. To my mind this section has almost the same effect as section 5 (1). The prohibition is that of prejudice because of past, present or anticipated exercise of a right conferred by the Act. Since the Court is considering a dispute about interpretation and application, I am constrained to give words employed by the legislature a meaning.

[27] The grammatical meaning of the word prejudice means harm or injury to a person or thing that may result from a judgment or action especially one in which his or her rights are disregarded. It shall be observed from the meaning that the person to be prejudiced must have rights that are disregarded. That to my mind means that the applicant must first show that the members had the right to the bonus, be it production bonus and/or exceptional performance

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bonus. By denying them that right simply because of the past, present or anticipated exercise of the right conferred would be in contravention of the section. With regard to annual performance bonus, the evidence shows that the bonus is discretionary in nature, thus employees do not have a right to it. It is not the applicant's case that the employees had a legitimate expectation to be paid the annual performance bonus and/or the exceptional performance reward. Therefore, just by denying them these bonuses, without even considering the '*because part'* of it, the respondent did not disregard any right they have. With regard to the exceptional performance bonus, the evidence demonstrated that for an employee to acquire the right to be paid he or she must have contributed to the 52% carat achievement and also performed exceptionally. The applicants before me, do not on the evidence, qualify for this type of a bonus. Their case is simply that this bonus is the same as the annual performance bonus, which case on the evidence before me is untenable. Accordingly, the applicant's members were not prejudiced, thus the provision of the section were not infringed.

[28] I now turn to section 5 (3). This section refers to an advantage in exchange for that person not exercising any right. During wage negotiations[13], in my judgment, a party may use any tactic that may avert an injury to itself. In other words, an employer may promise anything to avert a strike action, given its financial impact. Advantage means the position, state, or circumstances of being ahead of another, or having the better of him or her; superiority especially in a contest or debate. The applicant seems to conflate negotiations tactics with an advantage. On Makhura's own version, Kemp was intimidating them. Clearly, where one is being intimidated there is no advantage.

[29] In a special brief of 27 August 2013, two days before the commencement of the strike action, Kemp recorded thus: "*Once strike action commences, striking employees will forfeit production bonuses"*. The Industrial Relations

[13] In NUM and another v Eskom Holdings Soc Ltd [2012] 33 ILJ 669 (LC), I had an opportunity to state that parties can bargain about anything and with anybody. The current Act adopts a voluntarism approach. See also the authorities cited therein. Paragraphs 23-25 of the judgment page 678.

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Specialist in a letter addressed to the trade union's chief negotiator stated the following: "*All employees who were due to receive production bonuses will forfeit them if they participate in the planned industrial action*". In another special brief, Kemp recorded that "*any employee who joins the industrial action (even for just one day) runs the risk of losing the potential bonus payment schedule for end September 2013*". All of the above was viewed by Makhura as attempts to intimidate the workers from participating in a strike action. I must emphasize that the bonus referred to above is the annual production bonus and not the subsequent exceptional performance reward. What was to befall the employees was a forfeiture of that performance bonus. It is for this reason that I state that the true gripe is one of alleged unfair labour practice on this part of the case.

[30] Clearly these threats fell on deaf ears because the workers were resilient and were not cowed by this tactics, which Mr Redding SC, appearing for the respondent, termed "*propaganda*". In all the messages there is no advantage to be gained or promised to the employees before me. Mr Molotsi appearing for the applicant rightly conceded that the employees who gained the advantage and exchanged their rights are not before me. I again respectfully part ways with my brother Francis J in *Namakwa Sands supra,* when he concluded that the employer's conduct of paying non-striking employees a redeployment allowance and the free meals contravened the provisions of section 5 (3).[14]

[31] It appeared from the facts of that judgment that my brother applied the provisions of the section simply because the non-striking employees were paid an allowance and on that basis alone contravention was found to the benefit of the striking employees. In my judgment, contravention can only arise if the advantage is linked to an exchange. In other words, evidence would be required that a person who exchanged the right to strike did so because an advantage was given or promised. Therefore, the only person who can complain about the contravention must be the one who sold, as it

[14] At page 722 para 42 G-I

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were, his or her right. To my mind, the mischief sought to be avoided is one of employees selling, as it were, their fundamental rights entrenched in the Act. That mischief is apparent from a proper reading of section 5 (4) where invalidity is contemplated.

[32] The employees before me did not exchange their rights, thus they are incapable of being advantaged. On Makhura's own version, the annual bonus was cancelled and replaced with exceptional performance reward. They did not exchange their rights. In my judgment, the employees before me cannot gain or profit a contravention simply because some faceless employees received an "advantage". To interpret the section in that manner would defeat the purpose of the section. The section is aimed at protecting employees. An employee cannot gain advantage by an injury inflicted on another person. The section contemplates a situation where the exchanger (the employee who lost the right) and the benefactor (employer who avoided strike action) can settle a dispute. That being the case, I fail to see how a non-exchanger (employee who did not lose the right) can claim contravention. In my judgment the applicant failed to prove any infringement of section 5 (3). The applicant must fail on this part of the case. The applicant failed to cross the first hurdle (section 10 (a) of the LRA).

The approaches in the FAWU and Namakwa Sands matters supra

[33] It is apparent to me that the approach favoured by these two judgments is one that suggests that there is something fundamentally wrong, to a point of contravention of section 5 of the LRA, in paying a reward to employees who are not striking. In *FAWU*, the learned Acting Justice did not find persuasion in the evidence that the R200.00 voucher was paid to non-strikers for the hard work they performed during the strike action and for going the extra mile. If I follow this reasoning, I must equally come to the same conclusion in this matter. With due respect to the learned Acting Justice, I fail to understand this reasoning. As far as I am concerned paying non-strikers any money does not *per se* infringe section 5 of the LRA.

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[34] In my view, this reasoning seems to ignore the fact that participating in a strike action is an individual right of an employee. If an employee decides not to exercise this right on his own without being coerced by the employer, then the employee cannot be denied the contractual benefits simply because other employees are exercising the right to strike. I fail to understand the policy considerations that would underpin the reasons not to reward in any manner an employee who chose not to strike. This reasoning suggests that an employer should not reward any hard work to employees during the time when the full labour contingence has been withdrawn. Such could not have been the intention of the legislature when the section 5 protection was enacted. To show that that was not the intention, section 67(3) provides that despite subsection (2), which insulates a striking employee from delict and breach of contract, an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike. The corollary of this provisions must be that by remunerating a non-striking employee, the employer does not offend the LRA. It must be remembered that even in a strike situation, an employer must still run its business.

[35] The very reason why employees withdraw labour is to harm the employer financially. So if employer devices a means to stay afloat and reward those employees who assisted it to stay afloat, such an employer, in my view, does not offend any provisions of the LRA nor the Constitution. Whichever way one looks at it, this is an area of power play. The supervisory powers of this Court in this area of power play are limited.

[36] I am unable to understand why the approach in *Chemical Workers Industrial Union v BP South Africa*[15] is no longer befitting in the current LRA as it did under the old LRA. Almost on similar facts to the ones before me, the defunct Industrial Court held that in deciding to pay the bonuses, the employer's objective was to ensure that its business operations continued during the course of the strike. The Industrial Court rejected the union's contention that the employer's payment of the bonuses constituted victimisation of striking

[15] [1991] 12 ILJ 599 (IC).

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employees. Ultimately, the Industrial Court found that the payment of bonuses did not constitute an unfair labour practice under the old Act. The additional member Copeling had the following to say, to which I fully agree:

> "However, the fact of the matter is that where certain of an employer's workers elect to embark upon a strike whilst others do not, good and compelling economic reasons do exist for the employer differentiating in his treatment of striking and non-striking workers, albeit, as in the instant case, for the duration of the strike only. In such circumstances there, cannot, in my opinion, be talk of any victimization of striking workers. Moreover, it seems to me inappropriate to refer to respondent's payment of bonuses to certain of its non-striking employees as 'victimization', even in the broadest sense of the word, when it is clear that the respondent's object in making such payment was not to penalise the applicant's striking members, but rather to preserve its business operations…"

[37] I further fail to understand why the approach of the appellate division in *SACCAWU v OK Bazaars (1929) Ltd*[16] is wrong in any manner. The Court in there held that because strikes are disruptive, measures to discourage them are to be encouraged and were legally permissible. Among the measures are the offerings of financial inducement to non-strikers. It was further held that threat of withholding a bonus from strikers or actual withholding thereof does not affect workers' freedom to strike. Grosskopf JA, writing for the majority concluded thus:

> "It would in my view <u>be unreasonable to deprive workers who did not strike of a bonus merely because some others, perhaps even very few, engaged in a strike with which the non-striking workers might have no sympathy</u>.[17]"

[38] I agree with this observation. My reading of the current LRA does not suggest that the legislature fundamentally altered this position that reigned under the old Act. In my view, all section 5 does is to protect employees from

[16] [1995] 7 BLLR 1 (A).

[17] Page 9A-C of the SACCAWU judgment.

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victimisation and not to prevent measures to sustain a business during the currency of a strike action.

[39] An effective strike would remain effective even if other employees exercise the right not to participate[18]. It becomes illogical to even suggest, as it appears to be the case here, that policies of an employer that rewards exceptional performances are to be put on hold simply because other employees are exercising their fundamental right to strike. What then could be the policy consideration for the non-operation of the employer's employment policies during the currency of a strike action? In my view, there is none. To say so, implies that during the currency of a protected strike action, the business of an employer must stop. I do not subscribe to the view expressed by the learned Acting Justice when he says:

> "21.5 …Indeed, in my view, in the context of a legal strike, payment of any reward, incentive, or bonus should be strictly prohibited. Such payment is unnecessarily provocative and fuels an adversarial approach to collective bargaining."

[40] It is not clear to me whether the learned Acting Justice suggests that no incentive and/or bonus should be earned, in terms of whatever policy, during the currency of a protected strike or that it should not be paid but could be earned. In my mind I imagine a situation where employees, for a particular period earn a bonus, and it so happens that the payment date for such a bonus falls on a date when there is a legal strike, then such payments cannot be made until the strike ends. That seems to be untenable because it may potentially give rise to a dispute of unfair labour practices, something the LRA seeks to avoid. Perhaps a better understanding of the view is that during the currency of a protected strike action, policies relating to incentives, rewards and bonuses should be put on hold. Better still, I imagine a situation where an employee does not exercise a right to strike, and he or she works during the

[18] Generally, not all employees participate in a strike action. It would be fundamentally wrong, in my view, to attempt to give impetus to strike actions by gaging employers from paying bonuses due, under the guise that such would stifle collective bargaining and thus in contravention of section 5.

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strike period and in the process earn certain incentives and or bonuses as per the policies of the employer, the employer, on this view, would have a good reason to withhold payment. To my mind such would not be in keeping with the LRA.

[41] Therefore, in my view, it is unnecessary to elevate the right to strike to such levels. Section 5 is not only about a right to strike; it is there for the protection of a number of rights conferred by the LRA to employees including persons seeking employment. Section 5 must then be interpreted purposively, taking into account the mischief it seeks to avoid. It does not mean that because a right to strike is constitutionally guaranteed, once it is exercised certain rights like the right to continue in business should be adversely affected. Every right in the Constitution has limitations. Similarly, I part ways with the reasoning in *Namakwa Sands*, when my brother found that the practice of paying redeployment allowance contravened the provisions of section 5. For all the above reasons, I respectfully decide not to follow these two judgments on the issue of the contravention of section 5. To my mind, to that extent only, the judgments were wrong and not binding on me.

The alleged unfair discrimination in contravention of section 6 of the EEA

[42] In the pleadings, the applicant's case was foreshadowed in the following manner: *"The members were treated differently because they exercised their rights to participate in industrial action. The differential treatment is not fair and is on an arbitrary ground that is not permitted in terms of the LRA and/or Equity Act."*

[43] Section 6 of the EEA prohibits unfair discrimination. I have already found that the discrimination in section 5 of the LRA is not one contemplated in this section. That being so, I must conclude that section 6 has not been contravened. However, on the assumption that I am wrong in so concluding, the discrimination alleged by the applicant is not on the listed grounds but on arbitrary grounds. Section 11(2) of the EEA provides that the applicant such as the one before me must prove on the balance of probabilities that the

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conduct complained of is not rational, amounts to discrimination and the discrimination is unfair.

[44] The conduct complained of is the non-payment of a bonus to striking employees. For the purpose of this part of the case, for sake of argument, I depart from the premise that the bonus paid to non-strikers was indeed the annual performance bonus as alleged by the applicant. The immediate question I must turn to is whether by paying the annual performance bonus to the non-striking employees as such is discriminatory or not? The discrimination prohibited by the EEA is one that is unfair, one that impairs human dignity. When an employee is not paid any form of a bonus his or her dignity is not being impaired. The reason fathomed by the applicant for such non-payment is that it is because they participated in a strike action. Participation in a strike action is not a listed ground, nor could it be analogous to any of the listed grounds. In any event, evidence shows that the basis for differentiation was having contributed to the achievements and not the participation in a strike action *per se*. An arbitrary ground is a ground that is founded on, or subject to, personal whims, prejudices and/or caprice. However for such a ground to found a claim under the rubric of unfair discrimination it must be pejorative and be closely connected to one of the listed grounds[19].

[45] The evidence of the applicant does not even begin to get off the starting blocks in this part of its case. Makhura's evidence does not even begin to prove on the balance of probabilities that the conduct of the non-payment of the annual performance bonus, as they allege that that was what the respondent paid and not exceptional performance bonus, is not rational. On his own version, in order to pay the bonuses, Head Office must approve. Employees did not have a right to be paid such a bonus. That being his evidence, can this Court objectively conclude that the conduct was irrational? In my view not. It becomes even worse for the applicant if I take into the equation the evidence of Mr Kemp. If I do, as I am supposed to, on the

[19] See: Mothoa v SAPS [2007] 9 BLLR 879 (LC) and the authorities cited therein.

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balance of probabilities payment made to the employees who worked, was for the achievements and the exceptional performance. The applicant's members did not contribute to the achievement nor did they perform exceptionally. Differentiating them on those basis does not amount to an unfair discrimination, nor could it be said, that the differentiation is not endowed with reason or is illogical.

[46] Therefore, in my view, the applicant failed to discharge its onus in terms of section 11(2) of the EEA and is bound to fail.

[47] In the results, I make the following order:

Order

1. The applicant's claim is dismissed in its entirety;

2. There is no order as to costs.

GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicants : Advocate H. Molotsi.

Instructed by : MS Molebaloa Inc, Pretoria.

For the Respondent : Advocate A. Redding (SC)

Instructed by : Mervyn Taback Inc, Parktown.

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