THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 2236/16

In the matter between:

SOUTH AFRICAN POLICE SERVICE **Applicant**

and

MATIPANDILE SOTHENI **First Respondent**

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **Second Respondent**

E MAREE N.O. (AS COMMISSIONER) **Third Respondent**

Heard: **4 December 2019**

Delivered: **4 March 2020**

Summary: Bargaining Council arbitration proceedings – review of proceedings, decisions and awards of arbitrators – test for review – s 145 as read with 158(1)(g) of Labour Relations Act, 1995 – determination of gross irregularities and reasonable outcome

Unfair labour practice – benefits – scarce skill allowance – employee did not meet qualification for scarce skill allowance of an operators' badge until 2012 – objective and justified basis for not paying allowance back dated to 2010 – no unfair labour practice shown to exist

Unfair labour practice – four employees had received allowance back paid to prior having received operators badge – employer realised this was in error and sought to recover payments – arbitrator finding this constitutes inconsistency – issue cannot concern inconsistency – more akin to waiver – evidence does not show that employer waived its rights under a clear policy – finding of inconsistency unreasonable

Unfair labour practice – even if principles relating to inconsistency considered – arbitrator failing to properly consider the application of the principles of inconsistency to the facts in this case – finding of inconsistency unreasonable

Review of award – conclusion of arbitrator irregular and unreasonable – arbitration award reviewed and set aside – substituted with award that no unfair labour practice committed

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JUDGMENT

SNYMAN. AJ

Introduction

[1] This judgment concerns an application by the applicant to review and set aside an arbitration award of the third respondent in her capacity as an arbitrator of the second respondent, the Safety and Security Sectoral Bargaining Council (SSSBC). This application has been brought in terms of section 145 as read with section 158(1)(g) of the Labour Relations Act[1] (the LRA).

[2] This matter concerns the back payment of what is termed a scarce skills allowance to the first respondent, who was a warrant officer employed by the applicant in what is known as the Special Task Force (STF). According to the applicant, the first respondent did not qualify for the payment of the allowance until certain conditions were met, and this was then the subject matter of an unfair labour practice dispute relating to benefits pursued by the first respondent to the SSSBC. It is this dispute that ultimately came before the third respondent for arbitration.

[3] The third respondent was called upon to decide whether the decision by the applicant not to pay the first respondent a scarce skilled allowance back dated to the date when he actually joined the STF, constituted an unfair labour practice relating to benefits, and whether the first respondent was entitled to payment of this allowance from such date. In an award dated 27 August 2016,

[1] Act 66 of 1995 (as amended).

the third respondent decided that the applicant had committed an unfair labour practice as a result of its refusal to pay the first respondent a scarce skill allowance from the date he joined the STF, and afforded the first respondent the consequential relief of the payment of such an allowance for a period of twenty four months, amounting to R151 992.00. It is this award of the third respondent that forms the subject matter of the review application brought by the applicant.

[4] The arbitration award of the third respondent was served on the applicant on 30 August 2016. The applicant's review application was then served and filed on 21 October 2016. The application was thus some seven days out of time. The applicant did apply for condonation in its notice of motion. Despite the first respondent taking issue with such late filing in the answering affidavit, such opposition was not persisted with when this matter was argued before me. Even though the explanation for the delay in the founding affidavit was somewhat thin,[2] I do consider that the delay in this case is minimal, with very little prejudice resulting from it. I also consider that the review application was properly prosecuted to finality and both parties had the opportunity to fully ventilate the matter. Justice and fairness requires that the application be decided on the merits thereof, and accordingly I granted condonation for the late filing of the review application. I will now proceed deciding the merits of this review application by first setting out the relevant background facts.

<u>The relevant background</u>

[5] The applicant is the South African National Police Service. It is a highly regulated working environment, with a large number of policies and procedures determining the working conditions and occupational benefits and allowances payable to police officers. Fortunately, in this application, the core factual matrix was in essence undisputed.

[6] The case at hand relates to the Special Task Force (STF) of the applicant, and in particular at the Division Operational Response Service. It was common cause that the first respondent was employed by the applicant as a warrant

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[2] The applicant sought to explain the delay as being caused by the administrative processes in the applicant (SAPS) and the need to engage and brief counsel.

officer, and was deployed to the STF as an operator, as from 18 December 2010.

[7] As part of being deployed to the STF, police officers have to undergo further advanced training courses, to the extent of qualifying for what is called an '*operators' badge*'. The third respondent indeed underwent this further advanced training, and qualified for and was awarded his operators' badge on 18 December 2012.

[8] Where police officers are deployed to the STF, the possibility of the payment of what is termed a scarce skill allowance comes into play. The reason for this is that such police officers have to undergo extensive further training, which would not be applicable to ordinary police officers, so to speak, not in the STF. This takes several years to complete, and is why such police officers earn an operators badge upon successful completion thereof.

[9] The qualifications and criteria for receiving the scarce skill allowance are determined in what is called the Scarce Skills Policy 4/2/1 dated 13 November 2006 (referred to in this judgment as 'the policy'). In terms of the policy, a scarce skills allowance was approved for a number of occupational categories in the applicant. This included members of the STF. The qualification criteria for the payment of the allowance was that the employee had to sign a contract, obtain the qualification applicable to the occupation, and then serve a further 3(three) years. The employee also had to actually fulfil a scarce skill function.

[10] However, and on 14 December 2006, the qualifying criteria for a scarce skills allowance payable to STF members was adapted. In essence, the three years' service requirement after obtaining the required qualification was waived. In a memorandum dated 14 December 2006, the Divisional Commissioner: Career Management explained that because STF members underwent one years' basic training, plus another years' advanced training and then a further years' probation, they would qualify for the scarce skills allowance '*from the date on which he/she receives the operators badge*'.

[11] There was a further dispensation issued on the issue of the scarce skills allowance payable to members of the STF, by the Divisional Commissioner:

Career Management, on 9 February 2007. This was as a result of difficulties experienced by certain employees in the STF who had received an operators' badge, but still had some outstanding courses not offered by the task force itself, which they had to complete. It was determined that employees who had been awarded the operators' badge, but had outstanding courses, would receive the scarce skill allowance, provided the outstanding courses are completed in 24 months.

[12] After having been awarded his operators badge, the first respondent was then permanently appointed to the STF as from 7 January 2013, and was paid his scarce skills allowance under the policy. He also signed the required contract appointing him as an operator in the STF on the same date, which records that the first respondent shall be paid a scarce skills allowance (clause 1.1).

[13] On 17 December 2013, the first respondent then lodged a grievance. He contended that he should have been paid the scarce skills allowance from the date when he joined the STF, and not the date from when he obtained his operators' badge. The reason for this was that, according to the first respondent, he had worked as an operational member of the STF throughout and performed scarce skills from the date when he signed his job description on 25 May 2011.

[14] The first respondent also raised an issue of inconsistency. He indicated that some of his colleagues were paid the scarce skills allowance back dated to the date they joined the STF, upon receiving their operators' badge.

[15] The applicant from the outset conceded that some task force members were paid the scarce skills allowance back dated to the date they joined the STF, when they should not have been paid the allowance. The applicant stated that this was done in error. The applicant had in fact initiated steps to recover these payments, but was then met with disputes raised by the employees concerned, which aborted the efforts until these disputes could be resolved. As matters stood at the time of the arbitration, these disputes with these employees were still pending. The applicant however remained of the intention to recover these amounts.

[16] The applicant in the end declined to pay the first respondent's scarce skill allowance from 18 December 2010 to 18 December 2012, as he demanded. The first respondent then referred an unfair labour practice dispute to the SSSBC on 15 August 2014. In such referral, the first respondent stated that the requirement for being paid the allowance was that the employee must be an operational member of the task force actively involved in the functions of the unit, which he was. He also referred to the inconsistency issue as set out above. This is the dispute that came before the third respondent for arbitration.

[17] In deciding the dispute, the third respondent in my view correctly identified the gist of the respective cases of the two parties. She stated that the case of the applicant was that the terms of the policy applied, in terms of which the first respondent was only entitled to a scarce skills allowance once and as from when he had obtained his operators' badge. As to the case of the first respondent, she stated that his case was that he was entitled to the scarce skills allowance from when he joined the STF because he was doing operational duties in the STF from the outset, and that the applicant behaved inconsistently by paying this back dated allowance to other employees.

[18] The third respondent, in her finding, accepted that the policy regulated the issue of the payment of scarce skills allowances. She however held that here were 'numerous exceptions' to the policy, referring to the two alternative dispensations set out above. She held that '*the policy is clearly not cast in stone and has been implemented inconsistently*'. She concluded that the applicant was what she called consistently inconsistent.

[19] The third respondent also held that the '*situation might have been different'* if the applicant had seen through its efforts to recover the scarce skills payments from those employees it alleged were paid in error. In concluding the reasoning in her award, the third respondent decided that the first respondent was entitled to the payment of the scarce skills allowance from 18 December 2010, on the following basis:

> 'It is my view that due to the inconsistent application of the policy and especially the fact that retrospective payment of the allowance were made to other employees based on the date they commenced duties at the STF, the applicant is entitled to such back pay.'

This prompted the current review application, which I will now turn to deciding by first setting out the applicable test for review.

The test for review

[20] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and 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?...'*[4]. In *Duncanmec (Pty) Ltd v Gaylard NO and Others*[5] the Court succinctly summarized the test as follows:

> 'The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'

[21] It is however always necessary and important for the Court to enquire into and consider the merits of the matter in deciding what is reasonable.[6] In *Herholdt v Nedbank Ltd and Another*[7] 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] 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.
[5] (2018) 39 ILJ 2633 (CC) at para 43
[6] Id at para 41.
[7] (2013) 34 *ILJ* 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *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.

[22] What this means is a two stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure that is equally the end of the review application. 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.

[23] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to 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 the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on the material before the arbitrator as a whole, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[9]

[24] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the third respondent.

<u>Analysis</u>

[25] From the outset, I am unfortunately compelled to say that despite the third respondent correctly identifying the respective cases of the two parties, she does very little in properly deciding the cases. Her reasoning is sketchy and she does not properly come to grips with the evidence especially relating to the inconsistency issue. She appears to accept the policy exists, but simply seems to ignore its clear terms. All of this unfortunately adversely impacted on

[8] *Fidelity Cash Management Service (supra)* at para 102.
[9] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

the outcome the third respondent arrived at, to a material extent, as will be dealt with below.

[26] There can be little doubt that the scarce skills allowance constitutes a 'benefit' as contemplated by the unfair labour practice jurisdiction under the LRA.[10] As held in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation* and *Arbitration and Others*[11]:

> '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.'

[27] *In casu*, the benefit flows from the policy, which policy itself was never contradicted nor challenged. However, and what the third respondent does is to derogate the application of the policy, finding that it was not cast in stone and inconsistently applied. This finding is based not only on the first respondent's case that others were paid the scarce skill allowance back dated to prior the awarding of those employees' operators' badge, but that the applicant itself in general allowed deviations from the policy. I have a number of difficulties with the third respondent's findings relating to what she considered to be deviations from the policy. The inconsistency issue aside, what the third respondent considered to be deviations were actually written amendments to the policy to cater for specific circumstances in the STF, remembering that the policy when first promulgated on 20 November 2006 did not just apply to the STF, but a variety of other occupational categories as well. I will deal with this next.

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[10] Section 186(2)(a) reads: '*'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 …'*.

[11] (2013) 34 *ILJ* 1120 (LAC) at para 50. See also *Mawethu Civils (Pty) Ltd and Another v National Union of Mineworkers and Others* (2016) 37 ILJ 1851 (LAC) at para 20.

[28] As stated above, the policy, as originally promulgated in November 2006, provided for a signed contract, and having the required qualification plus three years' service, for an employee to qualify for the payment of the scarce skills allowance. After this promulgation, certain unique circumstances of the STF was considered, namely that an employee in the STF would have one years' basic training, one years' specialist training, and one years' probation, before obtaining the operators' badge qualification. Because of this, it was specifically directed in December 2006, again by way of written notification, that the additional three years' service requirement would not apply to STF employees, and that STF employees would qualify for payment of the scarce skills allowance upon receipt of the operators' badge (being the required qualification under the policy).

[29] Finally, and in 2007, another operational difficulty was identified, being that despite STF employees having received an operators' badge (thus qualifying as operator), some employees still had to complete courses not offered in the STF. In this respect, the written directive issued by the applicant specifically recorded that such employees, provided they were awarded the operators' badge, would keep their scarce skills allowance, provided they complete these outstanding qualifications in 24 months.

[30] So therefore, and after 2007 at the latest, the terms of the policy as applicable to the payment of a scarce skills allowance to STF employees was clear. Also, the policy was never further adapted, amended or deviated from after that, and continued to apply in those terms. Other than the first respondent's inconsistency case, there was no evidence or even case of any alternative application of the policy not on these specific terms. In sum, an employee such as the first respondent, deployed to the STF, would be entitled to the payment of a scarce skills allowance if he or she was awarded an operators' badge and signed a contract. If he or she still had outstanding courses after receiving the operators' badge, he or she would still keep the allowance, provided the outstanding courses were completed in 24 months. And lastly, he or she would keep the allowance for as long as they actually fulfilled scarce skills functions.

[31] On the undisputed facts, the first respondent was awarded his operators' badge on 18 December 2012. He signed his contract on 7 January 2013. He

then actually received his scarce skills allowance under the policy, having qualified for it pursuant to the clear terms of the policy. This should have been where the enquiry ended, in that the policy does not afford the applicant any discretion to decide if the scarce skills allowance could still be paid to an employee, irrespective of whether these requirements were met or not. It is simply the case of stipulated objective requirements being met by the employee, and a payment following thereon. Therefore, and in terms of the policy, the applicant was only entitled to be paid his scarce skill allowance as from 18 December 2012, which the applicant complied with.

[32] In my view, and clearly appreciating this difficulty to his case, the first respondent raised two contentions. The first is that the policy itself provides for the payment of the scarce skill allowance when he joined the STF, provided he fulfilled operational duties. The second is that the policy afforded the applicant a discretion, which it exercised when it made the back dated payment of the scarce skills allowance to four other employees, and the applicant unfairly failed to exercise this discretion in favor of the first respondent. As touched on above, the third respondent appeared to reject the first contention, but accept the second. For the reasons to follow, none of these contentions had merit, and the findings made by the third respondent in this regard are unsustainable on review.

[33] In giving his evidence, the first respondent contended that because clause 6 of the policy provided that an employee was entitled to receive the scarce skills allowance for as long as the employee performs the scarce skills functions, it meant that he would be entitled to receive the allowance once deployed at the STF and fulfilling operational duties, as opposed to administrative duties, there. The first respondent testified that from the outset of being deployed to the STF in December 2010, he fulfilled such operational functions and not administrative duties. That meant, according to him, that he was entitled to the scarce skills allowance in terms of clause 6 of the policy from December 2010.

[34] The applicant disputed this interpretation the first respondent sought to attach to clause 6 of the policy. According to Slabbert, who testified for the applicant, clause 6 of the policy cannot be read in isolation. It needed to be read in conjunction with all the other provisions of the policy. Slabbert said that the

policy contemplated that the employee first had to achieve the qualifying requirements to be paid the scarce skills allowance. Once this had been achieved, the employee would be entitled to continue to receive the allowance, but only for as long as the employee actually fulfilled the scarce skills duties. Slabbert stated that clause 6 contemplated that where an employee would move out of a scarce skills requirement role, such as being redeployed or accepting an appointment in another department not requiring the use of the scarce skills, the payment of the allowance stops.

[35] There is force in the evidence of Slabbert. It is in my view fully in line with the clear terms of the policy. The requirement that the scarce skills allowance is only payable for as long as the employee actually performs a scarce skills function is not a standalone qualification requirement to the exclusion of the other requirements. What the policy clearly means is that where an employee qualifies to be paid a scarce skills allowance in the first place, that employee only keeps that allowance for as long as the employee does the scarce skills job. The example of becoming a detective, which is not a scarce skill, and the employee then losing the allowance, given by Slabbert, is quite apposite. Accordingly, even if an employee such as the first respondent fulfills scarce skills functions in the STF after being transferred there, he would simply not qualify to be paid the scarce skills allowance until he gets his operators' badge.

[36] The first respondent's case where it came to the application of clause 6 of the policy is clearly contrived. It ignores what can hardly be more clearly stated in the memorandum of 14 December 2006, which specifically related to the STF, being that a member will only qualify for the payment of the scarce skill allowance from the date on which the member receives the operators' badge. The first respondent received his operators badge on 18 December 2012. As from then, he qualified for payment of the allowance. In terms of clause 6 of the policy, he will remain entitled to the payment of this allowance for as long as he performs operational functions in the STF. Should he at some time in the future accept a deployment or be transferred to another occupation in the applicant that does not require a scarce skill, he will lose the allowance. It is as simple as that. In *Skhosana v Commission for Conciliation, Mediation and*

Arbitration and Others[12] the Court dealt with a case where the payment of a vehicle allowance to an employee was suspended when the conditions imposed by a policy for the payment of the allowance were not met, and held as follows:

> 'In then deciding to suspend payment of the allowances to the applicant, NUMSA based this squarely on the provisions of the vehicle scheme and the policy, which in effect provides that if the vehicle is not returned to service in 30 days, the allowances could be suspended. This clearly, in my view, constitutes a proper substantive basis justifying the making of such a decision. *In casu*, the vehicle was unusable, had not returned to service (so to speak) when it was decided to suspend the allowances, and it was not presented for inspection when demanded. If the applicant was using the vehicle allocated to him, and had not parked it in his garage whilst using other vehicles, the problem would never have arisen. This was said in so many words by Marulane. There can be no doubt that the decision by NUMSA was objectively justified and relevant to the purpose behind the decision.'

[37] I believe the first respondent knew that his case about the application of clause 6 was irreconcilable with the remainder of the policy. That is why he adapted his testimony in the course of the arbitration. A pertinent example of this can be found where the first respondent was taken to task by the representative of the applicant under cross examination, about the policy specifically saying that the scarce skills allowance would only be paid once an operators badge is issued, and he was asked to comment on this clear wording. His answer was that this was not a rule but an '*assumption*'. This is undoubtedly a contrived answer, and completely lacking in merit. And later on in cross examination, the first respondent even went so far as to suggest that anyone can simply walk into the applicant's general store to get an operators badge, suggesting it means nothing. The third respondent should have had far more regard to the first respondent's lack of candour and propensity to fabricate evidence, as exhibited by the above examples, had she reasonably evaluated the evidence as expected of her.

[12] (JR 2160/15) [2019] ZALCJHB 39 (5 March 2019) at para 42. Also compare *City of Cape Town v SA Local Government Bargaining Council and Others* (2014) 35 ILJ 163 (LC) at paras 24 – 27.

[38] What the third respondent however inexplicably had no regard to, was the clear terms of the contract signed by the first respondent on 7 January 2013. It was undisputed that such contract would only be signed once an employee assigned to the STF had completed all training and passed probation. It was the document symbolizing permanent appointment to the STF. That contract specifically dealt with the scarce skills allowance and when it was payable. It recorded, in the case of the first respondent, that it was payable when he received his operators' badge on 18 December 2012. That is what he agreed to. To now try and squirm out of it by some kind of contrived reliance on the provisions of the policy was simply not acceptable. He should be held bound to what he agreed to, and the third respondent's failure to appreciate this is simply unreasonable.

[39] In summary, and as the policy stands and reads, and as read with the contract signed by the first respondent on 7 January 2013, the first respondent would not simply qualify for the payment of a scarce skills allowance prior to 18 December 2012, and the applicant's decision not to do so is fully in line with the policy, cannot be faulted, and is certainly not unfair. Any conclusion to the contrary would not be a reasonable outcome.

[40] The only leaves the inconsistency issue. The case of the first respondent in this regard is simple. He contends that five other employees were paid the scarce skills allowance upon being awarded an operators badge in 2009, but this payment was back dated to 2007 when they had joined the STF. The first respondent contended that based upon the application of the principle of inconsistency, he should also be awarded his scarce skills allowance back dated to 2010 when he joined the STF. As stated above, the third respondent accepted this argument, which constituted the primary basis for her finding in favour of the first respondent.

[41] Ordinarily, the issue of inconsistency is one of the elements of fairness where it comes to deciding whether a sanction of dismissal if fair in the case where employees are dismissed for misconduct. The basic premise underlying this is that persons who transgressed alike, should be treated alike. However, and where it comes to the dispute *in casu*, it is simply not a case of the first respondent having transgressed in some way, but then being treated

differently from other employees who also transgressed in the same way. In reality, it is thus not a case of inconsistency at all. Rather, it is a case of the first respondent seeking to assert a right he contended he had, being the right to the payment of a scarce skills allowance. That right, for the want of a better description, can exist as a guaranteed right, namely that the policy specifically provides for the payment of the allowance as claimed, or in the form of a discretion exercised by the employer to award the first respondent the allowance concerned.

[42] But the applicant must still prove the existence of the right, even if it is subject to an employers' discretion. If there is no right, there is no claim. In my view, what is contemplated by the word '*unfair*' in the unfair labour practice definition where it comes to benefits, is to target those cases where the right, for the want of a better description, is founded in the discretion of an employer. Ordinarily, and in common law, the exercise of a discretion is very seldomly assailable. However, and in the employment relationship, these kind of discretions are tested against the tenets of fairness. However, it must be proven that such a discretion in fact exists. The notion of 'unfairness' cannot serve to create a right on a discretion that does not exist in the first place. The notion of unfairness can only apply to that which already exists.

[43] The aforesaid is where the first respondent's problem in this case lies. The policy and his contract make it clear that he has no right to the scarce skills allowance from the date when he first joined the STF. The wording of the policy and the contract make it equally clear that the applicant is given no discretion to decide to award the scarce skills allowance to non-qualifying employees. Stripped down to its core, there must exist specified objective facts in order for an employee to be entitled to payment of the scarce skills allowance, being the attaining of an operators badge and the signature of a contract, with the allowance only being payable from that point onwards, and for as long as the employee performs the scarce skills functions. Thus, and if there is no right to the allowance in the first place, be it by way of a guaranteed right or in the form of the exercise of a discretion, there exists nothing against which to measure 'unfairness', so to speak. It follows that the real enquiry has to be far more than just comparing what happened to one employee to that which may have happened to another employee where it comes to benefits,

and then concluding that based only on that, the differentiation is unfair and thus an unfair labour practice.

[44] Therefore, in my view, what one thus has to deal with in this case is not inconsistency. It is actually a case of the first respondent needing to establish and prove that the applicant, by way of its conduct, has waived its right to rely on the clear terms of the policy and that it has agreed (tacitly or by conduct) to apply another tacit arrangement of the back dated payment of the scarce skills allowance to the date when the employee joined the STF. As held in *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another*[13]:

> '… The reason that such an agreement must be clearly and unambiguously proved is that compromise, as a form of novation, involves the waiver of existing rights, or claimed rights …'

[45] It is of course true that useful evidence to prove this kind of waiver by conduct would be an evaluation of how the applicant applied the policy to other employees, and if there was a deviation from its terms, what the reason for that deviation may have been. In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[14] the Court held:

> '… Waiver is the legal act of abandoning a right on which one is otherwise entitled to rely. It is not easily inferred or established. The onus to prove it lies with the party asserting waiver. That party is required to establish that the right-holder, with full knowledge of the right, decided to abandon it.
>
> So waiver depends on the intention of the right-holder. That can be proved either through express actions or by conduct plainly inconsistent with an intention to enforce the right. …'

[46] It follows from the *dicta* in *Intervalve supra* that it has to be shown that the intention of the applicant in back dating the payment of the scarce skills allowance for the five other employees was to negate the terms of the policy and rather apply this alternative dispensation. In order to show this intention, it is necessary to establish whether the applicant was aware of its rights under

[13] (2016) 37 ILJ 902 (LAC) at para 25
[14] (2015) 36 ILJ 363 (CC) at paras 60 – 61.

the policy, considered such rights, and then with that knowledge decided to abandon the same.[15] However, it must always be borne in mind that such a waiver is not readily inferred, considering the following *dictum* in *Ullman Bros Ltd v Kroonstad Produce Co*[16]: '… A waiver is not presumed, but must be clearly established by the party who relies on it. …'. As to what constitutes '*clear establishment'*, the Court in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*[17] referred with approval to the following *dictum* from the judgment in *Smith v Momberg* (12 SC 295):

> 'Under certain circumstances a renunciation of rights may be implied from the conduct of the person entitled to them, but his conduct must be such as to leave no reasonable doubt in the mind that he not only knew what his rights were, but intended to surrender them.'

[47] Applying the aforesaid to the facts, it was undisputed that despite the clear terms of the policy, five other employees stationed at the STF in Durban were paid their scarce skills allowances back dated to 2007, when they joined the STF, upon receiving their operators' badges in 2009.[18] However, and in order to establish if this proves the required waiver, the question that must be answered is why this happened. The answer was provided by the applicant, which answer was never disputed. That answer was that the payment made was a mistake and should never have happened. It appears that the payment was made because a request by the Section Head: Special Task Force made on 17 March 2010 that the scarce skills allowance be paid to these employees simply reflected an incorrect qualifying date of 1 December 2007, instead of 1 December 2009. When the Section Head became aware of this error, the Unit Commander in Durban was instructed on 2 February 2011 to recover the payments so made in error, and the employees were then advised that the payments were made in error and had to be refunded.

[15] See *Greathead v SA Commercial Catering and Allied Workers Union* (2001) 22 ILJ 595 (SCA) at para 17; *EHCWAWU obo Tshabalala and Others v M & P Bodies CC* (1999) 20 ILJ 1787 (LC) at para 26.
[16] 1923 AD 449 at 454.
[17] 1915 AD 1.
[18] These employees were Warrant Officers Cebekulu, Ntombela, Khubeka and Bishop, and Lieutenant Malgas.

[48] Two of these employees who received the back dated allowance were called by the first respondent to testify, as the first respondent had no actual and direct knowledge of the events giving rise to these payments. First, Malgas testified that he was entitled to the allowance because he fulfilled operational duties in the STF since starting there, which constitutes the same argument raised by the first respondent as discussed above. He conceded that he was told by the applicant that the payment had been a mistake because of an incorrect date reflected on the payment approval request relating to the allowance, that he was only entitled to the allowance from when he received his operators' badge, and thus he had to pay it back. He stated that he did not agree with the applicant, and challenged the demand for repayment, which dispute was still not resolved. The next witness in this regard was Cebekhulu, who in essence testified to the same effect as Malgas. What is significant of this testimony is that it simply does not prove that the applicant had any intention to waive its rights in terms of the policy and decided to rather apply an alternative dispensation where it came to the payment of the scarce skills allowance.

[49] In my view, the conduct of the applicant in this case, as established in the evidence, is indicative of the fact that the back dated payments were indeed made as a result of a mistake, and not based on any deliberate decision to depart from the terms of the policy. As reflected above, the applicant informed the employees accordingly and demanded a refund. When this was not forthcoming, it then tried to deduct it unilaterally from the employees' salary. This was met with a grievance and a dispute brought in the SSSBC, causing the applicant to cease and desist for the time being. The simple reality is that none of this conduct and evidence is consistent with an employer that waived its rights to rely on the clear terms of a policy.

[50] I must confess that I find it rather opportunistic for the first respondent to rely on these events, which date back several years before he initiated his claim, especially considering what happened after the payments were made. The evidence showed that it fairly common knowledge that the applicant considered that the payments were made in error and wanted it back. The opportunism lies in the fact that the first respondent only relies on the payments being made, but he completely ignores the reaction of the

applicant's senior management upon realizing what happened. Surely, the applicant must have appreciated that the applicant never intended waiving its reliance on the policy. To rely, in these circumstances, on the mere fact that the payments were made as a basis for justifying similar payment to the first respondent, is an untenable proposition.

[51] The third respondent makes much of the fact that the applicant did not power ahead in claiming back the payments from these five other employees, despite the dispute they raised. In my view, this is however an entirely irrelevant consideration. Again, the undisputed evidence was that the applicant still intended to recover the payments. The applicant hoped the issue would have been resolved in the SSSBC, but it declined jurisdiction, and determined that the issue had to be referred to the Labour Court. Even if the applicant can be criticized for not being assertive and pursuing its rights in this regard with due expedition, this cannot change the fact that it never waived nor abandoned its right to rely on the clear terms of the policy, and to ultimately claim its money back from the employees paid in error. There was also no evidence that the situation repeated itself again after 2010.

[52] In fact, the evidence showed that when the same issue arose again in 2013, the applicant assertively dealt with it. In 2013, there were a number of applications from employees in the STF based in Cape Town, Durban and Pretoria West, for the payment of a scarce skills allowance where such employees did not qualify for payment in terms of the policy.[19] This request was refused for most of these employees because they did not have an operators' badge.[20] Importantly *in casu*, in an information note circulated by the Section Head: Special Task Force on 29 August 2013, in which all Unit Commanders were instructed to make the terms of the policy clear to employees, the following was recorded:

> 'During interviews with the Unit Commanders it became clear that members are deployed during operations, whether they are qualified operators or not. Unit Commanders are however familiar with the fact that members need to be trained in advance courses during their third year in STF. By deploying new STF members with qualified operators, these members tend to argue that they

[19] There were a total of 21 employees that sought payment of the allowance.
[20] The applications by a few individuals were refused for other reasons, not relevant here.

> perform the same function and are also exposed to life threatening circumstances as those members who are qualified and who are receiving the scarce skills allowance. Thus they are applying to be payed the scarce skills allowance' (sic)

The answer provided by the Section Head to this argument was: '*Considering the framework (signed circulars) in which the scarce skills allowance for STF members are regulated, the application for members are …. not recommended*'. Payment of the scarce skills allowance to these employees was consequently refused, with the Divisional Commissioner: Operational Response Services recording in the information note that only qualifying members would receive approval for payment of the allowance.

[53] In summary, on the undisputed evidence, it simply cannot be legitimately said that the applicant, with full knowledge of its rights under the policy, decided to abandon the same in favour of an alternative back dated scarce skills allowance payment dispensation. If anything, the evidence shows the complete opposite. When the persons in authority at the applicant came to realize what happened, it was clearly intended to remedy the situation and recover the payments made. Steps were also taken to ensure that it does not happen again going forward.

[54] There is in my view another important consideration. The fairness of the provisions of the policy was never under attack. To now in effect find, as the third respondent did, that the terms of such policy should be negated because a mistake the applicant had made in the past, is simply not appropriate. The first respondent cannot benefit from what is clearly, in my view, a once off error never repeated again. It is not lost on me that this mistake was in respect of a few individual employees out of what must clearly be several hundreds of others. To ascribe to the approach that the mistake negates the policy will open the doors to all the hundreds of other employee to also come and claim back pay of the scarce skills allowance, which will be entirely unfair to the applicant as employer. Fairness, after all, is not a one sided enquiry, but a two way street.

[55] But even if the traditional principles of inconsistency are applied, it is not just a case of employees being treated differently *per se* establishing unfair

inconsistency.[21] Inconsistency, as an element of fair play, is far more than just establishing different treatment. In other words, the like for like comparison is just one element in the conducting of the inconsistency enquiry. There are two other important elements that must also be considered, namely that the decision by the employer must not be capricious, or induced by improper motives or by a discriminating management policy (in other words the conduct must be bona fide), and that a value judgment must always be exercised.[22]

[56] For all the reasons already discussed above, it cannot be said that the applicant, in not paying the first respondent the back dated scarce skills allowance, was induced by improper motives, or acted capriciously or arbitrary.[23] What happened was an error. There was never even a decision by the applicant as an employer to advantage some employees over others. It is understandable that in a large and often complicated organization such as the applicant, errors would creep in. For that reason, fairness dictates that an employer must have the opportunity to right a wrong.[24] An employee should not be allowed to profit from something that was clearly done in error. All this would be part of the value judgment that needed to have been made. In *Mathibeli v Minister of Labour*[25] the Court dealt with what called 'blunders' committed by officials of the Department of Labour relating to upgrading of the positions of employees, which then formed the subject matter of an unfair labour practice dispute. The Court held as follows:[26]

> 'Furthermore, no finding was made that the failure to retain the appellant in a putatively upgraded post constituted a ULP, nor could it be, because on the facts found by the arbitrator in regard to the provisions of the regulations, there could be no legitimate expectation of automatic retention in an upgraded post by the appellant.

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[21] *SA Commercial Catering and Allied Workers Union on behalf of Ramontlhe and Others v Sun City* (2020) 41 ILJ 160 (LAC) at para 25; *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 860 (LAC) at para 31

[22] See *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para 29; *Absa Bank Ltd v Naidu and Others* (2015) 36 ILJ 602 (LAC) at paras 36 – 37.

[23] Compare *Maile v FOSKOR (Pty) Ltd* (JR1148/2014) [2019] ZALCJHB 71 (2 April 2019) at para 30.4.

[24] See *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC) at para 26.

[25] (2015) 36 ILJ 1215 (LAC).

[26] Id at paras 8 – 9.

> The outcome that a ULP had been committed on the basis the arbitrator thought it had been committed cannot logically be connected to the notion that paying the appellant a back-salary at the grade 11 rate was appropriate. Thus, because it is not justified by its premises it is irrational. Accordingly, the award was unreasonable and must be set aside.'

[57] In the result, the second respondent's finding of inconsistency, even if inconsistency is considered, cannot stand. It is at odds with the evidence, and fails to account for all the essential legal requirements necessary to establish a case of inconsistency. As such, it is unreasonable.

[58] The third respondent concluded that the applicant was consistently inconsistent. As humorous as this statement may be, it is unfortunately not justified. The bulk of the evidence leaves me convinced that the policy is in fact being consistently applied by the applicant and what happened in this case where it came to the four other individuals is simply an isolated error. The third respondent seemed to be blinded by what she saw as differentiating between employees where it came to the application of the policy, without properly considering, on that facts, whether what happened was fair or not. The applicant never had any intention to depart from the clear terms of the policy. In the end, the first respondent cannot benefit from the mistake made. The third respondent's award is therefore unsustainable on review.

<u>Conclusion</u>

[59] For all the reasons as set out above, I conclude that the third respondent's finding that the applicant had committed an unfair labour practice towards the first respondent where it came to the issue of the back payment of the scarce skills allowance cannot be sustained, and falls to be reviewed and set aside.

[60] Having reviewed and set aside the award of the third respondent, I see no reason to remit this matter back to the SSSBC for determination *de novo* before another arbitrator. This matter dates back to 2013, and had already been before to this Court by way of a review application brought by the first

respondent after he lost his unfair labour practice case,[27] with the matter then being remitted back to the SSSBC for arbitration *de novo*. In my view, all the necessary evidence has been fully ventilated and reflected in a transcript that was in all respects complete. The documentary evidence is uncontested and speaks for itself. There is simply no need to go through the whole exercise of arbitration again. Exercising the powers I have under section 145(4) of the LRA,[28] I therefore consider it appropriate to finally determine this matter. I shall accordingly substitute the arbitration award of the third respondent with an award that the applicant did not commit an unfair labour practice towards the first respondent, and that the first respondent's dispute in this regard be dismissed.

Costs

[61] This then only leaves the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was successful, I do not intend to burden the first respondent with a costs order, especially considering the opportunity afforded to me to bring this matter finally to an end. The parties are still in an employment relationship with one another. I am also mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[29] where it comes to costs awards in employment disputes before this Court, and I do not consider there to be sufficient reason to depart from this. I accordingly exercise my discretion as to costs in this matter by making no order as to costs.

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

Order

1. The applicant's review application is granted.

[27] An award was handed down by arbitrator Matshekga on 17 April 2015 in which the arbitrator dismissed the first respondent's unfair labour practice claim. This award was successfully reviewed.
[28] Section 145(4)(a) reads: '*If the award is set aside, the Labour Court may – (a) determine the dispute in the manner it considers appropriate …*'
[29] (2018) 39 ILJ 523 (CC) at para 25.

2. The arbitration award of the third respondent, arbitrator E Maree, dated 27 August 2016 and issued under case number PSSS 262 – 14/16, is reviewed and set aside.

3. The arbitration award is substituted with an award that the applicant did not commit an unfair labour practice towards the first respondent, and the first's respondent's dispute referral to the SSSBC is dismissed.

4. There is no order as to costs.

S. Snyman

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant:	Advocate V Bruinders
Instructed by:	The State Attorney
For the First Respondent:	Advocate L Kalashe
Instructed by:	Mashiyi Attorneys