IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1425/2022

In the matter between:

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA) **Applicant**

and

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

COMMISSIONER DHELIWE MAVUMA *N.O* **Second Respondent**

NEHAWU obo MEMBERS **Third Respondent**

Heard: **10 September 2024**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 09 January 2025**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] In this opposed application, the applicant (ICASA) seeks an order reviewing and setting aside the arbitration award issued by the second respondent

(Commissioner), acting under the auspices of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA).

[2] In the award, the Commissioner had found that ICASA had committed an unfair labour practice under section 186(2)(a) of the Labour Relations Act[1], in that it failed to pay performance and merit bonuses to qualifying members of NEHAWU (Employees) for the 2019/2020 financial year. ICASA was ordered to pay to the Employees such bonuses. ICASA seeks a substitution of the Commissioner's award, or in the alternative, that the dispute between the parties be remitted to the CCMA for a re-hearing before another Commissioner.

Background:

[3] ICASA's performance award scheme is governed by its Performance Management Policy[2] and Remuneration Policy. In accordance with the Performance Management Policy, if ICASA achieves the percentage stipulated in the Annual Performance Plan (APP), then it must pay bonuses at 100%. Where employees' performance exceeds pre-determined performance standards during the period under review, they qualify for performance rewards. It is however specifically stipulated in the policy that the rewards are not an entitlement, but would be based on exceptional performance and availability of funds.

[4] Where the pre-determined objectives are not met, ICASA's Accounting Authority may exercise its discretion on whether to pay performance bonuses, and if so, on terms considered to be fair and reasonable. Further in accordance with the Policy, payment of performances bonuses is not a right, and ICASA's Council retains its discretion on whether payments should be made, flowing from recommendations of the CEO, and also taking into account the availability of funds.

[1] Act 66 of 1995
[2] Implemented on 1 April 2018 as approved and authorised in May 2018

[5] There is a dispute in regards to whether the target for 2019/2020 financial year as set out in the APP was met, and if so, what that target was. It is however common cause that ICASA achieved 86.8% organisational performance target for that financial year. The Employees contend that since the target was set at 80% and that 86.8% was achieved, they were entitled to 100% payments. ICASA on the other hand contends that based on the overall objectives and targets according to specific programmes outlined in the APP, the target was set at 90% and that since only 86.8% was achieved, there was no obligation to pay performance bonuses. It further contends that there were employees who qualified for a performance bonus and merit increase based on their individual performance, and that the Council applied its discretion and awarded a 'discretionary once-off gratuity performance reward' payment for 2019/2020 FY. The employees however regard the payments made as gratuity instead of the usual annual performance bonus and increases, which was something not catered for in the Policies.

[6] It was against the above disputes that the Employees had referred an unfair labour practice dispute to the CCMA, flowing from which the Commissioner had found that the performance target for the 2019/2020 financial year was set at 80%, and that ICASA was therefore required to have paid them 100% bonuses as well as merit bonuses to those that qualified.

The evidence and submissions before the Commissioner and decision reached:

[7] The evidence on behalf of the Employees by Ms Thabitha Serumola, who is also a shop steward, was essentially that in accordance with the APP for 2019/2020 financial year, ICASA set the performance target at 80%, which was signed off by the then Acting Chairperson in January 2019. She contended that the APP was the only source of authority for ICASA to set the annual performance targets, which could not be altered in any other document.

[8] ICASA's Senior Manager-Strategic and Procurement Management (Mr David Molapo) testified that the 80% target stipulated in the APP for 2019/2020 was

for a five-year plan and not specifically for that financial year. According to Molapo, the correct target figure was 94.5% based on percentages of objectives (20%) and an additional 74.5% of the baseline stipulated in the programmes to be achieved. This contention was further based *Foreword* in the APP, where it was stated that; *'The Strategic Plan for the fiscal years 2015/16FY to 2019/20FY prioritises and consolidates all priority activities and projects for the review period under the following strategic outcome-oriented goals'*, which were identified and listed in the APP.

[9] Molapo denied that the 80% stated in the *foreword* of the APP was the performance target for 2019/2020 and also disputed that the 86.8% reflected in the Annual Report for that financial year was the actual performance outcome targeted. He testified that other factors were considered, since the figure of 86.8% was to be assessed against the outputs that were planned for that particular financial year, and more specifically, 38 targets that were set and of which 33 were achieved in that year.

[10] The Commissioner having had regard to the description of *Organisational Performance* in the policy, had accepted that if ICASA achieved the percentages stipulated in the APP, then it must pay performance bonuses at 100%. The Commissioner also had regard to the 2019/2020 Annual Report in which it was stated that the Authority set a target of 38 targets, and that 86.8% of that was achieved.

[11] The Commissioner found that it was not ICASA's case that it had applied its discretion not to pay the performance bonuses and merit increases, or that it did not have sufficient funds to make the payments. The Commissioner accordingly concluded that ICASA committed an unfair labour practice on the basis that the Performance Management Policy made provision for the payment of 100% bonuses where performance targets were achieved. ICASA had according to the Commissioner, not produced any form of authority that set the target for the financial year at 90%, and on the contrary, Molapo's testimony that the target was set at 94.5% was not even supported by any documentation. The actual target that was set in the APP was 80%, and there

was no evidence to support Molapo's contention that the set target was for a period over five years.

The review test:

[12] The test on review is well-known as buttressed in *Duncanmec (Pty) Limited v Gaylard NO and Others*[3]*.* The enquiry into the reasonableness of a decision involves consideration of the merits, and it has been said that unreasonableness would warrant interference only if the impugned decision is of the kind that could not be made by a reasonable decision-maker. It was added that is not the task of reviewing Court to evaluate the reasons provided by the arbitrator with a view of determining whether it agrees with them. The principal enquiry is whether the award itself meets the requirement of reasonableness, in the sense that there are reasons supporting its conclusions.

[13] This Court must therefore determine whether from an assessment of the facts as a whole, it can be said that the Commissioner's conclusions fell outside a band of reasonableness[4]. In *Makuleni v Standard Bank of South Africa Ltd and Others*[5]*,* it was further reiterated that;

> 'The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable.

---

[3](CCT284/17) [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC) at paras 41 - 43

[4]See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 79, where it was held;

> '…a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

[5](JA125/2021) [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) at para 4

Only the conclusion is untenable is a review and setting aside warranted'.

The grounds of review and evaluation:

[14] ICASA seeks a review of the award on numerous grounds including that the Commissioner misconstrued the evidence; reached a conclusion that was irrational; committed gross irregularities; failed to properly apply her mind to the evidence before her, and/or disregarded that evidence.

[15] The employees in defending the award contend that the Commissioner understood the nature of the dispute to be determined, considered the material evidence before her, and reached a decision which is justifiable in law and consistent with her reasoning. It was further contended that the grounds of review relied upon by ICASA were akin to an appeal.

[16] Against the above, the starting point is section 186(2)(a) of the LRA[6]. In *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*[7], the Labour Appeal Court held that 'benefits' within the context of section 186(2)(a) of the LRA included bonuses, and that the non-payment thereof could give rise to an unfair labour practice dispute. It was further held that even where the employer enjoys a discretion in terms of a policy or practice relating to the provision of benefits, such conduct will be subject to scrutiny by the CCMA in terms of section 186(2)(a) of the LRA[8].

---

[6] Which provides;

> **"Unfair labour practice"** means an unfair act or omission that arises between an employer and an employee involving 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"

[7] (2013) 34 ILJ 1120 (LAC); DA1/11) [2013] ZALAC 23 (21 February 2013) at para 48

[8] See also at para 50 where it was held that;

> "In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu* or *ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in section 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion. In as far as *Hospersa*, *GS4 Security* and *Scheepers* postulate a different approach they are, with respect, wrong"

[17] Thus, where the employer claims that the payment of bonuses was discretionary or not a guaranteed right, the employee could still claim an unfair labour practice. This in circumstances where it can be demonstrated that the discretion was improperly exercised, resulting in unfairness, or where the employer in exercising its discretion, failed to meet an objective standard, or acted arbitrarily, capriciously and/or inconsistently[9].

The issues in dispute and evaluation:

[18] The parties in this case were in agreement that central to the dispute before the Commissioner was the exact performance target set by ICASA in the APP for the 2019/2020 financial year. That dispute revolved around whether the target was 80% as alleged by the Employees, or 90% (94.5%) as alleged by ICASA. Further issues for determination were whether the target was achieved and/or exceeded; whether the policies catered for gratuity payments; and whether the achievement of the target was without more, sufficient to entitle the employees to payment of the performance bonuses.

[19] The policies or instruments governing performance management and rewards are not in dispute. The interpretation thereof will thus have to be in accordance with the approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*[10]*.*

[20] The Performance Management Policy refers to *'Organisational Performance'*, which is defined as *'The Authority's performance target as set out and*

---

[9] See *Apollo* at para 53; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 at para 11

[10] (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18, where it was held that;

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

approved, and that if the Organisation achieves the percentage as stipulated in the APP, then the organisation pays performance bonuses at 100%'

[21] Under clause 6.8 ('Reward and Recognition') of that policy, it is provided *inter alia* that ICASA must achieve its objectives for consideration of a performance reward, taking into account the alignment between the organisational performance and individual performance. In the event that the predetermined objectives are not achieved, the Accounting Authority may exercise its discretion on whether to pay performance rewards, and if so, on terms considered fair and reasonable.

[22] The policy further provides that payment of performance bonuses is at the discretion of the Council flowing from the recommendations by the CEO, and further subject to availability of funds. Where employees exceed predetermined performance standards during the period under review, they must qualify for performance rewards, based on exceptional performance and availability of funds.

The set target for 2019/2020FY:

[23] In the Performance Management Policy, the 'APP' is defined as a *'document containing the Authority's five (5) year performance plan with a breakdown of quarterly targets for the financial year under review'. 'Targets'* are defined as; '*The agreed quantitative or qualitative standard(s)'*

[24] In the *Foreword* to the APP, it is provided that amongst the strategic outcome-oriented goals is to improve organisational service delivery by improving organisational performance to 80%, and also improving stakeholder and consumer experience through the monitoring of quality of services and stakeholder engagement from 10% to 80% by 2020.

[25] Molapo had conceded that any reference to 90% (or 94.5%) target for 2019/2020 is not found either in the APP. He however testified that the figure of 94.5% was based on goals achieved as per programmes which in turn

dictated and shaped those targets. He further contended that the computation of that figure had to be gleaned from the body of the APP.

[26] A reading of the transcribed record indicates that Molapo was clearly at pains in explaining why the target of 80% for the 2019/2020 as can be gleaned from the *foreword* in the APP, was not the actual performance target. He made a distinction between the targets set out in the APP, and those set out in the START plan. The latter plan gave a long term (five-years) perspective or vision of ICASA in terms of the framework set by National Government, and that the 80% in the APP was a target set over five years.

[27] Upon questions from the Commissioner, Molapo further testified that within the long-term STRAT plan were annual targets set towards that plan, and that performance bonuses paid to employees annually were to be based on the overall performance of the organisation, and not merely on target set in the *foreword* to the APP. According to Molapo, the APP contained a consolidation of all the targets of individual divisions and programmes, and that the 90% that was not achieved, even if not specifically in the APP, was arrived after that consolidation.

[28] According to Molapo, the 90% set indicators which allowed for baselines from which targets were to be met. He referred to the APP[11] under the rubric *'Programme Performance Indicators and Annual Targets for 2019*'; where the baseline of 89% is indicated, with the objective being to improve organisational performance from 29% by 20% by 2019/2020

[29] Against Molapo's evidence, it is my view that the proper approach in determining the target for 2019/2020 as contained in the APP, is to have regard to its entire contents. The difficulty with the employees' case is that they sought to rely on the *foreword* to the APP to the exclusion of everything else contained in it. Even under the *foreword*, reference was made to the STRAT Plan for 2015/16 – 2019/2020 financial years, which prioritised and

[11] At page 43

consolidated all priority activities and projects for the review period under strategic outcome-oriented goals. These included ‘Universal Service and Access to Broadband Services (which set a goal of 566MHz to 958MHz by 2020; Access to communication services and affordable prices; improvement of organisational service and delivery by 80%; improvement of stakeholder and consumer experience by 80%.

[30] Molapo therefore as a person who was party to the drafting of that APP was correct in pointing out that the *foreword* to it is not where the actual targets are to be found. The APP is a voluminous document and the relevant portions are from page 41, and to be read with the Addendum from its page 94, where the targets and baselines are set out according to six organised programmes. Some of the programmes such as Administration are made up of eight sub-programmes, with each being allocated a baseline performance, and targets. There are different targets (desired performance) set for each programme whether quarterly as or yearly, ranging between 80% and 100%, and with different baselines.

[31] The common trend with the target figures in the programmes as per the addendum[12], is that the baselines are set at 74.5%, with improvement of performance of 20% by 2019/2020 being required. The baselines according to programmes ranged between 20% and 89%.

[32] Arising from the above, the conclusion to be reached is that as indicated in the APP and its contents, it is apparent that the 80% mentioned in the *foreword* to the APP cannot be the actual target upon which any entitlement to performance bonuses were to be based or calculated. That figure was applicable to the goal of improving organisational service delivery and organisational performance as a whole over 2015/16 to 2019/2020 FY. At most, this could be read from the very definition of the APP in the Performance Management Policy as indicated on paragraph 23 of this judgment. Thus a proper determination of targets involves taking into account

[12] At page 94

all the programmes that were identified in in both STRAT plan and the APP. The two instruments cannot be read or considered in isolation contrary to the Employees' approach.

[33] It follows that the figure of 80% as stated in the *foreword*, ought to be read in context and not to the exclusion of how those targets were to be achieved and further towards what end. Against these observations, it follows that the Commissioner by solely relying on the target of 80% as set out in the *foreword* to the APP, without consideration of how the 86.8% in the Annual Plan was arrived at, clearly failed to properly take into account all the evidence placed before her. That figure on a proper reading of the *foreword* encapsulated the STRAT Plan for 2015/16 to 2019/2020FY. Furthermore, a proper reading of the *foreword* does not in my view specify a set target. This is so in that the 80% figure refers to '*improvement' of organisational performance'*, which is but one of the strategic outcome-oriented goals in accordance with the STRAT Plan.

[34] Thus, the Commissioner's reliance on the 86.8% target indicated in the Annual Report, and her conclusion that the 80% target was exceeded based solely on the 80% mentioned in the *foreword* of the APP, was not supported by the evidence before her. Accordingly, it is concluded that the 80% figure was in reference to the five-year plan set out against the STRAT Plan, and could not have been in reference to 2019/2020FY only for the purposes of annual performance bonus. The correct target figure therefore for 2019/2020FY and as also confirmed in the Annual Report was 90% taking into account the STRAT Plan. Even if Molapo's testimony tended to confuse the actual figures between 90% and 94.5%, the fact remains that it is unlikely that the performance figures set out in the 2019/2020 Annual Report, which was prepared in accordance with the guidelines issued by National Treasury, could have been manufactured simply to deny the Employees a performance bonus.

The issues of gratuity and insufficient funds:

[35] In accordance with clause 6.8.4 in the Performance Management Policy, it is provided that should ICASA not achieve its pre-determined objectives, its Accounting Authority may exercise its discretion on whether to pay performance rewards on terms considered fair and reasonable. The CEO's correspondence indicated gratuities were paid on the basis that not all criteria as required by the performance management policy were met. The CEO's subsequent correspondence indicated that Council resolved not to pay merit increases and performance bonus in the light of the failure to meet the target, and further that there was a need to recognise individual performance taking into account the financial sustainability of the organisation. In the final correspondence from the CEO on the matter, it was indicated that what was paid was a '*Once -off Gratuity Reward Payment'*, which the Council had approved based on available budget and availability of funds.

[36] It is correct as found by the Commissioner, that nowhere in the policies was provision made for *gratuity* payment. The parties had further recorded this as common cause in the pre-arbitration minute. Notwithstanding what was recorded as common cause, ICASA submitted that the Commissioner misconstrued the evidence in finding that the gratuity payment was not catered for in the policy. because of the import of clause 6.8.4 of the Policy.

[37] ICASA's submissions lack merit for the simple reason that on the principles of interpretation of documents such as the Policy as set out in *Endumeni,* one cannot read into that policy something that was not intended. The policy even on a plain reading of clause 6.8.4, only refers to *'performance rewards'*. A gratuity is a completely separate concept, and ordinarily refers to a token, which is not provided for in the policy. As already indicated, it was only in the last correspondence by the CEO to employees on the matter that the payment was referred to as '*Once-off Gratuity Performance Reward'*. In my view therefore, whether the payment was referred to as a gratuity or performance reward is neither here nor there, as any payments as per the CEO's correspondence were made in accordance with clause 6.8.4 of the policy.

[38] As already indicated, central to the dispute between the parties were the exact targets set for the purposes of awarding performance bonuses, and whether those targets were met and/or exceeded. It has been concluded that based on a proper reading of the APP, the STRAT Plan and the Annual Report for the 2019/2020FY, the target set was 90%, which was not met.

[39] From a reading of the transcribed record and the cross-examination of Molapo in particular, the issues surrounding whether ICASA had properly exercised its discretion in regards to what was paid to Employees, and whether it had sufficient funds to pay the performance bonus despite targets not being met, were not fully explored with him. It was submitted on behalf of the Employees in these proceedings that as the Commissioner had found, ICASA's case was merely that targets were not met hence bonus payments were not made, and that it was not its case that there was unavailability of funds or that it had exercised its discretion. Equally so, the Employees' case was that the targets were met hence performance bonuses ought to have been paid.

[40] The difficulty however is that the CEO's correspondence explaining the reasons why the performance bonuses were not paid, and that why it was decided to pay the 'gratuity' or performance rewards, formed part of the record before the Commissioner. If the parties in those proceedings confined their respective cases to specific issues, those are the issues that ought to be determined by the Commissioner. In this case the evidence before the Commissioner was confined to whether the targets were met or not. As already indicated, the Commissioner's finding in the affirmative in that regard is not sustainable, and therefore that ought to have been the end of the matter. This was so if the Employees failed to challenge the nature of the discretion or the alleged unavailability of funds. It does not therefore assist the Employees in review proceedings to argue that a particular issue was not ICASA's case and therefore a finding ought to have been made in their favour.

Conclusions:

[41] Against the observations and conclusions reached in this judgment in the light of the evidence before the Commissioner, it ought therefore be found that an even-handed assessment of that evidence reveals that the Commissioner's conclusions are untenable. Effectively, the Commissioner's conclusions in the light of the totality of the evidence before her, do not fall within a band of reasonableness. It follows that the award warrants to be reviewed and set aside.

[42] The voluminous arbitration proceedings record combined with the pleadings were properly before the Court. I therefore see no reason why the Court should remit the matter to the CCMA for re-consideration. Accordingly, a substitution of the Commissioner's award is equally warranted.

[43] In regard to costs, the parties sought costs orders against each other. The Employees were clearly within their rights to defend an award issued in their favour. In the light of the conclusions reached in this judgment and further having had regard to the requirements of law and fairness, it is my view that each party must be burdened with its own costs.

[44] Accordingly, the following order is made:

<u>Order:</u>

1. The arbitration award issued by the Second Respondent under Case Number GATW12895/21 is reviewed and set aside.

2. The Commissioner's award is substituted with an order that the failure by the Applicant (ICASA) not pay to the Third Respondents (Employees) a performance bonus for 2019/2020FY, did not constitute an unfair labour practice as contemplated in section 186(2(a) of the Labour Relations Act.

3. There is no order as to costs.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearance:

For the Applicant:	Adv. A.M Mtembu, instructed by Mashiane, Moodley & Monama Attorneys
For the Third Respondent:	Ms D Makhaza of Mdluli, Pearce & Mdzikwa Inc