IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA73/2018

In the matter between:

PELINDABA WORKERS UNION	**Appellant**
and	
SA NUCLEAR ENERGY CORPORATION	**First Respondent**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Second Respondent**
COMMISSIONER LEN DEKKER N.O.	**Third Respondent**

Heard: **06 June 2020**

Delivered: **25 June 2020**

Coram: Davis, Sutherland JJA and Savage AJA

JUDGMENT

SUTHERLAND JA

Introduction[1]

[1] This case is about whether the Commission for Conciliation, Mediation and Arbitration (CCMA) had jurisdiction to address the application brought by the appellant (PWU) claiming that the employer of its members, the first respondent (SANEC), committed an unfair labour practice as contemplated in section 186(2)(*a*) of the Labour Relations Act 66 of 1995 (LRA), in that SANEC's conduct of which PWU complained, constituted an "….unfair act or omission ….involving ….unfair conduct relating to the provision of benefits to an employee.[2]

[2] A commissioner of the CCMA held that jurisdiction existed; on review, the Labour Court found the opposite. The controversy falls to be determined by ascertaining the true character of the dispute because the critical contestation between the two parties is simply whether the dispute is really about a benefit. If it is, the CCMA has jurisdiction, if not, the CCMA has not got jurisdiction.[3]

[3] The test for the true dispute is well established. In *Coin Security Group (Pty) Ltd v Adams & others* [4] at [16]:

> 'It is the court's duty to ascertain the true or real issue in dispute: *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union & others (2)* (1997) 18 ILJ 671 (LAC); *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others (1)* (1998) 19 ILJ 260 (LAC). In conducting that enquiry, a court looks at the substance of the dispute and not at the form in which it is presented (*Fidelity* at 269G-H; *Ceramic* at 678C). The characterization of a dispute by a party is not necessarily conclusive

[1] This appeal has been addressed by the court without the benefit of oral argument in accordance with the agreement of the parties, a circumstance occasioned by the national lockdown resulting from the covid 18 pandemic.

[2] Section 186(2)(*a*): '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*; (emphasis supplied)

[3] The case bristles with several other issues which are unnecessary to traverse. The only issue which definitively disposes of the dispute is the jurisdictional issue.

[4] *Coin Security Group (Pty) Ltd v Adams & others* (2000) 21 ILJ 924 (LAC); see too: *National Union of Metalworkers of SA & others v Bader Bop SA (Pty) Ltd & another* (2003) 24 ILJ 305 (CC) at [52].

> (*Ceramic* at 677H-I; 678A-C). There is in my view no difference in the approach of these decisions. In each case the court was concerned to establish the substance of the dispute. The importance of doing this lies in s 65 of the Act which provides that no person may take part in a strike if 'the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act . . .'. The phrase 'issue in dispute' is, in relation to a strike, defined as 'the demand, the grievance, or dispute that forms the subject matter of the strike'.'

The dispute

[4] The point whether or not the dispute was about a benefit, and in turn, whether the CCMA had jurisdiction, was pertinently raised in the CCMA hearing.

[5] What exactly did SANEC do? The proximate act was to grant a wage increase to the D band employees of 5.5%. What SANEC did not do was to grant to that band, a 7.5% increase, which is what the rest of the workforce was granted.

[6] PWU is a minority unrecognised union. It has members in the D band, hence its grievance on their behalf. NEHAWU is the recognised majority union with whom collective bargaining takes place by SANEC.

[7] The conclusion of collective bargaining for the 2015 financial year produced a collective agreement between SANEC and NEHAWU granting a 7.5% increase in respect of bargaining unit A, which consisted of workers in bands A up to C3. Bargaining unit "B" included bands C4 and D. SANEC 'extended' the 7.5 % to C4 band, but not to band D.[5] D band employees got the lesser increase of 5.5%

[8] To bring the grievance about this differentiation between the rest of the workforce and D band within the jurisdiction of the CCMA, section 186(2)(*a*) was invoked by PWU, and the allegation was made that the conduct of SANEC was an unfair

[5] The workers in band C3 were not the subject matter of the collective bargaining in respect of the bargaining unit "A". An "extension", properly construed is one which satisfies the provisions of section 23 of the LRA. It was common cause that the section 23 requirements had not been met. The conduct of SANEC was thus, in this context, "informal".

labour practice. The heads of argument filed on behalf of PWU are unequivocal in this regard.

[9] The law on what constitutes benefits as contemplated by section 186(2)(*a*) of the LRA was held, in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (Apollo),*[6] at [50] - [51] to be an existing entitlement:

> '[50] ….
>
> 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. In as far as *HOSPERSA*, *GS4 Security* and *Scheepers* postulate a different approach they are, with respect, wrong.
>
> [51] This approach will also put paid to the anomaly created by *HOSPERSA*. An employee who wants to use the unfair labour practice jurisdiction in s 186(2)*(a)* relating to promotion or training does not have to show that he or she has a right to promotion or training in order to have a remedy when the fairness of the employer's conduct relating to such promotion (or non-promotion) or training is challenged. On the other hand, where an employee wants to use the same remedy in relation to the provision of benefits such an employee has to show that he or she has a right or entitlement sourced in contract or statute to such benefit." (Emphasis added)

[10] Plainly the contention by PWU is astonishing. What is the reasoning offered to support it?

[11] The award upheld the contention. The incoherency of the award presents a challenge to comprehension. When it grapples with the facts, it seems to articulate this rationale:

10.1 No collective bargaining took place in respect of band D.

---

[6] (2013) 34 ILJ 1120 (LAC).

10.2 *Ergo*, the change in the wage rates in band D was a unilateral decision by the Management.

10.3 This unilateral decision was made in terms of a "policy" of SANEC.

10.4 The "policy" in question was the decision to apply a sliding scale to wage increases, in that year.

10.5 *Ergo*, the increase in wages constitutes a benefit as contemplated by section 186(2)(*a*) of the LRA.

10.6 Therefore, the CCMA has jurisdiction.

[12] The reasoning is fundamentally flawed. It constitutes, in part, a series of *non sequiturs*. The elevation of an *ad hoc* decision to grant different percentage increases into a "policy" is fatuous. The approach seems to have been influenced by the decision in *Apollo* which articulates the idea that a benefit as contemplated by section 186(2)(*a*) is something which can be conferred pursuant to a practice or policy. It does not follow that a "policy" decision of the management to grant differential wages increases in a particular year is a "policy" in the sense of a practice or a policy as described in *Apollo*. Moreover, the notion that a benefit can form part of remuneration, itself uncontroversial, seems another influence; but plainly, that notion cannot be harnessed to support the conclusion reached on these facts. Another notion that seems to have influenced the conclusion is that the employer's consultation with another 'minority union' (i.e. NEHAWU as regards bands C4 and D which reside in bargaining unit "B") was unfair, presumably to the D band. Why this is so is not stated. The award also gives no hint of the source of the evidence of this 'fact' relied upon to state this observation. Lastly, it may be that the critical element in the flawed reasoning is that the commissioner seemingly equated a decision made in consequence of a discretion reserved to management as the antithesis of collective bargaining and *ergo*, if giving money to employees is not the result of collective bargaining, it

must follow that it is a benefit. Plainly that is incorrect; a grant of a "benefit" is not the flip-side of a collective agreement derived from collective bargaining.

[13] The Labour court in reviewing the award on the jurisdictional point, confined itself to stating that the reasons advanced by the commissioner were unsound. It seems that the rationale in the judgment is that a dispute over a wage increase cannot be anything other than a dispute of interest.[7] This was a correct stance to adopt on these facts. To construe a unilateral wage increase *per se* as a benefit is unsustainable; the unilaterality of the grant cannot convert the increase into a benefit.

[14] The Labour court, paradoxically, having found that the CCMA had no jurisdiction to hear the matter then decided the question of whether SANEC had indeed committed an unfair labour practice. This was inappropriate; logically, if the issue ought not to have been litigated in the CCMA, there cannot be a judicial pronouncement on the very issue which may not be heard. That part of the judgment cannot, therefore, enjoy any standing other than an *obiter dictum*.

[15] In argument on behalf of PWU, a thesis was advanced that NEHAWU and SANEC had concluded a collective agreement which was then, "outside the statutory framework" extended to bargaining unit "B" and because this act of extension could have no standing in law, the grant could only be construed as a unilateral act by SANEC, which was, *ipso facto*, not derived from the dynamics of collective bargaining, and as such, was therefore "arbitrary capricious and inconsistent" which therefore meant that a dispute of right arises, as encapsulated by section 186(2)(*a*) of the LRA. In my view, this thesis is without merit. The steps in the argument simply do not follow on from one another. The concept of a "benefit" as used in section 186(2)(*a*) is a term of art, which as cited above, has been circumscribed in the case-law.

[16] Accordingly, the appeal on this aspect must fail.

---

[7] See: *SAUJ v SABC* [1999] 11 BLLR 1137 (LAC) at [17].

The Costs

[17] The Labour Court ordered PWU to pay the costs. PWU has appealed against that order. No explanation was stated in the judgment why that costs order was appropriate. The continuing relationship between PWU and SANEC is a factor which would tend to mitigate against such an order. On the basis of the approach in *Zungu*,[8] the order must be set aside.

[18] As regards the costs on appeal, the efforts of PWU to defend the award, however frail the merits, cannot be branded as inappropriate. There shall be no costs order in this court either.

---

[8] *Zungu v Premier, Kwazulu-Natal* (2018) 39 ILJ 523 (CC):

[23] ….The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party's costs. Section 162 of the LRA governs the manner in which costs may be awarded in the Labour Court. Section 162 provides:

'(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account —

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties —

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.'

[24] The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:

'The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court.'

[25] In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct.

[26] In the result, the Labour Court and the Labour Appeal Court erred in not following and applying the principle in labour matters as set out in *Dorkin*. The courts did not exercise their discretion judicially when mulcting the applicant with costs. This court is therefore entitled to interfere with the costs award. Taking into account the considerations of the law and fairness, it will be in accordance with justice if the orders of costs by the Labour Court and Labour Appeal Court are set aside and each party pays his or her own costs. With regard to costs in this court, there will be no order as to costs".

The Order

(1) The appeal is, in part, dismissed, and in part, upheld.

(2) The order *a quo* that the CCMA has no jurisdiction in the dispute is confirmed.

(3) The costs order made in the court *a quo* is set aside.

_____

Sutherland JA

_____

Davis JA

_____

Savage AJA

APPEARANCES:

FOR THE APPELLANT:	Adv P Buirski Instructed by Deon de Bruyn Attorneys.
FOR THE FIRST RESPONDENT:	P Maserumule and N Mbuyisa, of Maserumule Attorneys