IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No.: JR 297/08

REPORTABLE

In the matter between:

DEPARTMENT OFJUSTICE & CONSTITUTIONAL DEVELOPMENT		**APPLICANT**
And		
F. J. VAN DER MERWE NO	**1ST**	**RESPONDENT**
THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**2ND**	**RESPONDENT**
NEHAWU obo 58 MEMBERS	**3RD**	**RESPONDENT**

HEARD ON: 30 SEPTEMBER 2009

JUDGMENT BY: C.J. MUSI, AJ

DELIVERED ON: 27 November 2009

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[1] This is an application to review and set aside a ruling made by the first respondent, the commissioner, under the auspices of the second respondent, the bargaining council, in favour of the third respondent, NEHAWU or the union.

[2] During the proceedings at the bargaining council the applicant contended that it (the bargaining council) did not have jurisdiction to arbitrate the dispute. It argued that the dispute was an interest dispute and not a rights dispute.

[3] The commissioner granted the parties leave to file affidavits wherein they set out the factual background and their respective arguments. The applicant filed a lengthy affidavit wherein it sets out the history of the dispute.

[4] The union did not challenge the factual assertions made by the applicant. After listening to oral arguments the commissioner dismissed the objection and found that the bargaining council does have jurisdiction to arbitrate the dispute.

[5] The factual matrix in which this matter must be adjudicated is that set out by the applicant. Mr Pieter Andries Du Rand a chief director in the employ of the applicant deposed to an affidavit on behalf of the applicant.

[6] The following facts are set out in Du Rand's affidavit. The applicant has a Performance Management System Policy (PMSP) which seeks *inter alia* to improve its performance and to establish a performance culture. The said policy is authorised by various pieces of Legislation as well as collective agreements of the bargain council. There is a collective

agreement between the union and the applicant in relation to the PMSP.

[7] In terms of the said collective agreement the employees' performance will be assessed annually within a performance management cycle which runs from 1 April to 31 March of each year. Depending on an employee's performance rating he or she will qualify for a performance reward of 10% or 18% of his or her salary and or pay progression.

[8] The PMSP provides as follows:

"11.2 **Monetary Recognition (Merit Award and Pay Progression)**

For the purpose of this policy monetary rewards are classified as those awards that were granted in terms of the merit system and pay progression as determined by the bargaining processes or through a directive from the Minister of Public Service and Administration…

11.2.2 The manager/supervisor will make a recommendation on rewards. The rewards relating to performance bonuses shall be limited to 1, 5% of the wage bill for that particular business unit or chief directorate or directorate or office. The rewards related to pay progression shall be limited to1% of the wage bill of that particular business unit or chief directorate or directorate or office. Employees may receive pay progression and other

performance related incentive (merit award) in the same financial year;

11.2.3 Only supervisors on the level of director and higher shall approve the recommendations by authorising the payment of performance rewards. In instance where these supervisors are making the recommendation such recommendation shall be approved and authorised by a manager of a higher rank".

[9] Clause 11.2.2 therefore sets the monetary ceiling for performance bonuses and pay progression rewards with reference to the annual wage bill of the particular business unit, chief directorate, directorate or office within which the employees are employed.

[10] During the relevant performance management cycle ending on 1 April 2005 the applicant decided to adhere strictly to the budgetary ceiling set in clause 11.2.2. The approved budget for performance bonuses was R557-193.00 and R329-134.00 for pay progression, in respect of the office: Magistrate Johannesburg. After Du Rand, as the responsible person to ultimately approve different awards, made his decision with regard to who will receive performance bonuses and or pay progression there was only R903.30 left to allocate for performance bonuses and R3 874.00 for pay progression.

[11] These amounts were reached after the relevant supervisors – who initially made recommendations – changed their initial recommendations as to who should get what. He then made the final decision. He states that he took his decision on who should get performance bonuses and or pay progression awards in a rational and fair manner.

[12] After this exercise the acting court manager for the Johannesburg magistrate's office wrote an undated internal memorandum to the Regional Head: Gauteng wherein he stated the following:

"**REQUEST FOR AUTHORISATION TO SPEND AN AMOUNT IN EXCESS ON PERFORMANCE ASSESMENT: MERIT AWARD AND NOTCHES: JOHANNESNBURG MAGISTRATE'S OFFICE**

1. PURPOSE:

   The purpose of this memorandum is to seek your approval for Johannesburg Magistrate's Office to spend an amount in excess of 1,5% Merit Awards and 1% Notches on Performance Assessment for Administration Staff as prescribed in the New Performance System.

2. BACKGROUND:

   The personnel expenditure for the Current Financial year is R55 904 000.00, based on 1,5% for Merit, the amount available will be R838 560.00 and based on 1% for Notches it amount to R559 040.00. The total amount is R1, 397 600.00. This total amount is not adequate to pay the deserving officials both for Merits and Notches awards.

Total amount needed for Merits and Notches is R1 647 600.00 and the difference is R250 000.00 for which the office need an approval.

Funds are available from the savings of the following vacant posts.

1. Deputy Director	= R 182 000.00 pa
3. Assistant Directors@ R125 000.00	= R 375 000.00 pa
Total	=R557 000.00

3. RECOMMENDATION

It is recommended that our additional amount of R250 000.00 be allocated to Johannesburg Magistrate to spend in excess of 1,5% and 1% to pay out on Merit and Notches respectively to the deserving officials."

[13] The effect of the letter, so states Du Rand, is to increase the budget for the payment of performance awards and pay progression.

[14] The union referred an unfair labour practice dispute to the council. In its referral document it summarised the dispute as follows:

> "Assessments were done and performance agreements were signed. However (payments) (for) performance bonus and notch increment were not effected."

[15] In respect of the required outcome the union stated that:

> "1. That the performance bonuses of 10% (to) the employees' salary be effected.

2. That the notch increments be effected."

[16] What the union in effect wants is that all employees who were assessed and found to qualify for 10% or 18% performance bonuses and pay progression awards should receive those irrespective of the impact same would have on the budget of the office.

[17] The applicant made three submissions. Firstly, that the union members had neither a contractual nor statutory right to the bonuses and hence the matter was an interest dispute. Secondly, that the issue was an interest dispute because the demand was for the increase in the budget allocated for the bonuses. Thirdly, that the dispute was about remuneration and not benefits. That being the case, so the applicant argued, the council had no jurisdiction to adjudicate the dispute.

[18] The union on the other hand contended that the dispute was a rights dispute because it related to an unfair labour practice concerning benefits. Secondly, that the collective agreement between the parties contains a dispute resolution mechanism, in terms of which disputes of this nature should be referred to the council for Conciliation and Arbitration.

[19] The commissioner found that the dispute is more about the union members' claim to be fairly treated with regard to the

awarding or not of performance awards in the form of merit bonuses. In his view this was a rights dispute because:

"on the one hand there is a collective agreement and a policy in terms of which consideration shall be given to the payment (or not) of a performance bonus to deserving employees and on the other hand as employees have a statutory right to fair treatment when it come to an (existing) benefit scheme."

He accepted that the payment of the bonuses is discretionary but found that, that fact does not make it less of a benefit. He accordingly found that the payment of the bonuses is not remuneration.

[20] It is the duty of the commissioner to ascertain whether he/she has jurisdiction to adjudicate the dispute. See **Northern Cape Provincial Administration v Hambidge NO & others** [1999] 7 BLLR 698 (LC) paragraph 8. This is so because lack of jurisdiction renders the proceedings and resultant award a nullity. In **Vidavsky v Body Corporate of Sunhill Villas** 2005 (5) SA 200 (SCA) at paragraph 14 it was said that:

"The authorities are clear that want of jurisdiction in judicial or quasi – judicial proceedings has the effect of nullity without the necessity of a formal order setting the proceedings aside."

[21] In terms of section 185 (b) of the Labour Relations Act 66 of 1995 (the LRA) every employee has the right not to be subjected to unfair labour practices. Unfair labour practice is defined in section 186 2(a) of the LRA as

"any 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."

[22] The union argued that this dispute is an unfair labour practice dispute "related to the provision of a benefit" and therefore arbitrable. As stated above, the applicant argued that performance bonuses and pay progression awards are not benefits. It was further contended that if the awards are not benefits then the dispute is an interest dispute which should be dealt with in terms of collective bargaining structures.

[23] The importance of the distinction between right disputes and disputes of interest, and its effect is set out in **Rycrof & Jordaan** A Guide to SA Labour Law, Juta, 1992 at page 169 as follows:

"Disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (or "economic disputes") concern the creation of fresh rights such as higher wages, modification of existing collective agreements, etc. Collective bargaining mediation and as a last resort, peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interests, while adjudication is normally regarded as an appropriate method of resolving disputes of rights."

This seems to be the hackneyed position. See **Hospersa & another v Northern Cape Provincial Administration** (2000)

21 ILJ 1066 (LAC) at paragraph 11; **Polokwane Local Municipality v SALGBC & Others** (2008) 8 BLLR 783 (LC) at paragraph 22.

[24] The categorisation of the dispute generally determines its path. Interest disputes take the path of resolution by way of interaction by the parties to the dispute. Rights disputes, generally take the adjudication route. To allow an interests dispute to be arbitrated under the pretext that it is a rights disputes would lead to the subversion of the collective bargaining process. See **Hospersa** supra at paragraph 10. The Constitutional Court has recognised the general rule that, except in organisational rights disputes, the scheme of the LRA is that where a dispute may be referred to arbitration, it is not a matter that can constitute the basis for a strike. See **NUMSA & OTHERS v BADER BOP (PTY) LTD & ANOTHERS** 2003 (2) BCLR 183 (CC) at paragraph 24.

[25] The argument of the union that the collective agreement contained a dispute resolution mechanism that must be adhered to in these kinds of disputes is untenable. The relevant clause of the collective agreement reads as follows:

"5 DISPUTE SETTLEMENT PROCEDURE

1. In the event of either party declaring a dispute about the **interpretation or application** of this agreement the declaring party to the dispute shall notify the other party in writing thereof stating the nature of the dispute, the reasons for the dispute as well as the proposed terms of settlement.

2. Upon receipt of such notice as it is envisaged above, the representatives to a maximum of two (2) per party shall meet within seven (7) days to consider the dispute in an endeavour to reach a settlement.
3. Should the parties fail to resolve the dispute at the meeting as envisaged above, any of the parties may refer the dispute to the GPSSBC for Conciliation and Arbitration" (my underlining).

[26] The underlined words make it clear that it is only disputes about the interpretation or application of the collective agreement that may be referred to the GPSSBC for Conciliation and Arbitration.

[27] This dispute is not about the application or interpretation of the collective agreement. In fact the applicant alleged, and it was not disputed, that it stuck chapter and verse to the provisions of the collective agreement. It is the collective agreement that stipulates that the amount allocated for rewards relating to performance bonuses shall be limited to 1, 5% of the wage bill of the particular office and that the rewards related to pay progression shall be limited to 1% of the office's wage bill. When the supervisors recommended that bonuses and pay progression rewards be made which exceeded the 1,5% and 1% of the offices wage bill it was trimmed down to fall within that limit. The trimming down process left victims in its wake. The casualties were the result of a strict application of the collective agreement.

[28] The commissioner clearly misconstrued the union's case by stating that the dispute was about the union member's claim to be fairly treated with regard to rewarding or not of a performance reward in the form of a merit bonus. That was never the case. The union wanted all those who were assessed and found eligible for performance bonuses to receive same irrespective of the limit set in the collective agreement. In fact Du Rand clearly and boldly states that in taking the decisions that he did he had regard to budgetary constrains and fairness. He puts it thus:

> "It needs to be pointed out that it was attempted where possible to grant all persons deserving thereof at least notch increments where budget for merit was insufficient…
>
> In many cases I accepted the final recommendations of the supervisor and I can therefore not understand what the applicant's are complaining about in relation to my decision. In some cases I did not but that was because I had to work within the limit of the budget and there were cases where in a particular division there was a limit upon the budget that could be spent, there may have been a few people competing for awards and I had to make decisions by a process of elimination. I did so in a rational and fair manner…"

[29] This was not disputed by the union. The internal memorandum written by the acting court manager makes it abundantly clear that an additional amount in excess of the 1, 5% and 1% for performance bonuses and pay progression should be utilized. This was clearly an attempt by the union to enhance an existing right and thereby creating fresh rights.

[30 It is not in the province of arbitrators to grant awards in respect of matters that are properly reserved for the terrain of collective bargaining. The arbitrator had no jurisdiction or power to order the applicant to pay an amount in excess of the 1, 5% and 1% limits set in the collective agreement. That is clearly a classical interest issue. The commissioner exceeded his powers.

[31] The applicant's second argument, i.e. that performance bonuses and pay progression awards are not benefits, is also compelling.

[32] It is common cause that the union members did not have a right *ex contractu* (in terms of their employment contracts or the collective bargaining agreement) or *ex lege* to performance bonuses and pay progression. The commissioner correctly, in my view, found that those rewards were given annually, to those who qualified, at the discretion of the applicant. An employee cannot utilise his/her right not to be subjected to unfair labour practices where the employee believes that he/she ought to enjoy certain benefits which the employer is not willing or unable to give to him/her, to create an entitlement to such benefit through arbitration in terms of the LRA. Likewise if an employer is not willing or able to spend an amount, on bonuses, in excess to that contractually agreed upon, the employees can not create an entitlement thereto by way of arbitration. Section 185 (b) sought to bring under the definition of unfair labour

practice, as defined in Section 186 (2), disputes about benefits to which an employee is entitled *ex contractu* or *ex lege*.

[33] Remuneration is defined in section 213 of the LRA as

"any payment in money or in kind, or both in money and in kinds, made or owing to any person in return for that person working for any other person, including the state and remunerate has a corresponding meaning."

[34] The LRA does not define benefits. In **Schoeman & Another v Samsung Electronics SA (Pty) Ltd** (1997) 18 ILJ 1098 (LC) at 1102 – 1103 it was said that:

"Remuneration is different from benefits. A benefit is something extra apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contact."

[35] Todd AJ correctly states that the court in **Schoeman v Samsung** supra was concerned that if the notion of benefits is interpreted too widely, this would in effect give parties the right to refer to arbitration disputes that are in essence disputes about remuneration. This would obviously preclude industrial action over a range of disputes over remuneration that property fall within the realm of collective bargaining. See **Protekon (Pty) Ltd v CCMA & Others** (2005) 7 BLLR 703 (LC) at paragraph 18. The rationale for this is clear that where a dispute is an interest or remuneration dispute it cannot be arbitrated under the guide of a benefits dispute because that would subvert collective bargaining.

[36] Performance bonuses and pay progression is not given arbitrarily or to every employee irrespective of performance. The performance of the individual employee is assessed over a fixed period of time. If the performance of the employee is good, 61% to 79% of the performance objectives met; or outstanding 80% and more of performance objectives met; that employee qualifies to be rewarded by way of merit and or pay progression.

[37] These awards are clearly a *quid pro quo* for good and outstanding services rendered. It is nothing else but remuneration for services rendered. It is therefore remuneration and not a benefit.

[38] The complaint is not that the performance awards or pay progression was unfairly given to a select few or unfairly taken from others. The unfairness or otherwise of the process was not an issue.

[39] The commissioner's ruling that he had jurisdiction to adjudicate the dispute is clearly wrong. He has no jurisdiction to adjudicate an interest dispute.

[40] The order that I propose to make will in essence have the same effect as prayers 1 – 4 of the notice of motion. I therefore

propose not grant any of the prayers as couched in the notice of motion.

[41] I am of the view that the dictates of fairness militates against making a costs order in favour of the applicant.

[42] I therefore make following order:

a) The first respondent's ruling is set aside.
b) The first respondent has no jurisdiction to arbitrate the dispute between the applicant and the third respondent under case number PSGA634/05/06.
c) No costs order is made.

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C.J. MUSI, AJ

On behalf of the Applicant: N.A. Cassim SC
Instructed by : State Attorney

On behalf of the Respondent: NEHAWU