IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: D 644/09

In the matter between

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION	**Applicant**
obo FJ VERSTER	
and	
UMHLATHUZE MUNICIPALITY	**1st Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**2nd Respondent**
AS DORASAMY N.O.	**3rd Respondent**

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter was appointed to act as a project management unit manager in a Municipal Infrastructural Grant project. He was continuously employed in this acting capacity between 01 December 2004 and 30 June 2007, which comprised two distinct

periods of appointment, the first running from 1 December 2004 to 30 June 2006, and the other from 01July 2006 to 30 June 2007.

[2] The applicant was paid an acting allowance for the second period but not for the first. It seems that a requisition for the payment of an acting allowance was approved in both cases, subject to certain conditions.

[3] The applicant pursued internal procedures to resolve a grievance over the failure to pay him an acting allowance for the first period and after these procedures had been exhausted without success the matter was referred to the South African Local Government Bargaining Council. The applicant claimed that the failure to pay him the acting allowance for the first period amounted to an unfair labour practice in terms of section 186 (2) of the Labour Relations Act, 66 of 1995 ('the LRA').

The arbitration award

[4] On 10 July 2009, the applicant's claim was dismissed by the third respondent ('the arbitrator'). In a succinct award, the arbitrator reached the following conclusions:

"18. The applicant has the locus standi to lodge the dispute;

19. Acting allowance does not constitute a benefit in terms of section 186 (2) (a) of the LRA.

20. The Council does not have jurisdiction to entertain the dispute." (sic)

[5] In reaching the critical conclusion in paragraph 19 of his award, the arbitrator relied on a number of decisions of the Labour Court. Firstly, he took account of the Labour Court decisions in *Samsung Electronics* and *Gaylard* cases which made a distinction made between a benefit and remuneration.[1] He also made reference to the Labour Appeal Court decision in the *Hospersa* case which effectively confirmed the finding of the court *a quo* [2] that a claim for an acting allowance in the absence of a right based in contract, a collective agreement, or a right arising *ex lege*, is simply a dispute of interest over a demand for further remuneration.[3]

[6] In support of his conclusion the arbitrator also cites the following dictum of Landman, J in the earlier *Hambidge* decision:

> *"However a claim that an employer has acted unfairly by not paying the higher rate cannot be said to concern a benefit even if its receipt would be beneficial to the employee. It is essentially a claim or a complaint that the complainant has not been paid more for a certain period for carrying extra responsibilities. It is a salary or wage issue. It is not about a benefit. It is about a matter of mutual interest. The interpretation by the commissioner is wrong in law. It was central to her decision. She did not have jurisdiction to entertain the dispute and to decide it in the way she did."*[4]

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[1] ***Schoeman v Samsung Electronics (Pty) Ltd*** **(1997) 18** ***ILJ*** **1098 (LC)** and ***Gaylard v Telkom SA Ltd*** **(1998) 19** ***ILJ*** **1624 (LC)** ,

[2] Reported as ***Northern Cape Provincial Administration v Commissioner Hambidge NO & others*** **(1999) 20** ***ILJ*** **1910 (LC)**

[3] ***Hospersa & Another v Northern Cape Provincial Administration*** **(2000) 21** ***ILJ*** **1066 (LAC)** at 1069-1070, paras [8] and [9]

[4] *Hambidge* at 1914, par [17].

The review application

[7] The sole question on review is whether or not the arbitrator was correct in finding that the council did not have jurisdiction to entertain the dispute on the basis that an acting allowance does not constitute a benefit in terms of section 186 (2) (a) of the LRA.

[8] Unlike other matters which an arbitrator is called upon to decide, an arbitrator's decision about whether or not she or he has jurisdiction, is not subject to review on grounds of reasonableness. The essential question is whether the arbitrator correctly determined the existence or absence of her jurisdiction over the matter, not whether the determination of her jurisdiction was reasonable or not.[5] For this reason, I will not deal with the parties contentions regarding the reasonableness of the arbitrator's decision.

[9] In its heads of argument, the first respondent ('the municipality') sought to resurrect an argument it had made to the effect that the referral of the unfair labour practice claim to the second respondent bargaining council ('the SALGBC') almost two years after the completion of the acting period in respect of which he was claiming payment meant that the application should be dismissed on this basis alone, in the absence of condonation being granted. The arbitrator dealt with this contention in paragraph 13 of his award. He found it is trite law that, in the absence of

[5] See ***SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others*** **(2008) 29 *ILJ* 2218 (LAC)** at 2229-2230, paras [39] – [40], where Tlaletsi, JA said *inter alia*: *"This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties."* This statement by the learned judge is equally applicable in this matter.

the employer ever having taken steps to set aside the certificate of outcome on review, it was barred from raising this at the arbitration. Although he did not cite authority for his conclusion on this jurisdictional question, his conclusion is soundly grounded in the decision in ***Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others*** **(2000) 21 *ILJ* 2382 (LAC)**.[6]

The characterisation of an acting allowance as a benefit

[10] Section 186(2) of the LRA 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 ;*
>
> *(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee ;*
>
> *(c) a failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement; and*
>
> *(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of*

[6] At 2387, par [12]

2000), on account of the employee having made a protected disclosure defined in that Act."

[11] The labour courts and arbitrators have long wrestled with the precise ambit of what constitutes a 'benefit' in terms of section 186(2)(b).[7]

[12] The view that prevailed initially is contained in the LAC decision in *Hospersa*. In that case, the LAC effectively decided that the meaning of a benefit in what was previously set out in Item 2(1)*(b)* of schedule 7 to the LRA, before it was repealed in 2002[8], is that it must be an existing entitlement in a contract, collective agreement or statute. In short, it must be an existing legal entitlement and not a new entitlement which

[7] Some examples are: ***Public Servants Association obo Botes & others v Department of Justice* (2000) 21 *ILJ* 690 (CCMA)** at 698A-B (in which the employees employees had not sought to rely on an existing contractual entitlement, but either on a right to fair treatment under the unfair labour practice jurisdiction or, alternatively, on a legitimate expectation to receive the benefit, but the commissioner dismissed their claim principally on the basis of the decision in *Hambidge*); ***Salstaff and Spoornet* (2002) 23 *ILJ* 1956 (BCA)** at 1960A-1961B (in which the arbitrator followed the decision in *Hospersa* also holding that benefits clearly did not include remuneration, which is more extensive than merely salaries, and further held that the need to interpret the LRA in a way that did not unjustifiably restrict the right to strike was a further reason for interpreting the scope of a benefit restrictively); ***Ithala Development Finance Corporation Ltd* (1) (2002) 23 *ILJ* 408 (CCMA)** at 416C-417F (in which it was held that a dispute over a benefit is a dispute of right and because the vehicle allowance in question was an established contractual right it could be enforced under the unfair labour practice jurisdiction); ***Protekon (Pty) Ltd v Commission for Conciliation, Mediation & others* (2005) 26 *ILJ* 1105 (LC)** (in which the court held effectively that: the true ratio of *Hospersa* was that an unfair labour practice claim could not be used to establish a previously non-existent entitlement to a benefit, but not that a contractual right , nor presumably, a statutory or collective agreement based right, needed to proven, before an unfair labour practice could be claimed [at 1113, par [33]]; that the distinction between remuneration and benefits was not a useful one [at 1110, paras [19] and [20]], and that it was an unfair labour practice for an employer to unilaterally withdraw a discretionary travel allowance and replace it with compensation [at 1115, par [46]]); ***Kopke and Futura Footwear* (PTY) LTD (2006) 27 *ILJ* 2476 (CCMA)** at 2485 (in which the arbitrator considered the approach in *Protekon* but following *Hospersa* found that a prize in a sales competition was not a pre-existing entitlement and therefore not a benefit, and in any event found that it would not have been unfair to refuse to award it to the applicant on the facts of the case); ***De Beers Consilidated Mines (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2010) 31 *ILJ* 2087 (LC)** at 2095F-2096B (in which the court decided that a benefit to which an employee was contractually entitled could either be referred to arbitration under the unfair labour practice jurisdiction, or to the labour court in terms of section 77 of the Basic Conditions of Employment Act 75 of 1997)

[8] Item 2(1)(b) was replaced by section 186(2)(b).

the employee is seeking to establish by means of an unfair labour practice claim.[9] Since *Hospersa* was decided more nuanced interpretations of the scope of an unfair labour practice concerning a benefit have been advanced.[10]

[13] A strong policy consideration underlying the decision in *Hospersa* was that to widen the concept of benefits to include claims to receive some material advantage, which an employee is not entitled by virtue of either a contract, collective agreement or statute, would seriously undermine the distinction between rights and interest disputes. Consequently, it would also blur the concomitant division between disputes that must be decided by an adjudicative process and those that fall to be decided in the cut and thrust of collective bargaining:

> *"[10] A dispute of interest should be dealt with in terms of the collective bargaining structures and is therefore not arbitrable. A dispute of interest should not be allowed to be arbitrated in terms of item 2(1) (b) read with item 3(4) (b) under the pretext that it is a dispute of right. To do so would possibly result in each individual employee theoretically cloaking himself or herself with precisely the same description of the dispute that is the true subject-matter of collective bargaining. And if such an individual employee could legitimately insist on his or her particular case being separately*

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[9] See ***Hospersa & Another v Northern Cape Provincial Administration*** **(2000) 21 *ILJ* 1066 (LAC)** at 1069-1070, par [9], where the learned Mogoeng AJA stated: "*[9] It appears to me that the legislature did not seek to facilitate, through item 2(1) (b) , the creation of an entitlement to a benefit which an employee otherwise does not have. I do not think that item 2(1) (b) was ever intended to be used by an employee, who believes that he or she ought to enjoy certain benefits which the employer is not willing to give him or her, to create an entitlement to such benefits through arbitration in terms of item 2(1) (b) . It simply sought to bring under the residual unfair labour practice jurisdiction disputes about benefits to which an employee is entitled ex contractu (by virtue of the contract of employment or a collective agreement) or ex lege (the Public Service Act or any other applicable Act)."*

[10] See the *Protekon* and *De Beers* decisions cited in the previous footnote and the minority judgment of Goldstein AJA in the *Department of Justice* case (see fn 12 below).

adjudicated, whether through arbitration or otherwise, the result would inevitably be a fundamental subversion of the collective bargaining process itself. (See by way of example Public Servants Association & others v Department of Correctional Services (1998) 19 ILJ 1655 (CCMA) at 1669C-E and 1674D-E.) If individuals can properly secure orders that have the effect of determining the evaluation of differing interests on the merits thereof, then the distinction between disputes of interest and disputes of right would be distorted and the collective bargaining process self-evidently would become undermined. The following extract as well as the definition not only explain the meaning of a dispute of interest and a dispute of right, but also highlights the correct procedure to be followed in their resolution.

[11] 'Broadly speaking, 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 right.' Rycroft & Jordaan A Guide to SA Labour Law (Juta 1992) at 169. This is consistent with what I have said above."[11]

[14] In the subsequent LAC decision in the *Department of Justice* case, the court was concerned with an unfair labour practice claim about the

[11] *Hospersa* at 1070-1071

employer's failure to permanently appoint an employee to a position in which he had been acting temporarily. The court found that the referral had been premature because the employer had yet to take a decision *not* to appoint him. Importantly for present purposes, the LAC made it clear that an unfair labour practice claim is a distinct statutory right which an employee can assert independently and it is not one that is merely contingent on the existence of some other legal obligation:

> *"[53] Counsel for the department also submitted that a dispute such as the one in the present matter was a dispute of interest and not a dispute of right and that item 2(1) (b) contemplated disputes of right and not disputes of interest. The right he was referring to is a right ex contractu or ex lege. He submitted that an unfair labour practice is confined to disputes of right created ex contractu or ex lege. The answer to this argument is simply that item 2 of schedule 7 is one of the statutory provisions that seek to give content to the constitutional right to fair labour practices which is entrenched in the Constitution. It creates a statutory right not to be subjected to an unfair labour practice that takes the form of conduct spelt out therein."* [12]

(emphasis added)

[15] Goldstein AJA, writing the minority judgment in the same case effectively concurs with the majority view in this respect but drew out the natural inferences flowing from this conceptualisation of the unfair labour practices. The learned judge postulated that it would be meaningless if an unfair labour practice claim were confined only to claims to pre-existing rights originating *ex contractu or ex lege*:

[12] ***Department of Justice v Commission for Conciliation, Mediation & Arbitration & Others*** **(2004) 25 *ILJ* 248 (LAC),** per Zondo, JP at 267

"Whatever the position it seems to me, respectfully, that the view expressed in para 9 that item 2(1)(b) provided only for rights which arose ex contractu or ex lege, is clearly wrong. If that were so, the provision would have been redundant since such rights would have been enforceable in the absence of item 2(1)(b). It is significant that item 3(4)(b) expressly provided for a dispute referred to, inter alia, in item 2(1)(b) to be resolved through arbitration. It is significant too that the introductory words in item 2(1) and the cardinal words in item 2(1)(b) concerned an 'unfair labour practice' and 'unfair conduct'. Just as the LRA provides for disputes arising from unfair dismissals in respect of which there are no contractual remedies or remedies at common law, to be resolved by arbitration, so was item 2(1)(b) designed for situations where neither the contract of employment nor the common law provide an employee with a remedy."[13]

(emphasis added)

[16] In the *Protekon* judgment, Todd AJ reached a similar conclusion to Goldstein AJA, apparently without having had sight of the LAC decision:

"[33] It does not, however, follow from this that an employee may have recourse to the CCMA's unfair labour practice jurisdiction only in circumstances in which he has a cause of action in contract law. If that was the case there would have been little purpose in introducing the specific unfair labour practices contemplated in s 186 of the LRA." [14]

[13] *Department of Justice*, at 288, par [14]

[14] *Protekon*, at 1113

[17] In *Protekon* the court also sought to delineate two distinct classes of benefit that might be claimed under the unfair labour practice jurisdiction, namely contractual and statutory based benefits which an employer fails to comply with, and discretionary benefits provided by an employer:

> "*[36] It follows from this that there are at least two instances in which employer's conduct in relation to the provision of benefits may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an employee in relation to the provision of an employment benefit. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.*" [15]

[18] *Protekon* also usefully makes the point that concerns about blurring the line between those issues which are justiciable and which are the subject matter of collective bargaining are not best resolved by trying to draw a bright line between remuneration and other benefits. Rather, the question can be decided by a proper conceptualisation of the true nature of the dispute between the parties and not how they have characterised, or 'packaged' it.[16]

[19] A union may demand acting allowances as a matter of right in collective bargaining, or an employee might challenge a failure to pay an acting allowance to him on the basis that the employer has unfairly exercised its discretion not to pay the allowance when his situation is compared to

[15] *Protekon*, at 1114

[16] *Protekon*, at 1111-1112, paras [21] – [25]

others who were given the allowance. If an entitlement to an allowance is included in a collective agreement, individual employees could only dispute a non-payment of the allowance as an interpretation or application dispute, or possibly as a matter of enforcing terms and conditions of employment. If the concept of a benefit in section 186(2)(b) properly speaking refers to non-mandatory benefits, workers could not resort to the unfair labour practice remedy to resolve a dispute about the payment of allowances in these circumstances. Conversely, if an unfair labour practice award had been issued which laid down parameters for the exercise of an employer's discretion when granting an allowance, then the granting of allowances would be regulated to a degree by the award. In terms of section 65(3)(a)(i) employees could not pursue protected strike action over the granting of the discretionary allowances given the existence of such an award, though they might well pursue demands for future changes to the allowance regime.

[20] If this conceptualisation of a 'benefit' in the unfair labour practice jurisdiction is correct, then there may well be restrictions on employees pursuing collective bargaining and adjudicative approaches simultaneously, and the suggestion by Todd AJ to the contrary might, with respect, need qualification.[17]

[17] *Protekon* at 1111-1112, viz: *"[25] Where disputes over benefits are concerned, its seems to me, there can be little objection to workers choosing to tackle the employer in the collective bargaining arena rather than trying to demonstrate unfairness in the sense contemplated in the unfair labour practice definition. The LRA does not appear to preclude them from doing both at the same time. (This is in contrast to the election to resort to either arbitration or industrial action in relation to A organizational rights: s 21 read with s 65(2) of the LRA; and the election to resort to either adjudication or industrial action now provided for in s 189A, with specific reference to s 189A(10).)"*

[21] Following the decisions in *Department of Justice* and *Protekon*, the learned author *PAK Le Roux* has trenchantly asked why the unfair labour practice claim relating to benefits needs to embrace contractual remedies at all.[18] Indeed, it is difficult to understand why the legislature would have singled out disputes over one narrow class of contractual employment conditions for adjudication by arbitration, when those disputes could just as easily have been dealt with under the ordinary law of contract. If benefit disputes simply constitute one type of contractual claim, then why did the 2002 amendments, which gave the labour court jurisdiction over contractual claims under section 77(3) of the BCEA, leave the determination of contractual benefit claim disputes to arbitration? It is hard to discern any principled reason for retaining this split jurisdiction over contractual entitlements. It is true some benefits may arise *ex lege* even though they may also create contractual entitlements, but then if a 'benefit' refers only to an entitlement originating in statute why not make that clear? The more plausible interpretation is that the term 'benefits' was intended to refer to advantages conferred on employees which did not originate from contractual or statutory entitlements, but which have been granted at the employer's discretion.

[22] What the brief review of the case law and academic commentary reveals is that there has been a shift in the conceptualisation of the ambit of the unfair labour practice claim at least in relation to the notion that a pre-requisite for bringing such a claim is proof of a pre-existing right. *Le Roux* argues that a rejection of the narrow approach in *Hospersa* is implicit even in the majority decision in *Department of Justice.*[19] I agree.

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[18] PAK Le Roux, **What is an employment "benefit" ?**, Contemporary Labour Law, Vol 15, no 1, August 2005 at pages 5 -6

[19] Ibid, p 4

[23] Once this conceptual hurdle has been overcome, it stands to reason that an unfair labour practice dispute over an acting allowance, in which an employee is making the claim on the basis that it was granted to him or others in similar circumstances on other occasions, is a claim that the employer has unfairly refused to confer the benefit on the occassion in question. This does not amount to a demand to make the benefit obligatory in the future. The latter claim would properly be the subject matter of collective bargaining. It is still true that if the employee is successful in his unfair labour practice claim this might clarify the factors the employer ought to consider in granting or refusing to grant the benefit in the future and might mean that it will be easier to predict when the benefit is likely to be granted, but that does not, in principle, make the dispute one about the creation of new rights.

[24] In adopting the view of an acting allowance that he did, the arbitrator did not consider the later developments in the law. Had he done so he would have taken a broader view of his jurisdiction to determine the dispute before him and would not have dismissed the employee's claim so easily. In the circumstances, I believe that the arbitrator's interpretation of what constituted an arbitrable dispute led him to mistakenly exclude the employee's claim for payment of an acting allowance for his first term in an acting capacity from the ambit of his jurisdiction. Consequently, the arbitrator's award must be set aside.

Relief

[25] Having set the original award aside, the remaining issue is the appropriate relief. The applicant did not ask the court to substitute the arbitrator's award with a determination of the merits of the claim in the event he was successful. He merely requested that it either be remitted

to the bargaining council for a hearing *de novo*, or simply that the award be substituted with an award confirming the bargaining council's jurisdiction to arbitrate the dispute.

[26] The first form of relief essentially encapsulates the second and there seems no reason not to refer it back to the second respondent for a determination of the merits of the applicant's claim.

Order

[27] In the light of the above an order is made in the following terms:

[27.1.] The third respondent's award dated 9 July 2009 is reviewed and set aside, and replaced with a finding that the second respondent does have jurisdiction to determine the applicant' unfair labour practice dispute over the non-payment of an acting allowance from 1 December 2004 to 30 June 2006.

[27.2.] The unfair labour practice dispute is remitted to the second respondent to set the matter down for a hearing before an arbitrator other than the third respondent.

[27.3.] At the hearing of the matter the arbitrator shall consider the record of the first arbitration together with such additional relevant evidence as the parties may wish to lead.

[27.4.] The first respondent must pay the applicant's costs.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 26 November 2010

Date of judgment: 06 May 2011

Appearances:

For the applicant: Mr M Futcher of Futcher Attorneys

For the first and second respondents: Mr R Monk of Livingston Attorneys