Employment law update

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Change in shift pattern

The applicant in *Apollo Tyres South Africa (Pty) Ltd v National Union of Metalworkers of South Africa (Numsa) and Others* [2012] 6 BLLR 544 (LC) sought to change the shift pattern at its Durban factory, at which approximately 600 employees were employed. When the National Union of Metalworkers of South Africa (Numsa) did not agree, the applicant sought a declarator that the proposed changes to the shift pattern did not constitute a unilateral change to the employees' terms and conditions of employment, as well as an order interdicting the employees from striking until they had complied with the provisions of s 64 of the Labour Relations Act 66 of 1995 (LRA).

The applicant's factory operated on a 24-hour, seven-days-a-week basis. In April 2004 the applicant and Numsa concluded a collective agreement regarding the implementation of a 12-hour, three-shift system. The intention of this agreement was to enable the applicant 'to cease operating illegally and in contravention of the Basic Conditions of Employment Act [75 of 1997]'. The new shift pattern did not, however, achieve this purpose and the applicant accordingly had to apply for ministerial determinations, the last of which expired on 30 June 2011. Shortly thereafter, the applicant commenced a consultation process with Numsa with a view to amending the shift pattern set out in the 2004 agreement. It described its proposal as an amendment to 'shift rotations' only, which it alleged fell within its managerial prerogative.

The court, per Gush J, noted that the crux of the matter was whether the proposed changes constituted a unilateral change to the employees' terms and conditions of employment or whether it was a work practice that the applicant could change at its discretion. It held that a shift pattern could only constitute a term and condition of employment if the employee has a contractual right to work the shift pattern concerned.

The 2004 agreement only applied to employees in the applicant's 'truck and radial (tyre) department'. It was, however, extended to the other employees at the factory, but this extension was not done in writing. The court noted that the LRA defines a collective agreement as 'a written agreement concerning terms and conditions of employment or any other matter of mutual interest' concluded between an employer and a trade union. Because the extension of the 2004 agreement to the other employees at the factory was not 'in writing', the court held that this extension was not a collective agreement for purposes of the LRA. The determination of these employees' shift patterns accordingly remained within the applicant's prerogative as a work practice. The court further observed that the 2004 agreement itself permitted the applicant, after consultation, to 'discontinue or modify' the shift pattern to 'achieve its operational requirements'. Therefore, even if the shift pattern of the employees outside of the truck and radial department was a contractual entitlement, they would be in the same position as the employees employed in this department, meaning that the applicant was contractually permitted to 'discontinue or modify' the shift pattern for its 'operational requirements'. The court held that the reasons advanced by the applicant for the proposed change in shift pattern clearly fell within what can be described as 'operational requirements'.

In the circumstances, the court held that the applicant was entitled to change the shift pattern for reasons related to its operational requirements. Further, the employees were interdicted from embarking on strike action until and unless they complied with the provisions of s 64 of the LRA.

Con-arb

The applicant in *Modikwa Platinum Mine (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2012] 6 BLLR 578 (LC) applied for the review of an arbitration award that was issued in its absence.

Consequent to his dismissal, the employee in this matter referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The matter was set down for con-arb (a process that allows for both conciliation and arbitration to take place as a continuous process on the same day), to which the applicant objected in terms of s 191(5A)(*c*) of the Labour Relations Act 66 of 1995 (LRA). The objection was addressed to the Witbank office of the CCMA, but was faxed to Polokwane. A copy of the objection was, however, delivered to the satellite office of the CCMA in Burgersfort, where the hearing was scheduled to take place.

Both the applicant and the employee attended at the CCMA on the date the matter was set down for con-arb. Conciliation was unsuccessful and the commissioner insisted on proceeding with arbitration. He refused to accept the written notice of objection to the con-arb process on the basis that it should have been sent to the Witbank office. The commissioner further stated that he could not accept the objection as there was no indication that it had been 'upheld' by the CCMA prior to the date of set down.

The applicant's representative, Letsebele, requested a short adjournment in order to fetch witnesses for the arbitration from the applicant's workplace, which was a short distance away. The commissioner refused this request on the basis that it was not 'the commission's responsibility to mollycoddle parties to attend processes'. Letsebele, who had not prepared for the arbitration and who was without any witnesses, asked to be excused and the arbitration continued in his absence. The arbitrator subsequently issued an award holding that the employee's dismissal was unfair and ordered the employee's reinstatement.

The court, per Seedat AJ, noted that
s 191(5A) of the LRA permits commissioners to immediately arbitrate a dispute if conciliation has failed. Such a process is referred to as ‘con-arb’ and is compulsory in disputes relating to probation. In other disputes, a commissioner can only proceed to arbitration if none of the parties has objected to the matter being dealt with as con-arb. Considering the commissioner’s reasons for proceeding with the arbitration, the court held that the commissioner had committed a reviewable irregularity; neither s 191(5A) nor r 17 of the CCMA rules requires the CCMA to consider or ‘uphold’ an objection to con-arb. Mere objection is sufficient to preclude arbitration from taking place immediately if conciliation fails.

The court also considered the commissioner’s failure to allow the adjournment requested by Letsebele and held that this, too, amounted to a reviewable irregularity. Letsebele did not request a postponement; he merely asked for an adjournment of approximately an hour in order to collect witnesses. The employee would not have suffered any irreparable harm or prejudice if the matter had stood down for approximately an hour.

In the circumstances, the court reviewed the award and the dispute was referred back to the CCMA for a rehearing before another commissioner.

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Benefit of the doubt

South African Post Office Ltd v CCMA and Two Others (LC) (unreported case no C293/2011, 18-6-12) (Steenkamp J)

Amid conflicting decisions regarding the subject matter in this dispute, the Labour Court was tasked with deciding whether or not an acting allowance constitutes a benefit as contemplated in s 186(2)(*a*) of the Labour Relations Act 66 of 1995 (LRA), thus giving the Commission for Conciliation, Mediation and Arbitration (CCMA) jurisdiction to hear disputes of this nature.

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.'

Referring his dispute as one relating to benefits, the employee (third respondent) lodged an unfair labour practice dispute with the CCMA, claiming that his employer (the applicant) had acted unfairly by not paying him an acting allowance from June 2008 to January 2011.

In terms of the applicant's policy, a person acting in a higher position than his current position will do so for a maximum of three months if approved by a senior manager.

At arbitration, the applicant raised two jurisdictional challenges. Firstly, it argued that the dispute did not relate to benefits and thus the CCMA did not have jurisdiction to hear the matter. Secondly, the dispute was referred outside the prescribed time frame and the absence of a condonation application left the CCMA without jurisdiction.

In a jurisdictional ruling, the commissioner held that an acting allowance constitutes a benefit and therefore the CCMA could arbitrate the dispute. On the issue of condonation, while acknowledging that there were two different versions on when the dispute arose, the commissioner ruled that he did not have to deal with condonation at this stage and deferred the issue to arbitration for evidence to be led by both parties.

On review at the Labour Court, the applicant set out two grounds for why the jurisdictional ruling should be set aside. In its first argument, the applicant persisted in its view that an acting allowance does not constitute a benefit and, as such, the CCMA did not have jurisdiction to hear the matter. Secondly, the applicant argued that the commissioner exceeded his powers by arbitrating the dispute without having made a ruling on condonation.

Dealing with the first ground, the court noted that the CCMA does not have jurisdiction for general unfairness and, therefore, an employee claiming an unfair labour practice at the CCMA must demonstrate that his claim falls under
s 186(2).

The court further pointed out that when reviewing a jurisdictional ruling, the test for review, as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC), was not applicable.

The crisp question under these circumstances was whether or not the CCMA or relevant bargaining council had jurisdiction, as opposed to asking whether or not the commissioner's findings were reasonable.

With that in mind, the court turned its focus to whether an acting allowance constitutes a benefit as contemplated in s 186(2)(*a*).

The court referred to the Labour Appeal Court (LAC) decision in *Hospersa and Another v Northern Cape Provincial Administration* [2000] JOL 6301 (LAC), in which Mogoeng AJA, faced with the same question, held that for an employee to claim a benefit under the LRA, that benefit must be a right created in either an employment contract or a collective agreement or by statute. In the absence of such a right, the claim would be for the creation of a new right, which in effect was a matter of mutual interest and hence not arbitrable.

The court also noted that the *Hospersa* decision was followed in subsequent decisions relating to the term 'benefit'.

This did not, however, end the matter. The court further had to deal with a dissenting view by Lagrange J in *Imatu obo Verster v uMhlathuze Municipality and Others* [2011] 9 BLLR 882 (LC), which followed other LAC decisions handed down after the *Hospersa* decision, in which it was held that a benefit under s 186(2)(*a*) need not arise from a pre-existing right before the CCMA has jurisdiction. In that matter, Lagrange J held:

'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 prerequisite 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 v CCMA and Others* [2004] 4 BLLR 297 (LAC)]. I agree.'

In the present matter, Steenkamp J highlighted that the *uMhlathuze Municipality* judgment did not take into account the decision in *G4S Security Services v NASGAWU* (LAC) (unreported case no DA3/08, 26-11-2009) (Tlaletsi AJA), where the LAC, when addressing the ambit of the term 'benefits', reverted to the *Hospersa* principle.

On this point, Steenkamp J said:

‘Persuasive as the discussion by Lagrange J in *uMhlathuze Municipality* is, I consider myself bound by the authority of the Labour Appeal Court. The employee in the present case has not established a right to an acting allowance *ex contractu* or *ex lege* beyond the initial three-month period in 2006. In seeking to establish a further entitlement to an acting allowance, the employee has strayed into the realm of a dispute of interest. In these circumstances, the commissioner had no jurisdiction to entertain an unfair labour practice dispute in terms of [s 186(2)] of the LRA.’

Turning to the second ground for review, the court held that the failure of the commissioner to first deal with the issue of condonation was a ‘clear misdirection’. With reference to binding authorities, the court held that a commissioner was duty bound to make a ruling on the issue of condonation and not defer the issue to the arbitration stage. The jurisdictional ruling was set aside.