

SOUTH AFRICA / JUDGMENT

# Adapt (Pty) Ltd v Maseko and Others (JR701/2019) [2023]

## ZALCJHB 5 (13 January 2023)

[2023] ZALCJHB 5

COURT

Labour Court Johannesburg

BEFORE

Swartz

CASE / FILE NUMBER

JR701/2019

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### Source record

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JR701/2019

In

the matter between:

ADAPT  
(PTY)  
LTD Applicant  
and  
LINDIWE  
P MASEKO  
First  
Respondent  
GODFREY  
RAMOTHATA  
N.O. Second  
Respondent  
THE  
COMMISSION FOR CONCILIATION,  
MEDIATION  
AND ARBITRATION  
Third Respondent

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|          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Heard:   | 8 November 2022<br>Delivered: 13<br>January 2023 (This judgment was handed down electronically by<br>circulation to the parties'<br>legal representatives by email and<br>publication on the Labour Court's website. The date and time<br>for hand-down is deemed to<br>be 13 January 2023 at 14h00).                                                                                                                                                                                                |
| Summary: | Review application in terms of section 158(1)(g) and section 145 of<br>the Labour Relations Act No. 66 of 1995. Unfair Labour Practice<br>section 186(2)(a) of the Labour Relations Act – discretionary<br>salary increase and bonus. Commissioner exceeded the CCMA<br>jurisdiction in awarding the first applicant an increase in her<br>salary<br>and a bonus. Commissioner overcompensated the First Respondent<br>taking into account the facts of the matter. Award reviewed and set<br>aside. |

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## JUDGMENT

SWARTZ AJ

### Introduction

- [1] In this matter, the applicant has applied to review and set aside the award dated 23 February 2019 of the second respondent in which the second respondent found that the applicant had committed an unfair labour practice by failing to subject the first respondent to a performance review to increase the first respondent's salary as well as to give her year-end bonus for the financial year ending on 30 June 2017.
- [2] The first respondent's unfair labour practice referral was brought under s186(2)(a) of the Labour Relations Act[1] (LRA) relating to the provisions of benefits.
- [3] The second respondent awarded the first respondent a total amount of R214 966 consisting of two months' compensation (R145 818) together with a salary increase (R42 506) plus a bonus (R26 642).
- [4] The applicant applied for condonation for the late filing of its review application. I am satisfied that the prejudice caused by the short delay in filing the founding affidavit was not one of great magnitude, caused no demonstrable prejudice to the first respondent and that the applicant should not be deprived of the opportunity of bringing this application. Accordingly, condonation for the late filing of the review application is condoned.

Factual

## background

- [5] The first respondent was employed by the applicant on 16 September 2015 as a Human Capital Business Partner. Paragraph 2.6 of the first respondent's employment contract states:

*"Discretionary Annual Performance Bonus*

The Company has a discretionary performance bonus scheme, which all employees participate in. You will be eligible to participate in the Company's discretionary, performance-based Short-Term Incentive Plan (Annual Performance Bonus), subject to the rules of the plan."

- [6] The first respondent did not undergo a performance appraisal in 2015 as her employment commenced after this process had already been completed for the other employees. However, in July 2016, the first respondent underwent a performance appraisal and received a salary increase as well as a bonus for that financial year. The first respondent did not undergo a performance appraisal for the financial year ending on 30 June 2017 and received no salary increase nor a bonus for that financial year. The applicant contends that no performance appraisal was conducted for the first respondent as a result of the first respondent being under a performance improvement plan (PIP) and thus not eligible for the applicant's discretionary salary increase and bonus. The first respondent contends that the failure by the applicant to conduct a performance appraisal and for her not to receive a salary increase as well as a bonus amounted to an unfair labour practice.
- [7] On 9 February 2018, the first respondent was dismissed for poor work performance with effect from 28 February 2018.
- [8] On 14 February 2018, the first respondent referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). In May 2018, the first respondent referred a second dispute for unfair dismissal.
- [9] On 4 April 2018, the third respondent issued a condonation ruling in respect of the first respondent's late referral of her unfair labour practice. The matter was then set down for arbitration on 20 July 2018.
- [10] At the 20 July 2018 arbitration the applicant raised a point in limine that the CCMA lacked jurisdiction as the first respondent's dispute that she did not receive a salary increase and bonus was discretionary and thus did not constitute an unfair labour practice.
- [11] At the 20 July 2018 arbitration, the applicant also brought an application for a postponement in order to apply for the rescission of the 4 April 2018 condonation ruling. The second respondent granted the applicant a postponement and ruled that the applicant was to apply for its rescission within 14 days of the postponement. The applicant never applied for rescission.

- [12] The unfair labour practice dispute was again set down on 19 September 2018 for arbitration before commissioner Sello. The matter was again postponed by the third respondent in order for this dispute to be set down before the second respondent.
- [13] On 6 December 2018, the unfair dismissal dispute was settled by the third respondent under case number GAJB 4890/18.
- [14] On 6 February 2019, the unfair labour practice was set down for arbitration before the second respondent.

Parties'

## Submissions

The applicant's case

- [15] At the commencement of the 6 February 2019 arbitration, the applicant raised a preliminary point that both the unfair labour practice dispute and the unfair dismissal dispute were settled on 6 December 2019 in the amount of R150 000. The second respondent dismissed this point, finding that only the unfair dismissal dispute was settled on 6 December 2019.
- [16] Thereafter the applicant sought a postponement. The reasons advanced for the postponement were that the applicant was not prepared to run the arbitration as it was under the impression that the unfair labour practice dispute had been settled on 6 December 2019 and that the applicant's previous legal representative had recently withdrawn. The applicant was not prepared to run the arbitration. The application for postponement was opposed.
- [17] The second respondent refused the postponement for the reason amongst others, that this matter had a long history of postponements and a further postponement would prejudice the first respondent.
- [18] Although the applicant called no witnesses, Happy Molefe (Molefe) being the applicant's Human Capital Executive went through the applicant's defence that the first respondent was not subjected to a performance appraisal as a result of the first respondent being under a PIP and thus was not eligible for the applicant's discretionary salary increase and bonus. Molefe also cross-examined the first respondent.
- [19] In essence, the applicant's defence was that there was no unfair labour practice as the first respondent did not qualify to be appraised and thus did not qualify for any salary increase or bonus. The applicant had a discretion to increase salaries and bonuses based on the applicant's and the first respondent's performance. There was no benefit to be disputed or claimed by the first respondent.

The first respondent's case

- [20] All employees of the applicant were annually appraised and received salary increases and a bonuses. The first respondent did not receive this and thus was deprived of a benefit which amounted to an unfair labour practice.
- [21] In 2016, the first respondent was appraised and received a salary increase from R840 000 per annum to R882 506 per annum and a bonus of R26 642.
- [22] The first respondent testified that in 2017, every employee of the applicant was subjected to a performance review for the 2016 to 2017 financial year except her and that she issued the increase letters to all other employees.
- [23] When the first respondent enquired from the applicant why she was not subjected to a performance review, her line manager told her that it was because she was not performing and when she requested a meeting to engage in a performance review it was declined for the same

### **reasons.**

#### The arbitration award

- [24] The second respondent found that the applicant did not lead any evidence to rebut the first respondent's version that the applicant's failure to subject her to a performance review for 1 July 2016 to 30 June 2017 led to the first respondent not receiving a salary increase and a year performance bonus for that period. There was no evidence led which proved that the first respondent was not performing satisfactorily during this same period.
- [25] The conduct by the applicant in this regard was unfair and the second respondent concluded that if the first respondent had been subjected to a performance review she would have qualified for a salary increase and a year-end bonus.
- [26] On the first respondent's version alone, the second respondent found that the applicant had committed an unfair labour practice.
- [27] The second respondent then delved into the financial loss that the first respondent suffered as a result of not receiving her salary increase and a bonus, and relied on section 195 of the LRA to justify awarding the first respondent a salary increase and a bonus amount based on her previous increase and bonus.
- [28] The second respondent awarded the first respondent a salary increase, a bonus as well as two months' compensation.

#### The grounds of review and the evaluation thereof

- [29] The grounds of review are not well articulated in the applicant's papers. The grounds in the founding affidavit are curiously contained in the notice of motion.

[30] The applicant's grounds in terms of section 158(1)(g) of the LRA are based on the principle of legality. The applicant also relies on certain grounds in terms of section 145 of the LRA.

[31] The section 158(1)(g) grounds will now be evaluated.

The acceptance by the second respondent of an invalid referral form

[32] I could not find any reference to this ground in the applicant's papers nor in its heads and oral argument.

[33] The referral form indicates that the first respondent is referring an unfair labour practice dispute. What is absent from the referral form is the relief sought that the first respondent was claiming her salary and a bonus that was not paid for the 2016 to 2017 financial period.

[34] In *Commercial Workers Union of SA v Tao Ying Metal Industries and others*[2], the Court said that:

*"In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration...The dispute between the parties may only emerge once all the evidence is in."*

[35] In light of the above, this ground does not assist the applicant with its review application.

The refusal or failure of the second respondent to rule whether or not the third respondent had the necessary jurisdiction to deal with the referral, more particularly the refusal or failure by the second respondent to have regard to the written argument provided by the applicant to the second respondent on 6 February 2019

[36] From the transcript, it seems that the second respondent gave an ex tempore ruling in this regard that the CCMA does have jurisdiction to adjudicate the unfair labour practice. The second respondent also refers to this ruling in paragraph 6 of his award. [3]

[37] In *Aucamp v SA Revenue Service*[4] (*Aucamp*), this court eloquently summarised the issue of whether a discretionary salary and/or bonus would fall within the ambit of a benefit as provided for in section 186(2)(a) of the LRA. The Court stated:

*"[29] Even if a benefit is subject to conditions and the exercise of a discretion, an employee could still, as part of the unfair labour practice proceedings, seek to have instances where the employee then did not receive such benefit adjudicated. So therefore, even if the benefit is not a guaranteed contractual right per se, the employee could still claim same on the basis of an unfair labour practice if the employee could show that the employee was unfairly deprived of same. An example would be where an employer must exercise a discretion to decide if such benefit accrues to an employee, and exercises such discretion unfairly. As the court said in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* :[5]*

*“[D]isputes over the provision of benefits may fall into two categories: firstly, where the dispute concerns a demand by employees that a benefit be granted or reinstated irrespective of whether the employer's conduct in not agreeing to grant or in removing the benefit is considered to be unfair. This kind of dispute can be settled by way of industrial action. Secondly, the dispute may concern the fairness of the employer's conduct. This kind of dispute may be settled by way of adjudication.”*

The Court concluded as follows: [6]

*“[44] This issue, whether the benefit must be an entitlement which arises ex contractu or ex lege was considered by the Labour Court in Protekon (Pty) Ltd v CCMA & others. The Labour Court correctly stated that HOSPERSA is authority for the view that the unfair labour practice jurisdiction cannot be used to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided for by the employer. The Labour Court then stated that it does not follow from this that an employee may have recourse to the CCMA's unfair labour practice jurisdiction only in circumstances in which he/she has a cause of action in contract law.*

[45] The Labour Court pointed out that there are many employer and employee rights and obligations that exist in many employee benefit

schemes. In many instances employers enjoy a range of discretionary powers in terms of their policies and rules. The Labour Court further pointed out that s 186(2)(a) is the legislature's way of regulating employer conduct by superimposing a duty of fairness irrespective of whether that duty exists expressly or implicitly in the contractual provisions that establish the benefit. The court continued and stated that the existence of an employer's discretion does not by itself deprive the CCMA of jurisdiction to scrutinize employer conduct in terms of the provisions of the section. It concluded that the provision was introduced primarily to permit scrutiny of employer discretion in the context of employee benefits. I agree with this

## conclusion.

[46] I also agree, with qualification, with the Labour Court's conclusion that there are at least two instances of employer conduct relating to the provision of benefits that 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. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.”

[30] What is clear from the above, is that the applicant's case is squarely that of an unfair labour practice. It pertains to a benefit founded in an employment policy and collective agreement (thus ex contractu) which the applicant contends he was unfairly deprived of as a result of unfair conduct by his employer (the respondent). The fact that the applicant also challenges his ultimate moderated performance score, would entail a challenge of the respondent's discretion in this regard as well, further cementing the conclusion that the principle at stake in this matter is an unfair labour practice. Therefore, I conclude that the other issue forming part of the applicant's case in this matter concerns an unfair labour practice relating to a

benefit.”

[38] Accordingly, and over and above the second respondent making an ex tempore ruling on this issue on 20 July 2018 referred to above, I find that the CCMA did have jurisdiction to determine an unfair labour practice in respect of the first respondent’s claim to her discretionary salary increase and bonus.

[39] In respect of the allegation by the applicant that the second respondent did not have regard to the written argument provided by the applicant to the second respondent on 6 February 2019, the second respondent in paragraph 4 of the award expressly refers to the parties submitting heads of argument. The fact that the second respondent does not specifically refer to the applicant’s heads of argument in his award is not a ground of review that is sustainable under section 158(1)(g) of the LRA.

The refusal or failure of the second respondent to grant the applicant a postponement of the arbitration hearing in circumstances where the applicant reasonably and justifiably understood that the hearing would not proceed on 6 February 2019

[40] From paragraphs 10.4 to 10.5 of the second respondent’s award, he deals with the application for a postponement brought by the applicant on 6 February 2019.

[41] In light of the history of postponements of this matter and the reasons advanced by the second respondent in this regard, I find that the second respondent’s refusal to grant a further postponement does not support a ground of review in terms of section 158(1)(g) of the LRA.

The refusal or failure of the second applicant to apply the principles of legality and “helping – hand” and to assist the applicant’s representative on 6 February 2019 given that the applicant was taken by surprise and unlike the first respondent, the applicant was not legally represented

[42] The second respondent was aware of the applicant’s defence and allowed the applicant to state its defence and for Molefe to cross-examine the first respondent.

[43] Clauses 20 and 21 of the CCMA Guidelines are the source of the so-called ‘helping hand’ principle. The provisions require a commissioner at the commencement of arbitration proceedings to inform the parties inter alia of i) the fact that the proceedings will be recorded; ii) any potential conflicts of interest; iii) the rules of proceedings; iv) the role and powers of the arbitrator; iv) the procedure in terms of which documents are introduced into proceedings; and v) the requirement that if evidence of a witness is disputed, the other party should, at the appropriate stage, question the witness in that regard and put its version to the witness so that the witness has an opportunity to respond[7]. Clause 21 of the CCMA Guidelines is of particular relevance. It states:

*“21 The extent to which the arbitrator deals with any of these issues should be determined by the experience of the parties, or their representatives, and their knowledge of CCMA procedures. If it is evident at a subsequent stage that a party or their representative does not understand the nature of proceedings and that this is prejudicing the presentation of its case, the arbitrator should draw this to the attention of the party. Circumstances in which it may be appropriate for the arbitrator to do this include if a party –*

21.1 fails to lead evidence of its version under oath or affirmation;

21.2 fails to cross-examine the witnesses of the other party or fails to put its version to those witnesses during cross-examination;

21.3 changes its version of events or puts a new version during proceedings.” [Footnotes omitted]

[44] The second respondent explained to the applicant certain aspects of the arbitration procedure as detailed in the first respondent’s heads of argument. The second respondent warned the applicant that without evidence he would be unable to accept the applicant’s version. Molefe confirmed that no evidence would be led. [8]

[45] Nevertheless, Molefe did present the applicant’s version but it was not evidence under oath. This resulted in the applicant’s defence not being dealt with by the second respondent in his award.

[46] Molefe spend a great deal of time dealing with the applicant’s defence about why the first respondent was not subjected to a performance review and why the first respondent was not given her salary increase and bonus. Despite Molefe’s submissions, the second respondent disregarded the applicant’s version in this regard finding in the award:

46.1 At paragraph 14: “The Respondent elected not to lead any evidence and closed its case. The Respondent was made aware of the potential adverse consequences of not leading any evidence”;

46.2 At paragraph 17: “The Respondent did not lead any evidence to rebut the Applicant’s contention that the Respondent’s

failure to subject her to a performance review for the period 01 July 2016 to 30 June 2017 lead to the Applicant not receiving a salary increase and a year performance bonus for the period. There was also no evidence lead which proved that the Applicant was not performing satisfactory [sic] during the same period”; and

46.3 At paragraph 20: “Under the circumstances, on the Applicant’s version alone, I am convinced that the Respondent has committed any unfair labour practice...”

[47] In *Nkomati Joint Venture v Commission for Conciliation, Mediation and Arbitration and others*, [9] the Labour Appeal Court stated:

*“An arbitrator may commit a gross irregularity, fail to fairly try the issues or render an unreasonable award where under a duty to lend a helping hand and then fails to do so. Where the circumstances and procedural fairness so require, a commissioner must intervene in accordance with the precepts set out in the CCMA Guidelines. Not to do so will invariably result in an unreasonable award. The purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues. A commissioner commits a reviewable irregularity not only when the outcome of an award is unreasonable but also where the nature of the enquiry has been misconceived, which may happen when the issues are not ventilated by proper lines of enquiry.”*

[48] The second respondent, as evidenced by the transcript, warned the applicant of the consequences of not leading evidence and thus adhered to clause 21 of the CCMA Guidelines.

[49] Accordingly, this ground of review must fail as the second respondent warned the applicant of the consequences of not presenting evidence.

The refusal or failure of the second respondent to mention in his award or apparently to have regard to the 2 sets of closing arguments

delivered by the applicants at the specific request of the second respondent

[50] This issue is dealt with above.

[51] The applicant's heads of argument do not constitute evidence and the fact that the second respondent did not refer to the applicant's heads of argument in his award may also be attributed to the fact that Molefe's submissions were not under oath.

[52] I find that the second respondent's refusal to mention in his award or apparently to have regard to the two sets of closing arguments delivered by the applicants does not support a ground of review in terms of section 158(1)(g) of the LRA.

The refusal or failure of the second respondent to allow the hearing to be reopened as requested by the applicant in closing arguments and to have regard to the written report of the external person who investigated the failure of the first respondent to meet the

necessary standards of conduct and performance

[53] The second respondent refused a postponement on 6 February 2019 for the reasons already stated above. I do not find this a reviewable ground. The reopening of the applicant's case would have resulted in the same delay had the second respondent allowed the applicant to postpone the arbitration.

[54] Despite the second respondent alerting the applicant to the consequences of not calling a witness, the applicant did not call a witness and accordingly, the written report of the external person who investigated the failure of the first respondent to meet the necessary standards was not properly admitted as evidence.

[55] Accordingly, this ground does not go against the principle of legality.

The applicant's grounds in terms of section 145 of the LRA

[56] In the applicant's founding affidavit and notice of motion this ground is not elaborated on and is framed in general terms. However, in the applicant's supplementary affidavit, this ground is expanded.

[57] The applicant submits that the first respondent failed to discharge her onus of proving that she was entitled to an upward adjustment to her salary or any bonus.

[58] Again, the first respondent's version was uncontested in that the applicant failed to lead any evidence to the contrary.

#### Evaluation

[59] It is now settled law that the payment of a performance bonus constitutes a "benefit" as contemplated by section 186(2)(a) of the LRA.

[60] It is furthermore trite that in employment law terms, and under the auspices of the unfair labour practice jurisdiction, there is no such thing as an unfettered discretion. The exercise of the discretion must always be subject to being tested against basic tenets of fairness[10]. In Aucamp[11] it was stated:

*"Even if a benefit is subject to conditions and the exercise of a discretion, an employee could still, as part of the unfair labour*

practice proceedings, seek to have instances where the employee then did not receive such benefit adjudicated. So therefore, even if the benefit is not a guaranteed contractual right per se, the employee could still claim same on the basis of an unfair labour practice if the employee could show that the employee was unfairly deprived of same. An example would be where an employer must exercise a discretion to decide if such benefit accrues to an employee, and exercises such discretion unfairly."

[61] In relation to the question of fairness, the court in National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others[12] held that the exercise of a discretion may be open to challenge if it:

*"... had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."*

[62] In Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others[13], the Court stated the following in relation to fairness:

*"... unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended."*

- [63] It follows that in those instances where an aggrieved employee wishes to challenge the exercise of an employer's discretion in relation to the payment or calculation of a bonus, the employee would bear the onus of showing that the employer, in exercising such discretion, acted irrationally, capriciously, grossly unreasonably or mala fide. In those instances, where an employer is found to have exercised its discretion inconsistently in respect of different employees, or with a clear intention of favouring or prejudicing one employee over another, this would in all likelihood assist the aggrieved employee in the discharge of their onus.
- [64] Importantly, however, it has been found that even if an employer may have been wrong in interpreting and applying bonus criteria, this would not automatically result in a finding that the exercise of its discretion had been unfair. What is required to be shown, is proof of some form of behaviour on the part of the employer which meets the aforementioned test of irrational, capricious, grossly unreasonable or mala fide.
- [65] Based on the above, I find that the applicant should have gone through the process of assessing the first respondent and explaining to her formally why she did not qualify for a salary increase and a bonus. Even if the first respondent would not have qualified for a salary increase and a bonus, the applicant's failure to go through this process properly was unfair. Accordingly, I find that the applicant in exercising such discretion, acted irrationally and / or capriciously. The second respondent's award is within the band of reasonableness and the principle of legality was not disregarded. However, the second respondent should have been cognisant of the undisputed fact that the first respondent was ultimately dismissed for poor performance which justified the applicant not increasing the first respondent's salary nor awarding her a bonus. I thus find that the compensation that was awarded for the unfair labour practice was too much.
- [66] In respect of the award relating to the applicant's salary increase and her bonus, the second respondent exceeded his jurisdiction in this regard. This was raised by the applicant in its oral argument that it is trite that matters concerning the CCMA's jurisdiction is not reasonableness but correctness.
- [67] The second respondent relied on section 195 of the LRA to justify awarding the first applicant her salary increase and bonus.
- [68] This finding is incorrect.
- [69] Section 73A of the Basic Conditions of Employment Act[14] (BCEA) provides:
- "(1) Despite section 77, any employee or worker as defined in section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination or a collective agreement.*
- (2) Subsection (1) does not apply to employees or workers earning in excess of the threshold prescribed by the Minister in terms of section 6 (3).

(3) An employee or worker, other than the employee or worker referred to in subsection (1), may institute a claim concerning the failure to pay any amount contemplated in subsection (1) in either the Labour Court, the High Court or, subject to their jurisdiction, the Magistrates' Court or the small claims court."

[70] "Earnings" means the regular annual remuneration before deductions i.e. income tax, pension, medical and similar payments but excluding similar payments (contributions) made by the employer in respect of the employee. [15]

[71] The earnings threshold, which is determined by the Minister of Employment and Labour from time to time in terms of section 6(3) of the BCEA is R224 080,48 per year (R18 673.37 per month) which came into effect from 1 March

2022. [16]

[72] Section 77(3) of the BCEA provides:

*"The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment,*

*irrespective of whether any basic condition of employment constitutes a term of that contract."*

[73] The first respondent's salary increase and bonus are contractual claims. The CCMA did not have jurisdiction to have adjudicated the first respondent's contractual claims as the first respondent's earnings were above the threshold and thus the first respondent's claims were precluded by section 73A (2) of the BCEA.

[74] In *Chimphondah v Housing Investment Partners (Pty) Ltd and others*[17], the court held:

*"In the circumstances, the award in this regard stands to be reviewed and set aside and substituted with an order that the CCMA had no jurisdiction to entertaining Mr Chimphondah's contractual claim. Of course, Mr Chimphondah may still avail himself to the recourse provided for in terms of s 77(3). If he decides to do so, there is, in my view, nothing that might prevent the parties from agreeing to use the record of the arbitration proceedings as evidence instead of a hearing de novo."*

[75] The second respondent's reliance on section 195 of the LRA is misplaced in that "...any other amount to which the employee is entitled in terms of any law..." cannot be an amount in which the CCMA has no jurisdiction in the first place to adjudicate upon.

[76] In *HC Heat Exchangers (Pty) Ltd v Araujo and others*[18], the Labour Court, in determining review applications in respect of the CCMA's jurisdiction, referred to the following previous judgments on this point:

*"[36] In Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[19] *the Court considered the now trite ordinary review test postulated by Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[20] *and said:*

*“... Nothing said in Sidumo means that the CCMA’s arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise ...” (emphasis added)*

[37] The aforesaid means that where the issue to be considered on review is about the jurisdiction of the CCMA or bargaining council, it is not about a reasonable outcome. What happens is that the Labour Court is entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court determines the issue de novo in order to decide whether the determination by the arbitrator is right or wrong.” [21]

## Conclusion

[77] The second respondent in awarding the applicant compensation in respect of the unfair labour practice is reasonable but the amount was too much considering that the first respondent was dismissed for poor performance. The compensation amount in the award stands to be reviewed and set aside. The amounts awarded to the first respondent in respect of her salary increase and bonus stand to be reviewed and set aside as the CCMA lacked jurisdiction to determine these claims.

[78] With respect to costs and in terms of section 162(1) and (2) of the LRA, I have a wide discretion when it comes to the issue of costs. I do believe that the first respondent had a right to oppose this matter. The commissioner went beyond his jurisdictional powers as a commissioner. In all these circumstances, the appropriate order when it comes to costs is to make no order as to costs.

[79] In the circumstances, the following order is made:

### Order

1. The ruling of the second respondent issued under case number GAJB5696-18 dated 23 February 2019, is reviewed and set aside.
2. The applicant is ordered to pay the first respondent one months’ salary of R72 909.
3. There is no order as to costs.

S Swartz

Acting Judge of the Labour Court of South Africa

### Appearances

For the Applicant: S

Harvey

Instructed by: Michalsons

Giles

For the First Respondent: C Bensché from Higgs Attorneys

Instructed by: Steenkamp

Van Niekerk Inc.

[1] Act No. 66 of 1995, as amended.

[2]

(2008) 29 ILJ 2461 (CC) at para 66.

[3] Transcript p 87 l:14 to 15.

[4]

2014) 35 ILJ 1217 (LC) at paras 29 – 30.

[5]

2013) 34 ILJ 1120 (LAC) at para 28.

[6] Id at paras 44 – 46.

[7] Clause 20 of the CCMA Guideline.

[8] Transcript Vol 2 p 109 l:12 to 25, Vol 2 p 110 l:1 to 15.

[9]

(2019) 40 ILJ 819 (LAC) at para 18.

[10] See: Solidarity obo Oelofse v Armscor (SOC) Ltd and others, unreported judgment under case no JR 2004/15 delivered on 21 February 2018 at para 28.

[11] Supra fn 4 at para 29.

[12] 2000 (2) SA 1 (CC) at para 11.

[13] Supra fn 5 at para 53.

[14] Act No. 75 of 1997.

[15] Government Gazette No. 45890, 9 February 2022.

[16] Government Gazette No. 45890, 9 February 2022.

[17]

2021) 42 ILJ 1720 (LC).

[18]

[2007] ZALC 72; [2020] 3 BLLR 280 (LC) at paras 36 - 37.

[19]

2008) 29 ILJ 964 (LAC) at para 101.

[20]

2007) 28 ILJ 2405 (CC).

[21] See: Trio Glass t/a The Glass Group v Molapo NO and others (2013) 34 ILJ 2662 (LC) at para 22.

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### Source & reproduction note

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