

SOUTH AFRICA / JUDGMENT

Mkhize v Rand Water Soc Ltd and Others (JR1515/22) [2024] ZALCJHB 284 (2 August 2024) [2024] ZALCJHB 284

COURT

Labour Court Johannesburg

BEFORE

L de Haan

CASE / FILE NUMBER

JR1515/22

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR1515/22

In the matter between:

MDUDUZI
MKHIZE
Applicant
and
RAND
WATER SOC LTD
First
Respondent
EUGENE
MTILENI N.O.
Second
Respondent
COMMISSION
FOR CONCILIATION
MEDIATION
AND ARBITRATION
Third
Respondent
Heard: 10 January 2024
Delivered: 02 August
2024

JUDGMENT

DE HAAN, AJ

Introduction

- [1] This is an application in terms of section 145, read with section 158(1)(g) of the Labour Relations Act[1] (LRA), to review the jurisdictional ruling dated 23 June 2022 by the second respondent (the commissioner) under the auspices of the third respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) under CCMA case reference GAJB5986-22.
- [2] The applicant was employed by the first respondent. On 31 January 2021 the applicant gave three months' notice to the first respondent that he wanted to retire early with effect 30 April 2021. The first respondent's chief operating officer approved this election by the applicant. The first respondent's incentive bonus cycle ran from 01 July in one year to 30 June the following year. The applicant was therefore employed for ten months of the first respondent's 2020/2021 bonus cycle when he retired.
- [3] The first respondent had a Short Term Incentive (STI) policy in place in terms of which qualifying employees would receive an incentive bonus upon certain conditions being fulfilled. On 14 January 2022 the first respondent paid its employees an incentive bonus under the STI for the 2020/2021 financial year. When the applicant learnt of this, he enquired from the first respondent as to why he had not received the bonus, as he was of the view that he qualified at least for a pro rata bonus, because he had worked for ten months of that financial year.
- [4] When the first respondent indicated to the applicant that he did not, in its view, qualify for the 2020/2021 STI bonus due to his early retirement, the applicant referred an unfair labour practice dispute under section 186(2)(a) of the LRA to the CCMA. The first respondent opposed the dispute and at arbitration raised the point in limine that the CCMA lacks jurisdiction because the dispute arose and was referred after the applicant had ceased to be an employee of the first respondent. There was therefore no employment relationship as required by section 186(2)(a) of the LRA. The commissioner upheld the first respondent's jurisdictional point and dismissed the dispute. Not satisfied with the outcome, the applicant launched the jurisdictional review application that is now before me.

Relevant background

- [5] The facts relevant to the determination of the correctness of the jurisdictional ruling are mostly common cause.

- [6] The applicant was employed by the first respondent since 01 November 1994. On 31 January 2021 the applicant submitted a letter to the first respondent's Chief Operating Officer, Mahlomola Mehlo, headed "Notice for Early Retirement". In it, the applicant notified the first respondent of his early retirement on three months' notice as required by relevant regulations, i.e. with effect 30 April 2021. The COO approved the applicant's early retirement on the same day and the applicant accordingly left the first respondent's service on 30 April 2021.
- [7] About 2003 the first respondent had introduced its STI policy. This was amended from time to time. In terms of paragraph 1 of the 2019 amendment of the STI policy, the first respondent would pay qualifying employees a performance bonus in respect of a bonus cycle (01 July to 30 June) if the employee had a valid, signed incentive contract and upon the achievement of organizational, portfolio, team and individual goals. It is expressly stated that the STI is purely discretionary as approved by the first respondent's Board.
- [8] On 14 January 2022 the first respondent paid the STI bonus for the 2020/2021 cycle, but not to the applicant. He was informed on 18 January 2022 that he did not qualify for the bonus because of his early retirement at the end of April 2021, and because he did not complete the STI cycle.
- [9] The applicant contends that he should have been paid a pro rata bonus in terms of the provisions of paragraph 4.12 of the STI policy, which, according to the applicant in paragraph 13 of the founding affidavit, provides that:

"4.12 Normal Retirements, Ill Health Retirements, Death in Service

[E]mployees qualify for a pro-rata incentive bonus based on the completed months in service within the Incentive cycle..."

- [10] In opposition, the first respondent contends that the applicant did not qualify for the 2020/2021 STI bonus, as paragraph 4.3 of the 2019 STI policy provides that:

"4.3 Qualifying date

Employees must be in service as at 30 June to qualify for the Incentive payment. Employees who exit the organization before 30 June are not eligible for an incentive bonus..."

- [11] The first respondent contends that the provisions of clause 4.12 do not apply to the applicant. The applicant retired early. His was not a normal retirement, a retirement for ill health, nor clearly a death in service. According to the 2019 STI policy contained at pages 47 to 55 of the arbitration bundle, paragraph 4.12 reads as follows:

These employees qualify for a pro-rata incentive bonus based on the completed months in service within the Incentive cycle..."

(My emphasis).

- [12] Although I make no finding in this regard, it occurs to me that the omission by the applicant of the first word of the provision – “These” – potentially lends a significantly altered meaning to the provision. From the use of the word, “These” it would appear that the first respondent’s intention was to refer to the category of employees mentioned in the heading to the paragraph, while without that word in reference to the heading of the paragraph the provision could conceivably be open to the interpretation that the applicant proffers, being that it refers to all retirees, including himself.
- [13] The first respondent further contends that the applicant did not have a signed incentive contract. Paragraph 4.1 of the 2019 STI stipulates that, “no Incentive bonus will be paid without a valid signed incentive contract.”
- [14] In his heads of argument, Mr Ndou argues for the applicant that either the 2016 STI policy or the 2019 STI policy applied to the applicant and that the applicant would be entitled to the STI bonus in terms of both. He also submits that the 2016 STI policy is the one that applied to the applicant in the 2020/2021 STI cycle. The applicant appears to elect to rely on paragraph 4.4 of the 2016 STI for the contention that an employee only had to work for six months within the incentive cycle in order to qualify for a pro rata STI bonus. Since the applicant had worked for ten months of the 2020/2021 cycle, he qualified, so the contention goes. Paragraph 4.4 of the 2016 STI policy provided that, “An employee must work a minimum of six (6) months within the incentive cycle to qualify for a pro-rata Incentive bonus...”
- [15] In contrast, paragraph 4.4 of the 2019 STI policy reads, “Newly appointed employees must work a minimum of six (6) months...” (My emphasis). It is not the applicant’s contention that he was a newly appointed employee in the 2020/2021 STI cycle, which appears to be why he invoked the 2016 STI policy, which does not refer to newly appointed employees.
- [16] In my view, the applicant’s contention that the 2016 STI policy applied to him does not alter the factual matrix insofar as the provisions of paragraph 4.13 of the 2016 STI policy (arbitration bundle page 60) is verbatim the same as paragraph 4.12 of the 2019 STI policy. As to the difference between the words, “Employees” in paragraph 4.4 of the 2016 STI policy and “Newly appointed employees” in the 2019 STI policy, it would appear that the 2016 STI policy was amended and was superseded by the 2019 STI policy, but I need make no finding in this regard. The fact is that the applicant relied expressly on clause 4.12 of the 2019 STI in his founding affidavit and he therefore cannot elect to rely on the wording of the 2016 version of paragraph 4.4.
- [17] In paragraph 4.12 of the 2019 STI policy the pro rata provision is expressly limited to employees who retired in the normal course, i.e. upon reaching retirement age, or who retired for reasons of ill health, or who passed away while in service during the relevant bonus cycle. The applicant, on his own version, retired early.

[18] Although I am not required, and I do not purport to decide the merits of the alleged unfair labour practice dispute, the allegations and argument set out above were included in the papers and submissions before me and provide context and the factual matrix for the jurisdictional ruling that is the subject matter of this judgment.

Grounds for review

[19] As to the grounds for review of the jurisdictional ruling, the applicant argued that his claim for the STI bonus, and thus his unfair labour practice dispute, was based on the stipulations of the STI policy and therefore arose while he was employed by the first respondent. The contract of employment, read with the STI policy, constituted a promise to the applicant that the first respondent would pay the STI bonus to him at the end of the bonus cycle if the policy conditions were met. The applicant argued, in reliance on the Constitutional Court judgment in *Pretorius and Another v Transport Pension Fund and Another*[2], that everyone has the right to protection from unfair labour practices, and that unfair labour practices under the LRA may extend

beyond the termination of employment.

[20] The applicant also relied on the judgment of this court in *Moloko v Commission for Conciliation, Mediation and Arbitration and Others*[3] for his submission that the mere allegation of an unfair labour practice irrevocably clothes the CCMA with jurisdiction, as opposed

to an unfair dismissal dispute, in which proof of a dismissal is a prerequisite for jurisdiction to be established.

[21] The first respondent argued that the central issue is whether the CCMA has jurisdiction in an unfair labour practice dispute where the alleged unfair labour practice occurred after termination of the employment relationship. Section 186(2) of the LRA defines an unfair labour practice as occurring, “between an employer and an employee.” The event that triggered the dispute is the payment of bonuses to staff on 14 January 2022, together with the refusal on 18 January 2022 to pay a bonus to the applicant. In his dispute referral form, the applicant recorded that the dispute arose on 14 January

2022. In paragraph 13 of his founding affidavit the applicant averred that the unfair conduct by the first respondent was the payment of bonuses to its staff on 14 January 2022 without also paying a bonus to the applicant.

[22] The first respondent argues that, when the dispute was triggered the applicant was no longer an employee. On the applicant’s own version, the dispute only arose when he was informed in January 2022 that he would not receive the STI bonus for 2020/2021. The applicant referred his dispute on 25 March 2022. There was no employment relationship between the applicant and the first respondent at the time that the dispute arose, i.e. when the first respondent decided to pay its staff an STI bonus for the 2020/2021 cycle, nor when the dispute was referred to the CCMA. The dispute therefore falls outside the ambit of an unfair

labour practice as defined in section 186(2)(a) of the LRA. In the first respondent's submission, the CCMA therefore does not have jurisdiction to arbitrate the dispute.

Evaluation

[23] It is by now trite that the test on review of a jurisdictional ruling is correctness.[4] The court is therefore required to determine if the arbitrator was right or wrong in his jurisdictional ruling that the CCMA lacks jurisdiction because there was no employment relationship at the time that the dispute arose.

[24] Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed or subjected to an unfair labour practice. An 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 (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;”.

[25] The Labour Appeal Court in *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*[5] settled the debate on the meaning of an unfair labour practice relating to benefits. A bonus is a benefit, and the non-payment of a bonus can give rise to an unfair labour practice dispute within the meaning of section 186(2)(a) of the LRA.

[26] In *Apollo Tyres*[6] it was further held that even where the employer enjoys a discretion in terms of a policy or practice relating to the provision of benefits such conduct will be subject to scrutiny by the CCMA in terms of section 186(2)(a). I am satisfied that a failure to pay the 2020/2021 STI bonus to a qualifying employee, whether it was discretionary or not, would fall within the scope of an unfair labour practice as defined in section 186(2)(a) of the LRA.

[27] The LAC in *Apollo Tyres* referred to *Velinov v University of Kwazulu- Natal and Others*[7] as the basis for rejecting the argument that the CCMA did not have jurisdiction because the employee had resigned and that there was therefore no employment relationship. The court in *Velinov* held that:

“I do not accept that an employee whose employment has been terminated either by resignation or otherwise, but who continues to work out his or her notice period, does not enjoy the protection of the provisions of the LRA and particularly the unfair labour practice provisions contained in Chapter VIII. This would not only be contrary to section 186(2) which, in defining an “unfair labour practice”, does not distinguish between different categories of employees but it is also contrary to the definition of “employee” in section 213. It is also contrary to the principle that despite termination of employment, employees have rights in the wider

*“ongoing employment relationship” (see *National Automobile & Allied Workers’ Union v Borg-Warner SA (Pty)**

Ltd 1994(3) SA 15 (A) at 25 E – I”[8]

[28] The facts in Apollo Tyres and in Velinov can be distinguished from the facts of this matter. In Velinov the employee had resigned, but was working her notice period, and in Apollo Tyres the employee resigned before referring her unfair labour practice dispute, but after all the facts giving rise to her dispute had taken place. In other words, her cause of action was already perfected by the time Hoosen resigned. In my view, the decisions in Apollo Tyres and Velinov are not authority for a proposition that the CCMA has jurisdiction to arbitrate an unfair labour practice dispute that only arises after termination of the employment relationship.

[29] In Pretorius supra the Constitutional Court had to decide an exception. For that purpose the court had to accept that all the allegations in the particulars of claim were true. The employer had raised a number of exceptions, including against an unfair labour practice claim under section 23(1) of the Constitution of the Republic of South Africa, 1996, on the basis that the particulars of claim did not allege an employment relationship between the parties. The court considered that the employer had made a promise to the ex-employees in 1989 when they were still employees and held that:

“Labour law jurisprudence under the Labour Relations Act (LRA) recognises that unfair labour practices under the Act may extend beyond the termination of employment.” and at [48], “In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of formal employment – but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of section 23 to only those who have contracts of employment.”[9]

[30] The Constitutional Court distinguished between unfair labour practice disputes brought by employees who fall within the scope and ambit of section 186(2) of the LRA and those who do not. The judgment established that employees without formal contracts of employment could enjoy protection against unfair labour practices under section 23(1) of the Constitution and should not automatically be unsuited at the exception stage because the subsidiarity principle may not apply. In my understanding of the Pretorius judgment, the Constitutional Court did not hold that the CCMA automatically has jurisdiction to arbitrate an alleged unfair labour practice dispute under section 186(2)(a) of the LRA referred by an ex-employee if the unfairness complained of occurred after termination of the employment relationship, and specifically not if the ex-employee relies on his former employment contract.

[31] After consideration of the judgments in Velinov, Malope and Pretorius, Tlhotlhalame J held in Magoshi v Gauteng Department of Education[10] that those judgments do not create carte blanche for referrals of unfair labour practice disputes by ex-employees. The applicant (Mahlase) was employed by the Department of Education and had been shortlisted for the position of principal. Mahlase resigned before the interviews for the position, but when another candidate was recommended Mahlase referred an unfair labour practice dispute to

the bargaining council. The court that:

“[12] To the extent that the decisions in Velinov, Malope and Pretorius confirm that on the less restrictive interpretation of the definition of ‘employees’, and the extension of the protections under section 23 of the Constitution, ex-employees are not barred from referring disputes, it is my view that this cannot be read to be open sesame for ex-employees to willy-nilly refer disputes. Implicit in these decisions and as can also be gleaned from the facts of those cases is that there is a qualification. Thus, the common trend in those cases was that the alleged wrong or unfairness complained of, took place during the course of employment and before termination of that employment.”[11] (My emphasis)

- [32] On the facts before it, the court held that the alleged unfairness, being the failure to appoint Mahlase to a position for which he had applied while he was employed by the Department of Education took place at the time when Mahlase was no longer an employee. Even on a less restrictive definition of an employee or on the extension of a protection under section 23 of the Constitution, the provisions of section 186(2)(a) of the LRA could not be available to the ex-employee.
- [33] I am in respectful agreement with the reasoning of Tlhotlhamajie J in Magoshi. To my mind, the distinction lies between disputes on the one hand that wholly arose during the employment relationship, but which were only referred to the CCMA or a bargaining council after termination of that employment relationship, in which cases the CCMA would have jurisdiction; and disputes that only arose after termination of the formal employment relationship, i.e. the facts that gave rise to the alleged dispute did not exist at the time of termination, in which case the CCMA would not have jurisdiction under section 186(2)(a) of the LRA. It therefore seems to me that the crisp issue for this court to decide is whether the alleged dispute arose before or after the termination of the employment relationship.
- [34] In this respect, the applicant contended that his entitlement to a bonus arose from his alleged entitlement thereto under the STI, which was a condition of his employment and thus constituted a promise to pay him the STI bonus. The first respondent contended that the applicant was not entitled to a bonus at all given the specific and express exclusions contained in the STI policy; that the existence of the STI policy was not a promise to pay the applicant a bonus given the express exclusions and conditions of the STI; but in any event, that the alleged unfair conduct complained of lay in the decision to pay staff a bonus but not to pay the applicant a bonus, which decision was taken long after the applicant had ceased to be an employee.
- [35] I agree with the first respondent. Not only did the applicant expressly state in his founding affidavit that the dispute arose on 18 January 2022 when he was informed that he did not qualify for the bonus, but the applicant recorded on his LRA 7.11 referral form that the date that the dispute arose was 14 January 2022. These admissions by the applicant were undoubtedly factually correct, as the catalyst to the alleged dispute was not the existence of the STI policy or the applicant’s former employment contract, but the payment in January 2022 of bonuses to the first respondent’s staff and the almost simultaneous refusal to pay the

applicant that bonus. The alleged dispute therefore arose after termination of the employment relationship.

- [36] The applicant's reliance on Moloko supra is misplaced. In that matter, the failure to implement an agreement to reinstate or re-employ the employee was alleged. The referral was therefore specifically in terms of section 186(2)(c) of the LRA. At arbitration the representative of the employer argued that the CCMA did not have jurisdiction as the employee had failed to establish the existence of an unfair labour practice as a jurisdictional fact. This was an impermissible transposition of the requirements in section 191(1) of the LRA to an unfair labour practice dispute, while section 186(2) has no similar provision to that of section 191(1). In his judgment, Moshwana J correctly identified the inherent flaw in that submission, as the distinction between the requirement to prove dismissal as a jurisdictional fact in an unfair dismissal dispute as opposed to the absence of such a requirement in an unfair labour practice dispute lies therein that, "the former goes to jurisdiction, whilst the latter goes to failure to discharge the onus of proof." The learned judge noted that:

"With regard to an unfair labour practice, the legislature makes reference to (a) an existence of a dispute; (b) about an unfair labour practice; (c) and an employee alleging an unfair labour practice. As defined, a 'dispute' includes an alleged dispute. Thus, what entitles an employee to enter the dispute resolution zone in relation to an unfair labour practice is an allegation as opposed to showing that an employee is dismissed in a dismissal situation."[12] (My emphasis)

- [37] Notably, Moshwana J refers repeatedly to the right of 'an employee' to refer an alleged unfair labour practice dispute. Nowhere in his judgment did Moshwana J purport to expand the definition of an unfair labour practice under section 186(2)(a) to include ex-employees beyond the qualification identified in Magoshe as being inherent to the judgments in Velinov, Malope and Pretorius, nor to confer jurisdiction on the CCMA to arbitrate alleged disputes that arose after termination of the employment relationship.
- [38] In this matter, the alleged unfair labour practice dispute is not in the alleged failure to implement an agreement to reinstate a former employee. The alleged dispute and issues in this matter is therefore clearly discernable from the alleged dispute and issues in Moloko. Also, in my view the fact that the legislature in section 186(2)(c) of the LRA expressly defined an unfair labour practice with reference to a former employee, while no reference is made to former employees in section 186(2)(a), supports the conclusion that the legislature intended the rights under section 186(2)(a) to be limited to disputes arising during the existence of the employment relationship.

- [39] If, as in this case, the alleged dispute is on a former employee's own version about the provisions of benefits, i.e. a dispute contemplated in section 186(2)(a) of the LRA, and the facts that gave rise to the dispute on the former employee's own version arose after termination of the employment relationship, the dispute falls outside the scope and ambit of the definition of an unfair labour practice in section 186(2)(a) of the LRA. It follows that the CCMA does not have jurisdiction to arbitrate such an alleged dispute.
- [40] For these reasons, in my view the commissioner was correct in his ruling that the CCMA does not have jurisdiction to arbitrate the alleged unfair labour practice dispute, as the facts that gave rise to the alleged dispute arose after the employment relationship had been terminated.

Costs

- [41] The applicant asked for costs in the event that he is successful, and the first respondent in turn asked that the review application be dismissed with costs. Before me, Mr Ndou for the applicant presented vigorous argument for a cost order on a punitive scale on the submission that the first respondent's case was hopeless and that the first respondent had no right to oppose the review application. He reluctantly conceded that I could consider a similar cost order against the applicant in the event that I dismiss the review application.
- [42] Mr Govender submitted on behalf of the first respondent that no case for a punitive cost order was made out on the papers. Having considered the nature of the issue to be decided and the parties' submissions in that regard; the general rule that costs do not follow the result in labour matters; the requirements of law and fairness; the provisions of section 162 of the LRA; as well as the judgments of the LAC in *Member of the Executive Council for Finance, KwaZulu-Natal v Wentworth Dorkin N.O.*[13] and of the Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[14], I am not persuaded that this is a matter in which a cost order is justified.
- [43] In the result, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

L. de Haan

Acting Judge of the Labour Court of South Africa

Appearances: For the applicant: N P Faranani, Ndou Attorneys For the respondent: Adv R Itzkin
Instructed by: Salijee Govender Van Der Merwe Inc

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

[2] (2018) 39 ILJ 1937 (CC).

- [3] (JR 1534/20) [2022] ZALCJHB 76 (9 March 2022).
- [4] South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby Pty Limited v South African Rugby Players Union and Another (2008) 29 ILJ 2218 (LAC) (12 May 2008); Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration and others (2008) 29 ILJ 954 (LAC); Trio Glass t/a The Glass Group v Molapo NO and Others (2013) 34 ILJ 2662 (LC); Eskom Holdings SOC Ltd v NUM obo N Coetzee and Others (C727/16)
- [2017] ZALCCT 75 (14 November 2017); Goliath v SA Broadcasting Corporation SOC Ltd and Others (2023) 44 ILJ 185 (LC).
- [5] (2013) 34 ILJ 1120 (LAC).
- [6] Apollo Tyres at 47.
- [7] (2006) 27 ILJ 177 (LC).
- [8] Velinov at para 16.
- [9] At para 47
- [10] (JR864/15)
- [2018] ZALCJHB 311; (2019) 40 ILJ 168 (LC) (2 October 2018).
- [11] Magoshi at para 12.
- [12] Moloko at para 14.
- [13]
- (2008) 29 ILJ 1707 (LAC).
- [14]
- (2018) 39 ILJ 523 (CC).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2024/284.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mkhize-v-rand-water-soc-ltd-and-others-unknown-topic-alcjhb-2024--6a3ea5193b1caa912980f8b0>

Prepared on 14 October 2026 · Esheria