

SOUTH AFRICA / JUDGMENT

Skhosana v Commission for Conciliation, Mediation and Arbitration and Others (JR 2160/15) [2019] ZALCJHB 39 (5 March 2019)

[2019] ZALCJHB 39

COURT

Labour Court Johannesburg

BEFORE

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CASE / FILE NUMBER

JR 2160/15

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

case

no: JR 2160 / 15

In

the matter between:

MANDLA
SKHOSANA
Applicant
And
COMMISSION FOR
CONCILIATION, MEDIATION
AND
ARBITRATION
First
Respondent
NATHALIE
WILLEMSE N.O. (AS ARBITRATOR)
Second Respondent
NATIONAL UNION OF
METALWORKERS OF
SOUTH
AFRICA ('NUMSA')
Third Respondent

Heard:

30 August 2018

Delivered:	05 March 2019
Summary:	CCMA arbitration proceedings – review of proceedings, decisions and awards of arbitrators – test for review –determination of gross irregularities and reasonable outcome Unfair labour practice – policy relating to motor vehicle and fuel allowance – constitutes benefit – benefit regulated by terms of policy Unfair labour practice – fairness determination – proper context must be considered – no separate requirement of procedural fairness – proper enquiry is whether suspension of benefit is objectively justified, and not irrational, arbitrary or mala fide Unfair labour practice – employee failing to comply with conditions of policy – proper objective cause to remove benefit – conduct by employer in removing benefit not unfair Unfair labour practice – even considering issue of opportunity to be heard – employee afforded such opportunity but elected not to participate Review application – no case made out to review award – award by arbitrator constitutes a reasonable outcome – review application consequently dismissed

JUDGMENT

SNYMAN, AJ

Introduction

[1] This application for once concerns the rare occasion where one of most well-known and established trade unions, National Union of

Metalworkers of South Africa (“NUMSA”) is taken to task by one off its own employees. It is certainly a case of the shoe being on the other foot. The question now is whether its conduct passes muster as being fair, considering that a Commission for Conciliation, Mediation and Arbitration (“CCMA”) arbitrator found in favour of NUMSA against the applicant. However,

and not to be outdone, the applicant brought an application to review and set aside the arbitration award of the second respondent, who was the arbitrator at the CCMA (the first respondent) that dealt with the matter. The application has been brought by the applicant in terms of section 145 of the Labour Relations Act[1] ('the LRA').

[2] The dispute at hand, as touched on above, concerned an unfair labour practice relating to a benefit, which benefit was founded in a motor vehicle purchase scheme offered by NUMSA to its employees. The benefit flowing from the scheme is that employees receive a vehicle and fuel allowance so that they can own and operate their own vehicle. But the scheme had conditions attached, which will be elaborated on below. According to NUMSA, the applicant contravened the scheme conditions, resulting in the benefit being suspended, and this gave rise to the unfair labour practice dispute. As touched on above, this dispute ultimately came before the

second respondent for arbitration. The second respondent was called upon to decide whether the removal of the benefit constituted an unfair labour practice.

[3] In an award dated 4 September 2015, the second respondent made a determination to the effect that the suspension of the benefit did not constitute an unfair labour practice, and dismissed the applicant's unfair labour practice dispute. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant.

[4] The applicant's review application was filed on 4 November 2015. Considering that the award was received by the applicant on 22 September 2015, the applicant's review application was thus brought within the 6 (six) weeks' time limit as contemplated by section 145 (1) of the LRA, and is properly before this Court for determination. I will now proceed to decide the review application by first setting out the background facts.

The relevant background

[5] The relevant background facts in this matter are straight forward, and are mostly common cause. I will refer in this judgement to the third respondent as NUMSA. The applicant is employed by NUMSA as a local organizer, having commenced employment with NUMSA on 1 March 2009.

[6] During the course of 2011, it became apparent to NUMSA that some of its employees were unable to purchase their own vehicles, because they would not qualify to do so, applying the ordinary credit regulatory requirements. To enable employees to purchase their own vehicles, a vehicle scheme was created. In terms of this vehicle scheme, NUMSA agreed with a related organization, being NUMSA Financial Services ('NFS'),[2] that it would purchase vehicles, which would in turn be financed by ABSA, and these vehicles would then be allocated to qualifying employees with the view to those employees then becoming owners of these vehicles and using the vehicles to execute their ordinary duties with NUMSA.

- [7] The vehicle scheme had a number of different scenarios, and conditions attached to its application. I will however confine myself to only setting out those provisions which is relevant to the case at hand. As will be dealt with further below, the applicant was allocated what was defined as a 'new' vehicle in the vehicle scheme, and the provisions applicable to this will next be set out.
- [8] Firstly, the only employees who would qualify for vehicles under the vehicle scheme would be local organizers who were in possession of a valid drivers' licence. It was undisputed that the applicant met these requirements. Once it was determined that an employee qualified, that employee would then be allocated a vehicle. The vehicle had to be of a certain specification. It is the actual allocation of the vehicle to the employee that would trigger the implementation of the vehicle allowance and fuel allowance. These allowances would then in effect be attributed towards this vehicle.
- [9] What is important to consider is that the registered owner of the vehicle would be NFS, who was obliged to honour the finance obligations to ABSA. The vehicle was financed over five years. In the fifth year, the employee could either take so-called 'full ownership' of the vehicle by paying the final balloon instalment, or the employee could return the vehicle to NFS at the end of four years.
- [10] In simple terms, the allocation of the vehicle triggered the vehicle allowance, and in turn the payment of the vehicle allowance would trigger the payment of the fuel allowance. There was no vehicle allowance or fuel allowance without an allocated vehicle.
- [11] The issue of the allocation of a vehicle and regulation of the allowances were contained in NUMSA's general staff conditions of employment adopted on 26 April 2011, as read with an earlier vehicle policy dating back to 1999 (referred to in this judgment as 'the policy'). In terms of the policy, it is inter alia specifically provided that if an employee fails to utilize the vehicle as a result of problems with the vehicle, the allowances paid to the employee will lapse after 30 days, if the vehicle is not returned to service in that period. There is also a duty placed on the employee to report any problems with the vehicle to NUMSA.
- [12] Turning then to the specific facts relating to the applicant, he was allocated a Chevrolet Cruze vehicle on 29 November 2011 (hereinafter referred to as 'the vehicle'). Along with being allocated the vehicle, the applicant was also allocated a vehicle allowance and the accompanying fuel allowance. In 2015, when the dispute in this matter arose, this vehicle allowance of the applicant stood at R4 500.00 per month, and the fuel allowance at R3 000.00 per month.

- [13] In November 2014, the vehicle fell into a state of disrepair, to the extent that the applicant was unable to use it. The vehicle was parked in the applicant's garage, whilst he was securing the necessary funds to procure parts to repair it. In the meantime, he used other vehicles. The difficulty was however that he never informed NUMSA of any of this. NUMSA continued to pay the vehicle and fuel allowance, despite the applicant not using the vehicle as required by the policy.
- [14] This entire state of affairs came to the fore in 2015, when the regional secretary, Jerry Marulane ('Marulane'), noticed that the applicant was driving another vehicle, and not the vehicle allocated to him. He was concerned about this, as nothing about the vehicle or the use of another vehicle had been reported to him, and this was in breach of the policy. He then issued the applicant with an instruction letter on 12 March 2015, calling upon the applicant to produce the vehicle for inspection on 16 March 2015. Marulane stated that he was also aware that the applicant had recently applied for a loan for vehicle repairs, and this made him even more concerned about the vehicle, which was still the property of the third respondent, and there are conditions attached to it in respect of insurance, warranties and a service plan.
- [15] The applicant failed to produce the vehicle for inspection on 16 March 2015, and failed to inform Marulane of the state of the vehicle. The applicant in effect decided not to comply. Marulane emphasized that the duty was squarely on the applicant to report any problems with the vehicle, and added that a failure to comply with the policy meant that the payment of the allowances would be suspended.
- [16] Marulane also explained that an employee cannot simply use another vehicle. He said that should any employee wish to utilize another vehicle, this must be reported to NUMSA, the vehicle must be inspected and approved, and there were forms that had to be completed in this regard. NUMSA also had to satisfy itself about the ownership of the vehicle and whether it qualifies as a vehicle that would attract the payment of allowances under the policy. Simply put, this alternative vehicle may not qualify for the payment of allowances under the policy, and NUMSA needs to be satisfied of, and approve this.
- [17] On 29 March 2015, and because of the lack of any effort on the part of the applicant to present the vehicle or inspection or to comply with what is required where it comes to the use of other vehicles, Marulane notified the HR department to suspend the allowances of the applicant relating to the vehicle. It was common cause that the applicant was in fact not using the vehicle at this time, in any event. Marulane added that there were two other employees with the same difficulty as well, and their allowances were also suspended. The vehicle and fuel allowances of the applicant were then suspended as from the end of March 2015.

- [18] The applicant only ultimately presented the vehicle for inspection on 24 August 2015. He indicated that he was using it. Marulane inspected it, and even though it was in an appalling condition as far as Marulane was concerned, it was running and useable, and as such, he notified the HR department to reinstate the applicant's vehicle and fuel allowances, which were then done as from the end of August 2015.
- [19] The applicant took issue with the suspension of his vehicle and fuel allowances for the period April to August 2015. According to the applicant, there was no provision in the policy or the vehicle scheme that allowed NUMSA to suspend payment of the allowances. He complained further that these allowances were taken away without NUMSA applying any kind of fair process. The applicant then, as stated above, pursued the suspension of these allowances for the aforementioned period as an unfair labour practice dispute relating to benefits, to the CCMA. The applicant sought consequential relief that he be paid the suspended allowances for this period.
- [20] In her award, the second respondent accepted that the payment of the allowances constituted a benefit as contemplated by the unfair labour practice jurisdiction. She however further held that in order to qualify for the benefit, the employees had to meet the conditions associated with the same vehicle scheme, and the policy.
- [21] The second respondent considered the basis of the applicant's unfair labour practice challenge as it was presented to her. She identified that his issues were, firstly, a contention that he was entitled to the allowances as part of his remuneration, and there was nothing prohibiting him from using another vehicle. She found that the applicant however never challenged the policy relating to the allowances, and the conditions attached to it. The second respondent also identified the second part of the applicant's complaint, being that there was a complete lack of any fair procedure applied when NUMSA decided to suspend the allowances.
- [22] The second respondent proceeded to consider all the terms of the applicable policy, and found that the applicant had the duty to report to NUMSA should he not be able to use his allocated vehicle or if there were problems associated with the vehicle. The second respondent accepted the contention of the applicant that there was no policy that prohibited the use of another vehicle, but she accepted that there was indeed a policy that required the applicant to report the use of another vehicle to the third respondent and that this had to be approved in line with the policy.
- [23] The second respondent concluded that the allowances were paid to the applicant as part of the vehicle scheme, and as such, he was obliged to adhere to the conditions attached thereto. This included that he had to use the vehicle, and report to NUMSA if there were problems with the vehicle. This duty also included that he had to present the vehicle for inspection when called upon to do so. The second respondent considered the rationale for these requirements under the policy, and accepted there was proper reason for it.

- [24] According to the second respondent, it was undisputed that the applicant was indeed instructed to produce the vehicle for inspection but did not do so, and that he had full knowledge of the problems with the vehicle and was using other vehicles, which he was obliged to report to NUMSA but never did. She concluded that the applicant thus did not comply with the conditions relating to the payment of the allowances in terms of the policy, and as such, NUMSA was entitled to suspend the payment of the vehicle and fuel allowances to the applicant.
- [25] Finally, and as to the applicant's procedural complaints, the second respondent held that the applicant had the opportunity to make full disclosure to NUMSA and provide an explanation to it, when called upon to produce the vehicle for inspection. The second respondent concluded that the applicant declined to avail himself of this opportunity and as such, there was nothing unfair in the decision of NUMSA to suspend the payment of the allowances.
- [26] The second respondent then dismissed the applicant's unfair labour practice claim. Dissatisfied with this outcome, the applicant then sought to challenge this determination of the second respondent on review to this Court, being the current matter now before me. The question to now answer is whether the above findings of the second respondent are reviewable, which I will next turn to, by first setting out the test for review.

Test for review

- [27] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,^[3] the Court held that 'the reasonableness standard should now suffuse s 145 of the LRA', and that the threshold test for the reasonableness of an award was: '... Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'^[4]. In *Herholdt v Nedbank Ltd and Another*^[5] the Court said:

'... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'^[6]

- [28] What this means is a two stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

[29] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[7] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.[8]

[30] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent.

Grounds of review

[31] Next, and in order to properly decide a review application, it is also important to identify the grounds of review upon which the

application is founded. These grounds must be properly set out and identified in the founding affidavit. As was said in *Northam Platinum Ltd v Fganyago NO and Others*[9]:

'... The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the

reasonableness or otherwise of the commissioner's award in his or her founding affidavit'

[32] However, and in the case of review applications, these grounds of review may be supplemented, after the filing of the record, by way of a supplementary affidavit.[10] The applicant indeed filed a supplementary affidavit, but this supplementary affidavit, as I will discuss below, did little to

supplement the actual grounds of review raised by the applicant.

[33] From the founding affidavit and the supplementary affidavit, it appears that the main thrust of the applicant's case is aimed at the issue of what he calls the lack of procedural fairness. There are multiple individual grounds of review raised, but all of these grounds, in a nutshell, constitutes a contention by the applicant that the second respondent failed to properly consider the evidence and the relevant legal principles where it came to the procedural fairness of the matter, and in particular, the failure to have afforded the applicant an opportunity to state his case and complying with *audi alteram partem*, prior to NUMSA deciding to suspend his allowances. The supplementary affidavit also merely embellishes this basic ground of review by way of making specific references to the transcript of the arbitration.

[34] Other than a vague and general challenge that the second respondent failed to consider pertinent evidence and provisions of law, there is no proper review grounds made out where it comes to the substantive findings of the second respondent that the policy existed, what the policy provided for in the form of conditions relating to the payment of the allowances, and that the policy contemplated the suspension of the allowances in appropriate circumstances if these conditions are not met. It must follow that

the findings of the second respondent to the effect that the applicant did not comply with the conditions as stipulated by the

policy and that as a result his allowances were suspended, stand as unchallenged.

Analysis

[35] First things first. The allowances paid to the applicant by NUMSA as part of the vehicle scheme undoubtedly constituted a benefit as contemplated by the unfair labour practice jurisdiction under the LRA. As held in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[11]:

‘In my view, the better approach would be to interpret the term “benefit” to include a right or entitlement to which the employee is entitled (ex contractu or ex lege including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer’s discretion. In my judgment “benefit” in s 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer’s discretion.’

[36] As stated, the applicant’s review challenge in this case is what can be described as a procedural one. It is all about NUMSA failing to comply with *audi alteram partem* prior to deciding to suspend the allowances of the applicant. This being said, I have difficulty with the applicant’s approach on review. In my view, in the case of an unfair labour practice dispute relating to benefits, it is often difficult to draw a clear

distinction between what is the substantive justification for the conduct of an employer, and what can be seen to be procedurally fair in the course of such conduct. In the end, it is in my view a single holistic enquiry, with the view to deciding whether the decision taken by the employer was fair. It is not appropriate to separate it into substantive and procedural components. There is no distinct and separate requirement of procedural fairness, in unfair labour practice disputes relating to benefits, as would be, for example, the case where it comes to dismissals.[12] The unfair labour practice doctrine is intended to protect against irrational, *mala fide* and arbitrary decision making by an employer, and any decision by an employer must be evaluated on that basis, and not the basis of the dual fairness requirement of substantive fairness on the one hand, and procedural fairness on the other. This is evident from the following dictum of Skweyiya J in *Chirwa v Transnet Ltd and Others*[13]:

‘The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the audi alteram partem principle and the rule against bias. If the process does not, the employee will be able to challenge her or his dismissal, and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices.’ (emphasis added)

[37] Accordingly, it is not appropriate for the applicant to attack the decision by NUMSA to suspend his allowances, under the unfair labour practice jurisdiction, by in essence only relying on a failure of audi alteram partem. I accept that in certain cases, the failure of audi alteram partem can contribute to a finding of irrationality or arbitrariness.[14] But in the end, it is always about whether the decision is substantively justified and fair, holistically considered, and not about audi alteram partem as a distinct and separate component of fairness.

[38] In *Solidarity obo Oelofse v Armscor (SOC) Ltd and Others*[15] the Court dealt with the decision by an employer not to pay an employee a performance bonus in terms of a remuneration policy. The Court held as follows:[16]

‘With the performance bonus in casu thus being a benefit, and the discretion to be exercised by the first respondent in awarding or not awarding such a benefit being subject to scrutiny based on what would be considered to be fair, the next most obvious question to answer is under what circumstances the exercise of the discretion could indeed be seen to be unfair. The Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, in dealing with the challenge of discretions in general, decided that a discretion would be open to successful challenge if the discretion was not judicially exercised and in particular:

‘... 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’

In *Apollo Tyres* the Court applied these general principles applicable to the challenge of the exercise of discretion on the basis of being unfair,

as follows:

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

The Court in *Oelofse* then applied these same considerations to the decision made or discretion exercised by an employer in the context of the benefits

provision of the unfair labour practice.[17]

[39] It follows that any determination about whether the decision by NUMSA to suspend the applicant's allowances was unfair, entails

considering whether the decision is objectively justified, accounts for all the relevant facts, and is not irrational, arbitrary,

capricious or mala fide.[18] What I will do, and in order to do the applicant justice even though he did not actually make out such a case on review, is to consider whether NUMSA's decision passes muster based on these principles, and not just based on the singular alleged failure of audi alteram partem, which may or may not be part of this holistic enquiry.

[40] The starting point in deciding the issue as aforesaid is considering objective justification. It is clear from the evidence that the benefit, in the form of the allowances in casu, indeed had specific conditions attached to the payment of it. In short, these conditions were that the applicant was required to use the vehicle allocated to him, on a day to day basis, and if he did not do so, the payment of the allowances could be suspended. If he wanted to use another vehicle, this had to be disclosed to, and then approved by, NUMSA. It was undisputed that the applicant did not comply with these conditions. In addition, the applicable rules placed the onus squarely on the applicant to report to NUMSA if there was any problem with the vehicle, which the applicant also never did. It was undisputed that there was a proper operational rationale for all these provisions.

[41] It is clear from her award that the second respondent was alive to all of these provisions in the policy and the vehicle scheme, and this played a central role in her arriving at the conclusion that she did. In this respect, she cannot be faulted. As discussed above, it was essential for the second respondent to have enquired into, and then determine, the issue of objective justification. This she correctly did.

[42] In then deciding to suspend payment of the allowances to the applicant, NUMSA based this squarely on the provisions of the vehicle scheme and the policy, which in effect provides that if the vehicle is not returned to service in 30 days, the allowances could be suspended. This clearly, in my view, constitutes a proper substantive basis justifying the making of such a decision. In casu, the vehicle was unusable, had not returned to service (so to speak) when it was decided to suspend the allowances, and it was not presented for inspection when demanded. If the applicant was using the vehicle allocated to him, and had not parked it in his garage whilst using other vehicles, the problem would never have arisen. This was said in so many words by Marulane. There can be no doubt that the decision by NUMSA was objectively justified and relevant to the purpose behind the decision.

[43] Yet again, the second respondent properly appreciated and considered the above circumstances. She accepted that there was proper cause for the policy to be applied and the allowance to be suspended. On the facts, this determination is unassailable.

[44] The judgment in *City of Cape Town v SA Local Government Bargaining Council and Others*[19] contains many similarities to the matter now before me. In that case, the employer also had a fuel allowance scheme, and one of the qualifying requirements for receiving the allowance was that the employee had to submit daily log sheets.[20] The employee then failed to submit the log sheets for several months, and his allowance was stopped, as a result of which the employee

pursued an unfair labour practice dispute relating to benefits. The Court concluded as follows:
[21]

‘When Esau stopped submitting log sheets to the city, he stopped being entitled to the benefit. It was not unfair of the city to stop payments in those circumstances.’

Also applicable, and as said in *Oelofse*: [22]

‘... it would not be unfair if the existence of an objective fact forms the basis of the exercise of the discretion, provided of course it is relevant to the purpose for which the discretion is exercised.’

[45] Next, the applicant’s contention in the arbitration that there was nothing in the policy that substantiated the suspension of the allowances was found by the second respondent to be without merit. I am compelled to agree with her. Holistically considered, the allowances are inextricably linked to the allocation of a vehicle in terms of the vehicle scheme. The allowances are not some or other loose standing or separate benefit. It follows that the employee must use the vehicle allocated to him or her, and is paid the allowances as a result. By not using the vehicle, the allowances must cease along with it. Once the vehicle is used again, the allowances resume. The use of the vehicle is, in short, the *quid pro quo* for the payment of the allowances. After some reluctance, the applicant ultimately conceded under cross examination that in order

to get the benefits in the form of allowances, he must meet the conditions attached to those benefits. It must also be considered

that when the conditions were then met in August 2015, when the vehicle was returned to service, the payment of the allowances to the applicant resumed.

[46] But even if NUMSA erred in the manner in which it interpreted and applied the policy, and the second respondent, in accepting that case similarly erred, that still does not render the decision to suspend the allowances to be arbitrary or irrational or *mala fide*. [23] The fact is that on the evidence, this exact same approach was applied across the board so to speak, to all employees. There were

even two others employees who similarly had their allowances suspended along with the applicant, and for the same cause.

[47] A further aspect of the applicant’s case at arbitration was that there was nothing standing in his way of using other vehicles for union affairs and still receiving the allowances. The second respondent, as said, dealt with this. She accepted there was nothing in the policy

prohibiting the use of another vehicle, but held that this was not the issue. The issue was that the applicant needed to report the use of another vehicle and NUMSA had to approve it. Considering the evidence, this finding is not only reasonable, but actually correct. What is clear is that if an employee wants to use another vehicle, this must first be reported to, and then approved by, NUMSA. In the absence of the applicant doing this, there is simply no basis upon which he could insist on the retention of the allowances in terms of the policy, whilst using another vehicle.

- [48] The applicant sought to rely on a provision in the policy that if a vehicle cannot be fixed in 30 days, assistance would be given to the employee to obtain an alternative vehicle. This reliance is however misplaced. As specifically explained by Marulane, this only applied to a vehicle that had been written off, and even then, there was an obligation to immediately notify NUMSA of this. As said above, the applicant's vehicle was not written off, and he never reported problems to NUMSA. I am thus satisfied that this provision in the policy equally does not assist the applicant.
- [49] Therefore, and substantively, NUMSA had proper objective cause and reasons to suspend the payment of the allowances to the applicant, which was conduct contemplated by the policy. There is nothing unfair in the decision taken to do so, and any discretion that may have been exercised by NUMSA in this regard.
- [50] As to the issue of *audi alteram partem*, it is indeed true that the applicant was not given specific prior notification of the intention by NUMSA to suspend his allowances, followed by some sort of hearing in which he was given an opportunity to make representations about this. However, and as I have said above, this does not equate to unfairness *per se*. The real question is whether the absence of this would be of sufficient magnitude to render the decision taken to suspend the allowances to be irrational or arbitrary, or constitute a failure to account to for all the relevant facts. The answer is simply that it is not so, for the reasons I have already provided. Further, there is simply no legal prescription of the right to a hearing when exercising a discretion with regard to a benefit under the unfair labour practice jurisdiction. All considered, what the unfair labour practice jurisdiction seeks to avoid is unilateral arbitrary conduct by the employer.
- [51] There is nothing arbitrary in what NUMSA did. And further, its decision is far from simply being unilateral. When Marulane became concerned about the applicant not using his vehicle, he gave the applicant notice to produce the vehicle for inspection. It must have been patently apparent to the applicant why this instruction was given to him, which he in any event never disputed. When given this notification, he had the opportunity to engage with NUMSA about the vehicle. Only when he did not respond, at all, or comply with the instruction, was the allowances suspended,
- [52] In *casu*, the second respondent properly and correctly appreciated that the applicant had the opportunity to engage NUMSA about the vehicle, and with it, the allowances. She accepted that this opportunity came when the applicant was instructed to produce the

vehicle for inspection, but he then, without any reason, never conveyed any problems with regard to the vehicle to NUMSA, nor did he present the vehicle for inspection. He thus spurned the opportunity he had to either convince NUMSA that he complied with the policy, or that NUMSA should consider an explanation as to why the allowances should not be suspended, and thus cannot be seen to complain about a lack of an opportunity to make representations.[24] The reasoning of the second respondent is sound, and certainly reasonable, and as such unassailable on review. I must confess that I believe that the applicant deliberately did not engage, as he knew he stood to forfeit the allowances if the vehicle was found to be unserviceable.

[53] One also cannot ignore, as the second respondent once again correctly appreciated, that there was a duty on the applicant to keep NUMSA apprised of any problems with the vehicle. If he simply did that, there could have been a discussion about it, and perhaps some plan could be made or an indulgence afforded to the applicant. If there was any unilateral action in this case, it was perpetrated by the applicant, who decided not to comply with the duty that squarely rested on him to properly report to NUMSA about the vehicle. In such circumstances, he can only have himself to blame if NUMSA then decided to suspend the payment of the allowances. After all, the concept of fairness is a two way street, considering the following dictum in *Oelofse*: [25]

‘... The concept of fairness is not one sided, but a two-way street, and must involve considerations of fairness to both the employer and the employee. ...’

[54] Insofar as the second respondent’s decision in this matter may be founded on her preferring the testimony of Marulane for NUMSA, there is no room for me to interfere with that approach. In any event, this Court should be loathe to interfere with credibility findings by arbitrators.[26] What I can also say is after having read the transcript in this matter, the testimony of the applicant was entirely unsatisfactory. He was prone to giving long speeches which had nothing to do with the matter at hand. Under cross examination, he was argumentative and often would not answer direct questions put to him. He in fact had to be taken to task by the second respondent in the course of cross examination, for disrespectful conduct. He also declined to make concessions where this was certainly called for. Overall, he was an argumentative and obstructive witness, who was simply not credible.

[55] In the end, the case of the applicant was not much more than a disagreement with NUMSA about the reason and manner in which it chose

to apply the policy, and then decided to suspend the applicant’s allowances. But a mere disagreement falls far short of establishing

an unfair labour practice. As held in *Oelofse*: [27]

‘Whilst it may be so that applicants disagreed with the manner in which the first respondent chose to exercise its discretion, such disagreement simply cannot substantiate a case for interfering with the discretion. It takes a lot more than disagreement to upset the exercise of a discretion. In Eskom Holdings SOC Ltd v National Union of Mineworkers obo Kyaya and Others the Court held, in comparable circumstances, when dealing with an unfair labour practice dispute:

‘It is difficult to understand, in the above context, now it can be said that the applicant acted unfairly towards the individual

respondents. The fact that the individual respondents may disagree with the grading attached to their positions because of the nature of the work and the duties they fulfilled simply does not matter. There was no evidence by the individual respondents or even any case that the grading of T10 attached to their positions was improperly arrived at, wrong, or for example in breach of the applicant’s policies. ...’

[56] I therefore conclude that the applicant has failed to make out a proper case to set aside the determination by the second respondent that NUMSA did not commit an unfair labour practice in suspending the applicant’s vehicle and fuel allowances. The second respondent in my view appreciated the real issues she needed to decide, properly evaluated the evidence, and came to a conclusion that not only resorted well within the bands of a reasonable outcome, but was actually correct. The award of the second respondent must thus be upheld on review.

Conclusion

[57] Therefore, and based on all the reasons set out above, it is my view that the applicant’s review application must fail. I am not convinced that the second respondent even erred, let alone came to a conclusion that was unreasonable as contemplated by the review test summarized above. The applicant simply failed to make out a proper case to justify interference with the decision by NUMSA to suspend payment of his allowances, on the basis of this decision being unfair. The finding by the second respondent that NUMSA did not commit any unfair labour practice in deciding to suspend payment of the applicant’s vehicle and fuel allowances is a determination that a reasonable decision maker could come to, based on the facts in this matter and the applicable legal principles. It is not open to be interfered with on review, and the applicant’s review application must be dismissed.

Costs

[58] This then only leaves the issue of costs. In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was unsuccessful, I do not intend to burden him with a costs order. There still exists an employment relationship between the parties, which would only be further prejudiced by a costs order. The third respondent also did not press the issue of costs when the matter was argued before me. I am also mindful of the dictum of the Constitutional

Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[28] where it comes to the issue of costs in employment disputes. I accordingly exercise my discretion as to costs in this matter by making no order as to costs.

[59] In the premises, I make the following order:

Order

1. The applicant's review application is dismissed;
2. There is no order as to costs.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr N Mkhize of Mkhize Attorneys

For the Third Respondent: Mr V Shezi – NUMSA Official

[1] Act 66 of 1995, as amended.

[2] NFS was owned by NUMSA Investment Company.

[3] (2007) 28 ILJ 2405 (CC).

[4] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 96.

[5] (2013) 34 ILJ 2795 (SCA) at para 25.

[6] See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others*

(2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate*

(2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*

(2015) 36 ILJ 2038 (LAC) at para 16

[7] *Fidelity Cash Management* (supra) at para 102.

- [8] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.
- [9] (2010) 31 ILJ 713 (LC) at para 27.
- [10] See Rule 7A(8) of the Labour Court Rules; *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Songoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.
- [11] (2013) 34 ILJ 1120 (LAC) at para 50. See also *Mawethu Civils (Pty) Ltd and Another v National Union of Mineworkers and Others* (2016) 37 ILJ 1851 (LAC) at para 20.
- [12] See section 188(1) of the LRA.
- [13] (2008) 29 ILJ 73 (CC) at para 42.
- [14] See for example *Johannesburg Water (SOC) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2018) 39 ILJ 845 (LC) at paras 14 and 19, where the court held that the decision of the employer relating to the payment of allowances was ‘patently arbitrary, capricious and inconsistent with the remuneration policy’, with the Court accepting that one of the factors leading to the conclusion being that the employees was presented with a *fait accompli*. In the end however, the Court in *Johannesburg Water* still considered the actual provisions and conditions of the remuneration policy, as a whole.
- [15] (JR2004/15)
- [2018] ZALCJHB 87 (21 February 2018).
- [16] *Id* at paras 30 – 31.
- [17] See para 33 of the judgment.
- [18] See also *Ncane v Lyster NO and Others* (2017) 38 ILJ 907 (LAC) at para 25.
- [19] (2014) 35 ILJ 163 (LC).
- [20] See paras 5 – 6 of the judgment.
- [21] *Id* at para 27.
- [22] (*supra*) at para 35.
- [23] Compare *Oelofse* (*supra*) at para 34.
- [24] Compare *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Metrofile (Pty) Ltd*

(2004) 25 ILJ 231 (LAC) at para 55, where the Court held, in the context of disciplinary proceedings, that an employee who refuses to attend the enquiry must be prepared to accept the consequences thereof, one of which is that the enquiry will proceed in his absence and adverse findings may be made.

[25] (supra) at para 36

[26] See *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 485 (LC) at para 18; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 31.

[27] *Id* at para 39.

[28] (2018) 39 ILJ 523 (CC) at para 25.

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