REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 546/12

In the matter between:

SOUTH AFRICAN REVENUE SERVICES	**Applicant**
and	
PINKY ASANDA NTSHINTSHI	**First Respondent**
DANIEL DU PLESSIS, N.O.	**Second Respondent**
CCMA	**Third Respondent**

Heard: **30 May 2013**

Delivered: **7 June 2013**

Summary: Question whether travel allowance a "benefit" in terms of LRA section 186(2)(a) considered. *Apollo Tyres* followed. Failure to pay benefit to employee *in casu* unfair. Award reasonable and review application dismissed. Condonation – rule 7A(9).

JUDGMENT

STEENKAMP J

Introduction

[1] Is a travel allowance a "benefit" as contemplated in s 186(2)(a) of the Labour Relations Act[1]? And if so, was the employee (the first respondent) entitled to that benefit in this case?

[2] The arbitrator (the second respondent) found in an unfair labour practice arbitration under the auspices of the CCMA (the third respondent) that it was a benefit and that the employee was entitled to it. The applicant, SARS, wishes to have that award reviewed and set aside. It argues that the travel allowance was not a benefit and that, therefore, the CCMA did not have jurisdiction. In the alternative, it argues that the employee *in casu* did not qualify for the benefit.

[3] The employee seeks condonation for the late filing of her answering affidavit. Since that question will impact on the extent of the evidence and argument before the court, I shall deal with that application first.

Condonation

[4] The arbitration award was handed down a year ago, on 28 May 2012. SARS delivered its application for review on 6 July 2012 and its supplementary affidavit in terms of rule 7A(8) on 28 September 2012. The employee's answering affidavit had to be delivered by 12 October 2012 in terms of rule 7A(9). Although her attorney of record, Vernon Seymour, belatedly delivered a "notice of opposition"[2] on 22 November 2012, the employee did not deliver an answering affidavit.

[5] The review application was therefore placed on the unopposed roll before this court on 31 January 2013. On that day, Seymour attorneys instructed counsel[3] to appear in court on its behalf. Mr Seymour was not in attendance. His counsel handed up an answering affidavit at court. It

[1] Act 66 of 1995 (the LRA).

[2] Rule 7A does not provide for such a pleading. Rule 7A(9) requires an answering affidavit to be filed within 10 days after the applicant had delivered a supplementary affidavit or a notice on terms of rule 7A(8).

[3] Mr D Traub and not Mr *Leslie*, who appeared on 30 May 2013.

transpired that he had served a copy of the answering affidavit on SARS's attorneys the previous day without filing it.[4]

[6] Having heard argument from the employee's counsel, the court granted the following order on 31 January 2013:

> The matter is removed from the unopposed roll by agreement and placed on the opposed roll.
>
> The first respondent's attorney is ordered to pay the wasted costs for today *de bonis propriis* on the attorney and client scale.

[7] SARS delivered a replying affidavit and this application was placed on the opposed motion roll for hearing on 30 May 2013. On that day, the employee's counsel handed up a further supplementary affidavit by Seymour.

[8] The employee applied for condonation in her answering affidavit. She also attached a "supporting affidavit" by a shop steward of NEHAWU, Nkululo Ngaleka. Nehawu is not a party to these proceedings.

[9] I shall consider the application for condonation at the hand of the well-known principles set out in *Melane v Santam Insurance Co Ltd*.[5]

Extent of delay

[10] The answering affidavit was delivered almost four months late. The delay is clearly excessive, given that it should have been delivered within 10 days after SARS had filed its supplementary affidavit in terms of rule 7A (8).

Reasons for delay

[11] The employee blames her trade union and her attorney for the extensive delay. She says that, after the arbitration proceedings in May 2012, she requested Ngaleka (the NEHAWU shop steward) "to please ensure that the ruling of the Commissioner must be enforced since I had a feeling they

[4] "Deliver" means serve on other parties and file with the registrar, as defined in the rules of the Labour Court.

[5] 1962 (4) SA 531 (A).

were going to comply" [*sic*]. In the weeks that followed in June and July 2012, she called Ngaleka several times. He assured her that she should not worry.

[12] Ngaleka confirms that he was aware of the review application by 20 July 2012 at the latest. Although he purports to have written to the employee's attorneys, Cliffe Dekker Hofmeyr, on that date, he did not attach a copy of that letter as alleged in his affidavit. Nevertheless, he did not take steps to assist the employee in delivering an answering affidavit, other than to ask the union to instruct attorneys. He only delivered his own "supporting affidavit" on 30 January 2013, the day before the review application was to be heard on the unopposed roll.

[13] Ngaleka contradicts himself under oath when he says that he received a letter dated 5 November 2012 from Cliffe Dekker Hofmeyr in which they advised him that they had filed an application for review; and that "this was a surprise to me as I had expected them to serve those papers on NEHAWU". He also alleges that "it was the first time I became aware that the application had been filed." That contradicts his earlier statement that, shortly after the arbitration award had been delivered – and before his letter of 20 July 2012 – "the applicant informed us that they have decided to take the matter on review to the Labour Court". Cliffe Dekker Hofmeyr also told Ngaleka by way of a letter on 3 October 2012 that it had served the review papers on the employee. Ngaleka alleges that the NEHAWU head office granted approval to oppose the review application on behalf of the employee "sometime in November". NEHAWU then appointed Vernon Seymour as the employee's attorney in mid-November 2012.

[14] Seymour delivered a "notice of opposition" on 22 November 2012 referring to affidavits by the employee and Ngaleka. He did not attach such affidavits.

[15] The employee signed her answering affidavit on 4 December 2012. She does not explain why she only delivered it on 31 January 2013, the day on which the application was due to be heard on an unopposed basis. Neither does Ngaleka, other than to say:

> "I was very worried about the December period as I know from experience that it is a difficult time of the year given in of year pressures and the pending holiday period."

[16] That is, of course, a wholly unsatisfactory explanation. This court has pointed out many times that holidays constitute no excuse for non-compliance with court rules. There are no *dies non* during December and January in the Labour Court. And Lagrange J has previously had occasion to remind the same trade union, NEHAWU, that it has had more than 15 years to familiarise itself with the rules of the Labour Court and to act timeously in the interests of its members.[6]

[17] Seymour's explanation for his own dilatoriness and lack of support to his client is even more unsatisfactory. In a supplementary affidavit belatedly handed up to court on the day of this hearing, he confirms that he was requested by NEHAWU to "assist" (and presumably to represent) the employee as long ago as 21 November 2012. He then explains his own inaction as follows:

17.1 He had "an obligation" for the period "December/January" at the African Nations Cup football tournament in Johannesburg and Port Elizabeth.

17.2 He requested a paralegal, Mr Quinton D'Oliveira, to arrange a consultation with the employee on 4December 2012. Seymour attended that consultation. Seymour then "identified a need" for Ngaleka to depose to a supporting affidavit. He instructed the paralegal to prepare the affidavits for the employee and for Ngaleka. The paralegal did not do it.

17.3 Seymour closed his offices from 19 December 2012 until 15 January 2013 without paying any further attention to the matter. This was despite the fact that, on 6 December 2012, he had received a copy of the set-down notice from this court setting the matter down for hearing on the unopposed roll on 31 January 2013.

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[6] *Nehawu v Vanderbijlpark Society for the Aged* [2011] 7 BLLR 690 (LC); (2011) 32 *ILJ* 1959 (LC) para [9].

17.4 From 8 January 2013 Seymour attended the soccer tournament in Port Elizabeth rather than attending to his duties as an attorney. He received a copy of Adv *Ackermann*'s heads of argument for SARS on 27 January 2013. He claims that it was only then that he "discovered that the answering affidavits were never filed". He returned to Cape Town and arranged a consultation with Ngaleka on 30 January 2013. He did not attend at court on 31 January 2013, but left for Port Elizabeth instead. He left it to his paralegal – on whom he blamed the failure to deliver the answering affidavits – and his then counsel to attend at court and ask for a postponement.

[18] Seymour's actions – or rather his inaction -- border on the unethical. He failed to provide a service to his client, instead leaving it to a paralegal – who proved to be incompetent – to draft and deliver affidavits on behalf of his client. Instead of attending to his client's needs – for which he was being paid by her trade union – he attended a soccer tournament. That is simply inexcusable. And what is more, Seymour falsely claims that the answering affidavits were served and filed on 29 January 2013. In fact, Ngaleka only signed his affidavit on 30 January 2013; and both his and the employee's affidavits were only filed on 31 January 2013, the day of the hearing that was set down on the unopposed roll.

[19] This court has held on numerous occasions that there is a limit beyond which a litigant cannot escape the dilatoriness of her chosen representatives.[7] Mr *Leslie*, who stepped into the breach at a late stage to represent the employee competently for the first time, argued strenuously that the employee in this case should not be non-suited because of the negligence of her trade union representative and her attorney. I debated with him whether her representatives should, in that case, be ordered to pay the costs related to the condonation application on a *de bonis propriis* basis. He agreed to leave that question in the hands of the court.

[7] *Saloojee v Minister of Community Development* 1965 (2) SA 135 (A) 141B-H; *Silplat v CCMA* [2011] 8 BLLR 798 (LC).

Prejudice

[20] Despite the excessive delay and the poor explanation therefor, Mr *Leslie* also argued that the employee should not be prejudiced by the negligence of her representatives. He argued that, on the other hand, any prejudice to SARS could be rectified by an appropriate costs order. I agree.

Prospects of success

[21] As will become apparent in the discussion on the merits, the employee has good prospects of success. I therefore decided to grant condonation for the late filing of the answering affidavit and to allow Mr *Leslie* to argue the merits fully, despite the excessive delay and the poor explanation therefor.

Costs in the condonation application

[22] Given the negligence of the employee's representatives, despite her efforts to ascertain that they were dealing with the review application, she should not be ordered to pay the costs related to the condonation application. On the other hand, even though I have, in the interest of justice, decided to grant condonation for the late filing of her answering affidavit, the negligence of her representatives calls for an appropriate costs order.

[23] Ngaleka falsely stated that he first became aware of the review application on 5 November 2012. He knew about the application on 20 July 2012 and on 3 October 2012. The trade union did not take the necessary steps to assist its member.

[24] Seymour's inaction is negligent, if not reckless. Despite having been instructed and paid by NEHAWU, he did not fulfil his duty as the employee's attorney. He should pay the costs of the condonation application out of his own pocket. I would have ordered him to do so together with the trade union, but the union is not a party to the application.

[25] I consider it just and equitable for Seymour to pay the costs of the condonation application *de bonis propriis*. I refrain from making a costs order against NEHAWU only because it is not a party to the application.

[26] I now turn to the merits.

Background facts

[27] The employee has been a team member of SARS's Estates Auditing Department in Cape Town for the past five years, since May 2008.

[28] SARS entered into a collective agreement with two trade unions (PSA and NEHAWU) in June 2006. The agreement provides for a travel allowance for field workers. Field workers are deemed to be employees who are involved in or are responsible for examining, investigating, auditing and collecting taxes at the premises of taxpayers. A fieldworker is further defined as an employee who spends "50% plus 1 % in the field with others other than SARS employees, for example clients/taxpayers." The term "in the field" is deemed to include time spent by fieldworkers in the office to support or finalise fieldwork and to organise, manage and control field workers.

[29] The purpose of the travel allowance is to ensure that employees are not out of pocket when they use their own vehicle for business travel purposes. SARS makes available pool cars for business-related travel; alternatively, employees may elect to use their private cars in the execution of fieldwork or audits.

[30] The employee applied for a travel allowance in 2009. The application was refused. She referred a dispute to the CCMA (the third respondent) claiming an unfair labour practice in terms of section 186 of the LRA.

The arbitration award

[31] The arbitrator (the second respondent) found, firstly, that the travel allowance constituted a 'benefit' as contemplated by section 186(2)(a), and that, therefore, the CCMA had jurisdiction to hear the dispute. Secondly, he found that the employee was entitled to the travel allowance and that SARS had unfairly refused it.

Evaluation / Analysis

[32] In considering whether the application is reviewable, this court firstly has to consider whether the travel allowance was a 'benefit' as contemplated by section 186(2)(a). If it is not, the CCMA did not have jurisdiction to hear the unfair labour practice dispute. If it is a benefit, the next question is whether the employee was entitled to it.

Travel allowance a 'benefit'?

[33] The question whether the travel allowance constituted a 'benefit' in terms of section 186 goes to the jurisdiction of the CCMA. Therefore, the reasonableness test in *Sidumo*[8] does not apply.[9] The question is simply whether the arbitrator was right or wrong in coming to the conclusion that he did have jurisdiction.

[34] This Court held in *South African Post Office*[10] that an acting allowance, on the facts of that case, did not constitute a 'benefit' as contemplated by section 186(2)(a). In doing so, and taking into account the principle of *stare decisis*, I considered myself bound by the Labour Appeal Court authorities in *Hospersa v Northern Cape Provincial Administration*[11], *Gauteng Provinsiale Administrasie v Scheepers*[12] and *G4S Security v NASGAWU*[13].

[35] Subsequently, on 21 February 2013 -- after this application had been brought -- the Labour Appeal Court handed down judgment in *Apollo Tyres South Africa (Pty) Ltd v CCMA & others.*[14] In *Apollo Tyres*, the LAC held that a 'benefit' for the purposes of s 186(2)(a) is not limited to an entitlement that arises *ex contractu* or *ex lege.* It departed from its earlier

[8] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC).

[9] *SARPA v SA Rugby (Pty) Ltd* [2008] 29 BLLR 845 (LC) paras [39] – 41]; *South African Post Office v CCMA & others* [2011] 11 BLLR 1183 (LC).

[10] *South African Post Office v CCMA & others* [2011] 11 BLLR 1183 (LC).

[11] (2000) 21 *ILJ* 1066 (LAC).

[12] [2000] 7 BLLR 756 (LAC).

[13] Unreported (case no DA 3/08), 26 November 2009.

[14] [2013] 5 BLLR 434 (LAC).

three judgments referred to above and followed by this Court in *SA Post Office.* Musi AJA held:[15]

> "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 judgement 'benefit' in section 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. Insofar as *Hospersa, G4S are* and *Scheepers* postulate a different approach they are, with respect, wrong."

[36] In the light of that unequivocal judgment, this Court must now be bound by the latest LAC judgment, even though it is contrary to that court's earlier jurisprudence.

[37] The travel allowance in this case was offered to all fieldworkers in terms of the collective agreement. In the light of *Apollo Tyres*, it must fall within the broad definition of a 'benefit' now adopted by the LAC. To this extent the arbitration award is not reviewable. The CCMA had jurisdiction to decide whether SARS fairly exercised its discretion not to approve the travel allowance for the employee.

Was the employee entitled to the benefit?

[38] In deciding this question, it goes to the reasonableness of the arbitrator's finding, and not to the CCMA's jurisdiction. The *Sidumo*[16] test applies.

[39] The arbitrator found that it was unfair for SARS not to pay the employee the travel allowance. The primary basis for that finding was that other employees doing the same work had received the allowance.

[40] The arbitrator held that it was "common cause" that the employee met all the requirements of the travel allowance policy. It was not. SARS argued

[15] *Apollo Tyres (supra)* para [50].

[16] *Sidumo v Rustenburg Platinum Mines supra* – i.e. whether the conclusion reached by the arbitrator was so unreasonable that no reasonable arbitrator could have come to the same conclusion.

in these proceedings that the employee did not spend “50% plus 1%” of her time doing fieldwork. But it appears from the transcript of the arbitration proceedings that other employees who also failed to meet the requirement did still receive the allowance.

[41] In a letter dated 28 November 2011 SARS set out its reasons why the employee was not entitled to the travel allowance. It gives two reasons for the refusal: one relates to her not meeting the 50% plus one criterion and the second to ‘modernisation initiatives’. That is explained in the evidence of SARS’s witness, Zahir Shaik (the branch manager of its Taxpayer Service Centre). He explained that SARS was changing the manner in which its employees work, reducing the need for them to do fieldwork; and that it is in the process of negotiating that no employees would be entitled to the travel allowance any longer. However, that process had not been completed by the time of the arbitration.

[42] Mr *Ackermann* argued that the monthly control sheet filled in by the employee makes it clear that she did not spend 51% of the time and fieldwork and that, therefore, she did not qualify for the travel allowance. On the control sheet, the employee in fact claims that she spent 62% of her time on fieldwork. Mr *Ackermann* argued that that is not borne out by the breakdown on the control sheet itself. That may well be so. However, the breakdown of the spreadsheet was not challenged at arbitration; and in any event, the Commissioner based his decision on the fact that six out of the seven employees in the Estates Department received the travel allowance, despite the fact that they did not always do the amount of fieldwork required by the policy and agreement. In those circumstances, he found it unfair of SARS not to pay her the allowance: “If she does not qualify for the allowance then nobody else does.” That does not strike me as an unreasonable finding. The allowance is clearly being abused; but SARS is taking active steps to revoke it. At the time when the employee applied for it, she appears to have had as much of a claim to the travel allowance as her colleagues did. That is a reasonable conclusion reached by the arbitrator.

[43] SARS further argued that the Commissioner fundamentally misconstrued the nature of the employer's discretion. It argued that the Commissioner found that the travel allowances were not revoked despite clear evidence to the contrary. It appears from the evidence that SARS had taken a decision to revoke the travel allowance by August 2011; however, at the time of the arbitration, that decision had not yet been implemented throughout SARS's operations. More specifically, the travel allowance was still being paid to employees in the Estates Department in Cape Town. When the Commissioner finds that "there are plans to do away with the allowance" but that "no definite date has been set for that" that is a reasonable conclusion based on the evidence before him.

[44] It is so that the employee could not explain why she did not request a car from the car pool, instead of using her own car (thus enabling her to apply for the travel allowance). However, that was not a prerequisite. The collective agreement states that employees can elect to use their private cars instead of making use of a pool car. The failure of the Commissioner to take into account that the employee elected to use her own car is not a reviewable irregularity.

[45] SARS also argued in these proceedings that there is a statutory injunction in terms of the Public Finance Management Act[17] that it must avoid fruitless and wasteful expenditure. SARS's witness, Shaik, led that evidence – i.e. that the continued payment of the travel allowance would be considered fruitless and wasteful expenditure – at arbitration, but he did not refer to the PFMA in terms. In her answering affidavit, the employee simply states that there was no evidence before the CCMA that SARS had any budget problems with regard to the payment of benefits. However, I cannot agree that the Commissioner misdirected himself when he did not consider the PFMA. He cannot be expected to take into account a statutory obligation that was not pertinently argued in the proceedings before him.

[17] Act 1 of 1999.

Conclusion

[46] The conclusion that the arbitrator reached was not so unreasonable that no other commissioner could have come to the same conclusion. It is not open to review, as opposed to appeal.

Costs in the review application

[47] Both parties submitted that costs should follow the result in the review application. Although there is an ongoing relationship between the parties, I see no reason to disagree. Although the applicant may have had strong prospects of success in the review application before the judgment in *Apollo Tyres* was handed down, it dissipated – at least with respect to the first leg of its review grounds – thereafter. The employee, on the other hand, had an award in her favour and exercised her right to defend it. In law and fairness, she is entitled to those costs; and neither party will be mulcted in costs arising from her attorney's negligence.

Order

[48] I therefore issue the following order:

48.1 Condonation is granted for the late filing of the first respondent's answering affidavit.

48.2 The application for review is dismissed.

48.3 The applicant is ordered to pay the first respondent's costs in the review application, excluding the costs relating to the first respondent's application for condonation.

48.4 The first respondent's attorney is ordered to pay the costs of the condonation application *de bonis propriis.*

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AJ Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	LW Ackermann Instructed by Cliffe Dekker Hofmeyr.
FIRST RESPONDENT:	GA Leslie Instructed by Vernon Seymour attorney.