REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 3009/11

In the matter between:

TRANS-CALEDON TUNNEL AUTHORITY **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

L NOWOSENETZ N.O. **Second Respondent**

CHRISTOPHER MAGEDA **Third Respondent**

Heard: **08 January 2013**

Delivered: **01 March 2012**

Summary: **Review – CCMA has jurisdiction to determine employee's unfair labour practice claim relating to benefits – jurisdiction not dependent on employee having enforceable right *ex contractu* – jurisdiction not affected by benefit forming part of employee's remuneration – jurisdiction not affected by employee alleging contractual right to benefit – if employer failed to implement contractual right, such failure not necessarily unfair – arbitrator's failure to consider unfairness independently of contractual liability a reviewable irregularity**

– arbitrator's finding that employee contractually entitled to full bonus a reviewable irregularity – award set aside on review and substituted with award dismissing employee's unfair labour practice claim

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JUDGMENT

MARCUS, AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act 1995 ("the Act") to review and set aside the award dated 20 October 2011 issued by the Second Respondent ("the Commissioner") under the auspices of First Respondent under case reference GATW 9787/11, in which Second Respondent ruled that First Respondent had jurisdiction to arbitrate Third Respondent's (the employee's) claim that the Applicant's failure to pay him the full incentive bonus package for 2011 of 50% of cost to company, for which he qualified as incumbent of the post of Projects Communication Manager in terms of his employment contract, was an unfair labour practice relating to the provision of benefits to employees as contemplated in section 186(2)(a) of the Act.

[2] Having found that he had jurisdiction to arbitrate in terms of section 186(2)(a) and that Applicant's failure to pay Third Respondent the full amount of the bonus provision was in breach of Applicant' obligations in terms of the employment contract and as such an unfair labour practice in terms of section 186(2)(a), the Applicant was ordered to make up in compensation the difference between the bonus paid to Third Respondent for 2011 and the full bonus incentive of 50% of cost to company provided for in the employment contract.

[3] The Applicant on review attacks First and Second Respondent's jurisdiction to arbitrate the dispute in terms of section 186(2)(a), which jurisdiction was unsuccessfully challenged by the Applicant at Arbitration. Should such jurisdiction exist, Applicant attacks Second Respondent's finding that the terms of the employment contract entitled the employee to payment of the full bonus provision of 50% of cost to company without reference to his performance assessment, and the further finding that if such entitlement exists, Applicant's failure to pay Third Respondent the full bonus provision was unfair and an unfair labour practice in terms of section 186(2)(a).

Background

[4] Clause 1 (first bullet) of his employment contract entitles the employee to a "guaranteed remuneration package of R500,000 per year" which is stated to include "all benefits such as a 13th cheque, medical aid, retirement and group life".

[5] Under bullet 2 of clause 1, the employee also receives a "variable package" in the form of "an incentive related to the performance of individuals and based on an agreed incentive contract. This amount is not included in the above guaranteed remuneration package. This position qualifies for an annual incentive payout of 50% on the actual cost to company, on a split of (30:20)." Clause 11 provides for evaluation of the employee's performance against his job description in terms of TCTA's performance management system.

[6] The employee's performance was reviewed in each of the three years of his employment with the Applicant. In the initial two years, when he also received a bonus which fell short of the full bonus provision of 50%, the employee did not object to or dispute the short payment 'because no dispute existed at the time and I was not aware of any differentiation by the employer in its treatment of myself and other employees'. In August 2011, he first lodged a grievance over his annual bonus payment on the grounds that the Applicant, in amending

its Remuneration Policy in regard to new employees following the introduction of the Imvuselelo ("New Dawn") project, was unfairly discriminating against existing employees like himself who allegedly received smaller bonuses than those paid to new employees under the new system.

The nature of the dispute referred by Third Respondent to Arbitration

[7] The employee then referred an unfair labour practice ("ulp") dispute to First Respondent alleging unfair conduct by the employer in relation to the provision of benefits in the form of the annual performance bonus paid to him for 2011, alleging that in the calculation of his 2011 bonus, Applicant failed to comply with the terms of his employment contract. In his referral of dispute, the employee sought to be compensated for the alleged ulp on the basis that his performance bonus for 2011 be calculated on the same basis as that applicable to new employees under the newly amended remuneration policy. In his answering affidavit, Third Respondent points out that the basis of his complaint in the referral was "unfair discrimination where I request for the result of the conciliation to refer to the removal of the differentiation. The incentive should be paid according to the current policy like the new employees".

Issues for determination at Arbitration

[8] In view of a degree of confusion arising from the manner in which the employee's dispute was articulated in his referral, and following Applicant's attorney's request at the inception of the arbitration for clarification as to the issues for determination, in particular, whether employee was complaining about unfair treatment compared to the new employees; the employee's representative advised the arbitrator that the unfair labour practice claim submitted to arbitration was founded solely on the employer's failure to pay the employee the full bonus provision of 50% of cost to company allegedly due to him under the terms of his employment contract, and did not derive from the

alleged unfavourable or unfair treatment as compared to the new employees, accorded him in the payment of his 2011 bonus. This was subsequently re-affirmed by employee's representative.[1] Whilst the discussions confirming that the employee's claim at arbitration derived purely from Applicant's failure to implement the bonus clause allegedly entitling the employee to the full 50% bonus regardless of his performance, do not appear from the arbitration transcript, they are attested by the deponent to Applicant's founding and replying affidavits and are not disputed by Third Respondent on this point. The issue as stated by employee's representative was also the issue determined by Second Respondent in his award, in terms of which Second Respondent awarded to the employee the amount of R172,640 claimed by his representative as representing the difference between the full bonus provision of 50% and the sum paid to the employee in respect of his 2011 bonus. This represents an entirely different basis of quantification of the employee's claim; from that based on the alleged differentiation between the calculation of the employee's bonus and that paid to the new employees with the amendments to the remuneration policy introduced following Imvuselelo, which formed the basis of his unfair discrimination claim in the referral of dispute, in which the employee sought to be compensated on the basis that his performance bonus for 2011 be calculated on the same basis as that applicable to new employees under the newly amended remuneration policy. Presumably as a result of the amendment of his claim at commencement of the arbitration to one based on his averred right, founded in law and fairness, to the full implementation of the bonus provision in his contract, no evidence was led at Arbitration to support the original discrimination based claim or its quantification in terms of the referral, nor was it dealt with by Second Respondent in his award.

[9] In the circumstances, the employee's (and his counsel in the heads of argument) attempts to persist in the answering affidavit with a claim based on unfair discrimination between him and the new employees in

[1] Record at 126-127.

regard to calculation of bonus are nothing short of extraordinary. The record (arbitration transcript) and the award itself serve to fully endorse Applicant's averments as to the nature of the issues placed before the arbitrator and determined by him at the arbitration, which averments were in any event not disputed by the employee in the answering papers. How in these circumstances, employee's counsel can submit in his heads that "it is clear his client's complaint is not about a contractual right to remuneration but about the unequal and thus unfair treatment of him vis-à-vis the new employees", and that his client "has conclusively shown that his case at CCMA was based on his perception of unfair treatment of himself versus another group of employees regarding the provision of a benefit" is utterly beyond me. It is quite clear that the unfair discrimination allegation in the referral was not proceeded with and did not form part of his claim at arbitration, which was confined to the factual issue as to whether the terms of the employee's contract entitled him *ipso facto* to the full 50% bonus provided for and, if so, whether the failure to award him the full 50% was an unfair labour practice in terms of section 186(2)(a).

[10] As mentioned, in accordance with the basis of his claim as stated by his representative, the employee sought to be compensated for the alleged ulp relating to his bonus payment, in an amount representing the difference between the full bonus provision of 50% of his guaranteed package, and the bonus paid to him for 2011.[2] In response to the Arbitrator's query as to the amount he was claiming at Arbitration, the employee's attorney indicated he would be seeking compensation of R172,640, representing "the shortfall in respect of the 50% of cost to company". In response to the Commissioner's further query as to how precisely this amount was made up, employee's attorney explained that the claim represented the difference between R300,000 (being 50% of employee's alleged cost to company) and the bonus of R127,360 paid to him for 2011 (Record, p18).

[2] Record at 17.

Amount awarded by Arbitrator

[11] Employee testified at the arbitration in line with the basis of claim as stated by his attorney, that he was contractually entitled to the full 50% bonus irrespective of his performance.[3]

[12] Having found in favour of the employee that his contract entitled him to the full 50% independently and regardless of his performance assessment, the arbitrator duly awarded the employee the amount of R172,640 claimed by his representative. This Ruling forms the main ground of Applicant's attack on the merits of the award in terms of the standard of reasonableness applied in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4], and on the process related grounds that the Second Respondent, in interpreting the bonus clause as entitling the employee to the full bonus regardless of his performance, failed to apply his mind to the issues and to the plain wording of the clause upon which Second Respondent purports to base his interpretation, which according to the Applicant are gross irregularities in terms of section 145(2) warranting the review of the award on its merits.

CCMA's jurisdiction to arbitrate over an employer's alleged unfair conduct relating to the provision of benefits to an employee in terms of section 186(2)(a)

[13] Third Respondent's characterisation of his claim that Applicant's failure to pay him the full 50% bonus for 2011 was in breach of the terms of his employment contract, as constituting an unfair labour practice in terms of section 186(2)(a).

[14] Applicant argues that Second Respondent lacks jurisdiction to arbitrate employee's claim as an unfair labour practice relating to the provision of benefits in terms of section 186(2)(a), inasmuch as it is essentially a claim for payment of remuneration allegedly due to employee in terms

[3] Record at 32-34.
[4] (2007) 28 ILJ 2405 (CC).

of clause 1 of the contract, bullet 2, in the form of the employee's alleged entitlement to the full 50% bonus independent of his performance, and as such is not a claim relating to a benefit as contemplated in section 186(2)(a). Applicant cites, in this regard, cases like *Schoeman and Another v Samsung Electronics SA (Pty) Ltd*[5] where the Court held that a "benefit" under the section (or its predecessor contained in item 2(1)(b) of Schedule 7 to the LRA) is something extra, apart from remuneration.

[15] Applicant further argues that section 186(2)(a) is not intended to confer jurisdiction on the CCMA to arbitrate over ordinary contractual claims arising from alleged breach of contract, which it says is confirmed by the provisions of section 77(3) of the BCEA which confers on the Labour Court concurrent jurisdiction with the civil courts "to determine any matter concerning a contract of employment". Applicant says section 185and 186 were enacted to create a set of equitable remedies designed to give content to the constitutional right to fair labour practices, over and above the long standing ordinary civil remedies that arise at common law or in terms of a statute, which already exist to address unlawful conduct by the employer like a breach of the employment contract. Applicant submits the intention in enacting sections 185 and 186 was to empower the CCMA to adjudicate disputes about the fairness (not lawfulness) of the employer's conduct, the purpose being to create a remedy to address unilateral action by the employer which, although lawful, is deemed by the arbitrator to be unfair to the employee, as in the lawful though unfair termination of an employment contract. Applicant submits that the protection conferred by section 186(2)(a) in relation to the provision of benefits is not aimed at protecting contractually enforceable benefits for the enforcement of which no special equitable remedy would be required, but that the section is rather intended to provide a remedy in the case of benefits to which the employee does not have a right enforceable in law, but which are conferred at the employer's discretion, in support of which

[5] (1997) 18 ILJ 1098(LC) at 1102-3.

Applicant cites the recent judgment of Lagrange J in *IMATU obo Verster v Umhlathuze Municipality and Others,*[6] in which the Learned Judge set aside the commissioner's finding that he lacked jurisdiction to order payment of an acting allowance as, per the Commissioner, this was not a benefit in terms of the section.

[16] Whilst in general I find myself in agreement with Lagrange J's analysis of section 186(2)(a) and with the above submissions made by the Applicant insofar as they reflect the views on the interpretation and application of that section expressed by the Learned Judge in the IMATU decision, Applicant's counsel, in his argument that benefits are something extra and apart from remuneration, appears to have overlooked Lagrange J's support for the view expressed in *Protekon (Pty) Ltd v CCMA and Others*[7] that this narrow definition of "benefit" went too far, the Court there holding that 'in my view, there is little doubt that remuneration in its statutory sense, is broad enough to encompass many forms of payment to employees that may, in the ordinary use of language, properly be described as "benefits"'.[8] In *IMATU*, Lagrange J points out that *Protekon* usefully makes the point that "concerns about blurring the line between those issues which are justiciable and those which are the subject of collective bargaining are not best resolved by trying to draw a bright line between remuneration and other benefits. Rather, the question can be decided by a proper conceptualisation of the true nature of the dispute between the parties and not how they have characterised or packaged it".[9] I agree with the views here expressed.

[17] I can find no persuasive argument based on the purposive interpretation of the section rightfully supported by Applicant's counsel, for excluding as a benefit within the meaning of section 186(2)(a), the employee's claim to entitlement to the full bonus *ex contractu*, merely

[6] (2011) 9 BLLR 882 (LC).
[7] [2005] 7 BLLR 703(LC).
[8] Ibid at para 19, per Todd AJ.
[9] *IMATU* (supra) at para 18.

because the benefit claimed falls within the definition of remuneration in the LRA. Whilst I agree with the Applicant that a straight claim for enforcement of a term of an employment contract would, as a right enforceable at law, be better and more appropriately dealt with as an enforcement claim by the civil courts or the Labour Court in terms of section 77(3) of the BCEA than by the CCMA as a ulp, one must bear in mind that the clause sought to be enforced by the employee in the present case is one that, in terms of the jurisdictional criteria argued for by the Applicant, confers a discretion on the employer as to the amount of bonus to award, based on the employee's performance and other factors, with which interpretation of the clause (as conferring a discretion on the employer in awarding a performance related bonus) I fully concur, as I shall come to presently. On the Applicant's own argument then, this consideration would. on the face of it, seem to bring the employee's claim within Applicant's jurisdictional criteria in terms of its argument that the section is intended to address the unfair unilateral though lawful exercise of a discretion by the employer not to confer the benefit claimed by the employee, where the employer's failure to do so, though lawful and within the employer's legal rights, is deemed unfair to the employee. In terms of the *Protekon* decision, an employer's failure to comply with a contractual obligation towards an employee in relation to the provision of an employment benefit, as well as its exercise of a discretion in relation to a benefit, may be subjected to scrutiny by the CCMA under its ulp jurisdiction.[10] In the first of these scenarios, the Court pointed out there is an overlap between the CCMA's ulp jurisdiction and that of the civil courts to deal with contractual disputes, whilst in the second instance where the employer has no obligation in law to award the benefit, the employee may be confined to an unfair labour practice claim.

<u>Analysis of the scope and ambit of the unfair labour practice jurisdiction relating to the provision of benefits, conferred by section 186(2)(a)</u>

[10] *Protekon* (supra) at para 36.

[18] In *IMATU*, Lagrange J points out that the Labour Courts and arbitrators have long wrestled with the precise ambit of what constitutes a benefit in terms of the section, and that the view that initially prevailed is that contained in *Hospersa and Another v Northern Cape Provincial Administration*,[11] which confirmed the finding of the Court *a quo* that a claim for an acting allowance based purely on the fact that the employee had been acting for some two years in a more senior position than her incumbent post, was in the nature of an interest dispute over a remuneration demand, and that item 2(1)(b) of Schedule 7 [now section 186(2)(a)],was not intended to enable an employee to invoke the CCMA's ulp jurisdiction to arbitrate over unfair employer conduct in relation to the provision of benefits, to create a new benefit to which the employee was not otherwise entitled *ex contractu* or *ex lege* (that is, in terms of his contract of employment or an applicable collective agreement or statute regulating his conditions). Whilst this dictum has been regularly applied in its literal or narrow sense in a number of arbitrations and Labour Court decisions over the years to exclude the CCMA's jurisdiction to determine unfair labour practice claims in terms of the present section 186(2)(a) in the absence of the claimant employee being able to establish a right to the benefit *ex contractu* or *ex lege* (in other words, a legally enforceable right thereto); in some more recent decisions of the Labour Court, this narrow interpretation of the *Hospersa* decision has (in my view rightly) been placed into question. In *Protekon,* Todd AJ rejected counsel for the employer's submission that the effect of *Hospersa* was to restrict the ulp jurisdiction in relation to benefits to the enforcement of contractual rights. In terms of counsel's argument, "scrutiny of employer conduct was to be limited to an examination of whether the employee is contractually entitled to the remedy sought. I do not agree that this was the intention of the LAC or the effect of the decision in *Hospersa*".[12] The Learned Judge, in my view, rightly points out that the true principle of *Hospersa* (and the proper limits of that decision) is that

[11] (2000) 21 ILJ 1066 (LAC) at paras 8-9.
[12] *Protekon* (supra) at para 31.

the CCMA's ulp jurisdiction "cannot be used to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided by the employer. To permit that would allow an employee to use the ulp jurisdiction to establish new contractual terms; something the LRA clearly contemplates should be left to a process of bargaining between the parties."[13]

What, then, is the true ambit of employer conduct intended to be addressed in the section?

[19] In my view, the wording of section 186(2)(a) bears out Todd AJ's analysis. The section cannot, in my view, have been intended to be confined to addressing unlawful employer conduct in breach of a legal or contractual obligation on the employer to provide a benefit, the construction that would follow from the narrow interpretation of *Hospersa* requiring the employee to establish a right to the benefit *ex contractu* or *ex lege* (i.e a right enforceable at law), in order to vest the CCMA with jurisdiction to arbitrate the employee's claim. Such right would only arise if the employer was acting unlawfully in refusing the benefit. This narrow interpretation of the section in the application of *Hospersa* has been applied by the Labour Court in a number of decisions excluding CCMA's jurisdiction to arbitrate ulp claims under the section.[14]

[20] As pointed out in the *Protekon* and *IMATU* judgments, there would be no need to create a special equitable jurisdiction to determine the unfair labour practices specified in section 186(2) in order to protect employees from unlawful employer conduct in breach of a legal or contractual obligation. This could not reasonably have been the intent of the section. A legally enforceable benefit can be enforced by the employee in the usual way in the civil courts or Labour Court in terms of section 77(3) of the BCEA. The protection afforded by the section is

[13] Ibid at para 32.
[14] See for instance, *Eskom v Marshall and Others* [2003] 1 BLLR 12 (LC) and *SA Post Office Ltd v CCMA and Others* [2012] 11 BLLR 1183 (LC).

also not couched in the form of enforcement of benefits to which the employee is contractually entitled. The nature of the protection afforded by the section is against "unfair employer conduct relating to the provision of benefits", a quite different concept from unlawful employer conduct in respect of which ample civil remedies already exist in our law. In creating an equitable jurisdiction based on fairness, the legislature could only have had in mind the redressing of employer conduct which, although lawful in that it does not involve a breach of any agreement or law, is found to be substantively or procedurally unfair to the employee. As pointed out in *Protekon* and *IMATU*, the obvious situation that comes to mind here, is one involving the lawful exercise of a discretion by the employer against awarding the benefit or promotion sought, lawful inasmuch as the employee does not enjoy a legally enforceable right *ex contractu* or *ex lege* to the benefit or promotion. The conclusion is that the ulp jurisdiction created by the section, being a special one founded in equity or fairness and not legal enforceability, is aimed precisely at addressing the situation where the employee does not necessarily enjoy a legally enforceable right to the benefit, but where the employer's refusal to confer it is found by the arbitrator to be unfair.

[21] Whilst many would argue that such interpretation is in conflict with the principles of *Hospersa* (although this does not reflect the view of *Hospersa* taken by Todd AJ in *Protekon*), it appears to me to be the only interpretation which accords with the language and intent of the section, which is surely aimed at providing employees with a remedy against lawful but unfair employer conduct in the areas covered by the section. For instance, it would be highly unusual for an employer to be contractually obligated to promote an employee. However, when the CCMA finds in arbitration proceedings under the section, that the employer acted unfairly (albeit lawfully) in declining to promote an employee, the employee is given a remedy under the section. Likewise when the employer is not legally obliged to provide a benefit but acts unfairly in withholding same from the employee. Inasmuch as the

employer's withholding of the benefit would not be unlawful, the employee would not have a right *ex contractu* or *ex lege* to enforce the benefit. However, despite the absence of a right enforceable at law, the employee is given an equitable right under the section to approach the CCMA in arbitration to seek delivery of the benefit where the employer's refusal to award same is found to be unfair. The unfair dismissal jurisdiction of CCMA is likewise founded in principles of equity denoted by fairness, rather than legally enforceable rights, the CCMA having jurisdiction to reinstate or compensate employees found at arbitration to have been unfairly although lawfully dismissed, lawfully inasmuch as the common law principles governing contracts for services (*locatio conductio operarum*) entitle either party to terminate the contract lawfully at common law by giving reasonable notice of termination. However, when the giving of such notice is deemed unfair, the employee is given an equitable remedy under the CCMA's unfair dismissal jurisdiction. In like vein, the rights conferred on employees against the unfair labour practices specified in section 186(2)(a) are triggered by unfair conduct by the employer in relation to the provision of benefits, even though the employer may be acting within his lawful rights in refusing the benefit (which implies the employee does not have an enforceable right to the benefit in law).

[22] The true nature of the ulp rights conferred by the section was highlighted by Zondo JP (as he then was) in *Department of Justice v CCMA and Others*,[15] where the Learned Judge President rejected counsel for the employer's submission (presumably derived from the narrow interpretation of *Hospersa*) that unfair labour practice claims under 186(2)(a) are confined to disputes of right arising *ex contractu* or *ex lege,* stating that 'the answer to this argument is simply that item 2 of Schedule 7 [now section 186(2)(a)], is one of the statutory provisions that seek to give content to the constitutional right to fair labour practices entrenched in the Constitution. The section creates a statutory right not to be subjected to an unfair labour practice that takes

[15] (2004) 25 ILJ 248 (LAC) at para 53,

the form of conduct spelt out therein.'[16] The Learned Judge President pointed out that the ulp's specified in the section, give rise to employee rights created *ex lege* in terms of the section. "For that reason, a dispute as to whether the conduct of an employer relating to promotion is an unfair labour practice, is a dispute of right and not a dispute of interest"[17] the reference here being to rights founded in fairness (equity) rather than in law or contract.

[23] In my view, the Learned Judge president could not have made it clearer that an employee `s claim under section 186(2)(a) is not one founded on a dispute of right arising *ex contractu* or *ex lege* (that is, one flowing from a law or contract regulating his or her conditions of employment). It is a claim arising *ex lege* founded in the special ulp jurisdiction created by the LRA in section 186(2)(a) to give content to the constitutional right against unfair labour practices. This interpretation of the rights conferred by the section was concurred in, in the minority judgment of Goldstein JA who states that "the view that item 2(1)(b) provided only for rights that arose *ex contractu* or *ex lege* is clearly wrong. If that were so, the provision would have been redundant since such rights would have been enforceable in the absence of 2(1)(b)…. Just as the LRA provides for disputes arising from unfair dismissals in respect of which there are no contractual remedies to be resolved by arbitration, so was item 2(1)(b) designed for situations where neither the contract of employment nor the common law provide the employee with a remedy".[18]

[24] This is not to say that CCMA would not have jurisdiction to address unlawful employer conduct under section 186(2)(a), provided such is at the same time deemed to be unfair, support for which can be found in the *Protekon* decision.[19] In *Protekon*, the Labour Court reached a similar conclusion to the LAC in *Dept of Justice* that there would have

[16] Ibid at para 53.
[17] *Department of Justice* at para 54,
[18] *Department of Justice* at para 14.
[19] *Protekon* decision at para 36.

been little purpose in introducing the ulp jurisdiction in section 186 if an employee's recourse to the ulp jurisdiction was to be confined to circumstances where he or she has a cause of action in contract law. Thus, where an employer is left with a discretion in the awarding of a benefit (which implies the benefit is not enforceable at law in terms of the narrow interpretation of *Hospersa*), this would not deprive the CCMA of jurisdiction to scrutinise employer conduct alleged to be unfair in terms of the section.[20] This principle also finds support in the *IMATU* decision where Legrange J held that "the more plausible interpretation was that the term 'benefits' was intended to refer to advantages conferred on employees which did not originate from contractual or statutory entitlements, but which have been granted at the employer's discretion."[21]

[25] In *Protekon*, Todd AJ points out that the true principle of *Hospersa* (and the proper limits of that decision) is that the CCMA's ulp jurisdiction "cannot be used to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided by the employer. To permit that would allow an employee to use the ulp jurisdiction to establish new contractual terms; something the LRA clearly contemplates should be left to a process of bargaining between the parties."[22]

[26] It seems to me the need for preserving the distinction between "rights" and "interests" disputes, highlighted in *Hospersa*, in the CCMA's assumption of jurisdiction to arbitrate ulp disputes relating to benefits, which distinction underlies the scheme of dispute resolution established by the LRA, would be adequately addressed by limiting the scope and application of the unfair labour practice jurisdiction relating to the provision of benefits, to those benefits for which the employee is entitled to apply to the employer in terms of his employment or under the existing employment structure or conditions, in the sense that the

[20] *Protekon* at para 35.
[21] *IMATU* at para 21.
[22] *Protekon* at para 32.

basis or potential for conferring the benefit already exists in the employment structure, whether in terms of his conditions of employment, existing policies or simply past practice of the employer in awarding the benefit in question as occurred in *IMATU,* where the basis of the employee's claim for an acting allowance was that he had received the benefit on another occasion. In *Hospersa* on the other hand, where no present basis for granting an acting allowance was found to exist in terms of the employee's conditions of service or the employer's policy, procedure or practice, apart from the employee's perception that a failure to pay such allowance was unfair, the court was justified in rejecting jurisdiction to arbitrate, in as much as the dispute was concerned with a matter of mutual interest which, as noted by Todd AJ, "the LRA clearly contemplates should be left to a process of bargaining between the parties…".[23]

[27] Although the judgment in *IMATU* does not expressly go this far, my sense of Legrange J's thinking on this issue is that there may not even be a need for CCMA to enquire into the question as to whether it is being asked to determine an interest dispute which ought not to be subject to arbitral scrutiny under its ulp jurisdiction, inasmuch as an employee claiming an acting allowance on the grounds that it was previously granted to him or others by the employer, is claiming the employer's refusal to grant the allowance <u>on the occasion in question</u> (my emphasis) was unfair. In terms of Legrange J's analysis, a ruling by the arbitrator in favour of such a claim, would not serve to create an enforceable right to such benefit in the future (either for the claimant or for others). "The latter claim (that is, to establish an enforceable right to such benefit in the future), would properly be the subject of collective bargaining".[24]

[28] Such a ruling in favour of the employee's claim to the benefit, would nonetheless serve to create a presently enforceable right to the benefit awarded, so that it may still be necessary for the arbitrator to consider

[23] *Protekon* at para 32.
[24] *IMATU* at para 23.

whether the CCMA's assumption of jurisdiction to arbitrate the dispute, would infringe against the principle highlighted in *Hospersa,* of not allowing an employee to use the ulp jurisdiction "to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided by the employer".[25]

[29] In the present dispute, even on the narrow application of *Hospersa* which I believe represents an incorrect and unintended application of section 186(2)(a) which has been overtaken by the LAC's judgment in *Department of Justice*, the CCMA would have had jurisdiction to arbitrate over the Third Respondents claim inasmuch as it is founded on an alleged contractual entitlement to the full bonus and, were such entitlement to be established as was found by the Arbitrator to be the case, to arbitrate over the further issue as to whether the failure to pay the full bonus was unfair. If, on the other hand, the narrow application of *Hospersa* is rejected in favour of the interpretation of the section contended for herein as I believe it should be; in my view the employee's claim could still be referred to arbitration under the section as one founded in the employer's alleged failure to comply with a contractual obligation towards the employee in relation to the provision of an employment benefit, which failure is averred by the employee to be unfair (that is, on the employee's interpretation of the contract) or, (on the employer's interpretation of the contract), as one involving the alleged unfair exercise by the employer of its discretion in the awarding of a discretionary bonus under the contract.[26]

[30] I respectfully associate myself with the views expressed by my brother judges in *Protekon* and *IMATU* differing from the Court's approach in *Samsung Electronics* (*supra*) that remuneration as defined in the LRA does not include benefits contemplated in section 186(2)(a) which were held in that case to be "something extra", apart from remuneration. Thus, whilst I accept that employee's claim to entitlement to the full bonus falls under the head of remuneration in the employment contract

[25] *Protekon* at para 32.
[26] *Protekon* at 711, para 36.

and in terms of the LRA definition, this does not in my view, serve to bar him from referring a ulp claim relating to benefits to arbitration in terms of the section. I am, however, in agreement with Applicant's submission that its failure to pay the employee the full bonus provision of 50% of cost to company allegedly due to him under the terms of his contract, and Second Respondent's ruling in favour of the employee that the terms of his contract entitled the employee to the full bonus without reference to his performance assessment, implied that the Second Respondent, before issuing an award in favour of the employee, was required to consider and determine independently of the employer's alleged failure to comply with the bonus clause, whether such failure was also unfair conduct relating to the payment of a bonus. Whilst Second Respondent concluded that it was, he furnished no reasons for arriving at this conclusion independently of his finding that the Applicant was contractually obliged to pay the full bonus. Whilst unlawful employer conduct may well also be deemed to be unfair in the circumstances and most probably often is, this is not a conclusion that follows automatically from every breach of contract. As pointed out by Applicant's attorney, had Second Respondent given proper consideration to the evidence proffered by Applicant in explanation of its actions in not paying the full bonus provision, he might well have concluded that Applicant's failure to do so, whilst found by him to have been in breach of Applicant's obligations under the contract, was nonetheless not unfair conduct in terms of the section.

[31] The inevitable inference is that Second Respondent did not consider or apply himself to the issue of unfairness independently of the issue of contractual entitlement, nor did he consider the evidence adduced by Applicant in regard to this issue (none was adduced by the employee whose claim derived solely from his alleged contractual entitlement to the full bonus). Second Respondent's failure to determine this issue as one separate from the finding that the employer had failed to comply with its contractual obligation to pay the full bonus, means that he failed to apply his mind to what was a critical finding in his award, namely,

whether Applicant acted unfairly (and not merely unlawfully) in its failure to pay the full bonus. I would agree with the Applicant that this amounts to a gross irregularity in terms of section 145 (2) which alone justifies the setting aside of the award on review.[27] [].

Arbitrator's finding that the plain language of the contract entitles Third Respondent to payment of the full 50% bonus, without reference to his performance assessment

[32] Earlier I concluded that the arbitrator was empowered to make such a finding in regard to the employee's claim, but that his unmotivated assumption that the finding that Applicant had failed to comply with its contractual obligation to pay the full bonus, *ipso facto* rendered such failure unfair in terms of the section, in the absence of an independent determination as to whether the employer had acted unfairly in not conferring the alleged contractual benefit, following a proper consideration of the relevant evidence and arguments adduced by the Applicant on this issue, amounted to a reviewable irregularity in terms of section 145 (2).

Is the Second Respondent's conclusion that the terms and plain language of the employee's contract entitled him to the full bonus payment regardless and independently of his performance assessment, justifiable?

[33] I fail to see how this conclusion could have been reached by Second Respondent on the plain wording of the remuneration clause. As pointed out at length by the Applicant in its founding papers, the second part (bullet 2) of the remuneration clause headed "Variable package", is just that. Whilst the first part of the remuneration clause is headed "Guaranteed package" and provides therein for payment of a "guaranteed remuneration package of R500,000 per annum", the second part of the clause, which Second Respondent interprets in his award as entitling Third Respondent to payment of the full 50% bonus independent of his performance, provides for payment of a variable

[27] See *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC) at paras 36 and 39.

annual incentive bonus based on the employee's performance. The amount of the bonus is expressly stated "not to be included in the above guaranteed remuneration package". I agree with the Applicant's submission that Second Respondent, in interpreting the last sentence of the "Variable package" part of the clause (which provides that the employee's post qualifies for an annual incentive payout of 50% of cost to company), as entitling the employee to the full 50% bonus independent of his performance assessment, inexplicably appears to have chosen to ignore the remainder of the "Variable package" portion of the remuneration clause, the plain wording of which makes it plain beyond doubt or dispute in my view, that the incentive bonus payment provided for therein does not form part of the guaranteed fixed remuneration package provided in the first part of the remuneration clause, and that it is not intended to provide therein for payment of a fixed annual bonus but rather for the payment of a "variable package" in the form of a discretionary incentive bonus based on the employee's performance, having a ceiling of "50% of cost to company".

[34] I have no doubt that the apparent failure by Second Respondent to consider or apply himself to the plain wording of the remuneration clause in concluding as he did that the clause conferred on the employee a contractual entitlement to payment of the full 50% bonus independent of his performance assessment, amounts to a reviewable gross irregularity in terms of section 145(2). Such interpretation by Second Respondent has also given rise to his issuing an award based on the Third Respondent's contractual entitlement to the full bonus as found by Second Respondent, a finding which I agree with the Applicant, no reasonable commissioner could have arrived at, which renders the award liable to be set aside both as a gross irregularity in terms of section 145(2), and on the application of the *Sidumo* test. I agree that, had Second Respondent properly applied himself to interpreting the plain wording of the clause, the only interpretation he could reasonably have arrived at, is that the second part of the clause provides for payment of a variable annual incentive bonus based on

the employee's performance. Clause 11 makes provision for the assessment of his performance in awarding such a bonus.

In light of my conclusion that Second Respondent was empowered to consider Third Respondent's claim under the section, should the claim be remitted to First Respondent for reconsideration by another arbitrator?

[35] In my view, there is no basis for remitting the claim for fresh arbitration, nor would any purpose be served in doing so. Inasmuch as the employee's ulp claim submitted at arbitration rested solely on the employer's alleged failure to comply with its averred contractual obligation to pay him the full 50% bonus independent of his performance, and in light of my conclusion that the only reasonable outcome that could have been reached by the Second Respondent on this issue, would have been to dismiss employee's claim of contractual entitlement to payment of the full bonus as unfounded, there would seem to be no grounds for referring the matter back for a re-hearing by another arbitrator as to whether Applicant acted unfairly in its award of the 2011 bonus. The sole ground of unfair employer conduct relied on by the employee at arbitration, was the employer's failure to comply with its alleged contractual obligation to pay him the full 50% bonus independent of his performance. I have pointed to the absence of any such obligation being found in the plain wording of the provisions of the employee's contract dealing with remuneration. No other ground of unfairness relating to the payment of the 2011 bonus was raised by the employee at the arbitration. Employee did not, for example, suggest that the employer's assessment of his bonus payment for 2011 was made on an arbitrary or irrational basis not related to his performance assessment. Had this been employee's case, Applicant would have been required to lead detailed evidence as to precisely how the bonus payment in question was arrived at.

[36] On this premise, why should the matter be remitted to CCMA for a fresh hearing on an issue which did not form part of the employee's complaint at arbitration or in his answering papers filed in the review?

Presumably, because no issues of this nature were raised by the employee at the arbitration, no evidence of this sort was tendered by him. His evidence in support of his claim at arbitration was confined to a confirmation of his view that the terms of his contract entitled him to the full 50% bonus independent of his performance. Even in his answering affidavit filed in the review, Third Respondent does not complain of an unfair exercise by the employer of its discretion in awarding him the bonus that it did, possibly because such a complaint would not accord with employee's claim that he was contractually entitled to the full 50% unconditionally and irrespective of his performance assessment.

[37] The Applicant dealt with this matter to a limited extent in its evidence adduced at the arbitration and in its founding papers in the review, in which Applicant avers that Third Respondent received a different amount in respect of his variable package in each year of his employment, and that this amount was never the full 50% provided for, which would only be paid in the remote circumstance that the employee, the division in which he worked and the company as a whole, all achieved the maximum scores on their respective performance evaluations. Applicant`s uncontested evidence in its founding papers is that at the arbitration, Third Respondent conceded during cross examination that he received a variable bonus each year which was always short of the full amount of 50%, that he had not disputed his bonus payment in previous years, and that he had undergone a performance review at the end of each year of his employment in which he had never achieved the maximum score.

[38] In these circumstances, there is no justification for remitting the matter to First Respondent for arbitration before another commissioner, nor would any purpose be served in doing so.

[39] I make the following order:

1. The award dated 20 October 2011 issued by the Second Respondent in favour of the Third Respondent is reviewed and set aside and replaced with a finding that:

   (a) Second Respondent had jurisdiction to determine Third Respondent's unfair labour practice dispute relating to the provision of benefits in terms of section 186(2)(a).

   (b) Third Respondent's claim that Applicant's failure to pay him the full 50% bonus provision for 2011 was in breach of his employment contract or was an unfair labour practice as envisaged in section 186(2)(a) of the LRA, is dismissed.

   (c) There is no order as to costs in the arbitration.

2. I make no order as to costs in the review.

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MARCUS AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv E. Tolmay

Instructed by Brink Cohen Le Roux INC

For the Third Respondent: Adv A. Campbell

Instructed by De Haan Denton Attorneys