REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 884 / 2011

In the matter between:

MERTZ AUCAMP **Applicant**

and

THE SOUTH AFRICAN REVENUE SERVICE **Respondent**

Heard: **14 August 2013**

Delivered: **17 October 2013**

Summary: Jurisdiction – nature of dispute – Court must determine true nature of dispute in deciding jurisdiction

Unfair labour practice – benefit – meaning of – nature of dispute actually one of unfair labour practice relating to benefit – Labour Court having no jurisdiction

Collective agreement – dispute resolution process in collective agreement –

collective agreement prescribing private arbitration – dispute resolution process in collective agreement must be followed – Labour Court having no jurisdiction

Collective agreement – nature of dispute also one about interpretation and application of collective agreement – Section 24 of LRA – Labour Court has no jurisdiction to determine this issue

Practice and procedure – Section 158(2) – discretion to stay proceedings and refer to arbitration – principles stated

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JUDGMENT

SNYMAN, AJ

Introduction

[1] In this matter, the applicant referred a dispute to the Labour Court by way of a statement of claim in terms of Rule 6. This statement of claim describes the dispute as '…. a referral in terms of Section 77(3) of the Basic Conditions of Employment Act …. for an order declaring the decision of the respondent's management to exclude the applicant's performance scorecard to be moderated and considered for performance bonus payment for the period 1 April 2010 to 31 March 2011 constitutes unfair labour practice' (sic).

[2] The respondent opposed this referral and filed an answering statement. The respondent raised a point in *limine* in terms of which it contended that the dispute was actually about the interpretation and application of a collective agreement in the respondent and not about Section 77 of the Basic Conditions of Employment Act ("BCEA").[1] The respondent also contended that the real issue in dispute was that of an unfair labour practice, which this Court did not have jurisdiction to determine.

[1] Act 75 of 1997

[3] In a pre-trial minute concluded between the parties on 9 October 2012, it was agreed that the objections in *limine* of the respondent first be dealt with prior to this matter proceeding to trial. This matter has now come before me for the purposes of the determination of these issues in limine only, as agreed to by both parties in the pre-trial minute. I will accordingly set out the backgrounds facts in this matter only insofar as it is necessary for the purposes of the determination of the objections in limine.

Background facts

[4] The applicant was employed by the respondent as an HR manager. The applicant was employed in terms of a written letter of employment, which recorded 'Performance bonuses are paid out in line with SARS Performance Management and Development System'.The letter further records that the applicant's employment, in general, was subject to the terms and conditions applicable in SARS. The applicant's employment with the respondent was at grade 7 in the respondent.

[5] The performance management and development system in the respondent came about by way of a collective agreement concluded between the respondent and Public Servants Association of South Africa ("PSA") and the National Education Health and Allied Workers Union ("NEHAWU"), being the representative trade unions in the respondent. This collective agreement was concluded on 18 November 2008 and 4 December 2008, when it was respectively signed by the parties, and still endures as at the determination of this matter. This collective agreement will be hereinafter referred to as the 'PMDS collective agreement'.

[6] In terms of the PMDS collective agreement, the parties actually agreed to the establishment of a performance management and development system and process, which was to be formulated and then adopted and implemented by the respondent in accordance with the principles as set out in the PMDS collective

agreement. Pursuant to the PMDS collective agreement, the respondent then adopted an internal policy, effective 1 April 2009, called the "Performance Management and Development System". This internal policy will hereinafter be referred to as the 'PMDS policy'.

[7] Therefore, and at stake in this matter is both the PMDS collective agreement, and its ultimate product, the PMDS policy. There is,, however, also another collective agreement which comes into play in this matter, being the Constitution of the SARS National Bargaining Forum, which was concluded on 16 October 2007 between the respondent, PSA and NEHAWU, and which agreement inter alia sought to regulate issues in dispute about conditions of employment in the respondent. This Constitution of the SARS National Bargaining Forum will hereinafter be referred to as the 'NBF collective agreement'.

[8] In his statement of claim, the applicant's case is that he was entitled to be paid a performance bonus in 2011 based on the principles of the PMDS policy. What was common cause is that the PMDS policy applied to all employees from grade 00 to grade 7 and prescribed that in order for employees to qualify for a performance bonus, the following pre-conditions had to exist: (1) the employee must have a signed and approved individual scorecard/agreement and personal development plan which was prepared in accordance with the respondent's prescripts ; (2) this individual scorecard/agreement and personal development plan must be compiled annually and reviewed four times a year; (3) the individual scorecard must comply with certain prescribed requirements and have a performance input and output section; (4) the metrics must be specific, measurable, achievable, realistic and time bound; (5) there must be alignment between the individual score card and the division/unit/team/ manager score card; (6) individual performance achievements will be used as inputs; (7) all performance management related matters must be properly documented in line with prescribed practices; and (8) the process was an ongoing and interactive

process.

[9] The applicant's line manager was Pheko Masebe ("Masebe"). It was common cause that the required interactive and ongoing performance management process was conducted between the applicant and Masebe. This included the prescribed performance appraisals in which the applicant gave a performance score and was also scored.

[10] Where an employee is performance scored in terms of the above process, this score will form the basis upon which an employee qualifies to be paid the performance bonus. The PMDS policy contains a specific scoring moderation process in terms of which a final post moderation score is arrived at. If this final post moderation score is 80.00 or higher, the employee will receive an annual performance bonus. In terms of clause 9 of PMDS policy, moderation must be done at all structural levels, which includes team, unit, divisional and organizational levels, and all moderated scores must be signed off by the relevant accountable manager. There is also a detailed prescribed process in respect of which the moderation mechanics is conducted, but these details are not relevant for the purposes of the determination of this matter. The upshot is however that the final moderation is done at divisional level and signed off by the divisional GM. This moderation process in terms of the PMDS policy in essence mirrors the contents of clause 10 of the PMDS collective agreement.

[11] Pursuant to the above principles, the applicant performance scored himself in March 2011 at a score of 84.00 and Masebe scored him at 90.00. According to the applicant, this entitled him to be paid a performance bonus, as he was performance scored at higher than 80.00.

[12] The respondent contended that the performance scoring by the applicant and Masebe was not the end of the scoring and moderation still had to take place. The respondent contended that the scoring of 90.00 by Masebe was the first

performance scoring by the immediate manager, and the prescribed moderation process then still had to take place. The respondent contends that following this moderation process, the applicant's final moderated score came out at 79.00, which meant that he did not qualify for a performance bonus. The respondent further contended that the applicant did not have a signed and approved scorecard/agreement, and for this reason as well he was disqualified from receiving a performance bonus.

[13] The PMDS policy further prescribes that if an employee's score is adjusted as a result of the moderation process, the employee should be provided with feedback and reasons for such adjustment. It was common cause that the applicant left the employment of the respondent on 31 March 2011, and the final moderation only happened after that date. Pursuant to moderation, and for those employees in the respondent that then qualified, the bonuses were only paid out on 23 July 2011.

[14] In his statement of claim, the applicant in fact contended that Masebe had breached the PMDS policy in failing to submit his (the applicant's) scoring and Masebe's own scoring for moderation to the head of department, as Masebe was compelled to do. The applicant further contended that Masebe was obliged to give him feedback on the outcome of moderation. The applicant contended that because of this, his score was not moderated as required by the PMDS policy resulting in the applicant being prejudiced and which was, in the words of the applicant himself, an 'unfair labour practice'. The applicant contended that the respondent therefore did not comply with the PMDS policy and the PMDS collective agreement. The applicant also took issue with the moderated score of 79.00 per se as unfair.

[15] The applicant then referred an unfair labour practice dispute to the CCMA on 16 August 2011. The matter came before Commissioner Mbatsana on 9 September 2011. Commissioner Mbatsana ruled in a written ruling dated 16 September

2011 that because the applicant had already resigned and left the respondent's employment on 31 March 2011, the CCMA did not have jurisdiction to determine the matter as the CCMA could not determine unfair labour practice disputes after employees have resigned. The least said about this ruling the better. It is clearly wrong. The CCMA in fact had jurisdiction to entertain the matter even if the applicant had resigned and the applicant should have challenged this award based on this reasoning as being wrong by way of a review application to the Labour Court. This being said, and because of the approach the applicant then decided to adopt, I will not deal with this issue any further.

[16] The applicant, as set out above, then chose to refer this whole matter to the Labour Court. The substance of the case of the applicant however, remained that of an unfair labour practice. This is evident from the applicant own legal grounds in his statement of claim. He states that Masebe made a decision not to refer the applicant's performance review to the head of department as required by the PMDS policy and collective agreement and this was an unfair labour practice. He stated that by Masebe not providing him with feedback after adjusting the performance review this was an unfair labour practice. He stated that the adjustment of his performance review to 79.00 was in breach of the PMDS policy and collective agreement. He finally stated that the non compliance by the respondent with the PMDS policy and collective agreement, in general, was an unfair labour practice.

[17] The final word in this whole issue comes by way of the NBF collective agreement. In clause 18 of the PMDS collective agreement, it is prescribed that any disputes would be dealt with in terms of the NBF dispute procedure or in terms of Section 24 of the LRA. Added to this, the PMDS policy in clause 12 prescribes an appeal procedure in respect of the outcome of any phase of the PMDS process. The NBF dispute procedure is found in clause 12 of the NBF collective agreement and prescribes that all disputes about the interpretation or

application of any collective agreement must be dealt with in terms of this dispute procedure, which in the end prescribes private arbitration to resolve such disputes.

The nature of the dispute

[18] From the outset, it must be stated that it is the duty of the Labour Court to determine the true nature of the issue in dispute between the parties before Court, no matter how an applicant may choose to label or describe the dispute. The Court is not bound by the description of the dispute as may be articulated by an applicant. In *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another,*[2] the Court said the following:

> 'It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. It is also important to bear in mind that parties may modify their demands in the course of discussing the dispute or during the conciliation process. All of this must be taken into consideration in ascertaining the true nature of the dispute.'

[19] Also in *CUSA v Tao Ying Metal Industries and Others*[3] the Court said that:

> 'In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that the parties attach to a dispute cannot change its underlying nature. A

[2] (2003) 24 ILJ 305 (CC) at para.52.
[3] (2008) 29 *ILJ* 2461 (CC) at para 66.

> commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration ...The dispute between the parties may only emerge once all the evidence is in'.[4]

[20] In deciding what is the true issue in dispute in this matter, I have little hesitation in concluding that the issue in dispute is actually about two issues in dispute, the first being an unfair labour practice and the second being the issue of the interpretation and application of collective agreements. This is evident not only from the pleadings themselves, but also from the documentary evidence placed before me as well as the common cause events preceding this case becoming litigious in this Court. The applicant has valiantly tried to camouflage the dispute by reference to Section 77 of the BCEA and describing the dispute as having arisen from his contract of employment and contending all that he is seeking is enforcement of his contract of employment, but these contentions are simply unsustainable, for the reasons I will now deal with.

[21] The regulatory provisions in the respondent on which the applicant seeks to rely is firmly founded in a collective agreement, being the PMDS policy and its empowering provision, the PMDS collective agreement. At the heart of the dispute lies a case advanced by the applicant of non compliance with these provisions and as a result, non compliance with the collective agreement. Added is this is a contention by the applicant that even if the relevant regulatory provisions in the respondent were applied, they were either incorrectly and improperly applied, and this would clearly be a dispute about the interpretation or application of this collective agreement as well. Added to this, there is the case by the respondent that any dispute about the kind of issues raised by the

[4] See also *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 ILJ 925 (LAC) at para 16 ; *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and Others (1)* (1998) 19 ILJ 260 (LAC) at 269G-H ; *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* (2008) 29 *ILJ* 1564 (LC) at para 37 ; *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC) at 2162F; *SA Chemical Workers Union and Others v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC) at 1726; *Van der Velde v Business and Design Software (Pty) Ltd and Another* (2006) 27 *ILJ* 1738 (LC) at 1745I.

applicant must be dealt with in terms of the dispute resolution provisions of another collective agreement which prescribed private arbitration to deal with such very issues, being the NBF collective agreement. It is thus my view that all the issues raised by the applicant concerning non compliance with the PMDS policy, or breach of such policy, or incorrect application of such policy, are issues that concern the interpretation or application of a collective agreement, and are issues that also specifically invoke the dispute resolution mechanism prescribed in the NBF collective agreement to determine the same.

[22] The applicant's employment contract cannot provide him with assistance to escape the above conclusion. The fact is that this employment contract is specifically subject to the respondent's policies and regulations. In addition, and considering that the issues at stake are regulated by collective agreement, Section 23(3) of the LRA must come into play, which provides that 'Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.' The Court in *National Bargaining Council for the Road Freight Industry and Another v Carlbank Mining Contracts (Pty) Ltd and Another*,[5] in inter alia specifically referring to Section 23(3), said:

> 'The two provisions together aim at advancing a primary object of the LRA, namely the promotion of collective bargaining at sectoral level and giving primacy to collective agreements above individual contracts of employment. The policy is in keeping with the ILO Collective Agreements Recommendation which states: 'Employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement.'

What thus must prevail, and must actually be determined, is the collective agreements themselves and the terms and provisions thereof, and not the

[5] (2012) 33 ILJ 1808 (LAC) at para 18

applicant's individual contract of employment. The issues raised by the applicant are in any event specifically regulated in the PMDS collective agreement, and not his individual contract of employment. Simply put, the true issue in dispute concerns the interpretation and/or application of collective agreements.

[23] The applicant has further contended that the manner in which the respondent chose to apply the PMDS process and policy towards him was unfair. He contended that as a result of this unfair conduct, he was prejudiced. The applicant actually made it clear, in no uncertain terms, that he considered the respondent's conduct towards him as an unfair labour practice. He actually referred an unfair labour practice dispute to the CCMA, but as a result of the unfortunate events in the CCMA referred to above, these proceedings were shipwrecked. The applicant in response to this then referred this very same dispute to the Labour Court, but under the guise of something else. The problem, however, remains that the statement of claim of the applicant is permeated with references to unfair treatment and the existence of an unfair labour practice, and this is actually case proffered by the applicant from the outset and which case in essence always remained the same. The applicant simply tried to attach a different label to the case to try and clothe the Labour Court with jurisdiction, when what the applicant should really have done was to challenge what was a completely and fundamentally wrong CCMA ruling on review to the Labour Court.

[24] The above being said, and if the factual basis of the applicant's case is considered, as he has identified and described it in his own statement of claim, it is clear that what he is in effect saying is that he was unfairly deprived of a benefit he was entitled to in terms of his contract of employment. The applicant is saying that because of unfair behaviour by the respondent relating to the application of the PMDS policy and the moderation (or lack thereof) of his performance score, he was deprived of his performance bonus, and this is unfair. This kind of dispute, as the applicant himself has articulated and put forward, is

an unfair labour practice as defined in law. In Section 186(2) of the LRA, an 'unfair labour practice' is inter alia defined as **'....** any unfair act or omission that arises between an employer and an employee involving - (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee …' (emphasis added).

[25] The issue of the applicant's performance bonus, and the case that he has been unfairly deprived of the same, is clearly such an unfair labour practice case relating to benefits. On the facts of this matter, the performance bonus is clearly not remuneration. In fact, the qualifying provisions and terms of the PMDS policy and collective agreement make it clear that it is not remuneration. It is linked to performance objectives, all kinds of qualifying requirements, and several moderation levels which do not specifically relate to employees or their own individual performance. Also, what is declared as a bonus pool as forming the very basis for the quantum of any such bonus is also discretionary and dependant on a variety of factors. It is clear the performance bonus is linked to performance of an employee in executing specific work. It is simply not necessary in this judgment to deal with all the factors and terms and principles regulating qualification for the performance bonus in detail, considering what I am actually called on to determine, so I will suffice by concluding that on the facts, the performance bonus of the applicant is not remuneration but a benefit. In *Independent Municipal and Allied Trade Union on behalf of Pregnolato and Others v City of Cape Town*[6] Professor Rycroft as arbitrator said that a payment of an allowance must be a *quid pro quo* for services rendered to be deemed to be part of an employee's remuneration. The matter concerned the payment of a vehicle allowance to employees for the use of their private vehicles for business purposes and the arbitrator concluded that the allowance was not part of

[6] (2012) 33 ILJ 1984 (BCA) at para 20

remuneration.[7] Similarly, and in the reported arbitration award of *Transnet Ltd v SA Transport and Allied Workers Union and Another*[8] it was held that remuneration in terms of the BCEA would exclude 'gratuities, allowances paid for the purposes of enabling the employee to work and any discretionary payments not related to the employee's hours of work or work performance.'

[26] The judgment of *Northern Cape Provincial Administration v Commissioner Hambidge NO and Other,* [9] also provides guidance in the determination of this issue where the Court said:

> 'A salary or wage or payment in kind is an essential element in a contract of service. See Basson et al *Essential Labour Law* vol 1 at 22-3. The definition of remuneration read with the definition of employee in s 213 of the Act makes this clear. Remunerations in s 213 means: 'any payment in money or kind or both in money or kind'. Remuneration is an essentialia of a contract of employment. Other rights or advantages or benefits accruing to an employee by agreement are termed naturalia to distinguish them from the essentialia of the contract of employment. Some naturalia are the subject of individual or collective bargaining. Others are conferred by law. In my view a benefit may be part of the naturalia. It is not part of the essentialia. Some support for this distinction may be derived from the definition of fringe benefit in *The Shorter Oxford Dictionary*. It reads: 'Fringe benefit - a perquisite or benefit paid by an employer to supplement a money wage or salary'.'

[27] In *Schoeman and Another v Samsung Electronics SA (Pty) Ltd*[10] the Court considered specifically the meaning of the word 'benefit' in the context of commission paid to an employee and concluded:

> ' Commission payable by the employer, forms part of the employee's salary. It is

[7] Id at para 22
[8] (2001) 22 ILJ 2792 (ARB) at 2797
[9] (1999) 20 ILJ 1910 (LC) at para 13 .
[10] (1997) 18 ILJ 1098 (LC) at 1102H – 1103B

> a quid pro quo for services rendered just as much as a salary or a wage. It is therefore part of the basic terms and conditions of employment. Remuneration is different from "benefits". A benefit is something extra, apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contract.'

[28] Based on the above principles, it is my view that in terms of the relevant statutory framework, remuneration as contemplated by law requires payment to the employee to be a *quid pro quo* for the employee actually working. In other words, the fact that the employee discharges duties or renders services in terms of his or her contract of employment in general terms is the direct cause for the payment being made. Therefore, bonuses forming part of remuneration would be bonuses which an employee receives because the employee is working for the employer per se, which would include for example 13th cheques and other guaranteed bonuses as a salary sacrifice and as part of a gross remuneration and a cost to company package. The employee is entitled to be paid this kind of bonus for tendering service and whilst the employee remains employed, and there is no real *nexus* between the specific work to be done and the bonus. The moment there is a direct *nexus* between the payment of the bonus and the performance of actual and designated work to be done, or the content thereof, or the discharging of such actual work, or the standard of the work so discharged, then the bonus is a *quid pro quo* for the nature and fulfilment of the work itself and not simply for working per se. In such instance, the bonus would not form part of the employee's remuneration, and a specific example would actually be the performance bonus in the current matter. The employee would still be entitled to these kinds of bonuses, depending on contractual provisions, but this would be as a benefit, and not remuneration.

[29] Even if a benefit is subject to conditions and the exercise of a discretion, an employee could still, as part of the unfair labour practice proceedings, seek to instances where the employee then did not receive such benefit adjudicated. So

therefore, even if the benefit is not a guaranteed contractual right per se, the employee could still claim the same on the basis of an unfair labour practice if the employee can show that the employee was unfairly deprived of the same. An example would be where an employer must exercise a discretion to decide if such benefit accrues to an employee, and exercises such discretion unfairly. As the Court said in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[11]:

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

The Court concluded as follows:[12]

> 'This issue, whether the benefit must be an entitlement which arises *ex contractu* or *ex lege* was considered by the Labour Court in *Protekon (Pty) Ltd v CCMA and others*. The Labour Court correctly stated that *HOSPERSA* is authority for the view that the unfair labour practice jurisdiction cannot be used to assert an entitlement to new benefits, to new forms of remuneration or to new policies not previously provided for by the employer. The Labour Court then stated that it does not follow from this that an employee may have recourse to the CCMA's unfair labour practice jurisdiction only in circumstances in which he/she has a cause of action in contract law.
>
> The Labour Court pointed out that there are many employer and employee rights and obligations that exist in many employee benefit schemes. In many instances employers enjoy a range of discretionary powers in terms of their policies and

[11] (2013) 34 ILJ 1120 (LAC) at para 28
[12] Id at paras 44 – 46

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

I also agree, with qualification, with the Labour Court's conclusion that there are at least two instances of employer conduct relating to the provision of benefits that may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.'

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

<u>The issue of jurisdiction</u>

[31] Now, as I have found that the issues in dispute in this matter actually relate to the interpretation and application of a collective agreement and/or an unfair labour practice, the next question to be determined is whether the Labour Court has jurisdiction to adjudicate such issues in dispute.

[32] When it comes to unfair labour practices, the dispute resolution process is regulated by Section 191 of the LRA. In terms of Section 191(5)(a) of the LRA, if an unfair labour practice dispute remains unresolved following conciliation, the dispute must be arbitrated.[13] Any dispute can only be referred to the Labour Court for adjudication if the dispute concerns a dismissal where it is alleged that the reason for dismissal is that it is automatically unfair, based on the employer's operational requirements, for participation in a protected strike, or being related to a closed shop agreement.[14] It is clear that the Labour Court is not tasked, in terms of these dispute resolution provisions, to determine and adjudicate an unfair labour practice dispute.

[33] Dealing then with disputes about the interpretation or application of collective agreements, the relevant provisions of the LRA can be found in Section 24. In terms of this Section, the first prize, so to speak, is that the collective agreement must have its own dispute resolution process which culminates in arbitration, and this dispute resolution process must be given effect to.[15] Only if the collective agreement does not contain its own dispute resolution process, may any party refer a dispute about the interpretation or application of the collective agreement to the CCMA for conciliation,[16] and if this fails to arbitration.[17] Once again, the Labour Court has no involvement in this dispute resolution process and is not called on to determine and adjudicate the same.

[13] See Section 191(5)(a)(iv) of the LRA
[14] See Section 191(5)(b)
[15] See Section 24(1)
[16] See Section 24(2)(a) ; The matter can also be referred to the CCMA is the dispute resolution process is not operative (Section 24(2)(b)) or the dispute resolution process is being frustrated by one of the parties (Section 24(2)(c)).
[17] See Section 24(5)

[34] The above being the relevant statutory provisions, I will first deal with the issue concerning the interpretation and application of a collective agreement as one of the issues in dispute in the current matter brought forward by the applicant. As I have set out above, the PMDS policy is founded in the PMDS collective agreement. The PMDS collective agreement stipulated that dispute about any PMDS issue must be resolved utilising the dispute resolution process in the NBF collective agreement. The NBF collective agreement then contains a specific dispute resolution process dealing with interpretation or application of any collective agreement in the respondent. It prescribes two dispute meetings between the parties to first try and resolve the dispute (conciliation) followed by private arbitration by way of a private arbitrator either agreed to between the parties or appointed by Tokiso. The costs of this arbitration are paid from the NBF fund.

[35] What is thus clear is that the collective agreement at stake in this matter has its own prescribed dispute resolution process, prescribing private arbitration. This agreement must be given effect to and followed, and consequently, the Labour Court simply has no jurisdiction to adjudicate any dispute about the interpretation or application of the collective agreement. In *SA Broadcasting Corporation v Commission for Conciliation, Mediation and Arbitration and Others*[18] it was held as follows:

> ' … It is my considered view that the fourth and fifth respondents were bound by the dispute-resolution provisions contained in the said collective agreement and that they did not comply therewith. Consequently, I find that the second respondent did not have the jurisdiction to hear the applications of these two respondents. …'

[18] (2003) 24 ILJ 999 (LC) at para 9

[36] The same approach was followed in *Mthimkhulu v Commission for Conciliation, Mediation and Arbitration and Another*[19] where the Court said the following:

> 'In the event, the misconduct dispute in casu must be referred to private arbitration in terms of the collective agreement and not to the CCMA in terms of the Act.
>
> Collective agreements enjoy precedence over the provisions of the Act in this regard. The Act prefers collective agreements concluded on a voluntary basis by the parties concerned, in keeping with the objectives of the Act. …
>
> In the event, precedence is given to the products of collective bargaining and, as a rule, the Labour Court will uphold the products of collective bargaining, save for instance where the collective bargaining agreement itself is contra bonos mores and therefore void on such basis.
>
> In the event, the commissioner concerned acted fully within her competence as a commissioner of the CCMA when she made the decision in regard to the absence of jurisdiction. The decision was justified on the basis that there was a collective agreement which provided for dispute resolution procedures in terms of which misconduct disputes (such as the present dispute) must be dealt with. The CCMA accordingly had no jurisdiction to deal with such dispute.'

[37] In submitting his argument in this matter, Mr Aucamp in fact sought to contend that no matter what the provisions of the LRA provided for in respect of dispute resolution, the Labour Court had some or other overriding jurisdiction to nonetheless entertain the dispute where it was seized with the same. These submissions are unsustainable and clearly not correct. In *JDG Trading (Pty) Ltd t/a Bradlows Furnishers v Laka NO and Others*[20], the Court held as follows when referring to the reasoning by a commissioner in deciding that he had jurisdiction irrespective of the dispute resolution provisions in the collective agreement:

[19] (1999) 20 ILJ 620 (LC) at paras 25 – 30
[20] (2001) 22 ILJ 641 (LAC) at paras 13 – 14

'…. He decided that the CCMA has an overriding jurisdiction over labour disputes which fall within the scope of the LRA. He further found that when the relationship agreement had been signed the process leading to applicant's dismissal had already begun and further that since the LRA encourages speedy resolution of disputes and since the matter was before the CCMA, the arbitration should continue.

This conclusion is manifestly incorrect. The relationship agreement was signed on 22 January 1997 and was clearly applicable to a dispute which arose on 24 January 1997. Thus first respondent did not have the required jurisdiction to hear the matter…'

[38] The Labour Appeal Court has always been consistent in its approach that where the dispute is about the interpretation or application of a collective agreement, the dispute resolution provisions of the collective agreement must be applied and that having regard to the clear provisions of Section 24 of the LRA, the Labour Court simply does not have jurisdiction to entertain any such dispute. I wish to make some specific individual references in this regard. In *SA Motor Industry Employers Association and Another v NUMSA and Others*[21] the Court held: 'The scheme of s 24 is to compel the parties to a collective agreement to resolve a dispute about the interpretation or application of the collective agreement by conciliation, and if that fails, by arbitration, either in terms of an agreed procedure or, in the absence of an agreed procedure, by the commission. In terms of s 157(5), "[e]xcept as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the Act requires that the dispute be resolved through arbitration'. In *Wardlaw v Supreme Mouldings (Pty) Ltd*[22] the Court said: 'It seems to us that the effect of s 157(5) read with s 158(2) is in part that the only situation where the Labour Court has jurisdiction to deal with a dispute that is otherwise required to be referred to arbitration in terms of this Act is a situation that falls within the ambit of s 158(2).' Finally and in the

[21] [1997] 9 BLLR 1157 (LAC) at 1160D - E
[22] (2007) 28 *ILJ* 1042 (LAC) at para 19

recent judgments of *Carlbank Mining Contracts*[23] and *PSA of SA obo De Bruyn v Minister of Safety and Security*[24] the Court followed the exact same approach and came to the exact same conclusions.

[39] Similarly, the Labour Court also has been consistent in accepting that it has no jurisdiction to determine disputes about the interpretation or application of a collective agreement. In addition to the judgments of *Mthimkhulu* and *SA Broadcasting Corporation* already referred to, I wish to refer to a number of further judgments. In *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd*[25] the Court said: '... it is clear that the Labour Court does not acquire jurisdiction in terms of the Act to adjudicate a dispute concerning the interpretation or the application of a collective agreement as such dispute must be resolved by way of arbitration. It is thus not a matter to be determined by the Labour Court.' In *Rustenburg Base Metal Refiners (Pty) Ltd and Another v National Union of Metalworkers and Others*[26] it was held: 'On the facts set out in the founding affidavit it is plain that the gravamen of the controversy is the interpretation and implementation of the agreement and, more particularly, s 24 (2)*(c)* must govern the complaint articulated by the employers about the conduct of the unions. These issues are in terms of s 24 (5) to be resolved by arbitration. That being so, it follows that the Labour Court is not a forum clothed by the LRA with the requisite jurisdiction to determine the proper interpretation of the ERPA nor whether or not the unions are in violation of its provisions ….'. The Court in *Botha v Blue Bulls Co (Pty) Ltd and Another*[27] held that: '... The interpretation of a collective agreement is the sole preserve of the CCMA and this court has no jurisdiction to do so. ...' From all of this, there surely can be no doubt that where it comes to the interpretation and application of a collective agreement, the dispute can only be determined by arbitration, and not the by the Labour Court.

[23] (*supra*) footnote 5 at para 30
[24] [2012] 9 BLLR 888 (LAC) at paras 33 – 34
[25] (1999) 20 ILJ 137 (LC) at para 14
[26] (2002) 23 ILJ 1891 (LC) at para 15
[27] (2009) 30 ILJ 544 (LC) at para 77

[40] The Court in *SA Breweries v Commission for Conciliation, Mediation and Arbitration and Others*[28] dealt with the situation where the dispute resolution process in the collective agreement prescribed private arbitration as the appropriate dispute resolution mechanism. The Court held as follows:[29]

> 'In Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and others (2001) 22 ILJ 2684 (LC), this court emphasized this principle, namely that the Labour Relations Act encourages voluntarism and collective agreements which should be given primacy over the provisions of the Labour Relations Act. Reference is made in that case to other cases notably Free State Buying Association Ltd t/a Alpha Pharm v SA Commercial Catering and Allied Workers Union and another (1998) 19 ILJ 1481 (LC); [1999] 3 BLLR 223 (LC).
>
> I accept the submissions made on behalf of the applicant in this application that when parties to a collective agreement agree to resolve their dismissal disputes by way of a private arbitration, they clearly seek to regulate their own affairs without having recourse to the Labour Relations Act save only in those instances which are made exceptions by provisions of s 158(1)(g) of the Labour Relations Act.
>
> I also accept the submissions made on behalf of applicant that if a dispute-resolution procedure is provided for in a collective agreement then the Commission for Conciliation, Mediation & Arbitration does not have jurisdiction.'

There is simply no reason why the same reasoning should not apply to the Labour Court being asked to determine the issue in dispute in the current matter, in identical circumstances where private arbitration is actually prescribed by the collective agreement(s).

[41] Based on all of the above, I therefore conclude that the Labour Court has no jurisdiction to entertain the applicant's case about the interpretation and

[28] (2002) 23 ILJ 1467 (LC)
[29] Id at paras 12 – 14

application of the PMDS policy and collective agreement. The applicant is duty bound to refer this matter for determination and adjudication as prescribed by the specific provisions of the dispute resolution process in the NBF collective agreement. If the dispute cannot be amicably resolved in terms of such provisions, it must proceed to private arbitration. This Court however cannot be seized with it.

[42] I will now deal with the issue of the unfair labour practice. In this regard, the scheme of the LRA must surely be clear. This can only be arbitrated by the CCMA, or, in the current matter, by a private arbitrator in terms of the NBF collective agreement. In *Wardlaw*[30] the Court specifically said that '…. An unfair labour practice dispute is also required to be referred to arbitration'. Specific reference must however be made to what the Court said in *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another*[31], where it was held:

> 'The Act requires some disputes to be referred to arbitration, and others to adjudication, if conciliation fails (see s 191(5)). Whether a dispute will end up in arbitration or adjudication it must first have been referred to conciliation before it can be arbitrated or adjudicated. Subject to referrals to the Labour Court which the Director of the Commission for Conciliation, Mediation and Arbitration has power to make under s 191(6) of the Act, it depends on the reason for dismissal as alleged by the employee whether a dispute should be referred to arbitration or adjudication.
>
> If the employee alleges reasons specified in s 191(5)(a) as reasons for his dismissal or if he does not know the reason for his dismissal, the dispute goes to arbitration. If he alleges reasons specified in s 191(5)(b), the dispute goes to adjudication by the Labour Court. Some of the reasons for dismissal which the legislature envisages in the Act are those set out in s 191(5)(a) (i), (ii) and (iii) and

[30] (*supra*) footnote 22 at para 22
[31] (2000) 21 ILJ 142 (LAC) at paras 38-39

in (b) (i)-(iv) of the Act."

[43] The LAC has also addressed this issue in another judgement, being that of *MTN (Pty) Ltd v Pragraj and Another (2)*[32] where it was held as follows:

> 'The scheme which emerges is that, if the dispute is of the nature described in subsection (5)(a), the commission (or a council) must arbitrate it at the request of the employee. If it is of the nature described in subsection (5)(b) the employee may refer it to the Labour Court for adjudication. …
>
> In the present case the first appellant, by alleging that his dismissal was automatically unfair, placed it squarely within the ambit of subsection (5)(b) and removed it from the scope of subsection (5)(a) ….'

[44] In *Parliament of the Republic of SA v Charlton*[33] the LAC also held as follows:

> 'Therefore, once it is apparent to the court that the dispute is one that ought to have been referred to arbitration, the court may stay the proceedings and refer the dispute to arbitration or it may, with the consent of the parties, and if it is expedient to do so, continue with the proceedings sitting as an arbitrator. It cannot deal with the dispute outside the ambit of these provisions. Accordingly, it has no power to proceed to adjudicate the dispute on the merits simply because it is already seised with the matter. To do so would be in conflict with the provisions of s 157(5) and s 158(2) of the LRA.
>
> In resolving labour disputes a clear line must be drawn between the different fora that have been set up by the LRA.'

[45] The Labour Court accordingly does not have jurisdiction to determine the applicant's unfair labour practice dispute as well. The Labour Court is simply not the prescribed forum to do this. The Labour Court simply cannot, as Mr Aucamp vigorously contended to be the case, determine the unfair labour practice simply

[32] (2002) 23 ILJ 299 (LAC) at para 15I
[33] (2010) 31 ILJ 2353 (LAC) at paras 34 – 35

because it is now before it and the Court may now be seized with it.

The issue of Section 158(2)

[46] In terms of Section 158(2)[34], where it becomes apparent that the issue in dispute should have been referred to arbitration, the Labour Court has the power to stay the litigation proceedings and order that the dispute be referred to arbitration.[35] The Labour Court does not have to stay the proceedings and still has a discretion to decide whether to do so, as is evident from the word 'may' in Section 158(2).

[47] It is however critical to consider that in terms of Section 158(3), the concept of 'arbitration' in terms of Section 158(2) includes arbitration '(d) in accordance with a private dispute resolution procedure; or (e) if the dispute is about the interpretation or application of a collective agreement'. In the current matter, the 'arbitration' at stake is clearly arbitration as contemplated by Section 158(3)(d) and (e) of the LRA, and thus the Labour Court can competently refer any dispute it does not have jurisdiction to determine in this regard to such arbitration. In the current matter, I can find no compelling reason not to exercise my discretion in favour of the applicant and so refer the dispute to the arbitration as prescribed. The applicant, after all, has consistently pursued his matter and has properly articulated what the dispute is about. It is clear what needs to be determined, and in general, the applicant has a right to have these issues determined one way or another. The applicant's difficulties in the current matter has simply been caused by the fact that he chose the wrong forum, and in my view, this wrong choice should not permanently deprive him of having his case heard, albeit in the proper forum.

[34] Section 158(2) reads: 'If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may- (a) stay the proceedings and refer the dispute to arbitration ….'

[35] *Wardlaw* (*supra*) para 24 ; *Pienaar v Stellenbosch University and Another* (2012) 33 ILJ 2445 (LC) at para 22 – 23 ; *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 371 (LC) at para 15; *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC) at pars 24 – 25.

[48] The problem, however, remains with regard to referring any unfair labour practice dispute to the CCMA for arbitration, which in my view cannot be done. The reason for this is simply that the CCMA has already determined that it does not have jurisdiction to entertain the applicant's unfair labour practice dispute. Whilst I believe this determination is wrong, the fact remains that it was never challenged as I already indicated I believe the applicant should have done in the first place, and as such, must stand and considered to be valid until actually set aside.[36] I in any event cannot in these proceedings review and set aside such ruling, as the CCMA and commissioner are not party to the current proceedings and it would thus be incompetent for me to consider and determine the validity of this ruling in their absence and in the absence of compliance with Rule 7A of the Labour Court Rules.

Conclusion

[49] The respondent's objections in *limine* must therefore be upheld. Despite the respondent's objections in *limine* being upheld, it is not the end of the matter. What does fall to be dismissed because of the upholding of the respondent's objections in *limine* is the unfair labour practice dispute as it exists for adjudication by the CCMA. However, the applicant's dispute about the interpretation and application of the PMDS policy and collective agreement is stayed in terms of Section 158(2)(a) and referred for arbitration in terms of the dispute resolution process in terms of the NBF collective agreement. This arbitration in terms of the NBF dispute resolution process may of course include the very issue as to whether fairness is an element of the PMDS process in terms of the policy and collective agreement and whether the respondent acted fairly in applying the terms thereof. These are, however, issues left up to the private arbitrator to determine.

[36] *Taung Local Municipality v Mofokeng* (2011) 32 ILJ 2259 (LC) at para 11 ; *De Beers Consolidated Mines (Pty) Ltd (Venetia Mine) v National Union of Mineworkers* (2008) 29 ILJ 2755 (LC) at para 16 ; *National Union of Mineworkers v Hernic Exploration (Pty) Ltd* (2003) 24 ILJ 787 (LAC) at para 46.

[50] As to the issue of costs, the applicant represented himself. I do not believe he was frivolous in pursing his case to the Labour Court. He was also clearly led astray by what happened in the CCMA when he initially tried to pursue his case there. This Court in any event even has a wide discretion where it comes to the issue of costs. The dispute is still ongoing with possible arbitration in terms of the dispute resolution process under the NBF collective agreement to come. In the current matter, I in any event believe that it is in the interest of fairness that no order as to costs be made, and I exercise my discretion accordingly.

Order

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

1. The respondent's objections in *limine* as to the jurisdiction of the Labour Court are upheld.

2. The applicant's dispute about the interpretation and application of the PMDS policy and collective agreement is stayed and is referred to private arbitration in terms of the dispute resolution process as prescribed by the NBF collective agreement.

3. Other than the order granted in terms of paragraph 2 above, the applicant's application is dismissed.

4. There is no order as to costs.

_____

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: In person

For the Respondent: Advocate S M Shaba

Instructed by: Routledge Modise Inc