REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

C973/2013

In the matter between:

WESTERN CAPE GAMBLING & RACING BOARD	Applicant
and	
COMIMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
BELLA GOLDMAN N.O.	Second Respondent
WILLIAM ATTWOOD DANIEL BOWERS	Third Respondent
YVONNE SKEPU	Fourth Respondent

Date heard: 5 August 2014

Delivered: 20 February 2015

Summary: Application to review an arbitration award on the basis that award would force a public entity to act ultra vires the PFMA; a public entity *qua* employer is bound to meet its obligations under the LRA.

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed review application in terms of section 145 of the LRA. The applicant seeks to review and set aside an arbitration award dated 14 November 2013, under case number WECT11468-13.

[2] The background facts material to the review application are not in dispute. The third and fourth respondent, both senior employees, referred an unfair labour practice dispute to the first respondent, the CCMA. They alleged that the applicant committed an unfair labour practice by excluding them from the application of its Pay Progression Policy (the Policy).

[3] The applicant is a statutory body responsible for regulating gambling activities in the Western Cape Province. It is an independent public entity, and must comply with the provisions of the Public Finance Management Act 1 of 1999 (the PFMA). In terms of the applicant's enabling legislation, the MEC for Finance, Economic Development and Tourism of the Provincial Government of the Western Cape has oversight over its functions.

[4] During August 2002, the applicant's board considered implementing the Policy. Its intended purpose was to achieve parity within the organization, in relation to the remuneration packages paid to employees. On or about 27 September 2002, the applicant adopted a resolution which approved the implementation of the Policy.

[5] A Practice Note issued by the Board to explain the Policy to its employees defined the procedure and criteria to be made to adjust the remuneration packages of its employees appointed on entry-level remuneration packages to equal those of other employees appointed on higher salary levels.

[6] In order to qualify for the benefit, employees had to be employed by the applicant for a minimum continuous period of two years and be appointed at a salary level lower than the salary level of an employee appraised at the average level.

[7] In terms of the policy, a qualifying employee's remuneration would be adjusted on the following basis: the employee would receive a 50% adjustment of the difference between the employee's current remuneration and that of an average employee's remuneration if:

(i) The employee had an average performance appraisal rating, after three year's employment**;** or

(ii) The employee had an above average performance appraisal rating, after two year's employment.

[8] The Policy was not applied to the third and fourth respondents and they did not receive any benefit. During September 2012, the third and fourth respondents raised concerns regarding the fact that they had been excluded from its application. According to the founding affidavit, the applicant's CEO investigated why they had been excluded from the application of the policy and following these investigations on 30 April 2013, he avers that a resolution was adopted in terms of which the policy would be applied to the third and fourth respondent as of 1 May 2013.

[9] In a subsequent meeting of the board, serious concerns were raised regarding the legality of the application of the policy to the third and fourth respondents. The board resolved that it would seek to obtain clarity from the MEC regarding the legality of its earlier decision. It also resolved that it would suspend the application of the policy and reduce the third and fourth respondent salaries to what they were prior to applying the policy. On or about the 7 June 2013, the CEO informed the third and fourth respondent in writing of the decision taken by the Board.

[10] On 1 October 2013, the MEC advised the applicant that the resolutions it adopted at its April 2013 meeting had required his prior approval and that the payment of the adjustments was considered to be unauthorized and irregular. He further instructed the board to recoup the monies paid to the third and fourth respondent in terms of the resolution adopted in April 2013. As a result, the third and fourth respondent did not receive the increase, as detailed in the April 2013 resolution.

[11] The dispute was referred to the CCMA as an alleged unfair labour practice and the second respondent, (the Commissioner) made an award as follows:

> "74. I find that the respondents Policy known as **Practice Notice 2/2003 Adjustment of Salaries of Employees Appointed on Entry**

Level Remuneration Packages when applied to its employees is a benefit in terms of the Labour Relations Act 1995 (LRA).

75. I also find that the applicants, Yvonne Skepu and William Attwood Bowers were beneficiaries in terms of that Policy.

76. Further I find that by not benefiting in terms of the Policy in the case of 1st applicant, Yvonne Skepu, on her 2nd and 4th anniversary of employment, and in the case of second applicant, William Attwood Daniel Bowers on the 2nd anniversary of employment; they were subjected to unfair labour practices relating to benefits in terms of section 186 (2) of the LRA by the fact that the Policy was not applied to them.

77. In terms of relief I order that the respondent Western Cape Gambling and Racing Board pay the first and second applicants the full amounts that would have been paid to them had the policy been applied to them which in the case of the first applicant is R175, 983.13 and in the case of the second applicant is R112, 072.23 up to the 30 November 2013.

78. The respondent, the Western Cape Gambling and Racing Board is ordered to pay the first applicant, Yvonne Skepu the sum of R175,983.13 (one hundred and seventy-five thousand nine hundred and eighty three rand and thirteen cents) and the second applicant, William Attwood Daniel Bowers the sum of R112, 072.23 (one hundred and twelve thousand and seventy two rand and twenty three cents). These amounts are to be paid by the Western Cape Gambling and Racing Board to Yvonne Skepu and William Attwood Daniel Bowers by no later than 6 December 2013, after which interest will run at the prescribed rate.

79. The respondent, the Western Cape Gambling and Racing Board is ordered to remunerate the first applicant, Yvonne Skepu at the annual rate of R759, 913. 15 per annum as from 1 December 2013. The respondent, the Western Cape Gambling

Board is also ordered to remunerate second applicant William Attwood Bowers at the annual rate of R624,136.05 per annum as from 1 December 2013.

80. I also order that the respondent Western Cape Gambling and Racing Board, upon the 2nd applicant, William Bowers fourth anniversary it apply the Pay Progression policy known as the Practice Notice 2/2003 Adjustment of Salaries of Employees Appointed on Entry Level Remuneration Packages to William Attwood Bowers subject to him receiving an above average performance rating, or on his fifth anniversary, if if he receives an average performance rating, and his salary then be increased to the top end of the salary of a Head of Department. "

[12] The applicant submits that the award of the Commissioner is reviewable in that she committed a gross irregularity by failing to apply her mind to the evidence before her and/or ignoring relevant evidence. It is further submitted that her conclusion was one that a reasonable Commissioner could not have reached. The essence of the applicant's case is that the Commissioner did not take into account the relationship between it and the Provincial Department of Economic Development and Tourism and further failed to consider that the applicant is one of 14 public entities within the Western Cape Province and that the Public Finance Management Act (the PFMA) applies to all of these entities.

[13] In terms of section 53 of the PFMA, the applicant is required to annually submit a budget of estimated revenue and expenditure for that financial year, for approval by the executive authority i.e. the MEC. Once the budget is approved it must comply with the terms of the approval. In other words, it is submitted that it is not open to a public entity to spend funds as it sees fit. All expenditure must comply with the prescripts of the budget, as approved. Expenditure not authorized by, or contrary to the purpose of and/or conditions attached to the budget, may constitute unauthorized or irregular expenditure.

[14] In its supplementary affidavit, applicant's CEO of the Board refers to the record of the arbitration proceedings and avers that: "based solely on my oral testimony before the Commissioner, it was made clear to her that both I in my capacity as CEO of the Applicant as well as the Board of the Applicant, considered the exclusion of the Third and Fourth Respondents from the Pay Progression Policy as unfair". He lists all the efforts he made to convince the MEC that he should condone and ratify the decisions taken by the board. It is his submission that there was a clear and unequivocal attempt by the applicant to remedy the situation in respect of the third and fourth respondents.

[15] It was argued on behalf of applicant that in circumstances where the uncontroverted evidence before the Commissioner was that it is subject to the authority of the MEC and that the MEC had directed it not to proceed to implement policy in relation to the third and fourth respondents, the finding that it had committed an unfair labour practice nevertheless, is a conclusion that a reasonable decision-maker could not make.

[16] Mr Leslie on behalf of the applicant argued that the Commissioner's finding that the third and fourth respondents were entitled, as of right, to the benefits under the policy was unreasonable. Even if the third and fourth respondents prima facie qualified under the policy, their entitlement to the salary increase depended on the prior approval of the increase by the MEC. Since no such approval had been obtained ,he submitted, they had no "right" to the increase within the meaning of **Protekon (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others** [1]

[17] The court in **Protekon** held that:

> "[34] The establishment of the CCMA's unfair labour practice jurisdiction specifically in relation to benefits is, it seems to me, a legislative response to the complexity of the reciprocal employer and employee rights and obligations that exist in many employee benefit schemes. In typical employee benefit schemes (such as pension funds

[1] (2005) 26 ILJ 1105 (LC)

and medical aid schemes) the employer's obligations frequently extend beyond the simple payment of money to the employee or a third party in return for services rendered by the employee. Employer obligations are typically regulated by separate policies or rules. In many instances the employer enjoys a range of discretionary powers in terms of those policies or rules. The legislature has clearly considered it necessary to regulate employer conduct in those circumstances by superimposing a duty of fairness irrespective whether that duty exists expressly or impliedly in the contractual provisions that establish the benefit."

[18] In **Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others**[2] the Labour Appeal Court endorsed the approach taken in **Protekon** finding that an employee has an ex lege right created by s 186(2)(a) not to be treated unfairly in relation to promotion, demotion, training and the provision of benefits[3]. The court held that the interpretation of the term 'benefit' includes:

> " a right or entitlement to which the employee is entitled (ex contractu or ex lege including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment 'benefit' in s 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion."[4]

[19] It is the applicant's contention that it is the MEC who has the discretion to grant the benefit *in casu* and that the effect of the award is to compel it to do something that is unlawful and which it is not empowered to do. Compliance with the award, therefore, would amount to a breach of the PFMA and the conditions on which the applicant's budget was approved. By ordering the Board to do something that is unlawful it submits, the Commissioner exceeded her powers and the award falls to be reviewed and set aside on this ground alone.

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[2] (2013) 34 ILJ 1120 (LAC)
[3] At para 41
[4] At paragraph 50

[20] This matter therefore raises important questions: can public entity employees' *ex lege* right to fair labour practices be limited by their employer's obligations in terms of the PFMA? Can a public entity *qua* employer offer a defence to prima facie unfair conduct in respect of provision of benefits by reliance on the prescripts of the PFMA?

[21] In my judgment, the answer to the above questions must be in the negative. Such an approach would violate constitutionally entrenched rights of employees of these entities. It would create a scenario in which employees of public bodies would be precluded from the protection of *ex lege* rights applicable to private sector employees, offending against their fundamental right to equality and fair labour practices amongst others. As the Constitutional Court has held, one of the manifest objects of the LRA is to subject all employees, whether in the public sector or in the private sector, to its provisions, except those who are specifically excluded from its operation[5].

[22] Mr Conradie for the third and fourth respondents argued that the applicant's stood to be judged on the basis of its employer status. I would agree. Even if it was the subjective view of certain of the applicants board members that it was not fair to deprive the third and fourth respondents from the benefit of the Policy the objective conduct of the employer in not doing so, amounted to an unfair labour practice.

[23] I therefore find that the approach taken by the Commissioner and the outcome of the award is unassailable. The applicant *qua* employer is bound to meet its employment law obligations in terms of the LRA. It needs to do so while at the same time complying with the obligations that it has by virtue of its public funding. The PFMA was not intended to be used as a shield behind which public sector employers can hide from employment law obligations.

[20] In all these circumstances, and taking into account the basis on which this review was brought, I make the following order:

[5] Chirwa v Transnet Ltd 2008 (4) SA 367 (CC) at paragraph 101

Order:

1. The application is dismissed.
2. The Applicant is to pay the costs.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: Mr. G Leslie instructed by Bowman Gifillan Inc

Third respondent: Mr. B Conradie of Bradley Conradie Attorneys