THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 693 / 15

In the matter between:

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**First Applicant**
OFFICE OF THE CHIEF JUSTICE	**Second Applicant**

and

CARINE NAUDE AND 13 OTHERS	**First Respondent**
GENERAL PUBLIC SECTORAL BARGAINING COUNCIL	**Second Respondent**
SILAS RAMUSHOWANA N.O.	**Third Respondent**

Heard: **10 October 2016**

Delivered: **2 December 2016**

Summary: Bargaining council arbitration proceedings – review of arbitration award and condonation ruling – test for review – s 145 of LRA 1995 – reasonable outcome

Unfair labour practice – applicable date when dispute arose for the purposes of Section 191(1) of the LRA – consideration of issue by arbitrator – in imine ruling correct

Unfair labour practice – benefit – meaning of benefit – principles considered and applied – no unfair practice exists – arbitrator misconstruing legal principles

Unfair labour practice – change to benefit – whether unfair – change to benefit not unfair

Review application – consideration of evidence by arbitrator – arbitrator failing to consider evidence rationally and reasonably – award not sustainable based on proper evidence

Review application – proper case made out for review – arbitration award reviewed and set aside – award substituted with determination dismissing unfair labour practice dispute

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This case has its roots firmly in the practices of the High Court in the far past. These practices existed before the consolidation and organization of the public service into a central framework, where conditions of employment of all employees in the public service are expected to be consistently applied and are the subject of organized sector level collective bargaining. In short, what one has in this matter is the remnants of the past finding its way into current affairs.

[2] The case forming the subject matter of this judgment arose from an unfair labour practice dispute referred by the first respondent parties to the General Public Service Sectoral Bargaining Council ('the GPSSBC'). This referral initially gave rise to a preliminary issue as to whether the dispute was referred

to the GPSSBC in time. The matter came before the third respondent as arbitrator, who decided in an *in limine* ruling handed down on 30 September 2014 that the dispute was referred to the GPSSBC in time. The matter then proceeded to arbitration on the merits thereof, and again came before the third respondent. In an award dated 4 March 2015, the third respondent determined that the first applicant had committed an unfair labour practice relating to a benefit in respect of all the individual first respondents.

[3] The first applicant was dissatisfied with both the *in limine* ruling and ultimate arbitration award, which both now form the subject matter of the review application brought by the applicants. This application has been brought in terms of Section 145 as read with Section 158(1)(g) of the Labour Relations Act[1] ('the LRA').

[4] The applicants' review application was filed in Court on 5 May 2015. It was however already served on the respondents at the end of April 2016. Therefore, and even though the review application was served on the respondent parties in time, it was filed in Court 4 (four) days out of time, considering the 6(six) weeks' applicable time limit under Section 145 of the LRA. The applicants did realize this predicament and sought to regularize the situation with a condonation application filed on 15 September 2016, which application remained unopposed. When the matter came before me, condonation was equally not placed in issue by the respondents. The delay is minimal, and the explanation provided for it in the condonation application acceptable. Condonation is accordingly granted for the late filing of the review application.

[5] The first applicant is the Minister responsible for the Department of Justice and Correctional Services, which I will refer to in this judgment as 'the Department'. The actual employer of the individual first respondents at the time when the arbitration award was handed down, was the Department.

[6] I will now proceed to consider the applicants' review application, starting with the setting out of the facts relevant to deciding all the grounds of review raised by the applicants in their review application.

[1] Act 66 of 1995.

The relevant background

[7] Before dealing with all the relevant facts, I need to set out how the second applicant became involved in this matter. Initially, and as said, the individual first respondents were all employed by the Department at the time when this matter proceeded to arbitration and the arbitration award was handed down. Since then, however, all employees employed in the area of the public service referred to as the Judiciary (Superior Courts) were transferred to the second applicant, by virtue of the provisions of the Superior Courts Act. The second applicant is now the employer of these employees. This would include all the individual first respondents.

[8] The individual first respondents are all Judges' secretaries employed at the Supreme Court of Appeal ('the SCA'). I will refer to the individual first respondents in this judgment, for the sake of convenience and ease of reference, as 'the 'SCA secretaries'. Each of these SCA secretaries are tasked to service an individual SCA Judge.

[9] As touched on above, this matter has as its origin the long standing past practice, spanning over decades, associated with the terms of the High Courts and the SCA. In between each of the Court terms there is a recess. In the recess, Judges in the SCA are not required to report for duty. A practice had then developed over some 65 years in terms of which the SCA secretaries allocated to each Judge were also not required to report for work in the recess, without having to take leave, unless the Judge concerned decided to work in the recess and instructed the SCA secretary to work as well. It was common cause between all the parties that in the past, this was indeed the practice. I may add that this practice also applied in several of the High Court jurisdictions as well. I will refer to the aforesaid practice in this judgment as 'the recess practice'. There was never a recess practice in the Constitutional Court, as this Court was newly established, after 1994.

[10] The recess practice endured until 1997. On 13 March 1997, the Director General of the Department wrote to all the Registrars of all the Superior Courts. This included the Registrar of the SCA. A pertinent topic contained in this correspondence was the issue of the leave benefits of Judge's

secretaries. The correspondence recorded that the Chief Justice was approached for his view where it came to service benefits of Judge's secretaries, and after the Chief Justice gave his recommendations, the Minister then approved service benefits relating to leave and termination of service of Judges' secretaries. Where it came to leave, the correspondence recorded that Judges' secretaries were compelled to take leave in the normal course and complete leave forms, and it was stated that the practice that secretaries being absent during recess without 'officially' taking leave 'must stop'. This clearly related to the recess practice. The Registrars were instructed to see to it that all secretaries comply with these directives. What is thus clear is that all Judges' secretaries were forthwith only permitted to be absent from work if they applied for leave, and were given approved leave.

[11] The Registrars of the High Courts implemented this directive from the Director General of the Department, in the course of 1997. That put paid to the recess practice in those Courts. However, the Registrar of the SCA, and for the reasons elaborated on hereunder, did not implement the directive and the recess practice where it came to the SCA secretaries in the SCA remained.

[12] Turning then to the SCA secretaries *per se*, and as referred to above, the SCA secretaries, like all Judge's secretaries, are employees in the public service, employed in terms of the Public Service Act, 1994. They are not employed by the individual Judges they are tasked to serve. Their conditions of employment are determined under the Public Service Act, along with all other public service employees.

[13] What followed towards the end of the decade was an evolution in the determination of conditions of employment for employees in the public service, which then moved in the realm of centralised collective bargaining in the Public Service Coordinating Bargaining Council ('PSCBC'). In the PSCBC, and pursuant to collective bargaining, actual conditions of employment for public service employees are determined. This process culminated in Resolution 7 of 2000, adopted in the PSCBC. This Resolution specifically included, in clause 7 thereof, the regulation of all leave of public service employees. Despite extensively regulating a variety of categories of leave, no provision is made in this Resolution for the recess practice. I may add that the

reason why this was not included is obvious, considering the correspondence of 13 March 1997 and the conditions of employment relating to leave of all Judges' secretaries already recorded therein.

[14] The upshot however is that the adoption of Resolution 7 of 2000, which was the product of collective bargaining and applied across the entire public service as a uniform set of conditions of employment, was completely inconsistent with the continued existence of the recess practice. What followed was a number of variations of Resolution 7 of 2000, being Resolution 5 of 2001, Resolution 15 of 2002, Resolution 1 of 2007 and finally Resolution 1 of 2012. None of these variations dealt with the issue of the recess practice. Therefore, no condition of service which entitles Judges' secretaries not to report for work in the recess without having to apply for formal approved leave, exists in terms of any of the Resolutions concluded under the auspices of the PSCBC.

[15] Despite all of these developments, and throughout, the Registrar in the SCA allowed the recess practice to continue in the SCA. This was done despite the formal abolishment of the practice in 1997 and no provision being made for it in the public service conditions of employment in terms of the Resolutions adopted under the auspices of the PSCBC.

[16] The situation in the SCA was obviously a problem to the Department. On 9 April 2008, the Regional Head of the Department wrote to the SCA Registrar, with regard to the application of the issue of leave of absence as prescribed in the public service employment conditions to the SCA secretaries, and requested that it be confirmed by the Registrar that these provisions are being adhered to. The Registrar answered on 16 April 2008, but did not provide the confirmation sought, and said that the issue of the SCA secretaries was a 'delicate matter'. The Registrar added that the 'present arrangement' where it came to recess practice was one insisted on by the Judges. The Registrar suggested that the President of the Court be approached about the issue. On 9 July 2008, the Regional Head of the Department requested the Registrar to inform the SCA secretaries to be at work in the June to August 2008 recess.

[17] An important letter in the context of this case was written by the Regional Head of the Department to the SCA Registrar on 31 July 2008. It was made

clear that the SCA secretaries were public service employees like all other employees in the public service and bound by the same conditions. It was recorded that even if the SCA secretaries receive their instructions from the Judges and are administered on a day to day basis by the Registrar, their obligations to be at work arise from their contracts of employment and in particular, the conditions of employment under the Public Service Act. The Registrar was informed that it was expected that these provisions be complied with. The Registrar answered on 1 August 2008, reiterating that the recess practice had existed for 'many years', and that the Judges had an interest in the matter and needed to be consulted before any changes were made.

[18] As a result, nothing changed and the recess practice persisted in the SCA. The simple reason why it persisted was because the Registrar of the SCA failed to take action to abolish it, as required. The Registrar did not want to be seen to cross the SCA Judges, who she perceived would be dissatisfied with any such action taken. It was necessary for the Registrar to have taken action to apply the public service conditions to the SCA secretaries, but she did not.

[19] Matters finally came to a head on 18 July 2013, when a meeting took place between SCA Judge Brand, the SCA Registrar and SCA secretaries. Judge Brand chaired the meeting. Judge Brand made it clear in the meeting that all the SCA secretaries had to be at work in the recesses, because they are public servants and must comply with public service conditions. Judge Brand said that even Judges and the Registrar could not change this. The Registrar stated that the same rules must apply to everyone, and that secretaries are required to do other work that does not just relate to Judges. The SCA secretaries were informed that office hours in the recess would be 08h30 to 16h00 Monday to Thursday and 13h00 on Fridays, which still a relaxation of the normal hours of 08h00 to 16h30 from Monday to Friday.

[20] Judge Brand prepared his own minute of the meeting on 18 July 2013. It is important to highlight what Judge Brand records at the outset of the minute:

> 'I confirm that consensus had been reached at the meeting on several issues. The first amongst these is an understanding by the secretaries that it is the insistence of regional office that they should attend during office hours while the court is in recess. Though the judges have tried to persuade the regional

> office that the position is impractical, unreasonable and so forth, we have lost the argument. …'

Judge Brand further wrote in the minute:

> 'I requested Mr Myburgh (the Registrar) to apply these rules strictly and take departmental disciplinary action against each and every secretary who fails to comply and he undertook to do so. I explained my reason for the request on the basis that both non-enforcement and inconsistent enforcement lead to resentment by those who seek to comply …'

[21] It is then, at some point in time after the meeting of 18 July 2013, that the recess practice was abolished in the SCA, and the SCA secretaries were required to report for work in the following recesses.

[22] The SCA secretaries then referred an unfair labour practice dispute relating to a benefit, to the GPSSBC on 15 November 2013, alleging that the dispute arose on 19 September 2013 when a final meeting on the recess practice abolishment took place. The dispute was unsuccessfully conciliated and a certificate of failure to settle issued. The dispute then proceeded to arbitration before the third respondent, who made the determinations referred to above, leading to the current review application. I will now proceed to decide this review application.

The test for review

[23] I will firstly, and in short, summarize the proper test for review. *In casu*, there are in reality two kind of review tests that find application, because both the jurisdictional ruling and the arbitration award of the third respondent are sought to be reviewed. As the jurisdictional ruling concerns an issue of the jurisdiction of the GPSSBC, the review test is different to that applicable to the arbitration award on the merits.

[24] Where it comes to the review test applicable to the arbitration award on the merits, the Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and*

Others,[2] held that the standards as contemplated by Section 33 of the Constitution[3] are in essence to be blended into the review grounds in Section 145(2) of the LRA, and the Court concluded that 'the reasonableness standard should now suffuse s 145 of the LRA'. Where it comes the threshold test for the reasonableness of an award, the Court said that the question to be asked was: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[4]

[25] The application of this review test since the judgment in *Sidumo* has not been without its challenges and misapplications. But now, and following close on a decade's worth consideration and application, the review enquiry to establish reasonableness as contemplated by *Sidumo* is more or less trite. Firstly, this reasonableness test only applies where the review ground is not specifically based on the text of Section 145(2)(a) and (b) as it stands, but is founded on the constitutionally suffused Section 145(2)(a)(ii). The application of the reasonableness test is a two tier inquiry, the first tier being the consideration whether an irregularity exists, and the second tier being the consideration whether the outcome arrived at is unreasonable.

[26] As to the first tier, what the review applicant must show to exist in order to succeed with a review, is that there exists a failure or error on the part of the arbitrator in making the award. If this cannot be shown to exist, that is the end of the matter. Once this failure or error is shown to exist, the second tier of the test entails that the review applicant must then show that the outcome arrived at was also unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, for a review application to succeed, the error of failure must affect the reasonableness of the outcome, rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*[5] the Court said:

> '…. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material

[2] (2007) 28 ILJ 2405 (CC).
[3] Constitution of the Republic of South Africa, 1996.
[4] Ibid at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[5] (2013) 34 *ILJ* 2795 (SCA) at para 25.

> errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[27] Following the judgment in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[6] reconsidered the review test and said:

> '…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material'

I align myself with this view.

[28] In short, the reasonableness test envisages a determination, based on all the evidence and issues before the arbitrator, as to whether there is a failure or error in the arbitrator's award, and if so, whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[7]

[29] A determination as to whether the outcome arrived at is unreasonable or not, thus necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at,

[6] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

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

that the review application would succeed.[8] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[9] it was held:

> '…. the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[30] Turning next to the issue of the applicable review test where it comes to the third respondent's jurisdictional ruling, the Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[10] said:

> '…. Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise …. ' (emphasis added)

[31] In simple terms, where the issue to be considered on review is about the jurisdiction of a bargaining council (as applicable in this case), the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court determines the issue *de novo* in order to decide whether the determination by the arbitrator on jurisdiction is right or wrong. In *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA,* the Court held:[11]

> 'The commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justiciable grounds....' (emphasis added)

[32] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others,*[12] the LAC articulated the enquiry as follows:

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[8] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[9] (2015) 36 ILJ 1453 (LAC) at para 12.
[10] (2008) 29 ILJ 964 (LAC) at para 101.
[11] (1999) 20 ILJ 108 (LAC) at para 6.
[12] (2008) 29 *ILJ* 2218 (LAC) at para 40.

> 'The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court…'

[33] I had the opportunity to deal with this kind of review test in *Trio Glass t/a The Glass Group v Molapo NO and Others*[13] and said:

> 'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[34] This 'right or wrong' review approach has been consistently applied in a number of judgments, in instances where the issue for determination on review concerned the jurisdiction of an arbitrator, which judgments include *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others*[14], *Hickman v Tsatsimpe NO and Others,*[15] *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others,*[16] *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others,*[17] *Workforce Group (Pty) Ltd v CCMA and Others*[18] and *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others.*[19]

[35] Against the above principles and tests, I will now proceed to consider the applicants' application to review and set aside the jurisdictional ruling and the arbitration award of the third respondent.

The jurisdictional ruling

[36] The jurisdictional ruling of the third respondent relates to the issue as to whether the unfair labour practice dispute of the SCA secretaries had been

[13] (2013) 34 *ILJ* 2662 (LC) at para 22.
[14] (2012) 33 *ILJ* 363 (LC) at para 23.
[15] (2012) 33 *ILJ* 1179 (LC) at para 10.
[16] (2013) 34 *ILJ* 392 (LC) at paras 5–6.
[17] (2012) 33 *ILJ* 1171 (LC) at para 14.
[18] (2012) 33 *ILJ* 738 (LC) at para 2.
[19] (2013) 34 *ILJ* 1272 (LC) at para 21.

referred to the GPSSBC in time. This in turn necessitates a determination as to when the SCA secretaries' dispute arose. In their referral to the GPSSBC, they contended that the unfair labour practice dispute arose on 19 September 2013. As far as the SCA secretaries were concerned, and when the dispute was referred to the Council on 15 November 2013, it was thus referred in time.

[37] The applicants contend that the dispute arose on 18 July 2013, when the meeting between the SCA secretaries, the SCA Registrar and SCA Judge Brand took place. If this is the date when the dispute arose, then the GPSSBC referral on 15 November 2013 was not made in time.

[38] The issue of the late referral of the dispute to the GPSSBC came before the third respondent in an arbitration hearing on 5 August 2014. Unfortunately the record of the arbitration proceedings on 5 August 2014 was not placed before me. Considering what is actually recorded in the jurisdictional ruling, as it stands, the first respondents presented evidence that a meeting was held on 19 September 2013 where the issue of the abolishment of the recess practice where it came to the SCA secretaries, was finally decided. They contended the 18 July 2013 was a consensus meeting, which was then followed on 19 September 2013 by a final meeting. The applicants disputed the meeting of 19 September 2013 took place, and contended the only applicable meeting was on 18 July 2013.

[39] The third respondent accepted the version of the first respondent. The third respondent accepted that there was a meeting on 19 September 2013 and that this was the final meeting to decide the issue of the abolishment of the recess practice. As a result, and according to the third respondent, the dispute was referred in time and no condonation was required.

[40] In order to decide whether the above finding of the third respondent is right or wrong, being the applicable review test, a proper record is critical. The reason for this is that this Court can only decide this jurisdictional issue for itself, on a *de novo* basis, with reference to such a record. In the absence of a record, there is simply no basis against which to test these factual findings of the third respondent, and as a result, the applicants' contention that this conclusion is

wrong simply cannot be sustained. In *Metalogik Engineering and Manufacturing CC v Fernandes and Others*[20] the Court held:

> '… The record of what was said in the arbitration is not properly before me and I am in no position to form a reasoned assessment of what it amounts to and, hence, whether or not there are good grounds upon which the conclusion reached by the second respondent should be assailed.'

[41] The fact that the recess practice was authoritatively dealt with in a meeting on 18 July 2013, cannot in itself lead to a conclusion that there could not have been a final meeting held on 19 September 2013 to implement the decision. In the absence of a record that informs otherwise, I thus have to accept that there was a proper basis in fact for the third respondent to decide that the abolishment of the recess practice was finally discussed in a meeting on 19 September 2013, and then implemented. In *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO and Others*[21] the Court said:

> 'In the absence of the transcribed record of the proceedings before the first respondent, the court a quo was in no position to adjudicate properly on the application before it and ought accordingly to have dismissed it.'

The same consideration must now apply, with regard to the arbitration proceedings on 5 August 2014 which led to the jurisdictional ruling. This approach has been consistently applied in this Court.[22]

[42] In terms of Section 191(1)(b)(ii) of the LRA, a dispute concerning an unfair labour practice must be referred to the CCMA or bargaining council, as the case may be, within 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

[43] Thus, if the dispute arose on 19 September 2013, a referral made on 15 November 2013 would be made within the prescribed 90 days and would thus

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[20] (2002) 23 ILJ 1592 (LC) at para 11.
[21] (2001) 22 ILJ 648 (LAC) at para 13.
[22] See *Consolidated Workers Union of SA on behalf of Individual Applicants v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2010 (LC) at paras 20 – 21; *Liwambano v Department of Land Affairs and Others* (2012) 33 ILJ 1862 (LC) at para 30; *A Black CC and Another v Department of Labour and Another* (2010) 31 ILJ 913 (LC) at para 10.

be in time. That would mean that the third respondent's ruling that the referral was made in time and no condonation being required, is correct. In these circumstances, the applicants' application to review and set aside the jurisdictional ruling of the third respondent is unsustainable and falls to be dismissed.

The unfair labour practice

[44] This brings me to the third respondent's award where it comes to the merits of the matter and the unfair labour practice dispute itself. The point of departure in deciding the review in this regard is to first establish the grounds of review raised by the applicants. Broadly speaking, the applicants' review grounds are founded on a contention that the third respondent ignored material evidence and then became unduly embroiled in irrelevant evidence, when deciding that the Department has committed an unfair labour practice towards the SCA secretaries in abolishing the recess practice. The applicants have also raised the further review ground that as a matter of law, this continuing recess practice simply could not override the terms and conditions of employment agreed to in the PSCBC, and that the application of the award would raise an inconsistency in the application of terms of conditions of employment in the public service. The applicants have finally contended that the third respondent misconstrued the relevant legal principles, leading to an unreasonable outcome.

[45] I will firstly deal with the evidence actually considered by the third respondent. Regrettably, there is substance in the contention of the applicants that the third respondent completely ignored material evidence. I venture to say this happened because the third respondent was unduly influenced by the calibre of one of the witnesses for the SCA secretaries that testified before him, being a retired SCA Judge, Judge Hefer. The third respondent became, for the want of a better description, star struck by the presence of so a senior Judge as Judge Hefer and fixated on the Judge's testimony to the exclusion of all else. In fact, and in his reasoning, the third respondent hardly made a reference to any other testimony, relying virtually only on the Judge's testimony. This is clearly not a rational and reasonable consideration and determination of the evidence before the third respondent as a whole, which is required.

[46] What the third respondent further completely failed to appreciate is that Judge Hefer retired in 2002, and could therefore only in reality testify what had happened in the past under the former dispensation. The third respondent had no regard at all to the testimony relating to the events in 1997, 2008 and 2013 referred to above, the advent of centralized collective bargaining in the PSCBC and the resulting Resolutions, and finally the change in circumstance where it came to public service in the new dispensation. A telling example of this change in circumstance can be gathered from the testimony of Judge Hefer himself to the effect that he had in the past appointed secretaries, which is certainly no longer the case, as secretaries are appointed by and employed by the Department, and not by the Judges they serve. With respect, the views of Judge Hefer were simply not current.

[47] What the evidence showed is that in 1997, the recess practice was abolished in all the High Courts, and the only reason why it was not abolished in the SCA is because the Registrar chose not to implement it because, according to the Registrar, it may have displeased the Judges. Again in 2008 the issue was revisited, with the Department insisting that the recess practice be abolished, and pointing out that the SCA secretaries were not employed by the Judges but by the Department and that they had to adhere to the public service conditions of employment. Yet again, the Registrar of the SCA chose not to adhere to these requirements based on the fact that the Judges may be dissatisfied with it being implemented. Finally, and in 2013, Judge Brand presided over a meeting wherein it was confirmed that the issue had been debated with the Department by the Judges, but they had 'lost' and the SCA secretaries had to comply with the normal leave requirements and provisions, and the recess practice had to be abolished. Therefore, and by 2013, even the reason for the Registrar of the SCA not abolishing the recess practice in the SCA, being the needs and views of the Judges, had fallen away.

[48] There is a proper factual foundation for the abolishment of the recess practice. The recess practice had its origin in a past that is no longer relevant, a past where each division of the High Court were in essence responsible for employing its own personnel and determining conditions of employment. The abolishment occurred in the context of what was now a centralized public

service, where conditions of employment are centrally negotiated and determined for all public service employees, so as to ensure consistency and equality. It is undesirable to have different terms and conditions of employment for public servants occupying the same or related positions, just because of the particular department in which they work (such as the Court in the SCA). As a matter of principle, it certainly can be justifiably said that SCA secretaries should be treated the same as all other Judges' secretaries in all divisions of the High Court.

[49] In the end, Judge Hefer's testimony was of little value in deciding this matter, as it was common cause that the recess practice indeed existed for a large number of years. Judge Hefer could not testify on the changing circumstances which brought about the abolishment of the recess practice. The reality is that any practice can never be cast in concrete. By its very nature, a practice must be susceptible to change if circumstances so dictate. The evidence of this change in circumstances was properly before the third respondent. The flaw in the approach of the third respondent was that he accepted that because the practice was a 'long standing' one, the mere conduct of withdrawing it was *per se* unfair. This approach elevates the practice to what is tantamount to a contractual right, and that is not sustainable reasoning, for the reasons elaborated on hereunder.

[50] It surely cannot be said that the SCA secretaries have a contractual or *ex lege* right to be absent from work in the recesses without taking formal leave. The actual contractual and *ex lege* terms and conditions of employment of the SCA secretaries are determined by their individual contracts of employment and the provisions of the Resolutions adopted under the auspices of the PSCBC by way of collective agreement. None of these provisions provide for leave of absence in the recesses without formal leave, in other words the recess practice.

[51] As a matter of principle, preference should always be given to products of collective bargaining, especially at sector (central) level. Section 1 of the LRA reads:

> 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are- …. (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy; and (d) to promote- (i) orderly collective bargaining; (ii) collective bargaining at sectoral level….'

[52] The Court in *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*[23] dealt with the primacy of products of collective bargaining under the LRA, and said:

> 'The Act seeks to provide a framework whereby both employers and employees and their organizations can participate in collective bargaining and the formulation of industrial policy. Finally, the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace, and the effective resolution of labour disputes.'

The Court also referred with approval[24] to the following passage by Brassey:[25]

> 'The general intention behind the Act is that voluntarism (provided, at any rate, that it is collective) should prevail over state regulation. As a result, the rights conferred by the Act are generally residual: they are normally subordinate to arrangements that the parties collectively craft for themselves and operate only in the absence of such an agreement.'

[53] The Court in *Kem-Lin Fashions CC v Brunton and Another*[26] dealt specifically with Section of the LRA, and said the following:

> 'The purpose of the Act is stated in s 1 to be the advancement of economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the Act. One of the primary

[23] (2003) 24 *ILJ* 305 (CC) at para 26.
[24] Id at para 65.
[25] Brassey *Commentary on the Labour Relations Act* Vol 3 (Juta Cape Town 1999) A3: 26.
[26] (2001) 22 *ILJ* 109 (LAC) at paras 17 – 18.

> objects of the Act is to provide a framework within which employees and their trade unions, on the one hand, and employers and employers' organizations, on the other, can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest (s 1*(c)*(i)). …
>
> The Act seeks to promote the principle of self-regulation on the part of employers and employees and their respective organizations. This is based on the notion that, whether it is in a workplace or in a sector, employers and their organizations, on the one hand, and employees and their trade unions, on the other, know what is best for them, and, if they agree on certain matters, their agreement should, as far as possible, prevail.'

[54] Similarly, and in *Police and Prisons Civil Rights Union v Ledwaba NO and Others*[27] the Court said that '… the fact remains that collective agreements have special status and authority, as the very product of collective bargaining', and further held: '… a collective agreement, as the product of the collective bargaining process, has preference over all else…'. Added to this, the Court in *SA Police Union and another v National Commissioner of the SA Police Service and Another*[28] said:

> '… Labour relations in our system are regulated primarily through collective bargaining, minimum standards legislation and contextually sensitive dispute resolution which takes account of the policy prescriptions and values of a constitutionally sanctioned pluralist model, underpinned by organizational rights, majoritarianism and a preference for negotiated solutions and outcomes.'

[55] I conclude in this regard by referring to the particularly apt dictum in the recent judgment of the LAC in *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members*[29] where the Court said:

> 'Collective agreements are to be accorded primacy. In *National Bargaining Council for the Road Freight Industry & another v Carlbank Mining Contracts*

[27] *Police and Prisons Civil Rights Union v Ledwaba NO and Others* (2014) 35 *ILJ* 1037 (LC) at para 27.
[28] (2005) 26 ILJ 2403 (LC) at para 54. See also *SA Breweries v Commission for Conciliation, Mediation and Arbitration and Others* (2002) 23 *ILJ* 1467 (LC) at para 12; *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 26; *Workforce Group (Pty) Ltd v Van Zyl NO and Others* (2015) 36 ILJ 2182 (LC) at para 37.
[29] (2015) 36 ILJ 624 (LAC) at para 26.

> *(Pty) Ltd & another*, this court held that the purpose of s 199 of the LRA, read together with s 23(3) of the LRA, is to advance the primary object of the LRA, namely the promotion of collective bargaining at sectoral level and giving primacy to the collective agreements above individual contracts of employment. Section 199 provides, inter alia, in essence, that contracts of employment may not disregard or waive collective agreements.'

[56] Based on the above, it has to follow that primacy must be afforded to what has been agreed to at sector level by way of the Resolutions adopted under the auspices of the PSCBC, as being the products of collective bargaining and collective agreements. Any existing practice in one of the individual components of the public service, such as the Court at the SCA, cannot override these provisions. Accordingly, it simply cannot be said that as at 2013, when the recess practice was finally abolished in the SCA, there existed any right, be it contractual or *ex lege*, to this practice as a benefit, which had then been taken away.

[57] The mere continued existence of the recess practice in the SCA after 1997, in the face of the Resolutions and the actual events in the interim as set out above, cannot establish such a right. In short, the consequence of leave in the public service being regulated at a central level by collective agreement has to be that any continuation of the recess practice in the SCA simply could not serve to change the actual terms and conditions of employment of the SCA secretaries, at odds with the provisions of the Resolutions. These terms as embodied in the Resolutions do not allow for absence from work by the SCA secretaries without formally applying for leave, and getting approved leave. Abolishing the recess practice was therefore long overdue, and cannot be seen to be unfair.

[58] The above being the case, what then remains for consideration? The SCA secretaries specifically relied on the unfair labour practice jurisdiction under Section 186(2) as a basis for contending that the withdrawal of the recess practice was unfair. In terms of Section 186(2)(a) of the LRA, an 'unfair labour practice' is defined as follows:

> ''Unfair labour practice' means 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 or training of an employee or relating to the provision of benefits to an employee.'

It was contended by the SCA secretaries that the recess practice was such a benefit, and taking it away was unfair, irrespective of whether a right to the benefit existed *ex contractu* or *ex lege*.

[59] I accept that where it comes to relying on an unfair labour practice relating to a benefit, it is not necessary for the SCA secretaries to show that they have a right to the benefit *ex contractu* or *ex lege*. The concept of a benefit in the case of the unfair labour practice jurisdiction is much broader than that. In *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[30] the Court said:

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

[60] Therefore, and where a privilege, advantage or entitlement is bestowed on an employee in terms of a policy or practice at an employer, by way of an exercise of a discretion by the employer, this would resort squarely under the meaning of a 'benefit' for the purposes of the unfair labour practice jurisdiction.[31] Where an employee is then deprived of that benefit by way of exercising the very same discretion, this can then be challenged as unfair under the unfair labour practice jurisdiction.

[30] (2013) 34 ILJ 1120 (LAC) at para 50.
[31] See also *Trans-Caledon Tunnel Authority v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2643 (LC) at para 20; *Thiso and Others v Moodley NO and Others* (2015) 36 ILJ 1628 (LC) at paras 11 – 13; *Autopax Passenger Services Soc Ltd v SA Transport and Allied Workers Union and Others* (2014) 35 ILJ 149 (LC) at para 30; *Aucamp v SA Revenue Service* (2014) 35 ILJ 1217 (LC) at para 29.

[61] The unfair labour practice jurisdiction however cannot be used to create new entitlements, privileges or advantages that did not exist before. In *Apollo Tyres*[32] the Court held:

> '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 & 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. …'

[62] *In casu*, the recess practice concerned was abolished, in general, as far back as 1997. That ended the benefit. And then, with the adoption of Resolution 7 of 2000, there no longer existed any discretion on the part of the employer where it came to absence from work of employees in the public service, which would include the recess practice. Specific provision was made for a variety of leave categories, which each had to be applied for and approved. There is no provision, nor any discretion, for absence from work in the recesses without approved leave. The only reason why these conditions of employment were not applied in the SCA was because of a failure on the part of the Registrar to implement it despite demand by the Department to do so, and this failure surely cannot serve to establish a discretion.

[63] The point that must be made is that the unfair labour practice jurisdiction requires the exercise of a discretion by the employer, in order to apply. In the absence of a discretion to be exercised, there cannot be an unfair labour practice, unless there exists an actual right *ex contractu* or *ex lege*. The Court in *Apollo Tyres*[33] referred with approval to the following *ratio* in *Protekon (Pty) Ltd v CCMA and Others*[34]*:*

> 'The Labour Court pointed out that there are many employer and employee rights and obligations that exist in many employee benefit schemes. In many

[32] Id at para 44. See also *HOSPERSA and Another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) at para 9; *Protekon (Pty) Ltd v CCMA and Others* (2005) 26 ILJ 1105 (LC) at para 32; *Trans-Caledon Tunnel Authority v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2643 (LC) at paras 18 and 25.
[33] Id at para 45.
[34] (*supra*) at paras 34 – 37.

> instances employers enjoy a range of discretionary powers in terms of their policies and 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 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.'

[64] In this instance, there was simply no discretion which the Department as an employer could, and did, exercise. The position of the Department consistently was that the leave provisions in the public service must apply, without exception. The conduct of the Registrar of the SCA in failing to give effect to what was required, based on what was in reality external considerations, cannot be seen to be the exercise of a discretion by the employer (the Department), especially in the face of the clear position to the contrary adopted by the Department. When the abolishment of the recess practice was finally implemented in 2013, this did not come about by way of the exercise of a discretion. It was just that circumstances finally caught up with the SCA secretaries, and what happened was always the reality. This is cannot be seen to be an unfair labour practice.

[65] It is in the above context that the third respondent got it completely wrong. He failed to appreciate that for an unfair labour practice to exist, there had to be a discretion exercised, and that discretion simply did not exist. Also, and what the third respondent in effect did was to elevate a past practice abolished more than a decade earlier to a right, just because it existed for so long a period of time in the past, which is simply not competent under the unfair labour practice jurisdiction. From a legal perspective, therefore, the third respondent's award is unsustainable and at odds with the law.

[66] For the sake of completeness however, it is my view that even if it is considered whether the abolishment of the practice was fair or unfair, that abolishment was in fact fair. It has to be seen to be fair because fairness dictates that all Judges' secretaries be treated alike. Further, and to treat the

SCA secretaries differently undermines the Resolutions adopted in the PSCBC, and in particular the uniform and consistent application thereof. In fact, for the recess practice to subsist can actually be seen to be a breach of the collective agreements concluded in the PSCBC giving rise to the Resolutions. These Resolutions must have preference over any practices that may exist in individual departments of the public service.

[67] When deciding what is fair in these circumstances, consistency is the key. Consistency ensures uniform conditions of employment, and eliminates resentment between employees and workplace conflict. Where it comes to considering what is fair, I firmly believe that these kind of considerations must prevail over retaining the *status quo* for a small group of employees in the public service.

[68] Mr Roux, appearing for the first respondent, argued that SCA secretaries do a lot more for their Judges than other secretaries do. These tasks include paying rent, making sure the Judge's accommodation is in order, organizing and payment of domestic help, buying groceries, organizing laundry and dry cleaning, payment of utility accounts, personal errands, and even assisting the Judge's family with personal requirements. Whilst this may be so, this cannot change what these secretaries' actual conditions of employment are. With respect, these are individual arrangements between the Judge, and the secretary allocated to him or her. There is nothing standing in the way of a Judge and his or her secretary coming to such a kind of arrangement, but these arrangements are personal and have nothing to do with conditions of employment. It certainly cannot elevate the secretaries into the realm of the benefits enjoyed by Judges, namely recesses between Court terms. In the end, the Judges are not the employers of the secretaries.

[69] It is in, any event, undesirable to have the attendance of a secretary at work or not, subject to arrangements with an individual Judge, and whether that Judge intends to be at work at the Court in the recess or not. There is in my view the real possibility of misunderstandings or even workplace conflict arising in such circumstances, which can be completely eliminated by the secretaries simply being at work in the recess. I illustrate the point by way of a few simple examples. What if a Judge did not intend coming to work in the recess, but

changes his mind and the secretary is then unreachable, with all the consequences flowing from that. Also, and with Judges coming or going as they may please in the recess, how is the Registrar, who is accountable to manage the secretaries, supposed to manage their attendance? It far more practicable for secretaries to be at work in the recesses. That way, and if their Judge comes to work, they are there to attend to the Judge's requirements. Further, they can also do other work that needs to be done in the Court, which is surely reasonably expected of them.

[70] If a secretary wants leave, for any reason, the Resolutions dictate that leave be applied for, and then approved. That is the only way in which authorized absence from work, in the form of permitted leave, can properly be managed. For the Department to insist on this situation, cannot be seen to be unfair. By way of comparison, and in *City of Cape Town v SA Local Government Bargaining Council and Others*[35] the Court dealt with a situation where the employee was receiving payments under a vehicle scheme, which the employee considered to be a benefit. This benefit was stopped by the employer when the employee did not submit log sheets as required by the scheme. The employee challenged this on the basis of an unfair labour practice relating to a benefit. The Court held as follows:[36]

> 'Esau conceded that he had not submitted log sheets for seven months and that this was in breach of the terms of the scheme. He did not submit log sheets because he stood to benefit financially if he submitted log sheets to SARS instead.
>
> When Esau stopped submitting log sheets to the city, he stopped being entitled to the benefit. It was not unfair of the city to stop payments in those circumstances.'

Similarly, it cannot be unfair for the Department as employer to insist on a leave application to be made, and approval for leave to be granted, before absence from work is permitted, especially considering the clear terms of the Resolutions.

[35] (2014) 35 ILJ 163 (LC).
[36] Id at paras 26 – 27.

[71] In summary, it is my view that the third respondent failed to consider material evidence, and in essence relied on what was actually irrelevant evidence. On the evidence, it is clear that the conduct of the Department did not constitute an unfair labour practice. Also, the third respondent misconstrued the applicable legal principles, especially where it comes to what constitutes an unfair labour practice. These failures by the third respondent clearly constitute gross irregularities, satisfying the first leg of the review test. It is then further my view, that in the absence of these irregularities, there is simply no basis on which the award of the third respondent can be sustained as being a reasonable outcome. Considering the proper evidence as a whole, and applying the relevant legal principles, I am satisfied that the outcome arrived at by the third respondent is unreasonable, satisfying the second leg of the review test. The arbitration award of the third respondent thus falls to be reviewed and set aside.

Conclusion

[72] Therefore, and for all the reasons set out above, the arbitration award of the third respondent in favour of the first respondents cannot stand. The arbitration award has to be reviewed and set aside, which I hereby do.

[73] Having reviewed and set aside the award of the third respondent, I see no reason to remit this matter back to the second respondent again for determination *de novo* before another arbitrator. The factual matrix in this matter was largely undisputed, and fully substantiated by the record of the proceedings and the documentary evidence. There is simply no need to go through the whole exercise of arbitration again. There is equally simply no reason why I cannot finally determine this matter, now, once and for all.

[74] I also consider that the events giving rise to this matter date back, at the very latest, to 2013. In reality, it is far earlier than that. This chapter of past practices in the Courts must now finally be brought to a close, especially considering the essential requirement of expedition in employment law dispute

resolution[37]. I therefore intend to substitute the arbitration award of the third respondent with an award that the first applicant did not commit an unfair labour practice towards the first respondents, and that the referral of the unfair labour practice dispute to the GPSSBC be dismissed.

[75] This then only leaves the issue of costs. In terms of the provisions of Section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicants were successful, I do not intend to burden the first respondents with a costs order, especially considering the opportunity afforded to me to bring this matter finally to an end. There is still an ongoing employment relationship between the parties, and I believe it to be fair that all parties now build this relationship going forward, with a clean slate. To mulch the first respondents with costs will not help this, and may only serve to compound resentment. I accordingly exercise my discretion as to costs in this matter, by making no order as to costs.

Order

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

1. The applicants' review application to review and set aside the jurisdictional ruling of the third respondent under case number GPBC 3331 / 2013 and dated 30 September 2014, is dismissed.

2. The applicants' review application to review and set aside the arbitration award of the third respondent on the merits of the dispute, under case number GPBC 3331 / 2013 and dated 4 March 2015, is upheld.

3. The arbitration award of the third respondent, being arbitrator Silas Ramushowana, under case number GPBC 3331 / 2013 and dated 4 March 2015, is reviewed and set aside.

4. The arbitration award reviewed and set aside in terms of paragraph 3 of this order is substituted and replaced with an award that the applicants did not commit an unfair labour practice relating to a benefit as against

[37] See *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 *ILJ* 613 (CC) at para 42; *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others* (2011) 32 *ILJ* 2861 (CC) at para 76.

the first respondents, and that the dispute referred by the first respondents to the second respondent (GPSSBC) is dismissed.

5. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants: Advocate W R Mokhari SC

Instructed by: The State Attorney

For the First Respondents: Advocate L A Roux

Instructed by: Lovius Block Attorneys