



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 300/17

In the matter between:

TIMOTHY VILAKAZI

Applicant

and

LIDWALA INSURANCE COMPANY

Respondent

Neutral citation : Timothy Vilakazi vs Lidwala Insurance Company
[300/2017] [2018] SZIC134 [2018]

Coram : **L. MSIMANGO – ACTING JUDGE**
[Sitting with Mr. P.S. Mamba and Mr. E.L.B.
Dlamini Nominated Members of the Court]

Date Heard : 13th August 2018

Date Delivered : 06th December 2018

SUMMARY: The Applicant has brought an application to Court for the determination of whether or not the Respondent judiciously exercised its discretion by not paying Applicant's bonus. The Respondent raised points of law to the effect that the matter is not properly before Court as it has not been reported to CMAC and that there is a litany of dispute of facts in

the matter.

JUDGEMENT

- [1] The Applicant is Timothy Vilakazi, an adult Liswati male of Ntondozi in the Manzini District, employed by the Respondent as an Under-writer.
- [2] The Respondent is Lidwala Insurance Company, a Company duly registered and incorporated in accordance with the Company laws of the country, situated in Manzini, in the Manzini Region.
- [3] The Applicant avers that the application concerns the Respondent's failure to pay the Applicant's annual bonus in December 2017, in accordance with the terms and conditions of Respondent's Employment Policy.
- [4] In that regard the Applicant submitted that he fully comprehends that the payment of a bonus is not a right, and that it is up to the Respondent to award a bonus. However, the non-payment of Applicant was exercised in a discriminatory and grossly irregular manner by the Respondent, in that

all Respondent's employees were awarded their bonuses in December 2017, save for the Applicant.

[5] The Applicant submitted further that, apart from the disciplinary hearing that was pending against him at that time, his performance had no issues that the employer directed to him. Hence the action of the Respondent of not awarding the Applicant a bonus was discriminatory and constituted an unfair labour practice. Further that the inescapable conclusion drawn by the Applicant from Respondent's action was that the Respondent had already found the Applicant guilty of the alleged offence yet that was for the Chairperson to decide, upon considering all evidence placed before him. However, the Chairperson had not done so at the time of payment of the bonus.

[6] The Respondent opposed the application and raised two preliminary points, being that; The Applicant has failed to comply with the peremptory provisions of Rule 14 of the Rules of the above Honourable Court, in that the Applicant has failed to demonstrate why the matter ought not to be dealt with in accordance with the provisions of Part VIII of the Industrial Relations Act. In particular reporting a dispute to the

Conciliation, Mediation and Arbitration commission as required by Section 76 of the Act.

- [7] In support of this point of law the Respondent cited the case of **PHYLIP NHLENGETHWA AND OTHERS VS SWAZILAND ELECTRICITY BOARD CASE NO. 272/2002**, where the Court said the following:-

“We must add that the 2000 Act has since created a further structure in terms of Section 62 (1) of the Act, known as the Conciliation, Mediation and Arbitration Commission (CMAC), which is an independent body with the task of conciliation, mediation and arbitration. The creation of the institution has increased the need for the Industrial Court, to enforce strict observance of the dispute resolution procedures under Part VIII of the Act because we now have a more suitable structure of expeditiously, conveniently and less expensively resolving industrial disputes which otherwise find their way unnecessarily to this Court”

- [8] On the strength of the above cited case, the Respondent submitted that the Honourable Court cannot take cognisance of this dispute in the absence

of a certificate of unresolved dispute issued by CMAC, further that, the Court is bound by the doctrine of stare decisions in that, it ought to observe and / or adhere to the strict observance of the dispute resolution procedures as stated by its judgements.

- [9] In answer to this point of law the Applicant argued that the matter was properly before Court, and the application was made in terms of Rule 14 (6) (b) of the Rules of this Honourable Court, which reads as follows:-

“in the absence of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission, unless the application is solely for the determination of a question of law.”

- [10] The Applicant averred that the application was brought before Court solely for determination of a question of law, which is whether or not the Applicant is entitled to a bonus in terms of clause 8.7 of the Respondent’s employment policy. The Applicant therefore submitted that the point of law raised by the Respondent ought to be dismissed as the matter was properly before Court.

[11] The question that immediately announces itself with regard to this point of law is what exactly is meant by question of law, and whether or not CMAA has the authority to deal with matters on question of law.

[12] Black's Law Dictionary 5th Edition describes a question of law as an issue that is within the province of the Judge, because it involves the application or interpretation of legal principles or statutes, or an issue arising in a law suit which only relates to determination of what the law is, how it is applied to the facts in the case, and other purely legal points in contention. All questions of law arising before, during and sometimes after a law suit are to be determined solely by a Judge.

[13] In the case of **WOODHOUSE AC ISRAEL COCOA LTD VS NIGERIAN PRODUCT MARKETING CO, LTS [1922] AC**, Justice Denning held that:-

“It has long been settled that the interpretation of a document is a matter of law for the Court, save in those cases where there is some ground for thinking that the words were used by the writer and understood by the reader in a special sense different from their ordinary meaning.”

[14] **Gifis Steven H**, the Law Dictionary, Third Edition, further defines a question of law as a question touching on the scope, effect or application of a rule in determining the rights of parties.

[15] Taking into consideration the definition of the question of law by the different authors and decided cases, it is the Court's considered view that the matter is before Court for determination of a question of law, and that is whether or not the Respondent judiciously exercised its discretion by not paying Applicant's annual bonus for the year 2017. Thus it is not necessary to report a dispute to CMAC for conciliation before it is brought to Court for determination as per Rule 14 (6) (b) of the Industrial Court Rules.

[16] In the case of **ISAAC DLAMINI VS THE CIVIL SERVICE COMMISSION AND 2 OTHERS CASE NO. 338/2012**, the Court stated as follows on a similar point:-

“There is no need for the Applicant to report a dispute at CMAC or to follow the dispute resolution mechanism that is provided for in Part VIII of the Act, since the Applicant's claim can be determined solely on a question of law.”

[17] Therefore the point in limine raised by the Respondent is misconceived and is accordingly dismissed.

[18] The second point raised by the Respondent is that of dispute of fact. The Respondent argued to the effect that the application is fraught with disputes of fact, which ought to have been foreseen and / or were reasonably foreseen on the part of the Applicant. These include but not limited to:-

18.1 that the decision to award bonus lies at the discretion of the board following certain considerations.

18.2 that the disciplinary process involving the Applicant was not amongst the factors considered for the non-payment of his bonus.

18.3 that the non-payment of bonus to the Applicant was not discriminatory, but was out of the exercise of the Board's discretion to award bonus.

[19] On this basis, the Respondent submitted that in view of the fact that the disputes were foreseeable, the Applicant ought not to have proceeded by way of action proceedings. Accordingly, the application stands to be dismissed on that basis.

[20] Having regard to the fact that the matter is based on a question of law, that is whether or not the Respondent judiciously exercised its discretion. It is the Court's considered view that this point of law is irrelevant in the circumstances.

THE MERITS

[21] Clause 8.7 of the Respondent's Employment Policy provides that:-

“The payment of bonuses shall be at the discretion of the Board of Directors every year and if awarded such bonuses shall be payable in December of each year.”

[22] The Applicant submitted that it is common cause that the issue of bonus is captured in the company policy as an issue of discretion. However, the Applicant averred that the discretion was improperly applied by the Respondent in refusing to pay his bonus.

[23] It was Applicant's contention that clause 8.7 of the Respondent's employment policy does not provide any threshold for awarding a bonus. The clause seem to provide that once the employer uses its discretion in

favour of paying bonuses, the bonus shall be paid across the board to all employees.

[24] On the other hand the Respondent argued that the payment of bonus to the Applicant was not a right. It was subject to meeting all the objectives of the company by the various departments or when an individual meets his/her set targets, furthermore, there were appraisals that were done by Management which were then taken to the board for consideration on whether or not bonus should be paid.

[25] The Respondent argued further that, the rationale of the clause was to ensure that payment of the bonus was to be done once certain conditions have been met, and that the board exercised its discretion based on cogent facts placed before it. Thus the non-payment of the bonus to the Applicant was in line with the discretion conferred to the Respondent by the Employment Policy.

[26] The issue to be decided by the Honourable Court is whether or not the Respondent judiciously exercised its discretion by not paying Applicant's bonus.

[27] It is trite that the exercise of discretion must always be subject to being tested against basic tenets of fairness. In **APOLLO TYRES S.A. [PTY] LTD VS COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION AND OTHERS (2013) 34 ILJ 1120 (LAC)**, the Court held that:-

“Therefore even where the employer enjoys a discretion in terms of a policy or practice relating to the provision of benefits, such conduct will be subject to scrutiny”

[28] A similar approach was followed in **AUCAMP VS S.A. REVENUE SERVICE (2014) 35 ILJ 1217 (LC)** where the Court held that:-

“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 have instances where the employee 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 same on the basis of an unfair labour practice if the employee could show that he/she was unfairly deprived of 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.”

[29] The next most obvious question to answer is under what circumstances the exercise of the discretion could indeed be seen to be unfair. The Court in **NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY AND OTHERS VS MINISTER OF HOME AFFAIRS AND OTHERS 2000 (2) S.A. 1 (CC)**, in dealing with the challenge of discretions in general, decided that a discretion would be open to successful challenge if the discretion was not judicially exercised and in particular:-

“.... had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles.”

[30] In the case of **APOLLO TYRES** supra, the Court applied these general principles applicable to the challenge of the exercise of discretion on the basis of being unfair, as follows:-

“.... unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.”

[31] It has been said that the discretion of the employer was not to be lightly interfered with, but despite this, the general theme that emerges is that the discretion would be considered to have been unfairly exercised if it was similar to what the Court said in Apollo Tyres, and that is exercised in a manner that was arbitrary, capricious, mala fide, irrational or grossly unreasonable.

[32] The exact same considerations can be applied when evaluating whether the exercise of the Respondent's discretion where it comes to not paying the Applicant's bonus, was unfair or not.

[33] The Respondent argued that in the exercise of its discretion to pay the bonus it considered the following factors:-

33.1 The organization has to meet its overall objectives, which include performance (financial), attainment of strategic goals (growth and sustainability of clientele) and optimum customer service.

33.2 The various departments have to meet their divisional performance targets.

33.3 The various individuals employed by the Respondent must also meet their performance targets and also execute their duties to the

satisfaction of their individual Managers and/or Supervisors as the case may be, this includes issues such as performance, compatibility, discipline, punctuality, decorum and attitude.

[34] The Respondent argued further that, even if all the above is attained, the Respondent's Board of Directors still retains the absolute discretion to determine which employee should receive or not receive the bonus in accordance with clause 8.7 of the Respondent's employment policy.

[35] It was again Respondent's argument that Applicant's performance, attitude, attendance, decorum and diligence were considered by the Board and it was determined that the Applicant was not entitled to a bonus. Further, that the exercise of the discretion to pay or not to pay the bonus is absolute and the Applicant does not have a right in law to contest the exercise of Respondent's discretion.

[36] In the case of **CROWE HORWATH [PTY] LTD VS LOONE [2017] VSC 163**, the Court had this to say:-

“The discretion given to employers in discretionary bonus clauses will be limited by the proper scope and content of the bonus clause/policy and a reasonable construction of the clause, taking

into account principles of honesty and arbitrariness. Discretionary bonus clauses must be drafted clearly and carefully, and all potential uses of the power should be made explicit.”

[37] Therefore a well drafted bonus clause should not be ambiguous. Any ambiguity should be resolved so as to achieve a result consistent with commercial efficacy and good sense, as informed by considerations of reasonableness and fairness. In the context of employment agreements, this may include the protection of vulnerable employees in their dealings with their employers. See in this regard the case of **KENNY VS WEATHERHAVEN GLOBAL RESOURCES 2017 SC 1335**.

[38] It is a timely reminder that care should be taken when drafting bonus clauses, so that employers are not unnecessarily trapped by poorly drafted employment documentation. Any bonus clause should be very specific as to the criteria which must be met for the bonus to be payable. If the bonus scheme relies on an employee having satisfactory performance, then whether the employee has satisfied these pre-requisites must be assessed objectively by the employer. In addition, the employer must have put the employee on notice that his/her performance is not satisfactory prior to the period when the employee is to be awarded the

bonus. Lastly, the employer should accordingly ensure that appropriate procedure is in place and followed in the payment of bonuses.

[39] The South African LABOUR GUIDE ON CONDITIONS OF EMPLOYMENT – PAYMENT OF BONUSES 149 2018, sets down the procedure as follows:-

- (i) If the procedure requires an employer to have regard to an employee's performance, any performance criteria used should be measurable and clearly documented with regards to that employee.
- (ii) Have solid evidence for any reduced or non payment of the bonus. There should be clear evidence of the reasons why payment was not made to minimize the possibility of a claim that the exercise of discretion was capricious, unreasonable or arbitrary.
- (iii) The employer should provide an opportunity for the employee to comment before the non payment or reduced payment is made. This would imply then that the employer should consult with employees if it is found that, for any legitimate reason or sound commercial rationale, the bonuses cannot be paid in a particular year, or if the amount of the bonus is to be less than the amount consistently paid in the past. Employees are entitled to put forward

their side of the story, and it cannot be denied that this opportunity is a fundamental requirement of “fair procedure.”

[40] In conclusion the Court has observed that the Respondent did not follow procedure in reaching the decision not to pay Applicant’s bonus. Furthermore the Respondent has failed to provide the Court with evidence regarding the Applicant’s assessment by the Board. The unsubstantiated explanation by the Respondent leads to the adverse inference that the discretion was unfairly exercised, taking into account the fact that the Applicant submitted that his work performance had no issues that the Respondent directed to him, and the fact that all employees of the Respondent were paid their annual bonuses for the year 2017, save for the Applicant.

[41] In the circumstances the Court makes the following order:-

- (i) The Respondent is directed to pay the Applicant an annual bonus for the year 2017 in the sum of E11, 999-26.
- (ii) The Applicant is awarded costs at an ordinary scale.

The Members agree.


L. MSIMANGO
ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant : Mr. A. Hlophe
(Magagula Attorneys)

For Respondent : Mr. H. Magagula
(Robinson Bertram Attorneys)