THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 2473 / 16

In the matter between:

CIVIL AND POWER GENERATION

PROJECTS (PTY) LTD **Applicant**

And

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

SIPHO TALANE N.O. (AS COMMISSIONER) **Second Respondent**

NUMSA OBO MAHLALELA AND 200 OTHERS **Third Respondent**

Heard: **23 October 2018**

Delivered: **22 March 2019**

Summary: CCMA arbitration proceedings – review of proceedings, decisions and awards of commissioners – test for review – s 145 of LRA 1995 – issue of material error of law – application of review principles in such circumstances considered

Collective agreement – interpretation of agreement – principles of interpretation considered

Collective agreement – clear language of agreement, proper context and common sense approach must lead to conclusion that employees' entire project bonus for the year is forfeited due to participation in unprotected strike action

Collective agreement – holistic view indicated specific prohibition of unprotected strike action – this misconduct treated more severely as other transgression where forfeiture of part of project bonus contemplated by collective agreement

Review of award – arbitrator misconstruing objectives of LRA and collective agreement – arbitrator failing to properly apply principles relating to interpretation of agreements – as such committing material error of law – award reviewable

Review of award – consequential relief – factual matrix common cause – issue of interpretation of agreement principally legal issue – award substituted with award that employees forfeit entire project bonus

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (CCMA) (the first respondent). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[2] The dispute in this case concerned the interpretation of a collective agreement to which both the applicant and the third respondents were bound. For ease of reference, I will refer to the third respondent trade union in this judgment as 'NUMSA', and its individual third respondent members as 'the individual respondents'. What was ultimately placed before the second respondent to decide was the interpretation of a clause in the collective agreement relating to the forfeiture of a project bonus payable to the individual respondents in terms of the collective agreement, where the individual respondents had embarked upon unprotected strike action.

[3] In an award dated 1 November 2016, the second respondent determined that the clause in the collective agreement only contemplated the forfeiture of the project bonus, by the individual respondents, of the month in which they embarked upon the unprotected strike, and not the entire project bonus for the year. This award came to the attention of the applicant on 3 November 2016 when it was e-mailed to the applicant by the CCMA. The applicant then filed its

[1] 66 of 1995 (as amended).

review application on 18 November 2016, well within the time limit permitted by section 145(1) of the LRA. The applicant's review application is thus properly before this Court for consideration, which I will now turn to by first setting out the background facts.

Background facts

[4] The relevant factual matrix in this case was straight forward, undisputed, and in fact agreed to in a pre-arbitration minute.

[5] The applicant conducts business in the construction industry. The applicant was one of the contractors appointed to do construction on the Eskom Medupi power station project in the Limpopo province ('the project'). There were also a number of other contractors and construction businesses working on the project.

[6] As part of the regulation of employment relations on the project, there was a group collective agreement concluded in respect of the project, between a number of representative trade unions and the various employers, as represented by two employers' organizations, being South African Federation of Civil Engineering Contractors (SAFCEC) and Construction Engineering Association of South Africa (CEA(SA)). This collective agreement was concluded in 2010 and was known as the Project Labour Agreement ('PLA'). NUMSA was an actual party to the agreement, and the applicant was bound to same by virtue of its membership of SAFCEC. The relevant provisions of the PLA will be set out next.

[7] Clause 2.2 of the PLA commits the parties to industrial peace and harmony, as one of the core objectives of the agreement. The clause stipulates that the parties '*shall endeavour to ensure that fair and proper channels, practices, policies and procedures are followed pro-actively to resolve differences …*'.

[8] The PLA also specifically deals with collective bargaining in clause 5. It stipulates that collective bargaining in respect of all matters of remuneration and conditions of employment will only be done in industry bargaining forums (clause 5.1). Clause 5.1 in fact goes further and then specifically prohibits any collective bargaining at site/project level.

[9] The regulation of strike action is further amplified in clause 12 of the PLA, which contains a peace obligation. Clause 12.1.1 reads:

> 'The Parties shall not sanction, promote or participate in industrial action until such time as the procedures contained or referred to in this Agreement and the applicable legislation have been exhausted. Neither should the Parties provoke one another. No industrial action shall take place:
>
> 12.1.1.1 concerning any issue which is the subject matter of this or relevant Industry Agreements;
> 12.1.1.2 after the Parties have agreed to refer the dispute to alternative dispute resolution mechanisms agreed to by parties;
> 12.1.1.3 following an Arbitration Award;
> 12.1.1.4 in breach of any provisions of the Labour Relations Act, Act 66 of 1995 as amended; or
> 12.1.1.5 in respect of an issue that the parties have to refer to arbitration…'

Clause 12.9 also imposes an obligation in parties to expeditiously take all steps necessary to bring unprotected industrial action to an end.

[10] Next is the actual clause in the PLA directly applicable in the current matter, being clause 13.25 itself. It must first be mentioned that the clause finds itself in the section of the PLA dealing with what is headed 'SITE SPECIFIC CONDITIONS OF EMPLOYMENT'. Clause 13 as a whole deals with working hours, wage rates, overtime, shifts, breaks, public holidays, wage payments, shut downs, transport, tools, leave, accommodation and meals, recruitment and allowances. As part of these conditions of employment, clause 13.25 then regulates a specific employment condition called the 'project bonus.'

[11] In terms of clause 13.25.1, a project bonus equal to 15 (fifteen) hours' wages accrues to an employee for every completed month worked on the project. In terms of clause 13.25.2, the project bonus is however only payable to an employee upon demobilisation, which in effect means the termination of the employee's services on the project. However, despite this due date of payment of the project bonus as stipulated by the agreement, it was common cause that Eskom instructed all the contractors to pay the project bonus to

employees accrued over a 12 month period, at the end of a 12 month cycle, even though they were not demobilized. It is however also relevant to note that clause 13.25.2 provides that no project bonus is payable in the case of dismissal, resignation or abscondment by an employee.

[12] Clause 13.25.3 regulates the issue of payment of the project bonus to employees, during the course of their employment. The subclauses to 13.25.3 then specifically and separately deal with instances where the project bonus would not be payable to employees, despite having accrued to employees in terms of clause 13.25.1. I will next individually set out these provisions, and deal with the provisions relating to unprotected strike action last.

[13] Firstly, clause 13.25.3.1 deals with what is called absence '*without consent*.' It is worded in the negative, recording that a project bonus will be paid to an employee that is not absent without consent. Be that as it may, the clause then prescribes specific forfeitures that are applied to the payment of the project bonus where an employee is indeed absent without consent. Where an employee is absent without consent on one occasion in a calendar month, the employee forfeits half the accrued hours for that month (being 7.5 hours). If the employee is so absent on a second occasion during that same calendar month, the employee forfeits the other half of the accrued hours for that month.

[14] Secondly, clause 13.25.3.3 deals with the refusal to work on an agreed Saturday, or to work overtime. The clause does not have a specific forfeiture provision attached to it, as is the case with clause 13.25.3.1. As such, it must be read with the main clause 13.25.3, and the clause in that context stipulates that a project bonus will only be paid to an employee that does not refuse to work on an agreed Saturday or overtime. It follows that if an employee does so refuse, the employee will not be paid a project bonus. But clause 13.25.4 then applies to this kind of refusal as well, and provides that the employee will forfeit 100% of the project bonus for that month in which the unauthorized absence occurs, clearly meaning the absence caused by the refusal to work on the agreed Saturday or overtime.

[15] This then brings me lastly to the unprotected strike provision in clause 13.25.3.2. If this clause is read with the main clause 13.25.3, it follows that

employees shall only be paid a project bonus if the employees do not embark upon unprotected strike action. Consequently, and as a general proposition, employees that embark upon unprotected strike action shall not be paid a project bonus. Clause 13.25.3.2 then creates specific exceptions to this general position. First, in the case of the employees returning to work within the cooling off period defined in the PLA, they will not forfeit their project bonus (clause 13.25.3.2.1). Second, and where the unprotected strike action takes place as a result of provocation by the employer which is not acknowledged by the employer with an undertaking to investigate, the employees will not forfeit their project bonus (clause 13.25.3.2.1).

[16] Clause 13.25.3.2.3 is an important provision relating to the matter *in casu*. It provides as follows:

> 'Rolling unprotected industrial action (where employees embarking upon unprotected industrial action return to work only to go out on further unprotected industrial action as the result of the same event) will result in the individuals losing their project bonus in terms of this PLA.'

[17] Turning next to the actual applicable facts in this matter, the applicant, by 2014, employed 907 employees on the project. Of these employees, 201 were members of NUMSA. These members are the individual respondents in the current matter.

[18] On the morning of 9 October 2014, the individual respondents embarked upon unprotected strike action. The unprotected strike started at 07h00 and the individual respondents only returned to work after lunch time on that day. Three ultimatums had to be issued in the course of the morning before they returned to work, the last being a final ultimatum. It was common cause that this conduct was part of what was called 'rolling unprotected strike action'.

[19] The 9 October 2014 incident was however not the first time the individual respondents had embarked upon unprotected strike action. In 2013, in particular on 20 June and 5 to 15 August 2013, they had also embarked upon unprotected strike action. More currently to the issue at hand, and on 23 September 2014, the individual respondents also embarked upon unprotected

strike action, which also required an ultimatum having to be issued before they returned to work.

[20] As touched on above, and despite the provisions of the PLA relating to project bonuses only being due and payable on demobilisation, Eskom instructed contractors on the project to pay all employees' accrued project bonuses up to period ending 30 November 2013. The applicant complied.

[21] But relating to the next period, being the period 1 December 2013 until 30 November 2014, the applicant refused to pay the individual respondents their accrued project bonuses, based upon its interpretation of the provisions of clause 13.25 of the PLA. According to the applicant, clause 13.25 contemplated that the individual respondents would lose their entire project bonus for that year, because of the October 2014 unprotected strike action. NUMSA disagreed, and contended that the PLA only contemplated that its members (the individual respondents) forfeit the accrued project bonus for the month in which the unprotected strike took place, thus being only for October 2014.

[22] NUMSA referred a dispute relating to the interpretation and application of a collective agreement to the CCMA, in terms of section 24 of the LRA, in order to resolve the above dispute between the parties. This dispute came before the second respondent for arbitration on 20 October 2016. The issue in dispute the second respondent was called upon to decide, in the end, was a simple one. On the one hand, the applicant contended that the individual respondents forfeited their entire accrued project bonuses for the period from 1 December 2013 to 30 November 2014. On the other hand NUMSA contended that the individual respondents should only forfeit their project bonuses for the one month in which they embarked upon the unprotected strike, which was October 2014. Determining this dispute thus necessitated the second respondent interpreting clause 13.25 of the PLA.

[23] The parties concluded a pre-arbitration minute on 20 October 2016 signed by both parties, in which the parties in fact agreed that the facts as summarized above were common cause. In particular, the NUMSA members (individual respondents) admitted there was a rolling unprotected strike on 8 October

2014.[2] The parties also agreed that the matter be decided based on the content of the pre-arbitration minute, as well as the undisputed documentary evidence submitted by the parties. The pre-arbitration minute also defined the issue for determination, as summarized above. Both parties also filed written submissions, which in essence contained the same argument presented in this Court.

[24] The second respondent was also presented with another example where employees on the project, employed at another contractor, forfeited their entire project bonus for participation in unprotected strike action. This was in the form of an arbitration award by arbitrator J Tsabadi of the Metal and Engineering Industries Bargaining Council issued on 27 September 2012,[3] under case number CDR-M12-98 between NUM and BCAWU on behalf of their members and MPS – JV. The applicant contended that this served as precedent to support its views.

[25] The second respondent embarked upon the exercise of interpreting clause 13.25 of the PLA by first setting out the applicable legal principles where it comes to interpretation of documents. He held that he needed to give the collective agreement a construction that accorded with the purposes of the LRA. He reasoned that the starting point of this exercise was determining the plain language of the document itself. The second respondent was alive to the *dictum* in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4], which will be further addressed hereunder, relating to the modern approach where it comes to the interpretation of written instruments.

[26] The second respondent then applied the above principles to the facts by first finding that the project bonus accrued to each employee on a month to month basis, at 15 hours per month. According to the second respondent, this meant that the '*unit of reckoning the bonus was a month'*.

[27] The second respondent next referred to the subclauses in clause 13.25, which I have summarized above. The second respondent considered that clause

[2] The date of 8 October 2014 is a typographical error. The actual date of the strike was 9 October 2014.
[3] There was a variation of the award on this date – the original award was handed down on 5 September 2012.
[4] 2012 (4) SA 593 (SCA).

13.25.3.1 only provided that if an employee is absent without consent in a particular month, the employee forfeits either half of the full project bonus only for that month. According to the second respondent, this again indicates the 'unit period of reckoning' is a month, which he considered to be the basis of any forfeiture provision. The second respondent also referred to clause 13.25.4, which provides that the employee forfeits the project bonus hours only for a month in which the employee committed the misconduct referred to in that clause. All of this, according to the second respondent, was support for the conclusion that forfeiture can only apply to the month in which the misconduct was committed.

[28] Next, the second respondent considered the purpose of the project bonus, which according to him was to reward the employees for the months they properly worked, and only to punish them for the months they did not.

[29] Having so reasoned, the second respondent then turned to clause 13.25.3.2 relating to unprotected strike action, and concluded that an unprotected strike is the same as the misconduct referred to in the other subclauses under 13.25. This meant, according to him, that the employees would, in the case of an unprotected strike, only lose their project bonus for the month in which the strike happened.

[30] In addition to the aforesaid finding, the second respondent then proceeds to down play the nature of the misconduct where it comes to unprotected strike action. He finds that where an employee goes on strike, whether protected or unprotected, the employee tries to participate in collective bargaining which is the employee's right to do, because a strike is an integral part of collective bargaining. For this reason as well, the second respondent concludes that it would make no sense for 'illegal strikers' to forfeit their project bonus for months other than the month they were striking.

[31] The second respondent then concluded by finding that any interpretation that employees who participate in 'illegal' strike action would forfeit the entire project bonus for the 12 month period is not an interpretation a reasonable person would make, would be grossly unfair, and would not be in line with the purpose of the LRA. The second respondent then decided that the individual respondents only forfeit their project bonus for the month of October 2014, and

were entitled to the payment of their project bonus for all the remaining months. It is this determination that gave rise to the current matter on review.

The test for review

[32] The test for review is well known. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[5] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award is: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[6]. In *Duncanmec (Pty) Ltd v Gaylard NO and Others*[7] the Court succinctly summarized the test as follows:

> 'This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.
>
> The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'

[33] In this instance, there was no dispute of fact the second respondent had to decide. The crisp issue is simply whether the second respondent committed a material error of law in applying the common cause facts to the legal principles relating to the proper interpretation of contracts. It is also trite that an error of law that is material, to the extent of that it would render the outcome

[5] (2007) 28 ILJ 2405 (CC).
[6] Id 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; *Herholdt v Nedbank Ltd and Another* (2013) 34 *ILJ* 2795 (SCA) at para 25; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *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] (2018) 39 ILJ 2633 (CC) at paras 42 – 43

unreasonable, is reviewable.[8] In *National Union of Metalworkers of SA v Assign Services and Others*[9] the Court said:

> 'An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable.'

[34] As succinctly summarized in *Auto Industrial Group (Pty) Ltd and Others v Commission for Conciliation, Mediation and Arbitration and Others*[10]:

> 'There is a line of judgments by the LAC that establish that an arbitration award may be set aside as constituting a gross irregularity when a commissioner commits an error of law, provided the error of law was material, in the sense that it materially affected the commissioner's ultimate decision. Put in the negative, an error of law is not material if the commissioner would have reached the same decision on the facts, despite the error of law.'

[35] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent.

Grounds of review

[36] In order to properly decide a review application, it is also important to identify the grounds of review upon which the application is founded. These grounds must be properly set out and identified in the founding affidavit. As was said in *Northam Platinum Ltd v Fganyago NO and Others*[11]:

[8] *Head of Department of Education v Mofokeng and Others* (2015) 36 *ILJ* 2802 (LAC) at paras 32 – 33.
[9] (2017) 38 ILJ 1978 (LAC) at para 32. The judgment of the LAC was upheld by the Constitutional Court in *Assign Services (Pty) Ltd v National Union of Metalworkers of SA and others (Casual Workers Advice Office as Amicus Curiae)* (2018) 39 ILJ 1911 (CC). See also with regard to this principle the judgments in *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 *ILJ* 1819 (LAC) at paras 21-22; *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 *ILJ* 2593 (LAC) at para 30.
[10] (2019) 40 ILJ 550 (LC) at para 31.
[11] (2010) 31 ILJ 713 (LC) at para 27.

> '… The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[37] However, in the case of review applications, these grounds of review may be supplemented, after the filing of the record, by way of a supplementary affidavit.[12] The applicant did not seek to supplement the grounds of review set out in the founding affidavit.

[38] In the founding affidavit, the applicant has raised several individual grounds of review. All of these grounds of review point to the applicant's contention that the second respondent committed an error of law in the manner in which he interpreted clause 13.25 of the PLA. Pertinent individual grounds of review relating to the findings of the second respondent are:

38.1 He misinterpreted the agreement because he failed to distinguish between the individual sub-clauses and their differing underlying rationale.

38.2 He erroneously relied on clause 13.25.1 of the PLA in that it did not apply to instances of strike action.

38.3 It was improper to equate strike action to absence without leave and other forms of misconduct.

38.4 He failed to consider that unprotected strike action is frowned upon in terms of the objectives of the LRA.

38.5 The limitation of the forfeiture of the project bonus to only the month of the unprotected strike action offends against the clear and unambiguous wording of the PLA.

[39] I will now proceed to consider the applicant's review application based on these principal grounds of review, as summarized above.

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[12] See Rule 7A(8) of the Labour Court Rules; *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.

Analysis

[40] As an opening remark, I am unfortunately compelled to say that this is a case where the interpretation of an agreement is unduly influenced by subjective considerations of the second respondent as a decision maker, rather than him remaining objective as required. A proper consideration of the reasoning of the second respondent in his award leaves me convinced that what materially influenced the second respondent in his reasoning is that he simply found it unpalatable that employees should forfeit their entire project bonus for the year for one incident of unprotected strike action. It just did not sit right with him, and he adapted his interpretation of the PLA accordingly.

[41] But needless to say, these kind of subjective considerations and personal views of what is fair is not a permissible basis upon which to interpret an agreement. This is especially so where it comes to broader based collective agreements such as the PLA, which has much wider implications to other unions, employers, employees and the industry itself.[13] In dealing with the interpretation specifically of an industry collective agreement, the Court in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[14] said:

> 'The proper approach to the construction of a legal instrument requires consideration of the document taken as a whole. Effect must be given to every clause in the instrument and, if two clauses appear to be contradictory, the proper approach is to reconcile them so as to do justice to the intention of the framers of the document. It is not necessary to resort to extrinsic evidence if the meaning of the document can be gathered from the contents of the document.'

[42] In his award, the second respondent in fact correctly identified all the legal principles applicable to the interpretation of agreements. But unfortunately, where it came to the manner in which he applied these principles, it is clear to me that he just paid lip service to these principles, and did not in reality

[13] For a discussion of this broader impact see *Cape Gate (Pty) Ltd v National Union of Metalworkers of SA and Others* (2007) 28 ILJ 871 (LC) at paras 38 – 40; *Solidarity v Metal and Engineering Industries Bargaining Council and Others* (2017) 38 ILJ 2109 (LC) at paras 48 – 49.
[14] (2008) 29 *ILJ* 2461 (CC) at para 90.

properly or rationally apply the same. It is perhaps best, as a point of departure, to now summarize these principles. What is now often referred to as the 'modern' basis of the interpretation of agreements, was enunciated in *Endumeni Municipality*[15] as follows:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[43] The Constitutional Court in *Association of Mineworkers and Construction Union and Others v Chamber of Mines of SA and Others*[16] applied the aforesaid *dictum* in *Endumeni Municipality*, and said:

> 'All interpretations of law are themselves in a sense 'factual': certain textual and other sources (for example, statutes, common and customary law) are excavated and marked out as factually 'law', in contradiction to non-law. But this process itself involves a contextual analysis of those sources. See in this

[15] Supra id fn 4 at para 18. See also: *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.
[16] (2017) 38 ILJ 831 (CC) at fn 28.

regard *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18. Indeed, interpretation and application are simultaneous and intricated. The most imaginative exponent of this insight is Ronald Dworkin. See Dworkin *Law's Empire* (Harvard University Press Cambridge 1986) at vii: 'legal reasoning is an exercise in constructive interpretation', in which we advance 'the best justification of our legal practices as a whole'.'

[44] I wish to make a final reference to the following useful *dictum* in *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others*[17] where the Labour Appeal Court made the following observations, after considering the dictum in *Endumeni Municipality*:

> '… Of course, context is not a secondary consideration but is part of the very process required to resolve any linguistic difficulty. The words employed and the purpose of the speaker are inextricably linked. This follows inherently from the very concept of the language. In the same manner, the content of an ordinary conversation cannot, in general, be divined from the meaning of the sentences employed or even with the conversationalist's goals in saying what they did, so the content of a legal text cannot, in general, simply be determined by the ordinary or technical meanings of the sentences in the text or indeed with the policy goals motivating the drafting thereof. As Scott Soames has noted:
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> 'The content of a legal text is determined in essentially the same way that the contents of other texts or linguistic performances are, save for complications resulting from the fact that the agent of a legislative speech act is often not a single language user but a group, the purpose of the speech is not usually to contribute to the cooperative exchange of information but to generate behaviour modifying stipulations, and the resulting stipulating contents are required to fit smoothly into a complex set of existing stipulations generated by other actors at other times.'

[45] I now return to the matter at hand, and apply what is set out above. One issue must be immediately disposed of. The second respondent's reasoning that the conduct of the individual respondents must in some way be mitigated or understood because unprotected strike can be seen as being simply part of

[17] (2016) 37 ILJ 1819 (LAC) at para 33.

their fundamental right to collective bargaining, is completely unsustainable and a misdirection. Where fundamental rights under the Constitution are regulated by statute, those rights must be determined based on the content of the statute concerned, and direct reliance on the constitutional provision is not permissible.[18] In this case, the right to collectively bargain is regulated by the LRA, which has as one of its core objectives orderly and legitimate collective bargaining. An unprotected strike action is in breach with what the LRA requires and is simply not consistent with it.[19] It therefore follows that where employees strike in a manner prohibited by the LRA,[20] it simply cannot be seen as being part of their right to collective bargaining as collective bargaining in terms of the LRA envisages only legally permissible conduct, and not unlawful behaviour.

[46] By adopting the approach referred to above, the second respondent negated an important context. This context is that unprotected strike action is very serious misconduct, not functional to collective bargaining, and may justify dismissal.[21] It is also the kind of conduct that causes material prejudice to an employer. The object of the LRA is clearly to dissuade employees from strike action that is not in compliance with the provisions of the LRA. In turn, this constitutes a proper context in terms of the LRA for treating this misconduct far more seriously in the PLA, namely by way of the forfeiture of the entire project bonus. So therefore, and contrary to what the second respondent believed, an interpretation of clause 13.25 to the effect that employees forfeit their entire project bonus for the year is fully in line with the objectives of the LRA.

[47] My view in this regard is cemented by the manner in which clause 13.25.3.2 is structured. As dealt with earlier in this judgment, the provision in fact

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[18] See: *SANDU v Minister of Defence and Others* (2007) 28 ILJ 1909 (CC) at para 51.
[19] See: Section 1(d)(i) of the LRA; *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC) at para 26; *SA Transport and Allied Workers Union and Others v Moloto NO and Another* (2012) 33 ILJ 2549 (CC) at para 33; *Transport and Allied Workers Union of SA v Putco Ltd* (2016) 37 ILJ 1091 (CC) at para 70.
[20] This is where the procedural requirements for the right to strike to accrue as set out in section 64 have not been met, or the strike is prohibited by way of section 65.
[21] Section 68(5) reads: 'Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account'. See also *National Union of Metalworkers of SA and Others v CBI Electric African Cables* (2014) 35 ILJ 642 (LAC) at para 28; *Transport and Allied Workers Union of SA on behalf of Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd* (2016) 37 *ILJ* 2485 (CC) at para 50.

contemplates that, at the risk of exaggerating, it is not every little strike of a few minutes that will lead to forfeiture of the project bonus. Employees are given the opportunity to save their project bonus by returning to work within the cooling off period defined in the PLA itself.[22] There is thus a balance, as envisaged by the LRA, that a strike of short duration does serve as mitigation.[23] Also, the clause specifically recognizes the concept of provocation by the employer as a mitigating factor.[24] In that instance as well, employees do not forfeit their project bonus. This is fully in line with the objective of fair dealing under the LRA, and an important factor the second respondent did not contemplate at all.

[48] A proper interpretation of clause 13.25.3.2, by simply considering the clear language in the clause, can in my view only have one result. This result is that the clause provides, as a general principle, that where employees embark upon an unprotected strike, they forfeit their project bonus. This is not their project bonus for only a month, but their project bonus for the year. However, if they go back to work immediately (within the cooling off time) or if they are provoked by their employer, this would serve as an exception to losing their project bonus. This is the only construction that fully accords with the clear language of the provisions.

[49] The provisions of clause 13.25.3.2.3 even further supports this construction. It serves to deal specifically with 'rolling' industrial action. This is the kind of unprotected strike action that has an element of deliberateness to it, in that it is planned. It is a stratagem where employees, for example, strike for a short period, return to work, then later strike for a short period and return to work, and so on, based on the same underlying issue in dispute. This conduct is

[22] Clause 12.9.3 of the PLA refers to 4(four) hours.
[23] See: *SA Commercial Catering & Allied Workers Union on behalf of Mokebe and Others v Pick 'n Pay Retailers* (2018) 39 ILJ 201 (LAC) at para 35; *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others* (2012) 33 ILJ 160 (LAC) at para 44; *Association of Mineworkers and Construction Union and Others v Anglogold Ashanti Ltd* (2016) 37 ILJ 2320 (LC) at para 263*; National Union of Metalworkers of SA and Others v Pro Roof Cape (Pty) Ltd* (2005) 26 ILJ 1705 (LC) at para 33.
[24] See Item 6(1)(c) of Schedule 8 to the LRA; *National Union of Metalworkers of SA and Others v Lectropower (Pty) Ltd* (2014) 35 ILJ 3205 (LC) at paras 20 - 22; *Food and Allied Workers Union and others v Supreme Poultry (Pty) Ltd (Formerly known as Country Bird)* [2016] JOL 35779 (LC) at para 14; *Transport and General Workers Union and others v Coin Security Group (Pty) Ltd* (2001) 22 ILJ 968 (LC) at paras 134 – 135.

simply unacceptable, and clause 13.25.3.2.3 contemplates this.[25] So where employees return to work within the cooling off period, for example, but the unprotected strike was part of 'rolling' industrial action, this clause specifically provides that the project bonus is lost. In simple terms, the language in the clause is clear – rolling unprotected strike action equals loss of the project bonus.

[50] I have dealt above with the issue of appropriate context where it comes to the provisions of the LRA, but the PLA itself also provides context. In my view, the PLA is squarely aimed at the prohibition of unprotected strike action. This is made clear in clauses 2.2, 5.1 and 12 I have set out earlier in this judgment. In the face of such clear prohibition, it explains the reason why unprotected strike action is dealt with more harshly where it comes to the project bonus. It then makes sense why a single transgression can lead to the forfeiture of the entire project bonus. It serves as the strongest discouragement possible to employees not to flout the provisions of the LRA, and act contrary to one of the primary objectives of the PLA itself, which after all is an agreement to which they all are a party.[26] In any event, the PLA is not adverse to the concept of the total forfeiture of the project bonus, which would happen, in terms of clause 13.25.2, in the case of fair dismissal, resignation and absconding.

[51] All of the above leaves me convinced that when considering the clear language of clause 13.25.3, the context provided by the actual objectives of the LRA and the PLA itself, and with a generous helping of common sense and logic, the result that must follow when objectively interpreting this clause is that where employees embark upon unprotected strike action, they forfeit their entire project bonus for the year, even if it is only a single instance. The only way to avoid this is for employees to show that they returned to work in the cooling off period, that they were provoked into striking, and that this was not 'rolling' industrial action.

[25] See: *National Union of Metalworkers of SA & others v CBI Electric African Cables* (2014) 35 ILJ 642 (LAC) at para 39; *County Fair Foods (Epping), a division of Astral Operations Ltd v Food and Allied Workers Union and Others* (2018) 39 ILJ 1953 (LAC) 22; *Mndebele and Others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (2016) 37 ILJ 2610 (LAC) at para 34.

[26] Section 23 reads" '(1) A collective agreement binds-the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates- (i) terms and conditions of employment …'

[52] In the current matter, none of the exceptions in clause 13.25.3.2 applied. There was no case made out that the employees retuned to work within the cooling off period. In any event, the trail of ultimatums show that this was not the case. There was no allegation or case made out that the employees were provoked. And then, to top it all off, it was common cause that this was 'rolling' industrial action. In terms of the PLA, only one result could follow. The individual respondents' project bonus for the year from 1 December 2013 to 30 November 2014 was forfeited.

[53] The second respondent tried several avenues to get around this clear and logical conclusion. He sought to rely on clause 13.25.1, which provides that the project bonus accrues on a month to month basis for as long as the employee works on the project. He in effect reasoned that because it accrues monthly, it can only be forfeited monthly. This is not only a misdirection, but reasoning that flies in the face of the clear language of clause 13.25 as a whole, as discussed above. The second respondent also ignores that although the project bonus accrues monthly, it is not paid monthly. It is paid as a once off lump sum at the end of the applicable 12 month period. The monthly accrual of the project bonus is nothing but a formula. So, and in the ordinary course, at the end of 12 months, the employees concerned will receive a once off payment equivalent to 15 working hours accruing month to month over that period. This constitutes the so-called carrot given to employees for being at work and working properly over a period of a year.

[54] However, and usually where a carrot is provided, there is inevitably always a stick. This stick is found in clauses 13.25.2, 13.25.3.1, 12.35.3.2, 12.35.3.3 and 12.35.4. In terms of these provisions, either the whole or part of the project bonus is forfeited, obviously before payment is made. In sum, these provisions contemplate total forfeiture in the case of fair dismissal, resignation and absconding. It also contemplates total forfeiture subject to specific exceptions in the case of unprotected strike action. Finally, it contemplates only part forfeiture for unauthorized absenteeism and refusal to work overtime or on an agreed Saturday. What is immediately apparent is that each of these instances of forfeiture are regulated separately.

[55] In my view, the second respondent completely failed to appreciate this distinction. The second respondent in fact sought to panel beat all forfeitures into one category. The second respondent in effect reasoned that all transgressions should be treated exactly the same where it comes to the *quantum* of forfeiture. That approach is however in my view contrived and misdirected, for a number of reasons, to follow.

[56] The approach of the second respondent is entirely incompatible with the clear language of the provisions he relies on. The PLA itself contemplates that the wielding of the stick of forfeiture of the project bonus is done differently depending on specifically defined circumstances. It flies in the face of the PLA to merge it into one, so as to secure an outcome most favourable to employees, which is what the second respondent did. In the end, a simple and common sense approach to interpreting and applying clause 13.25 shows it is not difficult to understand and apply. First, the employees are given an 'extra' as part of their conditions of employment, if they work properly over a defined period, and is payable at the end of that period. Second, this extra is completely lost if an employee is dismissed fairly, resigns, or absconds before it is payable. Third, the extra is completely lost if the employees embark upon unprotected strike action in this period, unless they return to work within a cooling off period or are provoked. Fourth, the extra is only partially forfeited on a month to month basis for unauthorized absenteeism, or a refusal to work overtime or on agreed Saturdays. In my view, it is as simple as that.

[57] The point can be best illustrated by example. An employee works on the project for a period of a year. As such, the employee accrues the full project bonus and would in the ordinary course be entitled to payment thereof at the end of the period. But in one month during the period, the employee was absent without leave for two days. In another month in the period, the employee refused to work on an agreed Saturday. As a result, and before payment of the project bonus is made, applying clauses 13.25.3.1 and 13.25.3.3 (as read with 13.25.4) two months must be deducted,. These are different forfeitures, separately provided for in clause 13.25. The one need not be grafted into the other. In the context of this same example, if the employee however resigns, even after 11 months of the 12 month period, the employee

gets no project bonus. Again, it is a different application of another provision of the clause to a different circumstance.

[58] In the context of this separation of forfeitures, strike action is viewed much more seriously. The rationale for this is common sense, as I have touched on above. The PLA itself regards this as serious. The consequences to the applicant as employer as a result of unprotected strike action by employees is far more serious than the consequences to the applicant of an individual employee that, for example, is absent without leave on one day. The nature of the misconduct of unprotected strike action is far more egregious that the other instances contemplated by clause 13.25.3. In my view, it thus follows that a proper interpretation of the PLA leaves me convinced that it was intended as a measure to discourage unprotected strike action in the strongest possible terms, in that there would be a total forfeiture of the project bonus where there is unprotected strike action.

[59] The judgment in *Renaissance BJM Securities (Pty) Ltd v Grup*[27] has a number of similarities to the matter now before me as it also concerned the payment of a bonus to an employee. It was contended that the bonus was paid as a retention bonus, meaning that it was paid on condition that the employee remains in the employment of the employer. After referring to *Endumeni Municipality supra*, the Court held:[28]

> **'**The language used in the impugned clause is unambiguous and contains no condition relating to the respondent remaining in the appellant's employ. The clause clearly states that the respondent would be paid 'cash of equal value to the forfeited value'. The money was therefore paid to compensate the respondent for the loss he suffered or would suffer as a result of resigning from Investec. The money was payable in three tranches, which were not linked to the respondent remaining in the appellant's employ.
>
> The context within which the clause should be considered is that the appellant desired the services of the respondent. Both parties were aware that the recruitment process would not succeed unless the respondent was compensated or sufficiently compensated for the loss that he would suffer on resignation from Investec. The only way in which the appellant could procure

[27] (2016) 37 ILJ 646 (LAC).
[28] Id fn 27 at paras 23 – 24.

> the services of the respondent was to facilitate his resignation from Investec by offering to pay him what he would forfeit on resignation. It is clear that clause 4.5 came into existence because of these considerations.'

[60] The approach I adopt now is similar to that of the Court in *Grup*. As said above, clause 13.25.3.2 is unambiguous. It contains no provision to the effect that where it applies, only the project bonus for the month within which the unprotected strike action occurred is forfeited. On the contrary, and in the case of rolling industrial action, as was the case *in casu* on the common cause evidence, clause 13.25.3.2.3 specifically provides for forfeiture of the entire project bonus for the period. These provisions were intended to discourage unprotected strike action which is specifically prohibited by the PLA. This leaves no room for the interpretation suggested by the second respondent. As said in *Phaka and Others v Bracks NO and Others*[29]:

> '**…** the contract falls to be interpreted by having regard to its plain and unambiguous language understood contextually and purposively …'

[61] Therefore, in summary, the second respondent's determination that the individual respondents that partook in the 'rolling' unprotected strike action on 9 October 2014 only forfeited their project bonus for the month of October 2014 is a misdirection and a material error of law. Such determination is incompatible with the clear and unambiguous language of clause 13.25 and the manner in which it is structured. It ignored the objectives of the LRA relating to unprotected strike action and negated the intended consequences of a violation of the strict prohibition of unprotected strike action found in the PLA. It is based on an artificial construct, subjectively intended to cause the least possible prejudice to employees. It is unsustainable on review, and thus an unreasonable outcome.

Conclusion

[62] Therefore, and based on all the reasons set out above, I conclude that the second respondent's award constitutes a material error of law to the extent

[29] (2015) 36 ILJ 1541 (LAC) at para 18.

that the determination he arrived at is unreasonable and thus cannot be sustained. The award thus falls to be reviewed and set aside.

[63] Having reviewed and set aside the award of the second respondent, I see no reason to remit this matter back to the first respondent again for determination *de novo* before another arbitrator. In terms of section 145(4), I have the power to determine the matter. As stated above, the factual matrix in this matter was undisputed and actually agreed to. The interpretation of the PLA is in essence a legal conclusion, and need not be decided again. I therefore consider it appropriate to finally determine this matter, once and for all. As a result, I consider it appropriate that the arbitration award of the second respondent be substituted with an award that the individual respondents forfeit their entire project bonus for the annual period of 1 December 2013 to 30 November 2014, as a result of their participation in rolling unprotected strike action on 9 October 2014.

Costs

[64] This then only leaves the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was successful, I do not intend to burden the third respondents with a costs order, especially considering and the ongoing relationship between the parties and the opportunity afforded to me to bring this matter finally to an end. I am also mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[30] where it comes to costs awards in employment disputes before this Court, and in this case there certainly exists no reason to depart from this. Also, neither party pressed the issue of costs when the matter was argued. I accordingly exercise my discretion as to costs in this matter, by making no order as to costs.

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

Order

[30] (2018) 39 ILJ 523 (CC) at para 25.

1. The applicant's review application is granted;

2. The arbitration award of the second respondent, arbitrator Sipho Talane, dated 1 November 2016 and issued under case number LP 6903 – 16, is reviewed and set aside.

3. The arbitration award is substituted with the following award and determination:

> *"The members of NUMSA that embarked upon unprotected strike action on 9 October 2014 forfeit their entire project bonus for the period from 1 December 2013 to 30 November 2014."*

4. There is no order as to costs.

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S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate M Van As
Instructed by:	Fluxmans Inc Attorneys
For the Third Respondents:	Mr X Ngako of Ruth Edmonds Attorneys Inc.