Reportable/Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C495/2019

In the matter between:

THE PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA (SOC) LTD	**First Applicant**
and	
CEPPWAWU obo MEMBERS	**First Respondent**
SOLIDARITY obo MEMBERS	**Second Respondent**
NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY	**Third Respondent**
COLIN RANI (*N.O.*)	**Fourth Respondent**

Date of Set Down: 6 October 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 14h00 on 25 October 2022.

Summary: (Review – Interpretation and application dispute – entitlement to performance bonus – entitlement not derived from collective agreement - Unfair Labour Practice – Short term incentive plan expired – employer paying bonus on a different basis – dispute over continued applicability of the STIP – whether non-payment of bonus on the formula set out in the STIP was unfair – Joinder and participation of employee party that was not formally joined as a party to the dispute – whether arbitrator should have allowed it to participate in arbitration-union party a necessary party in the arbitration dispute over interpretation and application whether party to the referral or not – Representative of union accordingly having locus standi – Arbitrator concluding without sufficient factual basis that employer obliged to pay incentive bonus which had expired – finding that employer's refusal to do so and relief reviewed and set aside – Employer's failure to consult over decision to implement a new bonus without prior consultation procedurally unfair – solatium awarded for unfair labour practice)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an opposed application to review and set aside an arbitration award in terms of which the applicant ('Petrosa') was ordered "to pay the qualifying employees and STIP (short term incentive plan) bonus pursuant to the STIP rules from a pool of R 123 million". The unions CEPPWAWU ('Ceppwawu') and SOLIDARITY ('Solidarity') oppose the review on behalf of their members ('the employees'). For the most part, Solidarity aligns itself with the argument of Ceppwawu.

[2] In terms of the pre-arbitration minutes, the issues the arbitrator was expected to decide were:

"5.1 Whether the STIP policy constitutes a valid and enforceable collective agreement between the parties;

5.2 Whether the STIP policy lapsed on 31 March 2017 and, if not, whether the respondent was obliged to pay the STIP bonus in terms of the STIP policy;

alternatively

5.3 Whether an unfair labour practice relating to payment of the STIP for the financial year end 31 March 2018 was committed by the respondent against the applicant and whether the respondent conduct was procedurally fair;

5.4 Whether the respondent was obliged to pay the STIP bonus."

[3] The arbitration minute also recorded that Ceppwawu referred the dispute in August 2018 and Solidarity was joined as an applicant in the dispute after the conciliation.

Background

[4] The arbitrator recorded the comprehensive agreement on common cause facts which the parties had included in their pre-arbitration minute. To this must be added certain other summary details of the narrative, some of which are in dispute. All of these factual details are set out below:

[5] Clause 16 of the union members' employment contracts provides that "[a]n incentive bonus, calculated in terms of the rules of the scheme will be paid upon the achievement of agreed performance targets".

[6] On 30 October 2012, PetroSA issued a draft STIP document to outline the rules and mechanics applicable to the PetroSA STIP.

[7] On 5 September 2013, PetroSA issued a performance management policy ('PMP') with objectives, including but not limited to, recognising and rewarding good performance by financially rewarding employees in terms of the STIP.

[8] During 2013, the parties concluded a collective agreement accepting the 2012 STIP as approved by PetroSA's board of directors at the time. The

STIP was approved and implemented retrospectively with effect from 1 April 2012 (‘the 2012 STIP’).

[9] In terms of the 2012 STIP the employees received their first STIP bonus in August 2013.

[10] Clause 4.6 of the 2012 STIP provides that: "the STIP will be valid for five years, from 1 April 2012 to 31 March 2017, whereafter the structure of the incentive scheme and governing rules may be amended in accordance with PetroSA 's requirements."

[11] Clause 4.10 of the 2012 STIP stipulates that: "the rules of the STIP may be amended from time to time by approval of the Human Capital Committee and/or by the Board of PetroSA, as may be appropriate in terms of corporate governance procedures."

[12] Clause 8.1 of the STIP states: “Any bonus determined in accordance with the STIP will only be certain, final and payable after PetroSA’s audited financial results have been approved by the Board. Payments will be affected during the months that follows the month in which the financial results were approved. The bonus determined will vest in all participants of the bonus scheme at this date of payment.”

[13] It is a matter of dispute whether or not PetroSA tried to renegotiate a new STIP with the unions before the existing one expired on 31 March 2017.

[14] On 24 July 2018 during the AGCEO and Labour meeting was held aimed at giving feedback on annual wage increases and the STIP. The chairperson stated that the STIP will be deferred pending the audited financial statements and a legal opinion. Labour responded by noting the AGCEO feedback but submitting that in the absence of a new policy the old STIP policy still applies and that the only delay that was acceptable to it was that of the audit process. They demanded that the bonus be paid on the STIP basis in the August 2018 salary run for the financial year ended 31 March 2018.

[15] On 17 August 2018, during another AGCEO and Labour meeting:

[16] PetroSA's management, and in particular the AGCEO (the accounting officer), took full responsibility for the collapse of the STIP and the PMS

including but not limited to the fact that 14% of employees did not have performance contracts for the 2017/2018 financial year. Despite this concession by management, PetroSA contested that employees also bore responsibility for the collapse of the STIP PMS;

[17] No employees had mid-term reviews in accordance with the PMS;

[18] Management acknowledged that a vacuum could not be allowed to exist which would perpetuate the "suffering of the employees";

[19] PetroSA accordingly decided to pay R82 million as a gratuity divided equally amongst all the employees amounting to approximately R63,000 each.

[20] This was not paid in terms of the rules of the 2012 STIP and was paid out notwithstanding the fact that 14% of employees had not completed their performance contracts for the 2017/2018 financial year;

[21] The unions disputed PetroSA's decision not to pay the STIP. Management confirmed that an achievement score of 2.98 did trigger the bonus provision of R 205 million, but management claimed that non-payment of the STIP was based on cash flow, the collapse of the PMS, and that the STIP had expired;

[22] The unions however maintained the view that the STIP policy remains in place and is governed by an enforceable collective agreement;

[23] The unions did not reject the R 82 million payment, but PetroSA viewed it as an un-finalised gratuity, which was not a STIP payment.

[24] On 20 September 2018, during another AGCEO and Labour meeting, PetroSA emphasised that the STIP bonus payment was dependent on audited financial statements. PetroSA confirmed that the STIP was agreed with labour, but until there was a legal opinion received there would be no decision on the matter. Labour objected to the delay in obtaining a legal opinion and maintains that the STIP applied until it was replaced and demanded that a bonus be paid with effect from August 2018;

[25] Consolidated and separate audited financial statements were issued for the year ending 31 March 2018 and it is common cause that if the STIP had been paid a rating of 2.98 would have been applied to the bonus pool of R 205 million. This would amount to an average payment of about

The arbitrator's key findings

[26] The arbitrator's central findings are summarised below.

[27] Despite the unions' contentions to the contrary, the STIP policy was not a collective agreement and therefore he could not determine the dispute based on the interpretation and application of a collective agreement, but had to determine the alternative claim that the failure to pay a STIP bonus or the financial year ended 31 March 2018 amounted to an unfair labour practice. There was no cross review launched to set aside this finding.

[28] In deciding if the failure to pay the bonus based on the 2017/2018 financial year end figures amounted to an unfair labour practice, the pertinent issue was to determine if the reason for not doing so was justifiable and fair in the circumstances.

[29] The cash flow justification advanced by PetroSA as one reason for not making the STIP payment was unsubstantiated and unsupported by any evidence and therefore could not be a valid reason for the non-payment. He noted also that PetroSA had paid out an R 82 million bonus, notwithstanding its alleged cash flow problem.

[30] Maintaining the PMS was the employer's responsibility and it could not blame its collapse on employees. Even if employees would not agree to increase the target score from 2.98 to 3.1 there was no evidence that this caused the collapse of the system.

[31] Lastly, even though the STIP policy had an expiry date of 31 March 2017, PetroSA "had an obligation to pay an incentive bonus in terms of the employment contracts of employees." Moreover, after March 2017, the parties continued to discuss the implementation and changes to the STIP and agreed that a score of 2.98 had been reached, which triggered a bonus provision of R 205 million, as confirmed in the audited financial statement. Accordingly, the STIP continued beyond 31 March 2018, and PetroSA was obliged to pay the STIP bonus for the 2017/18 financial year.

[32] He also found that it was a unilateral decision of PetroSA not to pay the bonus in terms of STIP which led to the dispute. The STIP was a condition of employment and part of the employees' employment contracts, and PetroSA should have consulted with employees regarding the non-payment of the STIP or its replacement if it had decided to discontinue it. Although he accepted that it was PetroSA's prerogative to introduce performance management systems "these systems/policies must be managed in a fair manner." He reaffirmed that PetroSA's unilateral decision not to pay the bonus in terms of the STIP was contrary to the fact that the STIP continued beyond the end of March 2018.

[33] The audited financial statements for the 2017/2018 financial year showed that "a score of 2.98 was achieved, which meant that the respondent had to pay R 205 million to the employees."

[34] The arbitrator found that PetroSA's "refusal to pay out R 205 million for the 2018 financial year, and its decision to pay out R 82 million instead was "arbitrary and unfair conduct" on its part

[35] In relation to the R 82 million PetroSA had already paid, the arbitrator commented that fairness was not a one-sided issue but required fairness to both employer and employee parties. He accepted that it was PetroSA' S choice to introduce and manage a workplace performance system/policy, and noted the payment already made. He then concluded that it would be fair for the qualifying employees to be paid the STIP bonus from a pool of R 123 million which represented the difference between what had been paid out and the R 205 million bonus provision.

The review

[36] PetroSA raised six grounds of review. For reasons which will become apparent it is not necessary to deal with all of them. Four of the grounds concerned alleged reviewable irregularities in the conduct of the proceedings. The remaining two concerned the reasonableness of the arbitrator's findings.

Objection to Solidarity's status as a party to the arbitration proceedings

[37] The first point raised by PetroSA is a jurisdictional objection to the Solidarity being a party as party to the arbitration proceedings on the basis joined as a party to the dispute without having been a party to conciliation proceedings.

[38] As mentioned, the pre-arbitration minute records that Solidarity was joined as a party in the arbitration proceedings. It is apparent from the transcript and the unconstested claim made in the PetroSA's supplementary affidavit that the participation of Solidarity as a party took place without a joinder application being brought or an express joinder ruling being made the arbitrator.

[39] On this basis, PetroSA contends Solidarity cannot rely on the judgment in Goliath v Rocklands Poultry Loss Control/Sovereign Foods (P295/15) [2019] ZALCPE 18 (7 November 2019) in which this court held if an arbitrator issued a joinder ruling admitting a party to arbitration proceedings, which had not been a party to the conciliation proceedings, the joinder ruling was binding unless set aside on review. [1] In *Rocklands* the court found that the Constitutional Court dictum in *National Union of Metalworkers of SA v Intervalve (Pty) Ltd & others* (2015) 36 *ILJ* 363 (CC) to the effect that conciliation was an indispensable pre-condition for arbitration[2] was distinguishable from the facts before the Labour Court, because in Intervalve the belated joinder application in the labour court proceedings was opposed and was the subject matter of the appeal to the LAC.

[40] However, in casu the parties agreed in the pre-arbitration minute that Solidarity was joined in the proceedings, so it must be supposed that there was no opposition to it being joined. Paragraph 3.17 of the pre-arbitration minutes simply records that "Solidarity was subsequently joined as the Applicant to the dispute after the conciliation." Ceppwawu argued that on the strength of an exchange in the pleadings between Solidarity and PetroSA that PetroSA had effectively conceded that a ruling to this effect

[1] At para [28].

[2] *Intervalve* at para [40].

was made. Solidarity contended that the transcript was not complete and that PetroSA could not simply rely on the transcript as evidence that no joinder ruling had been made by the arbitrator. In direct reply to that contention PetroSA stated that it was the legality of Solidarity being joined that was at issue and not the existence of the ruling or order which had permitted it. PetroSA continued its response stating: "the fact that Solidarity appeared at the arbitration hearing suggests that an order purporting to do so had been made. The point is only that there is no evidence of such an order or its contents to indicate the reasoning that was followed or the basis on which it was concluded that the rule prohibiting joinder after conciliation was not applicable." In the same replying affidavit PetroSA made the point that Solidarity was not a party to the referral to conciliation or to arbitration and there was no evidence that it was present in the conciliation proceedings. In an earlier paragraph in its replying affidavit, PetroSA states: "it is not disputed that the council or a Commissioner acting under its auspices at some point after the conciliation and the referral to arbitration purported to join Solidarity as a party and that Solidarity thereafter participated in the proceedings as if it had been lawfully joined. This purported joinder is precisely the act which PetroSA is challenging" (emphasis added). It does not seem to me that PetroSA conceded that a ruling was actually made joining Solidarity to the proceedings, but simply that it was purportedly made, in other words it was falsely portrayed that it had been made.

[41] Ceppwawu also argued, in the alternative, that PetroSA was estopped from disputing Solidarity's status as a lawfully joined party to the proceedings as it had tacitly consented to its participation and acknowledged it was a party without demur, until these proceedings. Attractive as such an argument might be, it is trite law that jurisdictional issues can arise at any stage and no authority was cited that jurisdiction can be conferred by the prior failure of a party to raise the objection.

[42] On the face of the transcript alone, it would seem that Solidarity was simply permitted to participate as a party to the proceedings, and used that opportunity fully. The first time that Solidarity appears on any of the bargaining council documentation of the dispute is on the notice of set down

for the pre-arbitration meeting. This tends to reinforce the impression that sometime after the conciliation hearing, but before the arbitration proceedings commenced, Solidarity was treated as a party to the proceedings. In the absence of any clear evidence of a ruling actually been made by a functionary empowered to do so, it does not follow that just because Solidarity was cited as a party that a ruling had been made joining it to the proceedings.

[43] It is revealing that the notes of the conciliating panellist who completed the handwritten outcome report of the conciliation and issued the certificate of outcome, noted at the top of the report "NB ? SOLIDARITY to be joined as one part of the collective agreement in question." In her handwritten summary of the outcome she characterised the dispute as "contractual not an ULP – rather application and interpretation of collective agreement combined with individual contracts." The summary refers to "employees not being paid performance in terms of STIP agreement in 2012." However, the outcome certificate itself described the dispute as one concerning an alleged unfair labour practice and made no mention of an interpretation and application dispute or any other type of dispute. If there is an explanation for Solidarity's subsequent inclusion in the proceedings other than it attending and participating on its own accord, it might have originated in the panellist's note that Solidarity might have to be joined because it was a party to a collective agreement that was the subject of an application and interpretation dispute. The reason for this seemed to have rested on the conciliator's understanding that the STIP policy document was a collective agreement. Indeed, that was one leg of the dispute which the parties referred to arbitration.

[44] That being the case, even if Solidarity had not joined the arbitration proceedings of its own accord, it ought to have been joined in them anyway, on the basis that if it was a party to a collective agreement that was the subject matter of an arbitration it had a legal interest in the outcome of a dispute about the interpretation and application of that agreement, irrespective of whether it had referred its own dispute or being present at the conciliation meeting. Accordingly, Solidarity did have *locus standi* to

participate in the arbitration proceedings and its official also had the right to appear.

Solidarity's participation vitiated the entire proceedings

[45] PetroSA argues that Solidarity's representative at the arbitration, Mr Pio, effectively conducted the case of both unions, though Ceppwawu was represented in the proceedings by its own official. The only witness called to give evidence for the employee parties was Ms P Tobias, a customer services manager employed by PetroSA, who also happened to be Solidarity's secretary for PetroSA. She purportedly testified in the latter capacity, which I take simply to mean that she was a witness called by Solidarity.

[46] In view of Solidarity's representative playing a leading role in the proceedings, without Solidarity being a proper party thereto, PetroSA argued that Mr Pio ought not to have been allowed to participate nor call any witness. Consequently, it argues that the proceedings were a nullity and the award should be set aside in its totality. The unions rightfully point out that the union membership status of a witness is of no relevance to that person's competence as a witness. In relation to the role played by Solidarity's representative, there is nothing untoward or unusual about parties on the same side in legal proceedings making common cause with each other and for one to rely largely on the efforts of the other in the proceedings to advance their own case. What is more contentious is whether a union official from a union which is not a party to the proceedings, can perform the role of a representative, but since Solidarity was entitled to participate in the proceedings, this ground of review falls away too.

The arbitrator should have allowed PetroSA legal representation

[47] After Tobias had concluded her evidence Solidarity's representative announced that the case was closed and there was no indication from Ceppwawu's representative that Ceppwawu had any intention of calling its own witness. The hearing on 13 March 2019 was adjourned at the request of PetroSA's representative, Mr P Mahlangu ('Mahlangu') who was PetroSA's employment relations manager, to prepare its witnesses. When

it reconvened 25 April 2019, Mahlangu requested a further postponement of the hearing, because PetroSA's board had taken the view that it should be legally represented in the proceedings going forward given the board's concern that, as a potential beneficiary of any STIP bonus declared, he was personally conflicted. The unions had been advised the previous day that PetroSA would apply for a postponement, but did not provide written reasons why it would make the request until after business hours.

[48] The application for postponement and PetroSA's wish to engage legal representation was vehemently opposed by Solidarity's and Ceppwawu's representatives.

[49] The arbitrator declined to allow PetroSA legal representation on the basis of the agreement in the pre-arbitration minute and also on the basis that the employee parties had already concluded their evidence. He also refused to postpone the arbitration to another day but decided to adjourn the proceedings for an hour for PetroSA to obtain a substitute representative. When the hearing resumed an hour later the conflicted representative announced that it had not been possible to get any of the directors to appear and no other managerial employee could appear because they would also be conflicted like he was. In view of the unavailability of any directors on that occasion the arbitrator postponed the enquiry for PetroSA to arrange the presence of a director.

[50] When the enquiry reconvened nearly a year later on 15 May 2020, despite PetroSA's misgivings about Mahlangu representing it, he continued to do so, and lead the evidence of a witness, Mr R Buhr, for PetroSA. However, it must be mentioned that a director was present as well, so the risk of PetroSA's interests being compromised by any possible conflict of interest on Mahlangu's part was mitigated.

[51] PetroSA argued that the arbitrator should have recognised that the PetroSA's board knew nothing about the pre-arbitration agreement excluding legal representation and that given Mahlangu's conflicted position it was unreasonable of the arbitrator not to admit legal representation on the basis that it is normally permitted in unfair labour practice disputes.

The arbitrator's decision to exclude supplementary documents

[52] PetroSA argued that the arbitrator committed a reviewable irregularity in excluding certain supplementary documents it sought to introduce after the unions had closed their case.

[53] The documents related to: an EVA management scheme which preceded the 2012 STIP; the changes to the STIP which PetroSA's board approved on 24 February 2014; PetroSA's board approval on 16 September 2014 for 50% of the bonus pool to be paid to employees for the 2013/2014 financial year following negotiations with the unions; further extensive changes on the STIP recommended to PetroSA's board for approval on 20 May 2015 (including a summary of discussions held with the unions); and a settlement agreement between PetroSA and the unions in 2017 relating to the STIP as facilitated by the same commissioner. The documents also recorded efforts by PetroSA to persuade employees to complete their individual performance management templates without reference to the STIP after its expiry.

[54] In view of the approach I have taken to the arbitrator's main findings on PetroSA's obligation to continue to pay a bonus on the formula contained in the STIP policy, it is not necessary for me to consider this ground of review.

The arbitrator's findings on the merits are ones that no reasonable arbitrator could have reached

[55] The arbitrator's finding that the failure to pay the STIP for the financial year ended 31 March 2018 was unfair was materially flawed because he concluded that the STIP continued beyond 31 March 2017, which could not be justified on the evidence.

[56] Although the arbitrator accepted that the STIP policy expired on 31 March 2017, he nonetheless concluded that there was a continuing obligation to pay the bonus in terms of the employees' contracts. The passage in the employment contracts referring to an incentive bonus reads:

[57] "An incentive bonus, calculated in terms of the rules of the scheme, will be paid upon the achievement of agreed performance targets. It should be

noted that in order to qualify for the bonus payment, you have to be in service of the company at the time when bonuses are paid, and you also have to be in the service of the company from more than three (3) calendar months during a financial year. Bonus payments will be prorated for service periods less than twelve (12) months."

[58] PetroSA argues that the arbitrator's findings in this regard are unsustainable for the following reasons:

58.1 There was no evidence of any agreement that STIP would be paid for the 2017/2018 financial year. All that was agreed was that if it was paid it would be done on the basis of a rating of 2.98 and a bonus pool of R 205 million. PetroSA claims that the arbitrator misconstrued what the extent of the agreement was. It argued that he improperly extrapolated from the common understanding of what the bonus pool would be if the STIP formula was applied to conclude that it actually had been agreed that the STIP bonus would again be paid for the 2017/2018 financial year.

58.2 Clause 4.6 of the STIP policy made it clear that the existing policy expired at the end of March 2017. A further provision reinforcing the intention that the STIP would be of limited duration was clause 8.2, forming part of the 'administrative rules' of the scheme, which stated:

> "8.2 Validity
>
> The STIP will be valid from 1 April 2012 until 31 March 2017."

58.3 PetroSA argued that, in effect, the arbitrator simply avoided consideration of these clauses, which unambiguously provided that the STIP was only applicable for the five year period.

58.4 There was undisputed evidence that the bonus had not been paid for three years prior to that owing to the collapse in the performance management system.

58.5 The arbitrator's finding relating to consultation failed to take account of the fact that clause 4.10 of the STIP provided that it could be amended by PetroSA structures, and after March 2017, clause 4.6 provided that

its structure of the incentive scheme and rules governing it could be amended in accordance with PetroSA's requirements.

58.6 The arbitrator made an unreasonable error in law in finding that employees' contracts obliged PetroSA to continue paying incentive bonuses as if STIP continued. Because the contractual provision stated that the bonus would be paid in terms of the rules of "the scheme" and on achievement of agreed performance targets, if there was no scheme in place because the existing one had expired and not being replaced, no contractual obligation existed to pay a bonus in terms of the previously existing scheme. The reference in the STIP policy to participation in the scheme being dependent on each employee's of employment advanced the argument no further.

[59] PetroSA argued that the minutes of the AGCEO Labour meeting of 24 July 2018 clearly showed that PetroSA was still waiting for the audited financial statements for the 2017/2018 financial year before making any pronouncement on "the possibility of a bonus or not", because the score based on the previous system had changed dramatically within a 24-hour period, casting doubt on the integrity of the numbers provided in the company. In addition, the scheme which existed and had been agreed to with the unions lapsed at the end of March 2017, which raised a puzzle as to what the basis would be for paying any bonus and the company was seeking legal opinion on this.

[60] By the time the next joint meeting was convened on 17 August 2018, PetroSA had decided instead to award a bonus, which it labelled a 'gratuity', amounting to R82 million, distributed equally amongst all staff so they each received about R 63,000. Labour questioned why it had been decided not to pay a bonus according to the STIP formula. Management's explanation was that the bonus and the wage increase of 4.5% for employees who are not part of the bargaining unit were coupled together. In motivating the decision, PetroSA explained that the figure had been arrived at on the basis of a 13th check which was a benefit payable in other companies. It was of the view that there was a shared sentiment that the STIP was not working and a new incentive scheme need to be created. The STIP policy and

associated performance management scheme had collapsed and the STIP policy unlike other PetroSA policies was not of indefinite duration but applied for a five year period ending the previous March.

[61] Ceppwawu contends that the arbitrator simply found that STIP did continue and that PetroSA was required to comply with it, not that there was an agreement it would continue.

[62] Ceppwawu pointed out that the test of reasonableness required that if the arbitrator's own reasoning is too flawed to justify the findings made, the court must still determine if the findings can be justified on other grounds. This means the court must determine if there was sufficient evidence to reasonably sustain those findings. Ceppwawu cited a recent summary formulation of the test, based on earlier authorities, by the Labour Appeal Court, in *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2021] 5 BLLR 475 (LAC):

> "[19] The test for review is this: 'Is the decision reached by the arbitrator one that a reasonable decision-maker could not reach?' To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator. This Court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding "whether the decision made by the arbitrator is one that a reasonable decision-maker could make. "

(footnotes omitted)

[63] In this review, Ceppwawu argues that the following evidence, provides sufficient justification for the arbitrators' findings:

63.1 The applicant's witness, Mr Buhr, conceded that the minimum period of the STIP agreement would be five years, after which it could be amended.

63.2 Clause 4.6 of the STIP simply set out the period during which which the policy would operate in its current form “where after the structure of the incentive scheme and governing rules may be amended in accordance with [PetroSA’s] requirements. Ceppwawu argues this clearly meansthe scheme was intended to continue, but subject to amendment. Clause 8.2 had no bearing on the issue of what happened after the expiry of the five-year period, wheareas clause 4.6 did and it was that provision which was relevant in determining if PetroSA had a free hand to determine what it did about the incentive bonus after March 2017.

63.3 The scheme was not amended in the sense that a variation of the scheme or a new scheme was introduced.

63.4 The offer of employment and employment contract documents dated 2018 refer to a performance based incentive scheme.

63.5 The minutes of the meeting of 24 July 2018 show that PetroSA was contemplating making a payment in terms of the STIP policy, and it was clearly not of the view that the policy had lapsed.

63.6 The minutes of the following meeting on 17 August 2018 demonstrated that PetroSA was still trying to determine how a payment could be made in terms of the STIP. As evidence of the policy’s continuation, Ceppwawu also alluded to a passage in the minutes in which management remarked that even before the 2.98 scorecard figure was arrived at, it was a common understanding that ‘STIP does not work and that a new bonus/incentive scheme [was] needed to be created to deal with the incentivising workers at PetroSA.”

63.7 Lastly, the arbitrator simply had to determine if it was unfair for the employer to decide not to pay according to the STIP, not whether the employees actually had an enforceable obligation to do so on the basis that the policy still applied. This was in keeping with the approach with the Labour Appeal Court decision in Apollo Tyres SA (Pty) Ltd v

Commission for Conciliation, Mediation & Arbitration & others (2013) 34 ILJ 1120 (LAC).

[64] In rebuttal PetroSA argued that:

64.1 Mr Buhr had made it clear elsewhere in his testimony that it did not follow if the STIP was not amended that it simply continued.

64.2 PetroSA's interpretation of clause 4.6 was irreconcilable with clause 8.2 which clearly limited the validity of the existing scheme to the five year period ending on 31 March 2017. As with Solidarity's argument that clause 4.6 restricted any possible alteration of the STIP to the structure and the rules of the scheme, these arguments are based on interpretation of the policy, which is a matter of law, and if that interpretation is wrong it cannot be used to justify the arbitrator's finding. Moreover, PetroSA argued that the union's interpretation of clause 4.6 effectively amounted to saying that the STIP continued, notwithstanding it no longer being valid.

64.3 The fact that there was no amendment of the pre-existing STIP after that date could not support an inference that it continued.

64.4 For the reasons previously mentioned, the individual contracts could not resuscitate a policy which had expired.

64.5 The portions of the minutes of the July and August meetings relied on by Ceppwawu only served to illustrate the point that PetroSA did not give the impression that it was simply a matter of course that the STIP would continue in its previous form.

64.6 The argument that the arbitrator had a discretion to determine if the failure to pay the bonus nonetheless amounted to an unfair labour practice, is premised on the employees not having a contractual right to be paid a bonus in terms of the STIP. Accordingly, the arbitrator needed to consider what would have been fair for the employer to do in the circumstances that the STIP was not applicable. However, the arbitrator simply awarded compensation as if the STIP still applied and did not consider if the R 82 million it paid out was fair conduct in the circumstances of the STIP being invalid.

64.7 The derivation of an obligation to pay the STIP based on the individual employment contracts is untenable

[65] Solidarity's counsel, *Mr Groenwald*, argued that clause 16 meant that employees were entitled to an incentive bonus payable in terms of the rules of the scheme subject to the attainment of targets, and that the STIP persisted under clause 4.6 of the scheme. Even if the STIP scheme had expired, the provisions of clause 16 imposed an express obligation on PetroSA to provide an incentive bonus scheme to give effect to clause 16. The only tenable way of giving effect to it at the time was to apply the STIP formula. Mr Myburgh, counsel for PetroSA, correctly noted that this approach contrasted with the position advanced by Ceppwawu, which had conceded that this provision of the employment contracts could not independently give rise to an obligation to apply the STIP scheme.

[66] As this question also concerns matters of interpretation and is one of the factors cited in support of the arbitrator's findings, its cogency as a ground of review must be evaluated on the same terms. PetroSA argues that "the scheme" referred to in the employment contracts could only refer to a scheme that was in force. Once the five year period was over, the STIP was no longer valid. Its validity and existence could not be maintained and extended indirectly by clause 16 of the employment contracts.

[67] PetroSA argued that while clause 16 of the employment contracts entitled employees to an "incentive bonus calculated in terms of the rules of the scheme" such entitlement was contingent on 'the scheme' being operative. As the scheme had expired, the contractual entitlement could not be enforced. Clause 4.3 of the STIP which refers to participation in the scheme as being "in terms of each employee's contract of employment", adds no greater weight to an interpretation that payment of the STIP is an ongoing contractual entitlement.

<u>Evaluation</u>

[68] The first two grounds of review relating to Solidarity's standing as a party and the consequent representative status of Mr Pio in the arbitration proceedings and the arbitrator's decision to refuse to

exclude supplementary documents have already been dealt with above.

[69] On the question of whether the arbitrator should have permitted legal representation notwithstanding the pre-arbitration minute excluding the same, PetroSA has a formidable hurdle to cross. It is well established law that a party may only resile from the terms of a pre-arbitration minute on the same principles it could resile from a contract.

[70] In *National Union of Metalworkers of SA & others v Driveline Technologies (Pty) Ltd & another* (2000) 21 *ILJ* 142 (LAC), the Labour Appeal Court held:

> "[91] To my mind the cases are consistent that whether or not a party will be allowed to raise or rely upon or introduce a cause of action or issue after a pretrial agreement or pretrial minute has been concluded in a case depends on whether it can be said that the party seeking to rely upon or to introduce or raise such cause of action or issue has abandoned that cause of action or has agreed either expressly or by implication (I would say necessary implication) not to pursue or rely upon such cause of action or point or has informed the court or the other party that such point or such cause of action or issue will not be relied upon. If he has, he cannot be allowed. If he has not, he can be allowed. This is quite apart from those circumstances where a party would be able to resile from such an agreement on the same basis as he would be able in law to resile from any other contract." [3]

[71] In *Telkom SA SOC Ltd v Van Staden & Others* (2021) 42 *ILJ* 869 (LAC), the LAC spelled out the requirements for avoiding the terms of a pretrial minute more expressly:

> "[21] The two minutes concluded by the parties were contracts entered into consensually between them, from which, in the absence of special circumstances, neither party can resile. This is so in that, as was stated in *Filta-Matix:*
>
> > 'To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37 which is to limit issues and to curtail the scope of the litigation. If a party elects to limit the ambit of his case, the

[3] At para [91].

election is usually binding. No reason exists why the principle should not apply in this case.' [4] (Footnotes omitted.)

[22] There is no reason why the same should not equally be applicable to the rules of the Labour Courts. In Driveline Technologies, this court made it clear that 'a party would be able to resile from such an agreement on the same basis as he would be able in law to resile from any other contract'. In Rademeyer v Minister of Correctional Services, the court indicated that for special circumstances to exist such as to allow the court to exercise its discretion in favour of a party seeking to resile from the agreement:

'Three requirements must be met: firstly, the defendant must furnish an explanation sufficiently full of the circumstances under which the concession was made and why it is sought to be withdrawn; secondly, he should satisfy the court as to his bona fides; and thirdly, show that in all the circumstances justice and fairness would justify the restoration of the status quo ante.'

[23] Yet, in CEPPWAWU 13 the Labour Court differed, taking the view that —

'setting the test for special circumstances as being substantially equivalent to the test for the grant of condonation (as *Rademeyer* does) is too lenient and does not take account of the fact that a pretrial agreement equates to a contract between the parties. Once this is accepted, then special circumstances in the present context should, in my view, be understood as meaning that, in order to resile from the agreement (or part thereof), the applicant must establish a basis for doing so in the law of contract'.

[24] Given the status of a pretrial agreement as a contract entered into between the parties, I am satisfied that the approach taken in CEPPWAWU is correct. No special circumstance has been shown such as would allow the respondents to resile from the agreement."

(emphasis added, footnotes omitted)

[72] PetroSA argued that the arbitrator should have independently applied his mind to the question whether or not legal representation should be permitted

[4] The quotation is from *Filta-Matix (Pty) Ltd v Freudenberg & others* [1997] ZASCA 110; 1998 (1) SA 606 (SCA) at 614B-D;

in the circumstances. In support of this contention PetroSA's counsel cited the judgement in *Ndlovu v CCMA Commissioner Mullins & another* [1999] 3 BLLR 231 (LC). However, that case dealt with a situation where the commissioner inferred that a party had tacitly consented to the other party been legal represented in unfair dismissal proceedings. The court took a dim view of the arbitrator making such an assumption and moreover found the arbitrator's failure to independently consider whether legal representation should be allowed under the prevailing statutory provisions governing legal representation in the arbitration proceedings was a reviewable irregularity.

[73] In this case there is no suggestion that Mr Mahlangu was unaware of the right of PetroSA to be legally represented when the pre-arbitration minute excluding legal representation was concluded. PetroSA argued that the board was nonetheless unaware of the situation and cannot be taken to have mandated him to waive PetroSA's right to representation. However, there is no reason for the other parties to the arbitration, including the arbitrator, to have had any reason to believe that Mahlangu did not have the necessary authority to conclude the pre-arbitration minute. The request to replace him with a legal representative was motivated not on the basis that he was not proficient enough to represent PetroSA, but because of his conflict of interest.

[74] In *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another* 2010 (4) SA 122 (SCA), the Supreme Court of Appeal held that even where a legal representative did not have the authority to agree to a settlement, that did not entitle the principal to resile from the settlement, because the other party was entitled to assume that the attorney had the usual authority to perform the functions normally performed by a representative in a pre-trial conference.[5] In my view, it would be equally untenable for a party who is faced with a representative who is a person entitled to appear on behalf of the other party in terms of the provisions governing representation of parties in arbitration proceedings, to have to obtain independent verification of that

[5] At para [21].

representative's authority to agree to the contents of a pre-arbitration minute.

[75] In any event, PetroSA did not make out a case based on contractual principles that it was entitled to resile from the pre-arbitration minute. Consequently, this ground of review must fall away.

[76] It is apparent from the arbitration award that the arbitrator concluded that the STIP bonus as formulated should have been implemented because it still applied. This was the primary reason for his finding that it was unfair of PetroSA not to have paid it for the financial year ending March 2018.

[77] To reach this conclusion, he interpreted the provisions of the policy and employment contracts, and considered the interactions between PetroSA and the unions over the payment of the bonus in 2018.

[78] PetroSA attacks his interpretation of the policy and contracts arguing that he committed a reviewable error of law on the basis it was either unreasonable or incorrect. The main pillar of the arbitrator's reason for concluding that obligation to maintain the payment of the STIP was ongoing was clause 16 of the employment contract. It seems that his train of reasoning was as follows:

78.1 The STIP provided that employees participated in the scheme by virtue of clause 16 of their contracts of employment.

78.2 The reference to 'rules of the scheme' in clause 16 which determined eligibility for the bonus could be interpreted as a stand-alone provision that survived the fixed five year term during which the existing scheme was valid

[79] The blind spot in the arbitrator's reasoning is that clause 8.2, which is one of the 'rules' governing the scheme, limited its validity to the five year period ending March 2017. The arbitrator's interpretation requires clause 16 to be read to include either an implied or a tacit term (underlined) as follows: "[a]n incentive bonus, calculated in terms of the rules of the scheme will be paid upon the achievement of agreed performance targets, irrespective of the scheme ceasing to be valid", or "[a]n incentive bonus, calculated in terms of the rules of the scheme will be paid upon the achievement of agreed

performance targets, irrespective of clause 8.2". The arbitrator's approach necessitates imputing the existence of additional conditions into the contract, which is at odds with the principle of documentary interpretation that the temptation to alter the words actually used should be avoided.[6]

[80] Alternatively, the arbitrator's reading would entail reading a condition into clause 4.6 of the scheme. Thus, clause 4.6 of the Scheme would have to be read to mean: "the STIP will be valid for five years, from 1 April 2012 to 31 March 2017, whereafter the structure of the incentive scheme and governing rules may be amended in accordance with PetroSA's requirements, and, if not amended, will remain valid despite clause 8.2." Clause 8.2 would then be rendered a superfluous provision of no consequence. The more consistent interpretation of the provisions, which gives effect to both clause 4.6 and clause 8.2 of the STIP policy is that the existing scheme would come to an end in March 2017, unless PetroSA decided to preserve it in its existing or amended form. If it simply did nothing, then nothing would replace it, because the scheme's validity expired at the end of March 2017.

[81] Whichever of these terms have to be read into the contracts or the policy to underpin the arbitrator's interpretation of the documents, they entail substantial and far reaching changes to the plain meaning of the express wording of those provisions. What cannot reasonably be read into clause 4.6 read with clause 8.2 is that PetroSA was obliged to preserve the scheme in its existing form, irrespective of its own requirements. PetroSA's view in 2018, which was not seriously contested, was that the STIP was not fulfilling its function as an incentive scheme. This was not an opinion without foundation. It is common cause that the STIP bonus had not been paid in the three financial years preceding the 2017/18 financial year. It decided that a bonus that was similar to a 'thirteenth cheque', though entailing payment of the same amount to all beneficiaries, would suit its requirements better.

[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]

[82] Was the course of discussions in 2018 nonetheless sufficient to justify the conclusion that, irrespective of the wording of the scheme or the employment contracts, an undertaking was made to continue to pay the bonus on the previous terms? Undoubtedly, the possibility of applying the STIP formula to determine the value of an incentive bonus for the 2017/2018 financial year was under serious consideration by PetroSA. However, it is equally clear that PetroSA was undecided about whether the STIP formulation should be followed again, now that the five year period of its validity had expired. It was upfront about the fact that payment of a bonus in terms of the STIP formulation would be deferred pending receipt both of the audited financial statement and a legal opinion. The unions were well aware that management was not committed to payment of a bonus on the STIP formula. Hence they saw the need to make it clear that they interpreted the policy to mean that it continued indefinitely unless amended. On the most generous interpretation of the course of discussions between them in 2018, there was a prospect management might continue to apply the STIP formulation to the determination of an incentive bonus, but simultaneously PetroSA was also seriously weighing up whether the STIP should continue to be applied at all.

[83] Because the arbitrator was of the view that the obligation to pay an incentive bonus in terms of the STIP was a continuing one, it followed that he did not interpret the payment of an equally distributed bonus of R 82 million as anything more than an underpayment what was due to employees. Incidentally, it is unclear from the evidence that the bonus that was awarded would not have been more generous to lower paid employees than what they might have received under the STIP formula. The arbitrator did not appear to consider this. His reasoning dictated his choice of remedy as well, which was to award a payment of an amount equivalent to what would have been expended on the STIP bonus if it had been paid.

[84] Even if the arbitrator's interpretation of the documents is one that could not be construed as one that a reasonable arbitrator could have arrived at, quite apart from whether it could be a correct interpretation, is the arbitrator's ultimate conclusion that PetroSA's decision not to pay a bonus based using

the STIP formula amounted to an unfair labour practice nonetheless sustainable on what was before him?

[85] In considering whether the decision not to renew the STIP and to replace it with a flat bonus costing less could amount to an unfair labour practice, the fact that an entitlement to an incentive bonus using the STIP formulation was not something employees could rely on beyond March 2017, obviously played no role in the arbitrator's reasoning. The STIP bonus scheme as it was structured was an entitlement limited to a five year period and the arbitrator's finding that it continued beyond that period was one that no reasonable arbitrator could have arrived at.

[86] Nonetheless, even if the STIP was no longer valid, was it feasible to conclude that PetroSA's failure to consult before it decided on the gratuity and abandoned the possibility of paying the 2018 bonus on the STIP formula, was nonetheless unfair? As mentioned above the possibility of paying a bonus based on the STIP formula was seriously under consideration, even if it was no longer an enforceable entitlement in terms of clause 16 of the employment contracts read with the provisions of the policy. Although the unions were advised that PetroSA was of the view it had expired and was obtaining a legal opinion on the issue, neither the unions nor employees could have reasonably anticipated was the R 82 million gratuity which PetroSA implemented as an alternative without consultation.

[87] Even if the arbitrator's finding that employees were still entitled to the STIP bonus was untenable and could not reasonably form part of a justification for concluding that PetroSA had committed an unfair labour practice, it is feasible on the evidence for the arbitrator to have concluded that PetroSA acted in a procedurally unfair manner by failing to consult over replacing the STIP with a completely different bonus before implementing it. In this respect the conclusion that the unilateral decision amounted to an unfair labour practice is not one that no reasonable arbitrator could have arrived at.

[88] Because the arbitrator's finding that PetroSA committed an unfair labour practice rested primarily on the basis that there was a binding obligation to

pay a bonus according to the STIP formula and that his award of relief reflected this, in view of the more limited procedural character of the unfair labour practice committed, it is necessary to substitute the relief awarded accordingly.

[89] In this regard, I am mindful that there are some similarities between this case and the conduct of the employer in the unopposed review case of *Protekon (Pty) Ltd v CCMA & others* [2005] 7 BLLR 703 (LC). In that matter the employer retained the right in the policy document regulating travel concessions to remove the concessions from a class of employees. Without any prior consultation, it exercised its discretion to do so and substituted the concession with an increase in remuneration to the affected employees.[7] Unlike this case, the arbitrator found that the employer was contractually entitled to remove the travel concessions and had a commercial rationale for doing so. That finding was not challenged on review. The arbitrator also found that the employer was entitled to take the decision without consultation because it was contractually entitled to do so. Nonetheless he decided that it was procedurally unfair for it to determine the substituted amount of remuneration it paid out as an alternative without consultation. The Labour Court expressed reservations about whether it was fair to remove the concession without consultation but that too was not an issue for the court to consider. The court concurred with the arbitrator's finding of procedural unfairness and in passing mentioned that it would have found a failure to consult on the rationale for withdrawing the concession unfair as well.[8] The court upheld the remedy awarded by the arbitrator to the individual employee who had brought the claim, which was to order the employer to pay the employee the difference between what she would have received if the concession had not been withdrawn and what she was paid in the form of additional remuneration prior to the award, and made a further conditional order to reinstate the concession if no consultation took place. The court upheld the award of compensation but not the additional relief.

[7] See paras [39] to [42].

[8] See paras [43] to [46].

[90] A couple of distinguishing features between *Protekon* and this matter are noteworthy. In *Protekon,* the court only upheld payment of once-off compensation for an ongoing alteration of the travel concession, and that was for the failure to consult prior to withdrawing and substituting a concession. In this case, the effect of the relief granted was intended to reinstate the full entitlement to a bonus under the STIP formula. Although the employer in *Protekon* had a discretion in terms of the policy governing the concession scheme to remove a class of employees from the scheme, the policy did not contain any expiry date for the application of the concession policy, so only the exercise of the employer's discretion could have altered the entitlement, which was an unpredictable event.

[91] In this case, it cannot be said there was no bona fide economic rationale for replacing the STIP, given the collapse of the PMS and the fact that it had not resulted in the minimum target being reached in three successive financial years. The collapse of the PMS was not a trivial matter in the application of the STIP, because an employee's claim to participate in the scheme was in part dependent on their own performance rating. Clause 7.3 of the STIP policy provided that employees with a rating of less than 2.5 were not entitled to an incentive payment. The STIP scheme was also not of indefinite or long duration (the concession policy in *Protekon* had been in place for 19 years[9]) but had ended on a date determined since its inception five years' earlier, contrary to the arbitrator's finding. The gratuity paid instead of resuscitating the STIP policy, though in most cases probably markedly less than what they might have received under the STIP, was hardly insignificant even for higher paid employees, it being common cause that employees would receive approximately R 62,000 each. The payment of such a sum in the absence of a functioning performance management system on a very egalitarian basis, with a view to approximating an annual '13th cheque' method of rewarding staff was also not patently capricious or arbitrarily discriminatory.

[92] The critical question is what is an appropriate remedy for the failure to consult over deciding not to reinstate the STIP bonus and replacing it with

[9] See *Marinus and Protekon (Pty) Ltd* (2003) 24 ILJ 1595 (CCMA)

something completely different, bearing in mind that there was no permanent contractual entitlement to a performance bonus in the absence of an existing scheme. I am of the view that the lack of consultation about the final decision in this instance requires some remedial relief. A process remedy along the lines of ordering PetroSA to somehow rectify the lack of consultation is plainly untenable after such a long time. The alternative, apart from ordering no relief, which would not discourage unilateral action without prior consultation, is some form of *solatium*.

[93] In my view, in determining the quantum thereof, the failure to consult over a discretionary entitlement is not of the same order of gravity as the failure to afford an employee a fair procedure before deciding to dismiss them. What is required is an award of a *solatium* that is sufficient to afford some recompense for the inability to influence the exercise of the employer's discretion and to disincentivise the employer from not consulting in future over such changes. I believe this balance can best be struck by requiring PetroSA to pay compensation amounting ten percent of the value of the gratuity previously awarded in 2018 to the employees who received it.

Order

[94] The following finding at paragraph 37of the Third Respondent's arbitration award dated 13 June 2019 issued under case number WCCHEM6-18/19 ('the award') is reviewed and set aside:

> "The refusal of the respondent to pay out R 205 million for the 2018 financial year and its decision to pay out R 82 million instead was arbitrary and unfair conduct on the part of the respondent."

[95] Paragraph 37 of the award is substituted with the following:

> "37. The failure of the respondent to consult beforehand with Solidarity and CEPPWAWU over its decision in 2018 not to pay a bonus based on the formula in the STIP policy and instead deciding to make a payment of a gratuity amounting in the aggregate to R 82 million was procedurally unfair and amounted to an unfair labour practice relating to the provision of a benefit."

[96] The relief awarded in paragraphs 39 and 40 of the award is reviewed and set aside and substituted with the following relief:

> "39. The respondent, Petroleum, Oil and Gas Corporation of South Africa (SOC) LTD is ordered to pay each of the employees, who received an equal portion of the aggregate gratuity payment of R 82 million in 2018, an amount of compensation equivalent to 10 % of the portion of the gratuity they received."

[97] The compensation payable in terms of the substituted relief in paragraph 39 of the award, must be paid within 30 calendar days of the date of this judgment.

[98] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	A T Myburgh SC instructed by Bradley Conradie Halton Cheadle Attorneys
For the First Respondent	C Bosch instructed by CTH Inc.
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