



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

**Reportable
Case no: JA85/2022**

In the matter between:

QUANTUM FOODS (PTY) LTD

Appellant

and

COMMISSIONER H JACOBS N.O.

First Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Second Respondent

**GENERAL WORKERS UNION OF SOUTH AFRICA
obo MEMBERS**

Third Respondent

Heard: 27 September 2023

Delivered: 18 October 2023

Coram: Waglay JP; Malindi et Smith AJJA

JUDGMENT

SMITH AJA

Introduction

- [1] The enactment of the National Minimum Wage Act¹ (Act) heralded a new era in the ongoing pursuit of social and economic justice for the most vulnerable and economically exploited sectors of society. Seeking to protect the lowest-paid workers from exploitation and to improve their wages, the Act prescribes minimum wages effective from the date of its commencement, which was 1 January 2019. The prescribed national minimum wage is R18 for farmworkers and for other workers R20 for each ordinary working hour.
- [2] In an attempt to bring its employees' wages in line with the prescripts of the Act, the appellant (Quantum Foods) restructured its payslips to include a contractual bonus, as well as the contributions it paid to a provident fund on behalf of its employees. The bonus may, at an employee's election, either be paid annually or in equal monthly payments. Once those amounts were factored in, the wages met the minimum threshold prescribed by the Act.
- [3] The third respondent (union), however, challenged Quantum Foods' entitlement to factor in the abovementioned payments and contended that those payments were excluded for the purposes of calculation of minimum wages in terms of section 5 of the Act. The union consequently declared a dispute on behalf of its members employed by Quantum Foods and the matter was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for arbitration.
- [4] The arbitrator (first respondent) was required to pronounce on the question of whether Quantum Foods was paying its employees the prescribed national minimum wage and, in particular, whether: (a) the contractual bonus payable to employees may be included in their salaries; and (b) the employer and employees' provident fund contributions, which are deducted from wages and paid over to the provident fund, should be excluded.
- [5] Relying on the dictionary definition of a "bonus", the arbitrator found that it was "*something one receives over and above your normal salary*". He reasoned that the fact that a worker may have a contractual right to the payment does not

¹ Act 9 of 2018.

mean that it becomes part of his or her normal hourly wage. In his view, it merely remains a guaranteed additional payment but cannot be factored into the calculation of the normal hourly rate for the purposes of determining compliance with the Act.

- [6] Regarding the provident fund contributions, the arbitrator found that Quantum Foods does not make any employer's contributions to the provident fund and in the event that it does, the contribution should not be factored in the assessment of the hourly rate. He consequently ordered Quantum Foods to comply with the provisions of the Act and to pay its employees the national minimum wage (excluding the contractual bonus) by 14 October 2019 and in the case of workers employed at its farms, with retrospective effect from 1 January 2019.
- [7] Aggrieved by the award, Quantum Foods brought review proceedings in the court *a quo*. It contended that the arbitrator committed material errors of law and fact, first, by failing to appreciate that the term "bonus" mentioned in section 5 (1) (c) of the Act is included in the concept of a "gratuity" and does therefore not encompass any payment to which an employee may be entitled to *ex contractu*, and second, in finding that Quantum Foods does not contribute to the provident fund on behalf of its employees.
- [8] The matter came before Phajane AJ, who upheld the arbitrator's reasoning and dismissed the application with no order as to costs. The learned Acting Judge reasoned that, since the bonus was previously excluded from the calculation of employees' wages, Quantum Foods was precluded from circumventing the provisions of the Act by factoring the same bonus into the workers' hourly rate. She reasoned furthermore that the phrase "[d]espite any contract or law to the contrary" in section 5(1) of the Act, renders the contractual entitlement to the bonus inconsequential.
- [9] Regarding the provident fund deductions, she said that since the arbitrator had found that no such contributions had been made, it was not necessary for her to pronounce on that issue.

[10] Quantum Foods appeals against the whole of that judgment with the leave of this Court.

The facts

[11] The facts which are relevant for the adjudication of the appeal are circumscribed and common cause. They are as follows.

[12] All of Quantum Food's employees, including the union members, signed contracts of employment which include the following terms:

'Annual/Monthly – The employee will qualify for an annual bonus equal to one month's employee basic amount, calculated from January to December and payable in December of each year.

Employees joining the Company in the course of a year will be paid a pro rata bonus. The employee may also elect to take his/her bonus monthly.

The bonus will commence accruing on the day that the employee commences working and the employees who do not start on the first day of the month will qualify for a prorated bonus for that month. Employees who leave Pioneer's service during the month, will similarly qualify for a prorated bonus for that month.

Should the employee leave the service of the Company for whatever reason he/she will qualify for a pro rata bonus if the Employee elected to receive a bonus annually.'

[13] Quantum Foods had, both before and after the Act came into operation, followed a 'total cost of employment' approach to remuneration. The contractual bonus was usually paid to employees during December, but they could also elect to receive it by way of monthly instalments.

[14] From April 2019, Quantum Foods restructured payslips to include, in addition to a cash amount of R3 462.55, the monthly *pro rata* bonus in the sum of R266.35, as a deferred payment. Previously, the bonus was only reflected on the payslip when it was paid out during December.

[15] Quantum Foods also pays employer contributions to a provident fund on behalf of its employees. This was conceded by the union's counsel during argument. The arbitrator's finding in this regard accordingly appears to have been a *bona fide*, albeit material error.

[16] The parties agreed that if Quantum Foods is entitled to factor the abovementioned payments into the calculation of employees' hourly rates, it would comply with the prescripts of the Act, and if not, it must be compelled to pay the prescribed minimum wages, excluding those payments.

The legal principles and discussion

[17] Central to the determination of the contested issues is the construction of section 5(1) of the Act, which prescribes how the minimum wage must be calculated. It reads as follows:

- '(1) Despite any contract or law to the contrary, the calculation of a wage for the purposes of this Act is the amount payable in money for ordinary hours of work excluding –
- (a) any payment made to enable a worker to work including any transport, equipment, tool, food or accommodation allowance, unless specified otherwise in a [sectoral] determination;
 - (b) any payment in kind including board or accommodation, unless specified otherwise in a sectoral determination;
 - (c) gratuities including bonuses, tips or gifts; and
 - (d) any other prescribed category of payment.'

[18] This provision and the relevant contractual clause must be construed in terms of the accepted canons of construction, which means that regard must be had to the language used, the context in which the provision appears, its apparent purpose and the material known to those who drafted it.²

[19] Mr *Niewoudt*, who appeared for Quantum Foods, submitted that the term "bonus" can either denote a gratuitous payment, which is within the discretion of an employer, or a payment that is due in terms of a binding contract,

² *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC).

depending on the context in which the term is used. In the latter case, the payment of the bonus does not depend on the whim of the employer but is an enforceable contractual obligation.

- [20] He submitted that the context in which the term is used in section 5(1)(c), namely its inclusion in the genus 'gratuity', means that it refers to a gratuitous payment or something that is paid in addition to the ordinary salary. The employment contract unambiguously entitles all Quantum Foods employees to a bonus, which, at their election, may be paid either annually or monthly. The payment is thus a contractual entitlement and does not require the employees to do anything in addition to their ordinary employment responsibilities to qualify for it. Neither does Quantum Foods have the discretion to withhold the payment on certain conditions. The contractual bonus is thus not a gratuitous payment envisaged in terms of section 5(1)(c) and Quantum Foods is accordingly entitled to factor that payment into the calculation of its employees' hourly rate.
- [21] Mr *Bayi*, who appeared for the union, on the other hand, argued that the construction contended for by Quantum Foods is not consonant with the unambiguous wording of the Act and will serve to undermine the main objective of the Act, namely the protection of the lowest paid workers.
- [22] The Shorter Oxford Dictionary defines 'gratuity' as meaning a gift or money given in return for some service or favour, "*the amount depending on the inclination of the giver*". It is manifest therefore that the term 'gratuity' denotes discretion on the part of the giver and perhaps, in some instances, expectation on the part of the receiver, but without any legal or contractual entitlement to the payment. The term 'gratuitous' has also been authoritatively interpreted by the Supreme Court of Appeal in *Estate Welch v Commissioner for SARS*³, as meaning something "motivated by pure liberality and not in expectation of any *quid pro quo*" and without any obligation to pay.
- [23] The other payments, which in terms of section 5(1)(c) are included in the concept of a gratuity, must be construed in accordance with the *eiusdem generis* rule. This means that their meanings must be restricted to the generic

³ [2004] 2 All SA 586 at para 31.

meaning of a 'gratuity'. Another way of putting it is that their meanings must be inferred *noscitur a sociis*, namely from those of the accompanying terms.⁴ This approach is in accordance with the established canons of interpretation and in particular the imperative for contextual reading of words and phrases. (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA))

- [24] The *New Oxford Dictionary* defines 'bonus' as "a payment or gift added to what is usual or expected, in particular: an amount of money added to a person's wages, especially as reward for good performance". There can thus be little doubt that the concept of a "bonus" referred to in section 5(1) (c) is indeed the type of gratuitous payment that is included, *noscitur a sociis*, in the genus of a 'gratuity' mentioned in that subsection.
- [25] The nature of the bonus that Quantum Foods is contractually obligated to pay its workers does, however, not fit in with that definition. It has no 'gratuitous' characteristic and is founded on a covenantal duty instead of on discretionary largesse or the inclination of the giver.
- [26] It appears that both the arbitrator and the learned Acting Judge have focussed only on the fact that the contested payment was called a "bonus" and have concluded on that basis that it was excluded in terms of section 5(1) (c). In my respectful view, that approach was erroneous. They should instead have analysed the nature of the payments in order to determine whether they were gratuitously made within the meaning of the section.
- [27] There is one more aspect that I need to deal with regarding this issue and that is the finding of the court *a quo* that the introductory phrase in section 5 (1), to the effect that the provisions of the section prevail, "[d]espite any contract or law to the contrary" means that "notwithstanding the applicant's inclusion of the bonus in a contractual agreement, the status of the bonus does not change". I disagree with this finding. In my view, that phrase is unambiguous in its injunction that an employer is not allowed, by virtue of a contract, to factor into the calculation of wages any payment that is excluded in terms of the section. However, in the case of a contractual bonus payable to an employee, the court

⁴ *Moodley v Scottsburgh/Umzinto North Local Transitional Council and another* 2000 (4) SA 524 (D).

is required to contemplate the legal nature of the obligation in order to determine whether it constitutes the type of gratuitous payment contemplated in terms of subsection 5 (1) (c).

- [28] To my mind, properly construed, the abovementioned subsection only excludes gratuitous bonuses from the calculation of a worker's hourly rate. The contractual bonus which Quantum Foods pays its employees is not such a gratuitous payment and must accordingly be factored into the calculation of workers' wages to determine whether it complies with the prescripts of the Act.
- [29] I now turn to the issue of the provident fund contributions. It is instructive that section 5(1) does not expressly include or exclude such payments. The question therefore arises as to whether it is 'payable' to employees "*in money for ordinary hours of work*" and whether it falls under any one of the exclusions.
- [30] A reasonable construction of the term 'payable' in accordance with the abovementioned canons of interpretation can only mean "*that which is required to be paid in money to an employee*". It would accordingly include any payment to be made on his or her behalf. Any other interpretation would simply not make any sense and I did not understand Mr *Bayi* to contend otherwise.
- [31] The provident fund contributions paid by Quantum Foods on behalf of its employees manifestly do not fall under any of the exclusions mentioned in subsections 5 (1)(a), (b), or (c). They must, accordingly, be factored into the calculation of the employees' hourly rate.
- [32] As mentioned earlier, it is common cause that if those payments are factored into workers' hourly rates, the wages Quantum Foods pays to its employees would comply with the provisions of the Act. The appeal must accordingly succeed. I am of the view that there is no reason why any of the parties should be ordered to pay costs.
- [33] In the result, the following order issues:

Order

1. The appeal succeeds with no order as to costs.
2. The order of the court *a quo* is set aside and replaced with the following order:

(1) The application is granted.

(2) The award is substituted with an award that reads as follows:

“The Employer’s incorporation of the contractual bonus and the Employer’s provident fund contributions in the calculation of its wage is in compliance with the provisions of the National Minimum Wage Act, 9 of 2018.”

(3) There is no order as to costs.’

SMITH AJA

Waglay JP and Malindi AJA concur.

APPEARANCES:

For Appellants:

Adv H C Niewoudt

Instructed by Norton Rose Fulbright South
Africa Inc

For the Respondent:

Mr M Bayi of Bayi Attorneys