

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA5/18

In the matter between

OTHUSITSE HABAKKUK RAPOO

Appellant

and

RUSTENBURG LOCAL MUNICIPALITY

Respondent

Heard: 03 September 2019

Delivered: 20 February 2020

Summary: Principle that an appeal lies against a court order and not the reasons for judgment restated. Lower court's reasons for judgment indicating that the employee is compensated was for an automatically unfair dismissal in terms of section 187(1)(f) of the LRA – however clear from court order that compensation awarded in terms of section 50(2)(a) of EEA for unfair discrimination in terms of section 6 of the EEA. Court's error not entitling appellant to 24 months' compensation in terms of section 194(3) of the LRA as he was not dismissed but resigned.

Practice and procedure – principle that applicant must state in his statement of case the nature and quantum of damages sought restated – impermissible for an employee to file a document extraneous to his statement of claim in which he seeks to particularise his damages - such document does not constitute proof of damages. Not competent for the appeal court to consider an application to adduce new evidence in a claim for damages that was not properly before the court below.

Coram: Waglay JP, Murphy and Kathree-Setiloane AJJA

JUDGMENT

KATHREE-SETILOANE AJA

- [1] This is an application for reinstatement of an appeal which lies against paragraph 5¹ of the order of the Labour Court (Mamasebo AJ) awarding the appellant compensation and damages as a result of being unfairly discriminated against, in terms of section 6 of the Employment Equity Act,² by the Rustenburg Local Municipality ("Municipality").

Explanation for the delay

- [2] The appeal lapsed as a result of the appellant's failure to lodge the record of appeal within the prescribed time limits. It was filed 13 days out of time. The appellant makes application for condonation for the late filing of the record and reinstatement of the appeal. The Municipality does not oppose the application.
- [3] The order for leave to appeal was granted by the Labour Court on 19 December 2017. It turned out that the parties were of the mistaken view that the calculation of the *dies* for the filing of the appeal record in this Court included the court recess days in December and that the appellant had until the end of April 2018 to file the record. Based on this misunderstanding the parties agreed to have the appeal record filed by Monday 9 April 2018. Thus, pursuant to the agreement, the appellant filed the record on 9 April 2018. However, by that stage the appeal had already lapsed.
- [4] I accept the appellant's explanation for the delay as he was unrepresented at the time and filed the record on the date agreed upon with the Municipality. However, to succeed in its reinstatement application, the appellant must, in addition to a

¹ Paragraph 5 of the order reads "Within 14 days of the order the Municipality must pay the [appellant] R241 881.06 compensation".

² 55 of 1998.

reasonable explanation for the delay, also demonstrate that he has a reasonable prospect of success in the appeal.

Prospects of success in the appeal

- [5] The appellant was employed by the Municipality on 1 November 2004 in its Local Development Unit. He reported directly to the Unit Manager, Ms Kathleen Matshidiso ("Ms Matshidiso"). During 2007, the Unit was restructured into a Directorate: Local Economic Development. The appellant was reappointed into the new structure as Coordinator: Enterprise Support. He was responsible for Small, Micro and Medium Enterprise Development & Support ("SMME Enterprise Development"). Ms Matshidiso was reappointed as Unit Manager: SMME Enterprise Development and the appellant continued to report to her.
- [6] The appellant had been diagnosed as suffering from a mental illness. The Municipality was informed of this in November 2011. During October/November 2011, the appellant was hospitalised in a psychiatric hospital in Randburg. The Municipality placed the appellant on seven weeks of incapacity leave to enable him to receive further psychiatric treatment from 6 June 2012 to 31 July 2012.
- [7] In 2012, two separate medical reports prepared by the appellant's psychiatrist, Dr L Mashayamombe ("Dr Mashayamombe"), were presented to the Municipality recommending that he be removed from his stressful working conditions and be accommodated in a unit where he would not report to his supervisor, Ms Matshidiso, as there was a history of conflict between the two of them. The first report was presented to the Municipality on 12 June 2012 and the second on 7 September 2012.
- [8] The appellant testified in the Labour Court that he had been victimised by Ms Mashidiso and that he had lodged a number of grievances against her to no avail. One of his grievances was that he would come to work each day but was not given work to do. Another was that when he was allocated work, it was beneath him and did not fall within his area of responsibility.

- [9] The Municipality failed to accommodate the appellant as recommended by Dr Mashayamombe. Dr Mashayamombe testified at the trial that the appellant's mental illness (Depressive Mood Disorder) was perpetuated by the stress he experienced in his work environment. He was, however, of the view that the appellant was likely to recover after treatment and that his transfer to a different unit was for an initial period of six months to enable the appellant to recover.
- [10] On 5 November 2015 and after receiving the second report from Dr Mashayamombe, Mrs Matshadiso recommended to the Director: Local Economic Development *inter alia* that the appellant be sent for an independent medical assessment by a psychiatrist appointed by the Municipality, and that he be given an incapacity hearing as he was unable to execute his duties. In summation, she reiterated that "the most appropriate disciplinary measures be taken against [the appellant] for failure to perform his duties".
- [11] A year later, the Municipality charged the appellant with gross dereliction of duty, absence without leave, gross insubordination and breach of duty of good faith. The disciplinary hearing was held on 10 March 2014. On 15 December 2015, the appellant was found guilty of all four counts and the issue of sanction was reserved pending the outcome of an incapacity hearing.
- [12] However, the appellant resigned on 3 March 2015 and before an incapacity hearing could be held.

In the Labour Court

- [12] Having heard the testimony of the appellant and his expert witness, the Labour Court held:

'The Municipality has been on a collision course with the [appellant] from 8 December 2011. It knew that the applicant had a mental condition and, evidently, despite numerous reports from the different medical specialists, failed to intervene. Instead it chose to pursue the disciplinary enquiry route by charging him with misconduct. There is no doubt that a person found to be suffering from a

mental illness which is job-related must be treated with sympathy, understanding and compassion. The disciplinary chairperson's findings in respect of the sanction addressed all relevant aspects including the correct procedure that the Municipality should have followed. However, the Municipality soldiered on and maintained the same stressful environment for the applicant without any effort to implement the recommendations of Dr Mashayamombe and Ms Zwane [Occupational Therapist].

- [13] On the question of whether the appellant was discriminated against in terms of section 6 of the EEA, the Labour Court observed:

'In my view, the delay by the Municipality to move the [appellant] from the stressful environment as recommended by the medical experts exasperated his condition and left him to his own devices to contend with a disability contemplated in the EEA. Section 1 of the EEA defines people with disability as "people who have a long term or mental impairment which substantially limits their prospects of entry into or advancement in employment."

...

The appellant has on several occasions produced medical reports saying that he was unfit. The municipality clearly had a problem with his continued absences. However, the municipality has failed to move him to a different unit to report under a different manager for at least six months while he continued his therapy. Clearly the municipality has failed to comply with Code of Good Practices on the Employment of People with Disabilities under the EEA, the Constitution of the Republic of South Africa, International and foreign law as well as best practices.

There is no doubt in my mind that the Municipality avoided to deal with the [appellant's] mental impairment and persistently ignored his grievances. The approach adopted by the Municipality in dealing with the [appellant's] disability, was it itself, a discriminatory practice. I therefore find that the Municipality discriminated against the [appellant].'

- [14] On the question of whether the discrimination was unfair, the Labour court stated that the Municipality should have conducted an incapacity investigation which it

failed to do and it was required to accommodate the appellant reasonably, which it also failed to do. She, accordingly, found the discrimination to be unfair.

[15] In relation to the appellant's claims for compensation and damages under section 50(2) of the EEA, the Labour Court observed:

'The relief sought by the [appellant] is located in section 50(a), (b) and (c) as well as costs. The Labour Appeal Court in the SAA Airways [(2014) 35 ILJ 2774 (LAC) at 2880 para 79] case distinguished between damages and compensation and held that sometimes an award for damages in respect of the patrimonial loss and compensation for injured feelings, may, depending on circumstances and facts of the case be justified. The order must not only be appropriate but just and equitable. The [appellant's] testimony has not only shown how the Municipality has totally ignored his plight for reasonable accommodation for him to recover, but how he ended up feeling humiliated in meetings until he stopped attending them. It is clear that he did not only lose a job he loved but lost income as well. The award for damages will account for the financial position that the applicant would have been in had he not been unfairly discriminated against and the compensation would be for the humiliation and hurt suffered by the applicant as a result of the unfair discrimination.

The [appellant] has prepared a Schedule of his Loss accounting for his claim in the total amount of R1, 984 075.00. Under the head Violation of Statutory Rights, a total amount of R1039503.84 is claimed being the equivalent of a maximum of 20 months' remuneration. He also claims R207 900.77 for pain and suffering and loss of amenities of life calculated at 20% of the 24 months' remuneration; an amount of R104 507.44 for special damages and R396 172.40 for future loss of income.'

[16] The Labour Court took into account the following factors in determining fair and equitable compensation:

'43.1 The fact that medical certificates and medical reports were submitted with recommendations to the Municipality but they were completely ignored by the employer;

43.2 The employer's attitude and failure to accord reasonable accommodation to the [appellant] which it perceived as giving him unwarranted special treatment;

43.3 The humiliation that the [appellant] endured at the hands of the employer and being subjected to a disciplinary enquiry instead of the determination of his incapacity;

43.4 The [appellant] suffered further humiliation by being made to perform work that was not suited and thereafter being kept in the office without being allocated any work or instructions.

43.5 the [appellant] incurred some patrimonial loss in terms of medical costs, legal costs for his erstwhile attorneys and obtaining the transcribed record of the disciplinary enquiry;

43.6 Because of the humiliation, victimisation and harassment by the employer [the appellant] had to receive psychiatric treatment having suffered severe depression;

4.7 The [appellant's] length of service with the Municipality. He enjoyed his work prior to the hostility and tension between him and his immediate supervisor. He struck me as an intelligent employee who was able to grapple with presenting his case unrepresented and still remained coherent in his argument. This can only mean that in a conducive work environment he can be categorised as a star performer. He interacted well with colleagues except Ms Matshidiso. It was unfair that his mental condition was used by his employer to his detriment.'

[17] In relation to the proven damages to be awarded to the [appellant], the Labour Court allowed the proven medical expenses paid directly by the [appellant] in the amount of R11 398.85; legal expenses for David Cartwright Attorneys in the sum of R5000.00 and the transcribed record for the disciplinary inquiry of R25 490.40 totalling R41 881.06.

[18] On the question of compensation to be awarded to the appellant, the Labour Court curiously held that from the appellant's annual income of R295 704.00, she regarded the amount of R200 000.00 to be just and equitable as compensation

for his automatically unfair dismissal in terms of 187(1)(f) of the Labour Relations Act ("LRA").³

[19] The Labour Court made the following order:

- '1. The lack of accommodation, harassment and victimisation of the [appellant] by the Rustenburg Local Municipality amounts to unfair discrimination.
2. The Municipality is directed to take all reasonable steps to prevent the recurrence of unfair discrimination or similar practice occurring in the future against [the appellant] or any other employee.
3. It is declared that the witness of the applicant, Dr Mashayamombe, was a necessary expert witness.
4. The Municipality is directed to pay the reasonable travelling costs/qualifying fees of applicant's expert witness, Dr L Mashayamombe, and for preparation of the expert summaries for the trial.
5. Within 14 days of this order the Municipality must pay the [appellant] an amount of R241 881.06 as compensation.
6. The Registrar is directed to send a copy of this judgment to the Municipal Manager of Rustenburg Local Municipality.
7. Costs of suit.'

Compensation

[20] As already alluded to, the appeal lies only against paragraph 5 of the Labour Court order in terms of which the Labour Court ordered the Municipality to pay the appellant the amount of R241 881.00 comprising both compensation and damages as contemplated section 50(2)(a) and (b) of the EEA. Section 50(2) of the EEA provides:

³³ 66 of 1995.

‘(2) if the Labour Court decides that an employee has been unfairly discriminated against, the Court may make an appropriate order that is just and equitable in the circumstances, including –

- (a) Payment of compensation by the employer to that employee;
- (b) Payment of damages by the employer to that employee;
- (c) An order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;
- (d) An order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;
- (e) An order directing the removal of the employer’s name from the register referred to in section 41;
- (f) The publication of the Court’s order.’

[21] In relation to the compensation award of R200 000.00 which the Labour Court awarded to him, the appellant contends that the Labour Court erred by not awarding him maximum compensation of 24 months as stipulated in section 194(3)⁴ of the LRA for an automatically unfair dismissal in terms of section 187(1)(f)⁵ of the LRA.

[22] The appellant’s claim in the Labour Court was for unfair discrimination in terms of section 6(1) and (3) of the EEA and not for an automatically unfair dismissal in terms of section 187(1)(f) of the LRA. Despite concluding that the Municipality

⁴ Section 194(3) of the LRA provides:

“The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months’ remuneration calculated at the employees’ rate of remuneration on the date of dismissal.

⁵ Section 187(1)(f) provides:

“(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –

...

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but limited to race, gender, sex ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

...”

unfairly discriminated against the appellant in terms of section 6 of the EEA, the Labour Court awarded the appellant compensation of R200 000.00 for an automatically unfair dismissal. The Labour Court erred in doing so, as the appellant was not dismissed but rather resigned on 3 March 2015.

[23] Notably, the Municipality did not cross-appeal against the Labour Court's finding that the appellant is entitled to compensation in the amount of R200 000.00 for an automatically unfair dismissal in terms of section 187(1)(f) of the LRA. In the absence of a cross-appeal, this finding stands.

[24] The appellant, however, seeks to exploit the Labour Court's error by contending that he is entitled to 24 months' compensation which is the maximum compensation that the Labour Court is allowed to award in terms of section 194(3) of the LRA for an automatically unfair dismissal. Notwithstanding the error in its reasons for the order, it is clear from the Labour Court's order that the award of compensation was made in terms of section 50(2) of the EEA for unfair discrimination in terms section 6 thereof. It is a trite proposition of law that an appeal does not lie against the reasons for the judgment and order but rather against the order itself.⁶

[25] An award of compensation by the Labour Court in terms of section 50(2)(a) of the EEA is a discretionary exercise. Therefore, the power of this Court to interfere, on appeal, with the quantum of compensation awarded by the Labour Court is circumscribed. It can only be interfered with on the narrow grounds that the Labour Court exercised its discretion capriciously or upon the wrong principle, or with bias, or without reason or that it adopted a wrong approach or has misconducted itself on the facts or reached a decision which could not reasonably have been made by a decision-maker properly directing itself to all the relevant facts and principles. In the absence of one of these grounds, this Court has no power to interfere with the amount of compensation awarded by the Labour Court in terms of section 50(2)(a) of the EEA. It is impermissible for this

⁶ *Western Johannesburg Rent Board and another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.

Court to interfere with the award of compensation simply because it would come to a different decision.⁷

- [26] Unlike section 194(3) of the LRA which places an upper limit on the amount of compensation that may be awarded to an employee whose dismissal is found to be automatically unfair in terms of section 187(1) of the LRA, section 50(2)(a) provides no limit on the amount of compensation that the Labour Court may award to an employee who has been unfairly discriminated against by his or her employer. The Labour Court ordered the Municipality to pay the appellant compensation on account of unfairly discriminating against him as contemplated in section 6 of the EEA. The appellant is therefore wrong in submitting that he was dismissed by the Municipality for reasons contemplated in section 187(1)(f) of the LRA and is entitled to a maximum of 24 months' remuneration in terms of section 194(3) of the LRA.
- [27] In the circumstances, the appellant has failed to demonstrate that, in awarding him compensation of R200 000.00, in terms of section 50(2)(a) of the EEA, the Labour Court had exercised its discretion capriciously or upon the wrong principle, or with bias or without reason or that it adopted the wrong approach.
- [28] Factors to be taken into account in determining the quantum of compensation to be awarded to an employee who is unfairly discriminated against include the nature and seriousness of the injuria, the circumstances in which the infringement occurred, the conduct of the defendant, the extent of the plaintiff's humiliation or distress, abuse of the relationship of the parties, and the attitude of the defendant after the injury or wrong has taken place.⁸
- [29] As is apparent from paragraphs 43.1 to 43.7 of its judgment, the Labour Court exercised its discretion judicially by taking into account all the relevant factors in this matter before awarding the appellant compensation in the amount of R200 000.00. In the circumstances, I consider the quantum of compensation awarded

⁷ *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ (LAC) paras 21 and 55.

⁸ *Minister of Justice and Constitutional Development and Another v Tshishonga* (2009) 30 ILJ 1799 (LAC) para 18; *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC) para 24.

by the Labour Court to be appropriate as well as just and equitable. There is accordingly no basis for this Court to interfere with the compensation order of the Labour Court.

Damages

[30] In relation to his damages claim, the appellant contends that the Labour Court erred in failing to award him his proven claim for:

- (a) Special and general damages in terms of the EEA including past and future loss of earnings;
- (b) Contractual damages for amongst others loss of past or future earnings;
- (c) Constitutional damages for loss of dignity.

[31] The appellant sought, in his statement of claim, damages in addition to compensation for being unfairly discriminated against by the Municipality. However, he did not particularise the nature of the damages nor the estimated amount claimed in his statement of claim. Quite unconventionally, sometime after filing his statement of claim (the document is undated and does contain a stamp of the Labour Court), the appellant filed a "Schedule of Loss" claiming damages (general and special) in the amount of R1.984 075.00.⁹ Thereafter on 19 July 2016, he filed an "Amended Schedule of Loss" in which he sought damages in the amount of R13 921 687.20.¹⁰ He also filed a witness statement in which he claims to have extended the scope of his claim to include breach of contract and contractual and constitutional damages.

[32] An employee must set out the heads of damages and the amounts claimed in his statement of claim so as to enable the employer to reasonably assess the

⁹ This was broken down into general damages for pain and suffering and loss of amenities in the amount of R207 900.77, special damages in the amount of R104 507.44 and future loss of income in the amount of R396 172.40.

¹⁰ This was broken down into damages for violation of statutory rights in the amount of R2 079 007.68, special and general damages in the amount of R560 529.09 and future loss in the amount of R11 282 150. 40.

quantum thereof and reply to the claim. It is impermissible for an employee to file a document extraneous to his statement of claim in which he seeks to particularise his damages. It bears noting that any such document will not constitute proof of damages.

[33] Nor for that matter, is it permissible for an employee to extend the scope of his claim by filing a document such as a “schedule of loss” and/or “witness statement”. A statement of claim may only be amended with consent of the employer or with leave of the court.

[34] In the circumstances, the appellant’s claim for damages, as particularised in his “Schedule of Loss” and “Amended Schedule of Loss” were not properly before the Labour Court and should not have been considered by it in assessing the appellant’s claim for damages.

[35] The Labour Court accordingly erred in awarding special damages to the appellant in the amount of R41 881.06. However, since there is no cross-appeal against this award, the award stands.

[36] In view of the fact that the appellant’s damages claim for special and general damages, as particularised in his “Amended Schedule of Loss”, was not properly before the Labour Court, it is not competent for this Court to entertain his grounds of appeal in relation to his claim for damages. Nor is it competent for this Court to entertain his claim for breach of contract, contractual damages arising therefrom and constitutional damages as the appellant has not made out a case for such relief in his statement of claim.

[37] The appellants seek in his heads of argument to appeal the costs order of the Labour Court. Since the appeal is limited to paragraph 5 of the Labour Court’s order, there is no appeal against its costs order.

[38] On 19 March 2019, the appellant filed an application to adduce new evidence in this Court in an effort to prove his claim for future loss of earnings as set out in his “Amended Schedule of Loss”. Since that application is premised on a

damages claim which was not properly before the Labour Court, it is not competent for this Court to entertain it.

[39] For all these reasons, the appellant has failed to demonstrate that he has any prospects of success in the appeal. Accordingly, his application for condonation and reinstatement of the appeal must fail.

Costs

[40] I consider this to be a matter where no costs order should be made.

Order

[41] In the result, I make the following order:

1. The application for condonation and reinstatement of the appeal is dismissed.
2. The appeal is struck from the roll.
3. The application to adduce new evidence is struck from the roll.

Kathree-Setiloane AJA

Waglay JP and Murphy AJA concur.

APPEARANCES:

FOR THE APPELLANT: Mr OH Rapoo

FOR THE RESPONDENT: Mr T Mosikili

Instructed by Majang Attorneys

LABOUR APPEAL COURT