

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(Held at Johannesburg)

CASE NO.:JA61/99

In the matter between –

M MKHONTO

Appellant

and

B L FORD N.O.

1st Respondent

**THE COMMISSIONER FOR CONCILIATION,
MEDIATION AND ARBITRATION**

2nd Respondent

MM DE VILLIERS

3rd Respondent

JUDGMENT

CONRADIE JA

[1] The appellant who is before us pursuant to leave granted by the court *a quo* was dismissed on 13 October by her employer, the third respondent, with effect from 23 December 1997. It is common cause that the dismissal was substantively fair. It is not disputed by the third respondent that the dismissal was procedurally unfair, as indeed the first respondent found it

was. The dispute centres around an offer of reinstatement made to the appellant on 25 November 1997. Revelas J decided that, such an offer having been made by the third respondent, the appellant had been offered substantial redress and that the award of R7250.00 for her procedurally unfair dismissal was insupportable. The appellant challenges this conclusion on appeal.

[2] After the appellant's dismissal the third respondent who was, I would imagine, concerned about the legality of what she had done, consulted her attorney. He drafted a letter which she was to hand to the appellant. It read as follows –

‘1. This serves to inform you that your services have not been terminated as alleged by yourself, or in any manner whatsoever.

2. I therefore regard you as a full-time employee employed in terms of the terms and conditions of employment which has(have) governed our relationship since your employment.

●Inasfar as any conduct of mine could reasonably be construed as conduct terminating our employment relationship, which conclusion I would dispute, I hereby offer you unconditional reinstatement.’

[3] Mr Maluleke for the appellant agreed that this reinstatement offer was a crucial aspect of the case. It is common cause that the third respondent on 25 November 1997 attempted to give this letter to the appellant who refused to read or even take it. However, the third respondent testified that

the content of the letter was conveyed to her.

[4] The commissioner, the first respondent, does not deal with the offer of reinstatement in her award at all. All that she says in her reasons in this regard is that the letter drafted by the third respondent's attorney is an indication that there had indeed been a dismissal, something which was in dispute at the arbitration hearing. She does not mention the dispute of fact concerning the handing over of the letter or the communication of its content.

[5] The inescapable conclusion is that the first respondent ignored this, highly relevant, evidence. It is obvious that, to use the terminology of *Carephone (Pty) Ltd v Marcus NO & others* [1998] 11 BLLR 1093 (LAC), a conclusion cannot 'rationally be connected to material properly available to a decision-maker' if the latter, in arriving at that conclusion, did not have regard to relevant material.

[6] The consequence of this misdirection was that the first respondent failed to consider whether the reinstatement offer had been conveyed to the third respondent and, if so, what impact this might have on the applicant's claim for compensation. Without a consideration of this aspect of the case, the first respondent misconceived the whole nature of the enquiry. The enquiry was not merely whether the appellant was entitled to compensation according to the formula in s 194(1) of Act 66 of 1955 ('the Act'), but whether she should have received any compensation at all. (*Johnson & Johnson (Pty) Ltd v Chemical Workers' Industrial Union* (1999) 20 ILJ 89 (LAC) at 99 I – 100 A

[7] The finding of the court *a quo* that the award fell to be set aside was clearly correct. The order which the court then gave pursuant to this finding, was not. The learned judge referred the dispute back to the CCMA for determination. On further reflection she formed the view that she had erred in remitting the dispute and said so in her judgment granting leave to appeal against the order setting aside the commissioner's award.

[8] The third respondent cross-appealed against the remittal order. Mr Maluleke argued that the cross-appeal was not properly before us because no leave to cross-appeal had been granted. In support of his argument he referred to *National Union of Metalworkers of South Africa & others v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) at 460 B where a cross-appeal against a costs order made by the former labour appeal court was struck off the roll for want of leave to appeal having been granted. Rule 30 of the rules for the conduct of proceedings in the labour court provides for an application for leave to appeal. There is no provision for an application for leave to cross-appeal. The rules for the conduct of proceedings in the labour appeal court provide in rule 4 for a petition for leave to appeal. Nothing is said about a cross-appeal. It is interesting to observe that rule 48 of the uniform rules of the high court provides for the granting of leave to appeal. It then says that after the

grant of leave a notice of cross-appeal is to be delivered within ten days of delivery of the notice to appeal. Leave to cross-appeal is evidently not required in that forum. Although s 17 C of the Labour Relations Act 28 of 1956 required leave for an appeal from the labour appeal court to the appellate division, nothing was said about leave to lodge a cross-appeal. It may be that a wide interpretation of the expression 'leave to appeal' in rule 30 of the labour court rules might encompass leave to cross-appeal. It is, however, not necessary to finally decide the point. It was conceded by Mr Maluleke that the judge *a quo*, in virtually suggesting a cross-appeal can be said to have impliedly granted leave to cross-appeal.

[9] The resolution of the dispute of fact in this matter does not depend upon the credibility of the witnesses. It can be achieved by an evaluation of the probabilities. We are thus in as good a position as the next commissioner to decide the one factual dispute, which is whether the appellant was offered reinstatement. The appellant refused to take the letter given to her by the third respondent; the third respondent had been to her lawyer for the express purpose of obtaining advice and was provided with the text of a letter to give to the appellant informing her that, insofar as she might have been dismissed, she was being unconditionally reinstated. It is therefore in the highest degree improbable that the appellant would not have been told by the third respondent of the reinstatement offer contained in the letter when it became clear that she declined to read it.

[10] The refusal to accept the reinstatement offer impacts upon the appellant's entitlement to compensation. The law, as it presently stands, is that a court may in respect of a procedurally unfair dismissal award either the full compensation prescribed by s 194(1) of the Act or nothing at all. (*Johnson & Johnson (Pty) Ltd v CWIU* (supra) was followed in *Whall v Brandadd*

Marketing (Pty) Ltd (1999) 20 ILJ 1314 at 1323 (LC) and *Lorenzen v Sanachem (Pty) Ltd* (1999) 20 ILJ 1811 (LC).) The guiding principle is fairness. I should therefore ask myself whether it would be fair to fully compensate an employee to whom an unconditional offer of reinstatement was made before the effective date of her dismissal. If not, I must deny her compensation. I would think that the appellant ignored the offer at her peril. She put herself in a position where ‘... the employer’s ability and willingness to make... redress is frustrated by the conduct of the employee.’ (*Johnson & Johnson (Pty) Ltd v CWIU* (supra) at 1220 D.) An employee’s refusal to allow an employer to remedy a procedural defect may, depending on what is fair, deprive him or her of compensation which would otherwise have been payable; *De Bruin v Sunnyside Locksmith Suppliers (Pty) Ltd* (1999) 20 ILJ 1753 (LC) at 1762 B – E.

[11] I propose exercising the discretion conferred by s 194(1) of the Act myself. It is in the interests of fairness that this trifling dispute, which has already gone far further than it should have, should not be allowed to go further still. The appellant’s refusal to accept the reinstatement offer was grossly unreasonable. There are doubtlessly cases where the circumstances of an unfair dismissal are so degrading that it would not be fair to expect an employee to accept an offer of re-instatement. This is not such a case. The appellant did not indicate that her remaining in the third respondent’s employ for two months after having been told of her dismissal caused her any anguish.

[12] The appellant’s conduct in the litigation leaves much to be desired. Not only did she fail to proffer any reason for having refused the offer of reinstatement, but her evidence concerning the reinstatement offer, the

only factual issue in the case, was patently false. I thus see no reason for interfering with the order of the court *a quo* that the appellant should pay the third respondent's costs. The costs in this court, including the costs of the application for leave to appeal, are to be paid by the appellant. There is no reason in law or fairness to order otherwise.

- the appeal is dismissed with costs;
- the order of the court *a quo*
 - setting aside the first respondent's award is upheld;
 - referring the dispute back to the CCMA for determination is overturned

CONRADIE JA

I agree

ZONDO AJP

I agree

WILLIS JA

Date of Hearing:

9 March 2000

Date of Judgment:

30 March 2000

Attorney for Appellant:

Mr MD Maluleke from Newu

Attorney for Respondent:

DH Masher from Hofmeyer Herbstein

Gihwala Cluver & Walker Inc

Counsel for Respondent:

Adv le Grange