

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO:
JR249/02

In the matter between:

VAN ASWEGEN, DARRYN

Applicant

and

THE COMMISSIONER FOR CONCILIATION,
MEDIATION AND ARBITRATION

First Respondent

ZWANE, BUTI NO

Second Respondent

TELEMESSAGE (PTY) LIMITED

Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an application to review, correct and/or set aside the compensation order in an arbitration award dated 21 January 2002 issued by the second respondent (“the commissioner”), who sat as the commissioner in arbitration proceedings initiated by the applicant under the auspices of the first respondent, under case number GA127301.
2. The applicant is also seeking condonation for the late filing of his answering affidavit. Good cause has been shown for the late filing of the answering affidavit.
3. The review application was opposed by the third respondent. The third respondent was

in default today when the application was argued before me.

Background facts

4. The applicant was employed by the respondent on 29 June 1999 as a sales executive.
5. On 25 January 2001, pursuant to a disciplinary enquiry into the alleged mal performance, the third respondent dismissed the applicant. The applicant appealed. On appeal the dismissal was upheld by the third respondent on 8 February 2001.
6. The applicant referred the matter to the first respondent for conciliation, and subsequently arbitration. The commissioner presided at the arbitration hearing.
7. The arbitration commenced on 25 July 2001 when the third respondent presented its case whereafter the arbitration was postponed *sine die* and was resumed on 8 January 2002. On 8 January 2002 the applicant presented his evidence and the parties delivered argument.

The arbitration award

8. On 22 January 2002 the commissioner delivered his award. He found that the dismissal was both substantively and procedurally unfair.
9. Pursuant thereto the commissioner directed that the third respondent pay the applicant six

month's salary which he determined to be an amount of R69 568,50 at the rate of remuneration of the applicant at the time of dismissal.

10. The reason that the commissioner gave for limiting the compensation to six months was that neither of the parties was responsible for the delay from 25 July 2001 to 8 January 2002 when the arbitration was finalised but for the award.
11. It is against the findings referred to in paragraphs eight and nine *supra* that the applicant has brought the review application.

The grounds of review

12. The applicant contends that the commissioner misdirected and/or misconducted himself and/or committed a gross irregularity in awarding an amount of six months compensation to him, in circumstances where the commissioner had found, correctly, that neither the applicant nor the third respondent was at fault for any delay in the timeous completion of the arbitration under review.
13. The misdirection/misconduct/gross irregularity occurred in that the commissioner misdirected himself in applying section 194(2) of the Labour Relations Act 66 of 1995 ("the Act"). The commissioner ought to have directed that the applicant was to be awarded an amount of compensation equal to the remuneration which he would have received from the time of the termination of his services being 25 January 2001 to the last

date on which the arbitration was held being 8 January 2002 which is a period of 11 months and 14 days. The commissioner, so it was contended, did not apply his mind to the aspect of compensation.

Analysis of the facts and arguments raised

14. I am of the view that the award of six months is not at all justifiable on the reasons given therefor. The fact that neither party was responsible for the delay does not excuse the third respondent from payment of the compensation he is by law obliged to pay and which the commissioner was by law obliged to award, nor may the applicant be denied his lawful compensation for the said reasons.
15. The commissioner was obliged at the time he delivered his award to grant the applicant the full compensation but for a discretion to award zero remuneration. Having decided to award some compensation in view of the commissioner's finding that there had been both substantive and procedural unfairness, he was obliged to award the full measure thereof, subject to a limit of twelve months remuneration. The twelve-month rule prevails in circumstances where the date between the commencement and conclusion of the arbitration exceeds a twelve-month period. In circumstances where the time period between commencement and conclusion of the arbitration occurs within a twelve-month period then the maximum measure of compensation would be the elapse time period which in the present case is eleven months and fourteen days. The commissioner was obliged to award remuneration equivalent to that period.

16. No purpose will be served by referring the matter back to the commissioner or any other commissioner. The third respondent has conceded on the papers in this review application that the applicant's monthly remuneration was R9 640,00. The applicant accepted that amount as his monthly remuneration. It is further common cause that the time period from the commencement of the arbitration to the last day of the hearing was eleven months and fourteen days.
17. The applicant is entitled to payment from the third respondent of R110 476,55 being the remuneration for the period of eleven and fourteen days.
18. There is no reason why costs should not follow the result.
19. In the circumstances the following order is made:
 1. The compensation order in the arbitration award dated 21 January 2002 under case number GA127301 issued by the commissioner sitting as an arbitrator of the first respondent is reviewed and corrected.
 2. The third respondent is directed to pay the applicant the sum of R110 476,55 being the equivalent of eleven months and fourteen days remuneration.
 3. Condonation for the late filing of the replying affidavit is granted

4. The third respondent to pay the costs of the application.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : T C TIEDEMANN INSTRUCTED BY PETERSEN
HERTOG & ASSOCIATES

FOR THE THIRD RESPONDENT : NO APPEARANCE

DATE OF HEARING : 27 MAY 2003

DATE OF JUDGMENT : 27 MAY 2003