



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2767/09

In the matter between:

JOHANNESBURG CITY PARKS LTD

Applicant

and

SMANGA TOLI N.O

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

EDWARD SEROBA

Third Respondent

Heard: 1 November 2011

Delivered: 06 December 2011

Summary: Review – the decision of the arbitrator to award compensation and retrospective reinstatement. Section 193(1) and (2) of the LRA.

JUDGMENT

MOLAHLEHI J

Introduction

- 1] This is an application to review and set aside the arbitration award of the second respondent made under case number IMD 010806 dated 2 September 2009. The applicant does not however seek to review the entire arbitration award but only that part of the arbitration award that reinstates the third respondent (the employee) retrospectively including the compensation awarded to the employee. It should be noted in this respect that the applicant has complied with that part of the arbitration award that required it to reinstate the employee.

Background facts

- 2] The employee who at the time of his dismissal was employed as horticulture was dismissed for misconduct related to refusal to obey lawful instruction. The alleged refusal to obey the instruction arose from the refusal to stop using the vehicle of the applicant because he was given travelling allowance and a petrol card.
- 3] The employee not being happy with the dismissal referred a dispute concerning an alleged unfair dismissal to the bargaining council for conciliation. Conciliation having failed the matter was referred to arbitration. The arbitrator ordered the retrospective reinstatement of the employee and the relevant part of his order for the purpose of this judgment reads as follows:
- ‘(a) I order Johannesburg city parks to reinstate Edward Serobe retrospective to 27 November 2007, a date of his unfair dismissal, with employment conditions not less than those he enjoyed prior to his dismissal.
- (b) Reinstatement is without loss of benefits.
- (c) I further order Johannesburg city parks to pay and years salary to the amount

of R565 340,16 (Five hundred and sixty five thousand, three and forty rands and sixteen cents calculated as [26920 x 21 months]. This area salary or back pay is payable within fourteen days in receipt of this award.'

Grounds for review

4] As indicated above, the applicant does not challenge the arbitration award in its entirety but has limited its challenge to the retrospective reinstatement of the employee including the compensation order by the arbitrator. In this regard, the applicant says that the arbitrator either committed a gross irregularity, misconduct or that he exceeded his powers in that:

- '9.1 The arbitration proceedings were initially set down for 1 July 2008, but it was postponed at the request of the Applicant and the Third Respondent as the parties were trying to settle the matter.
- 9.2 The arbitration was set down again for 4 August 2008, but was postponed because the Third Respondent did not receive the notice of set down from the Second Respondent.
- 9.3 The arbitration was again set down for 29 October 2008, but did not proceed on this date as the Second Respondent did not have any Commissioner available to arbitrate the matter and it was postponed.
- 9.4 The dispute was once again set down for arbitration on 18 November 2008. On this date the matter was postponed at the request of the Applicant and the Third Respondent as the parties were trying to further (sic) explore the possibility to settle the matter.
- 9.5 The parties agreed to the postponement and that they would report back to the First Respondent by 1 December 2008 on whether a settlement had been reached or not. The matter was not settled and it was set down for arbitration on 25 March 2009.
- 9.6 On 25 March 2009 the Applicant requested a postponement. The Third Respondent did not oppose the request and the matter was set down for arbitration on 28 May 2009.

9.7 On 28 May 2009 the Third Respondent requested the postponement in order to consult with his family and the Applicant did not oppose the request.

9.8 The arbitration finally commenced on the 15 July 2009 and was finalised on 19 August 2009.,

5] It is apparent from the above that the arbitration hearing was postponed on a number of occasions, in some instances by agreement between the parties and they did so largely because they were involved in settlement discussions. It is also apparent that on the other occasions the postponements were due to administration problems on the part of the bargaining council.

The issue

6] In essence, the issue in this matter revolves around whether the arbitrator in ordering retrospective reinstatement including payment of the back pay for the period of 21 months, exercised his powers properly and in a fair manner.

Evaluation

7] In ordering retrospective reinstatement and compensation, the arbitrator exercised powers provided for under subsections (1) and (2) of section 193 of the Labour Relations Act¹ (the LRA). In light of this it is necessary to quote the provisions of both subsections. Section 193 (1) reads:

‘193. Remedies for unfair dismissal . . .

(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other

¹ 66 of 1995 as amended in 2002.

reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.'

8] Section 193 (2) reads:

'(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

9] In terms of section 185(a) of the LRA, an employee has a right not to be unfairly dismissed. The remedies for any unfair dismissal are provided for in terms of sections 193 and 194 of the LRA.

10] Section 194 of the LRA provides:

'(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of the dismissal.'

11] It is now settled that an arbitrator or the Labour Court has a discretion whether to grant compensation where the dismissal of an employee is found to be unfair. In

Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,² the Constitutional Court held that:

‘It is trite law that the power to grant a remedy in section 193 is by its nature discretionary and that the discretion must be exercised judicially by a court that enjoys that unfettered discretion.’

12] In interpreting the provisions section 193 of the LRA, the Constitutional Court in *Equity Aviation Services* held that:

‘The ordinary meaning of the word “reinstate” is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers’ employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal.’³ [Footnote omitted]

13] Towards the end of the same paragraph (36) the Court further said:

‘The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee’s having been without income for that period was a direct result of the employer’s conduct in dismissing him or her unfairly.’ [Footnote omitted]

14] In considering whether compensation should be awarded, the arbitrator or the Labour Court has to balance the dictates of fairness to both parties. The approach to be adopted in this regard is to look at the reason for the dismissal and whether such a dismissal was done in a fair manner. The nature of the

² [2008] 12 BLLR 1129 (CC) at para 48. See also *Johnson & Johnson v CIWIU* (1998) 2 1209 (LAC).

³ *Equity Aviation* at para 36

misconduct and the extent of the procedural defect and the implication to both parties if compensation is to be granted are some of the factors that may influence the granting or refusal of compensation.

15] In *Dr D.C. Kemp t/a Centralmed v Rawlins*,⁴ after dealing with the discretion which the arbitrator has in terms of section 193(1)(c) of the LRA, the Court held that in assessing whether to order reinstatement the following factors which are not exhaustive are to be taken into account:

(a) the nature of the reason for dismissal; where the reason for the dismissal is one that renders the dismissal automatically unfair such as race, colour, union membership, that reason would count more in favour of compensation being awarded than would be the case with a reason for dismissal that does not render the dismissal automatically unfair; accordingly, it would be more difficult to interfere with the decision to award compensation in such case than otherwise would be the case;

(b) whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair;

(c) in so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation;

(d) in so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal;

(e) the consequences to the parties if compensation is awarded and the

⁴ (2009) 11 BLLR 1027 (LAC).

consequences to the parties if compensation is not awarded;

(f) the need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent;

(g) in so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business; and

(h) any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes.¹⁵

16] In arriving at the conclusion that the employee in *Dr Kemp* was not entitled to compensation the Court took into account that:

‘(a) a genuine and reasonable offer of reinstatement was made to her which she did not accept;

(b) had the respondent accepted the appellant’s offer of reinstatement:

(i) she would not have suffered any financial loss which she may have suffered as a result of her dismissal;

(ii) the dispute between the parties would have been resolved without the appellant having to incur the legal costs that he must be taken to have incurred in defending the unfair dismissal claim and the costs relating to this appeal;

(iii) the respondent would not have incurred the legal costs that she must be taken to have incurred through this litigation both in the Labour Court and in this Court;

(c) for some time after the appellant had made the offer of reinstatement to the

5 *Dr D.C. Kemp t/a Centralmed* at para 20.

respondent, the respondent did not even bother to respond to the appellant – and that is conduct which is unacceptable, particularly when one of the parties is trying to have the dispute resolved. Such conduct undermines one of the primary objects of the Act which is the effective (which includes expeditious) resolution of disputes: it is better that disputes be resolved through conciliation than through litigation or arbitration or industrial action.’

- 17] In *Equity Aviation Services*, the Constitutional Court in dealing with the contention that the employee should not be allowed to benefit from the 19 months delay in the prosecution of the review held that:

‘As to the criticism that Mr Mawelele will benefit unjustly from the delay of 19 months in prosecuting the review, it is common cause that the delay was caused by the unavailability of the record of the proceedings before the CCMA. The tapes seemingly went missing. The delay was therefore not due to any deliberate, wilful or flagrant disregard for the express provisions and underlying purpose of the LRA. In the circumstances it would be unfair to lay the blame for the delay on Mr Mawelele.’⁶

- 18] The arbitrator in the present instance in ordering the reinstatement and compensation of the employee reasoned as follows:

‘Looking at the reason for James to oppose the applicant’s reinstatement ... one cannot find any one justifiable enough for his version to hold. The applicant paid his rates. James agreed that bad relationship between the applicant and him was personally irrelevant. The applicant’s qualifications limit him to the respondent only, a fact supporting reinstatement. Mike Griffiths did not testify to any irretrievable broken relationship as the applicant’s immediate superior so the version was James remained irrelevant.

Nothing of what the respondent presented in evidence showed that the applicant’s conduct before dismissal warranted or justified to reinstate. Circumstances surrounding the dismissal negated the respondent’s opposition to reinstatement.’⁷

- 19] In my view, based on the facts and the circumstances of this case, the arbitrator cannot be faulted for exercising his discretion in the manner he did. The

⁶ *Equity Aviation Services* at para 51.

⁷ Paras 49 and 50 of the arbitration award.

arbitrator in arriving at the decision that the employee should be reinstated took into account the fact that the relationship between the parties had not broken down and that there was no basis for refusing reinstatement. The arbitrator rejected the basis upon which the applicant sought to support its contention that the relationship with the employee had irretrievably broken down. The main witness of the applicant submitted that the relationship with the employee had irretrievably broken down for the following reasons:

- ‘1. The applicant lied to a disciplinary hearing that he took the car for the service at the garage and the hearing chairperson’s telephone to that garage proved that he lied in that he did not take the car in that Friday but only on Monday.
2. The applicant defied two eviction orders by the respondent to vacate the employer’s house he was allocated while still employed.
3. The applicant also failed to pay rent for the employer’s house for a very long period.
4. The applicant further failed to pay services for the house the employer allocated him.
5. Even after getting employment with one of the respondent’s contractors after his dismissal, the applicant failed to pay municipal services and rental for the employer’s house.’

20] The arbitrator rejected the version of the applicant and found that its witness was not credible and reliable. The arbitrator found that the cautionary letter which the applicant claimed it had issued against the employee was never issued and that it may have come into existence when the applicant was preparing for this matter. The arbitrator found that there was documentary proof that the employee had paid for the municipal rates contrary to the version of the applicant’s witness.

21] As concerning the order for compensation, the applicant argued that the arbitrator ought not to have made such an order as the employee was to blame for the delay in finalising the arbitration proceedings. It is apparent that the

arbitrator was alive to the fact that there was a delay in finalising the proceedings. In this regard, the arbitrator sets out the details relating to how this matter progressed prior to his involvement in it and thereafter. At the beginning of the arbitration award, the arbitrator sets out the instances where this matter had to be postponed and reasons thereof. At one stage or the other either of the parties requested a postponement for various reasons. It would appear that none of the application for the postponement were opposed by either party. In two instances, the delay was occasioned by failure of the bargaining council to ensure that the employee was properly served the notice of attendance and secondly due the unavailability of the arbitrator.

- 22] It is important also in considering the issue of reinstatement and compensation that regard should be had to both the pre-arbitration minutes and what the deponent to the founding affidavit says at paragraphs 8.10. In the pre-arbitration minutes, the parties recorded the relief sought as amongst others entailing:

‘8.1 Retrospective reinstatement with full back pay; alternatively

8.2 Compensation equal to 12 month’s salary ...

8. Payment of the applicant’s outstanding leave pay’

- 23] In other words, the common understanding between the parties was that if the arbitrator was to find that the dismissal of the employee was procedurally and substantively unfair the remedy available was retrospective reinstatement with full back pay. The conclusion reached by the arbitrator is thus in line with what the parties envisaged in their pre-arbitration minutes. In this context, it makes sense why the applicant never, as it was conceded on its behalf during the argument, these issues are raised for the first time in this hearing and not during the arbitration hearing.

- 24] In my view, based on the above facts, it cannot be said that the arbitrator did not appreciate the issues of reinstatement and granting compensation in circumstances where there had been a delay in finalising the matter. It would also seem to me that the arbitrator in exercising his discretion in favour of

awarding compensation was influenced by the nature of the charges which led to the dismissal of the employee.

25] Accordingly, the applicant's application stands to fail. I see no reason why the costs should in the circumstances not follow the results.

26] In the premises, the applicant's application is dismissed with costs.

Molahlehi J

Judge of the Labour Court of South Africa

REPRESENTATION:

FOR THE APPLICANT: Adv H M Viljoen instructed by Helena Strijdom Attorneys

FOR THE RESPONDENT: R Kuhn of Rudolf Kuhn Attorneys