



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: JR1495/09

In the matter between:

TRUELY MOSOME

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL (GPSSBC)

First Respondent

ZARINA WALELE N.O

Second Respondent

DEPARTMENT OF FINANCE

(THE PROVINCE OF GAUTENG)

Third Respondent

Heard: 26 April 2012

Delivered: 31 August 2012

Summary: Review application. Exercise of discretion in terms of section 193 of the LRA. Consequence of submitting arbitration award after 14 days- section 138 (7) of the LRA.

JUDGMENT

Molahlehi J

Introduction

- 1] This is an application to review and set aside the arbitration award made by the second respondent (the arbitrator) under case number PSGA 525-05/06 dated 7 May 20009.
- 2] The arbitration award which is the subject of this review was made consequent to the order, which was made by Cele J on 24 July 2008, in terms of which the matter was remitted to first respondent to allow for further evidence to be led by the parties on whether the applicant should be reinstated or compensated as envisaged in terms of section 193 (2) of the Labour Relations Act of 1995 (the LRA). The arbitration award was in that regard reviewed to the extent that it provided for the remedy of compensation and not reinstatement. In other words the award was not review and set aside insofar as the substantive fairness of the dismissal was concerned.
- 3] The arbitration award which was the subject of the review application that was served before Cele J will in this judgment be referred to as “the first award” and the one that is the subject of this review shall be referred to as “the second award.” The Arbitrator in the second award found that the appropriate remedy was compensation and not reinstatement.

Background facts

- 4] The applicant, who was prior to his dismissal employment as the principal

trade advisor, was charged and dismissed for several acts of misconduct. The focus was however on the charge of insubordination. The applicant was found guilty and dismissed. At the arbitration hearing the arbitrator found the dismissal to have been unfair and ordered compensation and not reinstatement.

- 5] In the second arbitration proceedings the Arbitrator was required to determine an appropriate remedy for the finding that the dismissal was substantively unfair. Again as indicated above, the Arbitrator in the second award found that the reinstatement would not be appropriate in the circumstances of the matter.
- 6] The focal point in the assessment of what remedy should be made had to be considered in the context of the charge of insubordination. The charge of insubordination arose essentially from the written communication between the applicant and her supervisor, Ms Kekana.

The grounds for review

- 7] The applicant has raised several grounds of review in seeking to have the arbitration award reviewed and set aside. The grounds of review are summarised in the applicant's heads of argument as follows:
 - '3.1 The Award is challenged on the ground that the Applicant contends that in the light of evidence that was canvassed, any reasonable person would agree that justice and fairness demands that the Applicant be reinstated.
 - 3.4 The second Respondent refused to order reinstatement of the Applicant on the ground that in her view the circumstances surrounding the unfair dismissal of the Applicant were such that continued employment would be intolerable to the Respondent and the Applicant.'
- 8] The applicant further contended that the arbitration award was defective because the arbitrator issued it after six months in contravention of the

provisions of section 138 (8) of the LRA which requires that arbitration award be issued 14 days after the conclusion of the hearing.

The arbitration award

- 9] In the second arbitration award in her analysis Arbitrator Walele, start by identifying the issues she had to determine. She confirms that as it had already been found that the dismissal was unfair the issue she had to determine concerned whether the appropriate remedy was compensation or reinstatement. She then summarises the principle enunciated in section 193 (2) of the LRA as providing for an exception to the general rule that the primary remedy in an unfair dismissal case is reinstatement. The exception to the general rule is however, that an employee may not be reinstated or re-employed where "circumstances surrounding the dismissal are such that a continuous employment relationship would be intolerable."
- 10] In relation to the facts the Arbitrator says that she was not persuaded that the relationship between the applicant and Ms Kekana was not "turbulent." The Arbitrator further found that the letter addressed by Ms Kekana to the employee did not occur in isolation and that it was a culmination of events and situation between the employee and her superior. The reason for the Arbitrator's conclusion that the relationship between the applicant and the respondent had irretrievably broken down is dealt with in more details later in this judgment.

Evaluation

- 11] The respondent has raised a point *in limine* concerning the issue of the adequacy of the record. It is common cause that the record as filed by the applicant is incomplete. It is undisputed that the applicant's attempt to address the issue of the incomplete record was frustrated by lack of assistance on the part of the first respondent. In my view, to order that this matter be remitted to the first respondent for reconstruction or rehearing afresh would defeat the interests of justice and speedy resolution of this matter, particularly when regard is had to the period that it has taken for the matter to reach the stage where it is now. I am therefore of the view that the matter should be determined on the basis of the material before this court.
- 12] The second point raised by the respondent is that the applicant is unsuited because she failed to comply with paragraph 4 of the earlier court order, which remitted this matter back to the first respondent to be determined afresh. It is common cause that the applicant did not refund the first respondent the amount she had received consequent to the first arbitration award.
- 13] It is common cause that the issue of non-payment of the amount as was ordered by the court was discussed between the parties prior to the commencement of the arbitration hearing. The parties agreed to proceed with the arbitration hearing notwithstanding the non-compliance with paragraph 4 of the court order by the applicant.
- 14] Whilst non-compliance with a court order is a serious matter and something that should not be tolerated, I am on the basis of the agreement of the parties of the view that the point in *limine* regarding the non-compliance of the court order should be dismissed.
- 15] The other point raised by the respondent concerns the delay in the prosecution of the matter.
- 16] The applicant has on the other hand, raised a number of grounds upon which she contends that the arbitration award should be reviewed and set aside.

The first one concerns the delay by the Arbitrator in handing down the arbitration award. The applicant contends in this respect that the arbitration award was handed down after 14 days contrary to the provisions of section 138 (7) (a) of the LRA. This issue received attention in a number of judgements of the Labour court.

- [17] In *AA Ball (Pty) Ltd v Kolisi*,¹ the applicant contended that a proper interpretation of section 138(7) of the LRA was that once the 14 days have expired the Commissioner was no longer competent to issue an award. In dealing with this issue the court held that:

‘The above directions seem to be imperative. The Act is however silent on what the consequences are if the Commissioner does not comply with the time provisions set out in section 138 of the Act or if no extension is granted on good cause shown. I do not understand non-compliance with section 138 of the Act to constitute a “defect” as envisaged in section 145 of the Act. In my view, an award which is handed down a few days late cannot amount to misconduct in relation to the duties of the Commissioner (section 145(2)(a)(i)). Neither can it be construed as a “gross irregularity”(section 145(2)(a)(ii)) or conduct equal to the Commissioner exceeding the commissioner’s powers (section 142(2)(a)(iii)).’

- 17] In *State Mining Association Ltd t/a Alpha Farm v SACCAWU & Another*,² the court held that:

‘It is quite clear that having regard to human nature, an arbitrator may not always be able to sign and issue an award within the 14-day period. If a arbitrator were to sign or to issue the award after that period, it would not be in accordance with the aims of this Act to visit such an omission with invalidity. If that were to be done it would simply mean that the dispute had not reached finality and the arbitration proceedings would have to take place *de novo*. This could not have been intended. There may, of course, be circumstances where an award is issued so late that different consequences

1 (1998) 6 BLLR 560 (LC) at 563 B-D

2 (1998) 19 ILJ 1481 (LC); 1999 (3) BLLR 223 (LC) at

may follow.’

- 18] I align myself with the above authorities and find that although the delay in issuing the award was regrettably excessive it would not be in the interest of justice to visit it with invalidity.
- 19] The rest of the points raised by the parties in this matter are in my view, overly technical and did not in any manner advance the needs of resolving the dispute speedily within the spirit of the LRA. In my view the issue that this Court need to concern itself with is whether the Arbitrator applied her mind properly in exercising the discretion given to her by the provisions of section 193 (1) of the LRA.³

Reinstatement, re-employment or compensation

- 20] The issue of whether an employee who had been unfairly dismissed should be reinstated received attention in *Dunwell Property Services CC v Sibande and Others*,⁴ where Labour Appeal Court per Ndlovu JA held that:

‘In order to determine whether or not an unfairly dismissed employee should be reinstated, as contemplated in section 193(2) of the LRA, the overriding

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Section 193 of the LRA provides as follows:

- “(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 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.
- (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.”
- 4 [2012] 2 BLLR 131 (LAC) at para

consideration in the enquiry should be the underlying notion of fairness between the parties, rather than the legal onus, and that “[f]airness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment.’

- 21] The Court further quoted with approval what was said in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & Others*⁵ where the Constitutional Court held that:

‘The remedies awarded in terms of the provisions of section 193(2) of the LRA must be made in accordance with the approach set out in *Equity Aviation (supra)*. That approach is based on underlying fairness to both employee and employer. It would introduce unwanted and unnecessary rigidity to saddle an inquiry into fairness with notions of a legal onus.’

- 22] In the present instance the Arbitrator arrived at the conclusion that compensation was the appropriate remedy after summarising and analysing the evidence which were presented before her. It is also apparent that the Arbitrator took into account the written submissions which were made by the parties.

- 23] In assessing the evidence as was presented by the parties, the Arbitrator found that she was confronted by two conflicting versions. The version of the applicant on the one hand, was that the relationship between her and the respondent had not broken down. The respondent on the other hand contended that the relationship had broken down irretrievably between the parties.

- 24] The terms of reference of the Arbitrator has to be understood within a context where the issues of determining the appropriate remedy has to be assessed by having regard to the finding which was made in the first award, which was that the dismissal was unfair. In other words, in addition to exercising her judicial discretion as vested on her by virtue of the provisions of section 193 of the LRA, the Arbitrator had a further duty to ensure that in exercising that

5 [2010] BLLR 465(2010) (5) BCLR 422) (CC)

discretion she also takes into account the findings that had already been made in the first arbitration award. The important aspect of this consideration is that the court in reviewing and ordering that the matter should be remitted back to the first respondent did not set aside the whole of the first arbitration award, but only reviewed and set aside the conclusion reached concerning the remedy. It therefore means that the finding made in the first award concerning the seriousness of the misconduct committed by the applicant stands and had to be taken into account in assessing the fairness to both parties of awarding compensation or reinstatement or reemployment. In other words, in assessing the remedy to be made in terms of section 193 of the LRA, weight had to be accorded to the finding on substantive fairness, in particular in as far as it relates to the seriousness of the offence because the seriousness of the offence plays a critical role in the determination of whether the relationship between the parties has irretrievably broken down.

- 25] The finding in the first award is of significant importance in that in its proper analysis it provided that the requirements for awarding the primary remedy as a general rule had been satisfied. The determination in the second award was to determine whether the circumstances that prevailed around the dismissal were such that it would be inappropriate to reinstate or re-employ the applicant. In this enquiry as stated earlier the finding made in the first award was important in relation to the finding of the seriousness of the offence because that in my view carries a significant weight in the determination of whether the dismissal was an appropriate sanction and whether misconduct was so serious as to cause the breakdown in the relationship between the parties.
- 26] In light of the above discussion it is apposite that the finding made in the first award concerning the substantive fairness be quoted in full. In that respect the reasoning as concerning the finding that the dismissal was substantively unfair is stated in that award as follows:

‘5.7 I am unable to find the dismissal to have been occasioned by a fair reason. I accept that the applicant had shown disrespect towards her

superior, this being Ms Kekana. It will, however, be inimical to ignore the context in which this had occurred. In her correspondence she had used words such as "stupid letters to me." This, I must hasten to mention, is deplorable. Kekana was, however, not an innocent victim.

5.8 She also employed inappropriate language in her dealing with the applicant. At best, I venture to say, the applicant should have been charged with insolence. There is no doubt in my mind that her conduct related to impudence. In *Rostoll en ander v Leeupoort Mineral Bron (Edms) Bpk* (1997) 366 (LC) (sic) court condoned an employee who was disrespectful towards a superior as this was as a result of provocation.'

27] Turning to the issue at hand it is trite that in performing the functions of determining the fairness or otherwise of the dismissal including determining the appropriate remedy, Arbitrators had to take into account the facts and the totality of the circumstances of the case in question which she failed to do so. In this respect Waglay DJP in *Motsamai v Reverite Building Products*,⁶ in dealing with the issue of sanction had the following to say:

'It is now accepted that when a Arbitrator arbitrates a dispute, it is the Arbitrator who must decide what is the appropriate sanction having regard to: all of the evidence presented to him/her; the company's code of conduct; and, of course the nature and seriousness [of the] misconduct. The fact that the decision is that of the Arbitrator does not mean that it can be made in a vacuum. Like any other decision the decision that the Arbitrator arrives at in respect of the sanction must also be one that is reasonable in all the circumstances.'

28] In the present instance it is apparent that the Arbitrator rejected the contention of the applicant that the dismissal was as a result of a single incident of a letter she wrote to her superior. The Arbitrator specifically rejected the contention of the applicant that the relationship between her and her superior was not "turbulent." In this respect the Arbitrator found that; "Ample reference is made to situations and work-related issues prior to the writing of the letter

6 [2011] 2 BLLR 144 (LAC) at para 22.

and similarly the response of the applicant cements this view that I hold.”

29] The Arbitrator further reasoned:

‘The Applicant’s attempt to persuade me that the relationship between herself and the superior was not turbulent must fail. I am of the view that the letter addressed to the Applicant certainly did not occur in isolation and that it may very well be the result of the culmination of events and situations between the Applicant and her supervisor. Ample reference is made to situations and work related issues prior to the writing of the letter and similarly the response of the Applicant cements this view that I hold. I can hardly believe that Kekana would wake up one morning and decided to address a letter to the Applicant in the form and manner that she did ; the Applicant then simply filled with anger decides to reply to same without enquiring what may be the reason for this rebuke from her supervisor. The Applicant claims that she expected the supervisor to address the issues with her but does not do the same and instead angrily replies to a letter with the intention as she admits to harm her supervisor. The relationship between the parties was not sound and this is evident from the testimony of all the witnesses including the Applicant. The Applicant unsuccessfully tried to paint a picture that all was well and that the disagreements that existed between herself and Kekana were always resolved. The Applicant alludes to ‘officials who think they are Government’ referring to Manamela who she thought was behind her dismissal. Manamela is once again a Superior and she holds this contemptuous view of him when she says he is boastful therefore can express a similar view of her. The Applicant did not shy away when she says that her superiors have to earn her respect before she accords them their authority.’

30] It would seem that the Arbitrator similarly to the finding in the first award found that an element of provocation was present in the circumstances of this case. In this respect the Arbitrator says that the applicant ought to have made an enquiry first before acting on her anger. In considering what sanction to impose the Arbitrator focuses her attention on the failure of the applicant to check first before she acted on her anger.

31] In my view the Arbitrator ought in her assessment of what relief to make to

have, in the first place, taken into account that the letter of the applicant was an unfortunate reaction to the contents of the letter from her superior. Ms Kekana, had powers at her disposal to take action against the applicant if she believed that the applicant had done something wrong or was not doing her work as was expected. Therefore, there was no basis to have used such provocative language in addressing issues she had with the applicant. The Arbitrator ought to have also appreciated that she was not dealing with the issue of insubordination in its general sense of refusal to obey lawful instruction but the offence committed by the applicant had to do more with insolence as the first award indicated.

32] The arbitrator ought to have also taken into account the finding made in the first award in relation to the other offences for which the applicant was charged with. In this respect the arbitrator in the first award found at paragraph 5.9 to 5.11 that:

‘5.9 Regarding weekly schedule, I am once again unable to find the applicant to have failed to obey a lawful and a reasonable instruction. In fact I find the applicant’s version in this regard to be most-probable. She insisted that she had advised Kekana that it was practically impossible to submit weekly schedules. If she had refused to carry out an instruction, why did it take the respondent so long to charge her? The charge of insubordination emerged at a later stage. There was no evidence to suggest that Kekana did not accept the applicant’s suggestion on monthly schedules.

5.10 The applicant was also charged with insubordination for her refusal to hand over a cellular phone as well as the respondent’s office keys. The instruction may have been lawful, and issued by her superiors. I however do not believe it was reasonable.

5.11 There was a practice, at least according to the applicant’s unchallenged testimony, where employees had been suspended before but not subjected to this treatment. None of them had been asked to hand over office keys and cellular phones. In order to justify dismissal insubordination must be serious, persistent and deliberate.

See in this regard Chemical Workers Industrial Union & another v AECI Paints Natal Pty (1988) ILJ 1046 (LC). In Metal & Allied Workers Union & Another V Transvaal Pressed Nuts, Bolts and Riverts, Pty Ltd, the court refused to accept as proof of insubordination and employee's refusal to clean an area cleaned by a colleague.'

- 33] It is also my view that the Arbitrator ought to have taken into account that the letter was not circulated to other employees as is sometimes the case in cases of this nature. Except for the person who typed the letter the contents of the letter in terms of the evidence before the Arbitrator was confined to the applicant and Ms Kekana. In addition the contents of the letter do not address themselves to the management team or other superiors of the applicant. The letter has to also be read in the context where, as the Arbitrator observed, there had been conflict between the two employees and that the applicant's reaction was due to the anger provoked by the letter of Ms Kekana.
- 34] I do not however believe that provocation is an absolute defence that wipes out the liability of the applicant. This is not a case where in a snap of a moment and due to provocation a person launches an assault on the other. The applicant had all the time to consider what she wanted to say as she drafted the letter and possibly edit it once it was typed.
- 35] Because the first award was reviewed only to the extent of the relief it therefore means that the other findings made therein had to be taken into account in the evaluation of the relief to make. It was found as indicated earlier that the dismissal was substantively unfair because the offence was not serious enough to warrant a dismissal. It is apparent from the reading of the first award that the Arbitrator found the offence not to have been serious because of the provocation and that in fact in the circumstances of the case the appropriate charge against the applicant ought to have been insolence which by implication is less serious than insubordination. The inference can also be drawn from the fact that insolence in general is an aspect of the offence of insubordination.

36] In my opinion and in light of the above reasons the arbitration award of the Arbitrator stands to be reviewed and set aside. It would however be unfair and would sent a wrong message if the employee was to escape liability of her conduct simply on the basis of provocation. A clear message need to be sent to her and others that abusive language whose intent is undermining and insult their superiors cannot be tolerated.

Cost

37] It is trite that in terms of section 162 of the LRA, costs are governed by the principles of fairness and the law. In the circumstances of this case, it seems to me that it was not unreasonable for the respondent to oppose this application. It would therefore in those circumstances be unfair to allow costs to follow the result.

38] It cannot be disputed that it took a considerably long time to bring this matter to finality. It seems to me that the major contributory factor in this regard has to do with the process of seeking to reconstruct the record and the delay in the issuing of the award. It would in my view be unfair to deny the applicant the primary remedy only for that reason.

Order

39] In the premises, the following order is made:

39.1 The arbitration award of the second respondent made under case number PSGA 525-05/06 dated 7 May 2009 is reviewed and set aside.

39.2 The arbitration award is substituted with the following award:

- ‘1. The respondent is ordered to re-instate the applicant and issue her with a final written warning.’

39.3 In calculating the back pay that the third respondent is in terms of the reinstatement award required to make, the third respondent is entitled to take into account the seven month’s payment the applicant has already received and for which she was ordered to repay by the earlier order of the court.

39.4 There is no order as to costs.

Molahlehi J

Judge of the Labour Court of
South Africa

APPEARANCES

APPLICANT: Ndhlovu A J Attorneys

RESPONDENT: Ncube Inc Attorneys

Billiton Aluminium SA Ltd t /a Hillside Aluminium v Khanyile & others [2010] 5 BLLR 465 (2010 (5) BCLR 422) (CC)	139
Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others [2008] 12 BLLR 1129 (2009 (1) SA 390) (CC)	139
Kroukam v SA Airlink (Pty) Ltd [2005] 12 BLLR 1172 (LAC)	139
Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others [2006] 11 BLLR 1021 (SCA)	139

Footnotes

Act [96 of 1991](#). This Act was repealed by the Immigration Act [13 of 2002](#) which came into effect on 12 March 2003.

See *Rustenburg Platinum Mines Ltd (Rustenburg [Section](#)) v CCMA & others* [\[2006\] 11 BLLR 1021](#) (SCA).

[S 192\(2\)](#) of the [LRA](#).

At 38 of the indexed record.

At 76 of the indexed record.

At 77 lines 18–20 of the indexed record.

At 54 of the indexed record.

Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others 2009 (1) SA 390 and [\[2008\] 12 BLLR 1129](#) (CC) at para 36.

Equity Aviation, above, at para 39.

Billiton Aluminium SA Ltd t /a Hillside Aluminium v Khanyile & others [2010 \(5\) BCLR 422](#) (CC) [also reported at [\[2010\] 5 BLLR 465](#) (CC) – Ed].

Billiton Aluminium, above, at para 43. Compare: *Kroukam v SA Airlink (Pty) Ltd* [\[2005\] 12 BLLR 1172](#) (LAC) at 1203 para 94 and *Rustenburg Platinum Mines Ltd (Rustenburg [Section](#)) v CCMA & others* [\[2006\] 11 BLLR 1021](#) (SCA) at para 45.

S 193(1)(c) of the LRA.

S 194(1) of the LRA.

Footnote	×
	1
Act 66 of 1995.	
Footnote	×
	2
Act 96 of 1991	
Repealed Act	
×	
Act 96 of 1991 has been repealed by s 54 of Act 13 of 2002	
. This Act was repealed by the Immigration Act 13 of 2002 which came into effect on 12 March 2003.	
Footnote	×
	3
See Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others [2006] 11 BLLR 1021 (SCA).	
Footnote	×
	4
S 192(2) of the LRA.	
Footnote	×
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At 38 of the indexed record.	
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At 76 of the indexed record.	
Footnote	×
	7
At 77 lines 18–20 of the indexed record.	
Footnote	×
	8
At 54 of the indexed record.	
Footnote	×
	9
<i>Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others</i> 2009 (1) SA 390 and [2008] 12 BLLR 1129 (CC) at para 36.	
Footnote	×
	10
<i>Equity Aviation</i> , above, at para 39.	