



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1368/12

In the matter between:

SOUTH AFRICAN POST OFFICE LIMITED

Applicant

and

M SOMAN N.O

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

NESHUNZHI R B

Third Respondent

Heard: 25 November 2015

Judgment: 25 Novemeber 2015

Edited: 25 February 2016

EX-TEMPORE JUDGMENT

CELE J:

[1] This is an application brought in terms of section 145(2) of the Labour Relations Act 66 of 1995 where the applicant seeks to be granted an order which appears in the appended notice of motion and it reads thus:

‘1. That the arbitration award of 30 March 2012 by the first respondent given under case number GAJB32240/11 of the second respondent in terms of which the applicant was ordered to pay to the third respondent an amount of R532 500 be reviewed and set aside.

2. That the court substitutes the said award with an order that:

a) The dismissal of the applicant by the respondent was procedurally unfair;

b) There is no relief granted to the applicant.

Alternatively to a) and b):

c) The dismissal of the third respondent by the applicant was substantively and procedurally unfair.

d. The applicant is ordered to reinstate the applicant on the same terms and conditions applicable as at the date of dismissal on 27 October 2011.

e. The applicant is not obliged to utilise the services of, or provide any work to the third respondent for the period of reinstatement which would be an equivalent to the period he would have served from 28 October 2011 until 31 May 2012.’[sic]

- [2] The application is opposed by the third respondent in whose favour the award was issued. It remains common cause between the parties that the third respondent was an employee of the applicant as a senior manager, he was charged with an act of misconduct related to sexual harassment and his junior staff members had to come and testify at the hearing.
- [3] He was acquitted and at the time of the internal disciplinary hearing he had been placed on suspension from 2010. The acquittal of the third respondent presented a complication in the employees of the applicant in the sense that these junior employees had to continue the relationship of employment with him when he was their senior. The applicant realised that there was this problem and when it was decided to communicate the decision of the acquittal to the junior staff. A meeting was convened and a psychologist was called to counsel the staff. However, after the acquittal of the respondent, he was not reinstated to his position, he was kept on suspension until the employment was terminated by the applicant on 28 August 2011 and at that time the applicant decided to continue to pay his salaries until 31 May 2012.
- [4] The third respondent had been on a fixed term contract of employment, it was initially five years and it was extended thereafter for three years and thereafter I think for a short period but it would have ended on 31 May 2012. The third respondent felt aggrieved by this termination of employment which he classified as a dismissal. He referred an unfair dismissal dispute for conciliation and when conciliation could not resolve it, he referred it to arbitration.
- [5] The first respondent was appointed to arbitrate this dispute. A lot of facts were basically common cause and what was therefore to be decided essentially was whether or not an employer who pays

a salary to an employee is obliged to give employment or to give work to the employee that is the main principle involved in this matter.

- [6] This is so, because as I have indicated, the third respondent continued to get his salary and that salary would have taken him through to the end of the fixed term period. The second respondent having listened to the evidence decided to compensate the third respondent and I think it was an amount equal to six months compensation.
- [7] The applicant takes issue with the approach in the computation of compensation, making out a case that this was a misdirection on the part of the commissioner in that the commissioner should have realised that there was only two months left for this contract to end and if there was any kind of compensation it would have been limited at most to the two months period of time.
- [8] Secondly, that the third respondent had not testified and not given any evidence and therefore there was no rationale or basis on which any kind of compensation could be determined on such evidence. Therefore the compensation was merely based on speculation on what kind of increment there was likely to be in the salary of the third respondent.
- [9] The third respondent opposes this application and today Mr Moshwana, appearing for the third respondent, has brought to my attention the important decision in the case of *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*¹ It is appropriate in this case, paragraphs 21 to 23 to the extent relevant read:

- [21] Where a dismissed employee does not seek reinstatement or re-employment or where reinstatement or re-employment is not an appropriate remedy as provided for in s193(2) of the LRA, or where

¹ [2015] 11 BLLR 1081 (LAC).

only compensatory relief is sought for a claim of unfair dismissal or an automatically unfair dismissal, then compensation sought and ordered in terms of the LRA is limited in terms of s194. The limit on compensation for a dismissal found to be automatically unfair is what the dismissed employee would have earned over a period of 24 months. However, before one sets out how to calculate what the appropriate compensation is, it is important to consider what is understood by compensation under the LRA. As a starting point, compensation under the LRA must not be confused or conflated with compensation as understood in the laws of contracts or delict. As pointed out in *Trotman and Another v Edwick*,²

*'A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he had sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony had been diminished by such conduct should be restored to him.'*³

[22] The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that s/he has suffered.⁴ The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not to be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.

[23] Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the

² 1951 (1) SA 443 (A).

³ At 449 B-C.

⁴ An employee who has been subjected to an unfair labour practice or unfairly dismissed and who has immediately found other better employment suffers no loss but may still be entitled to compensation under the LRA.

employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a *solatium*⁵ and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated.⁶ The *solatium* must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising⁷ the employer. It is not however a token amount hence the need for it to be "just and equitable" and to this end salary is used as one of the tools to determine what is "just and equitable".

[10] This judgment indicates to me that the reliance on a salary when compensation is arrived at is a complex matter. It is merely a guide but one should not base a review merely because of how a salary has been used as means of compensation and the complexity involved in the computation of compensation is clearly indicated in paragraph 24 of this judgment.

[11] In my view, notwithstanding the fact that the third respondent did not testify at the arbitration, the commissioner was still entitled to find a means of compensating the employer, the third respondent who had been embarrassed in the manner that he had been dismissed. The fact that his remaining part of the contract was only two months is not much of a relevant consideration.

[12] I am not of the view that no commissioner could have

⁵ This was first raised in *Johnson and Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC) with regard to procedurally unfair dismissals.

⁶ The LRA and the EEA in matter such as this give effect to the fair labour practice right entrenched in the Constitution of the Republic of South Africa Act 108 of 1996.

⁷ We do not need to enter into the debate on whether or not *solatium* contains a penal element suffice to say that the monetary prejudice the employee suffers must equate to some form of a punitive element but not a penalty in the context of criminal and criminal procedural laws. Compare S Vettori "The Role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals" PER/PELJ 2012 (15)4 102/231-123/231 when he says "*The cap on compensation for automatically unfair dismissal is double that of "ordinary dismissal", namely 24 months' salary as opposed to 12 months' salary. Perhaps this could be construed as an intention on the part of the legislature to introduce a punitive element in the amount of compensation awarded for automatically unfair dismissals since these reasons for dismissal seem to be morally reprehensible and repulsive to our sense of justice.*" At 109/231.

compensated the third respondent to the extent that the second respondent did. Accordingly it has not been shown to me that the decision reached by the second respondent in compensating the third respondent, is visited by any defect.

[13] I therefore make the following order:

14.1 The review application is dismissed.

14.2 The applicant is to pay the costs. .

CELE, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. EJ Van Rooyen-Steenkamp, instructed by Adams and
Adams

For the Respondent: Mr Moshwana of Mohlaba Moshwana Inc.