



Not reportable

THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case no: JR 2533/14

In the matter between:

PANNIERS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

JOHANN E PRETORIUS N.O.

Second Respondent

GUIDLLE THOMAS HLONGWANE

Third Respondent

Heard: 28 February 2017

Delivered: 29 March 2017

Summary: (Review-unopposed-condonation- compensation disproportionate relative to gravity of unfairness)

JUDGMENT

LAGRANGE J

- [1] This is an unopposed review application in which the review application was filed one day late. The applicant has applied for condonation for the late filing of the review. In view of the minimal delay and my assessment of the merits which are dealt with below there is no reason why condonation should not be granted.
- [2] The arbitrator found that the third respondent had been substantively and procedurally unfairly dismissed and ordered the applicant to pay him eight months compensation.
- [3] The arbitrator was sceptical of the employer's reasoning that it was compelled to retrench the third respondent based on operational requirements for financial reasons when he was the only person out of a workforce of 65 who was retrenched, particularly in the absence of the employer providing any financial information about the specific impact the retrenchment would have in addressing its financial difficulties. During the consultation process, the third respondent had said that he was willing to be placed in any position in the warehouse. He had previously been employed as a forklift driver in the warehouse before he was transferred to the position of a logistics assistant. The employer had claimed that it had looked at other positions but could not spare anyone else.
- [4] The employer had conceded that the third respondent had said he was willing to be placed in any position in the warehouse as an alternative to dismissal that it did not have any position available for. Because he was the last person employed in the logistics department, he was selected for retrenchment on that basis. The third respondent agreed that his salary had increased by R 1500 per month as a logistics assistant but that his payslip did not reflect that, this was a permanent move because it still described him as a forklift driver. The evidence of the respondent was that, another person replaced him as a forklift driver when he was moved out of the warehouse. When the third respondent asked why he could not simply have been returned to his previous position as a forklift driver, the response was simply that there was already a person filling that position and an additional forklift driver was not needed. It is fairly obvious that the

respondent took a very narrow view of selection criteria and did not consider whether the new forklift driver should be the one to be retrenched instead of the longer serving employee being the third respondent.

- [5] The evidence¹ also tended to show that the consultation process was an extremely narrow one focusing on the third respondent himself and it is difficult to escape the sense that although the applicant's financial problem was stated in broad terms, it had effectively closed its mind to considering anyone else for retrenchment except the third respondent because he was the only person they consulted with. Further, the consultation with the third respondent itself appeared to have a narrow focus because the applicant appeared to have assumed that a general discussion at a staff meeting about the company's possession at which retrenchments had not been mentioned, formed part of the consultation process it then instituted with the third respondent. There was no evidence to suggest that the applicant had responded to the third respondent's suggestions of alternative employment in the warehouse, which is at odds with a meaningful engagement process in which an employer is expected to explain its inability to consider alternatives.
- [6] The only grounds of review the court can consider are those set out in the founding affidavit. In essence, these are not very different from grounds of appeal and it is questionable whether they satisfy the requirement that, not only must they show that the arbitrator's evaluation of the evidence failed to take into account material factors but that the failure to consider such factors necessarily meant that arbitrator could not have arrived at the conclusions he did if those factors had been considered.²
- [7] In summary, the grounds of review set out in the founding affidavit are that:

7.1 The arbitrator failed to realise that there was substantial compliance with the provisions of section 189.

¹ Note: only the transcript of the arbitration was filed as a record in the proceedings.

² See e.g. *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 943 (LAC) at 950, para [21].

- 7.2 The arbitrator failed to appreciate that the third respondent had been paid to severance, notice pay and leave pay owing to him.
- 7.3 The arbitrator failed to appreciate that the evidence that there was no alternative position for the third respondent and that proposed alternatives would not have been compatible with the applicant's financial position.
- 7.4 The arbitrator failed to appreciate that there was a valid reason for the dismissal in view of the uncontested financial position of the applicant and that the third respondent's post was the only post "in danger of retrenchment" and there were no other suitable alternatives.
- 7.5 The arbitrator's award of eight months compensation was excessive given that the applicant had complied with its obligations to pay severance notice pay and leave pay and failed to have regard to the financial difficulties suffered by the applicant.

[8] On considering the grounds of review, I am satisfied that:

- 8.1 It appears that the arbitrator felt that the respondent did not seriously engage in the question of alternatives to retrench the third respondent in the sense that it did not seriously consider his request to be placed in any position in the warehouse. In this context, even if the applicant had not specifically mentioned his previous position as a forklift driver, that obviously was a post he was fit to fill and no explanation was provided other than the fact that there was someone in the post. If the applicant had indeed been committed to the LIFO principle, it is inexplicable why it did not consider the more recently appointed forklift driver as an alternative candidate for retrenchment.
- 8.2 It cannot be said that merely because an employer cites financial difficulties that it follows that it needed to retrench one employee. When the applicant's witness was asked to what extent the third respondent's retrenchment had assisted in alleviating its financial position, the question was avoided. The arbitrator sensed a disconnection between the broad financial problem stated by the

applicant and the retrenchment of the third respondent as a solution. I do not think that was an unreasonable inference to draw.

8.3 The fact that the applicant had complied with its other statutory obligations regarding payments due on termination where the reason for termination is operational requirements has no bearing on the fairness of the retrenchment, since the applicant is merely complying with its other legal obligations. The issue before the arbitrator was simply whether or not the retrenchment was fair.

8.4 However, on the question of the compensation of eight months remuneration given that the applicant had been employed for three years prior to his retrenchment, the level of compensation does seem somewhat disproportionate in relation to the gravity of the applicant's failure to act fairly. This was not a case in which the retrenchment process was entirely perfunctory or where there was no rationale at all for embarking on a retrenchment exercise. The principal sense in which the process was wanting was in the employer's failure to properly explore alternatives and in adopting a very narrow approach to the ambit of consultations with the third respondent. In the circumstances and given the applicant's length of service, the award of eight months compensation is hard to justify as a reasonable exercise of the arbitrator's discretion.

[9] In the circumstances, the award stands to be reviewed only in respect of the quantum of compensation, which is reduced to four and a half months' remuneration

Order

[10] The award of compensation of eight months' salary in the arbitration award of the second respondent dated 5 November 2015 issued under case number GATW 9989-15, is reviewed and set aside and paragraph 39 a) of the award is replaced with the following:

"a) The respondent Panniers (Pty) Ltd, must pay the applicant, Mr Guiddle Thomas Hlongwane, compensation of four and a half months' salary, calculated as follows: $R\ 6,500-00 \times 4.5 = R\ 29,250-00$.

[11] The substituted amount of compensation in paragraph [10] above must be paid within 14 days of receipt of this judgement.

[12] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

APPLICANT:

N Mahommed of Nadeem Mahomed
Attorneys

THIRD RESPONDENT:

No appearance

LABOUR COURT