



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 06/16

In the matter between:

ROAD TRAFFIC MANAGEMENT CORPORATION

Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

ELSABE HARMSE N.O

Second Respondent

B MOTJOTOA

Third Respondent

Heard: 12 October 2017

Delivered: 19 October 2017

Summary: Review of an award ordering the payment of compensation. Single ground for review relates to the amount of compensation awarded. Discretion the court is not to interfere with unless the arbitrator acted capriciously or biased or upon a wrong principle or not for a substantial reason or adopted an incorrect approach. No case is made out to justify interference in the discretion that was exercised.

JUDGMENT

PRINSLOO. JIntroduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 15 October 2015 wherein the Second Respondent (the arbitrator) found the Third Respondent's dismissal substantively and procedurally unfair and ordered the Applicant to pay him compensation equivalent to ten months' remuneration. In the notice of motion, the relief sought was for an order to substitute the award with an order that the dismissal was procedurally and substantively fair. However, the Applicant did not challenge the arbitrator's findings on substantive and procedural fairness and effectively sought only a reduction of the amount of compensation awarded.
- [2] The Third Respondent (the employee) opposed the application.

Background facts

- [3] The employee applied for a position of senior inspector, for which position he was interviewed. During the interview the employee disclosed that he was dismissed by his previous employer, the Rustenburg Municipality due to strike related misconduct. After the interview the Applicant appointed Siyaya Placements to do a background check on the employee and on 24 April 2015 the employee signed the consent form wherein he gave Siyaya Placements a mandate and consent to verify certain information including qualifications, criminal record and other personal information.
- [4] On 8 May 2015 the Applicant issued an offer of appointment as senior inspector to the employee, subject to the verification of educational qualifications, citizenship, criminal record, reference checks, security vetting and any matter that might be considered to be materially defective.
- [5] On 9 May 2015 the employee accepted the offer, subject to the verification of the aforesaid factors and indicated that his date of assumption of duty would be 1 June 2015. The employee resigned from his position as security supervisor at Momentus Energy on 13 May 2015 to take up employment with the Applicant on 1 June 2015.

- [6] The employee's version was that he went through all the vetting procedures required by the Applicant and when he received the formal offer of employment on 8 May 2015, he accepted all to be in order.
- [7] On 29 May 2015 the Applicant addressed another letter to the employee wherein his letter of appointment was nullified because the Rustenburg Municipality confirmed on 28 May 2015 that the employee was dismissed for unacceptable conduct in that he failed to provide supervisory advice to his colleagues so that they may not embark on illegal unprotected strike action as well as entering the premises without permission.
- [8] The employee referred an unfair dismissal dispute to the First Respondent Commission for Conciliation, Mediation and Arbitration (CCMA) and the matter was arbitrated on 10 September and 14 October 2015. The issue to be decided was whether the employee's dismissal was procedurally and substantively fair or not and if not, the appropriate remedy to be awarded to him.

The arbitrator's findings and grounds for review

- [9] In respect of procedural fairness, the arbitrator found that the Applicant failed to conduct a proper investigation into the factual circumstances of the employee's case, no charges were formulated, no hearing whatsoever was held and the Applicant did not follow due process before dismissing the employee. The employee's dismissal was found to be procedurally unfair.
- [10] In this review application the Applicant takes no issue with the arbitrator's finding that the employee was procedurally unfairly dismissed.
- [11] In respect of substantive fairness, the arbitrator found that the employee complied with what was expected or required of him to do in terms of the contract and the law and the fact that he did not provide the Applicant with the full particulars of his pending Labour Court case or the full transcript of his disciplinary hearing, which was not in his possession, did not amount to a material non-disclosure. There was no secret or new information pertinent to the employee's previous dismissal which was unknown to the Applicant. The arbitrator further held that if the Applicant treated this matter as serious as it

wanted the arbitrator to believe it was, it would not in the first place have made an offer of employment to the employee.

- [12] The arbitrator found the employee's dismissal substantively unfair as the Applicant failed to prove that it had a valid reason to dismiss the employee and did not adduce any evidence to justify his dismissal.
- [13] The Applicant also takes no issue with the arbitrator's finding that the employee was substantively unfairly dismissed.
- [14] The only ground for review raised by the Applicant is in respect of the compensation awarded.
- [15] The arbitrator ordered the Applicant to pay the employee compensation equivalent to ten months' compensation, after she found his dismissal substantively and procedurally unfair. The arbitrator considered that the employee resigned from his previous employment to start working for the Applicant and that he was in a far worse off position due to the Applicant's conduct. The arbitrator considered the fact that the employee suffered severe prejudice as a result of what transpired. In her summary of the employee's evidence the arbitrator recorded his version that the situation had a negative impact on him, that it caused him stress and that he became ill as a result of it.
- [16] The arbitrator took a dim view of the Applicant's abhorrent and unlawful conduct and the total disregard for the law, with specific reference to the Labour Relations Act (the Act)¹.
- [17] The Applicant's only ground for review is that the arbitrator committed gross misconduct in the execution of her duties in that she failed to take into account the relevant factors in deciding just and equitable compensation and she failed to apply her mind to the justness and equitability of compensation when she awarded ten months' compensation.
- [18] The one part of the ground for review is that the arbitrator failed to take into account relevant factors in deciding just and equitable compensation. In the heads of argument filed by the Applicant it was submitted that the employee was not entitled to a *solatium* for his injured feeling and humiliation suffered at

¹ Act 66 of 1995 as amended.

the hands of the Applicant as there was no evidence from the employee to support such a finding and in the absence of any such evidence, the arbitration award stands to be set aside.

- [19] In argument before this Court Mr Botha for the Applicant correctly conceded that upon a perusal of the transcribed record and the arbitration award, there is no merit in the allegation that there was no evidence adduced in respect of the employee's suffering and that the arbitrator did not consider relevant factors. It is evident that the evidence was indeed adduced and that the arbitrator considered the relevant factors.
- [20] Mr Botha persisted with the second part of the ground for review namely that the arbitrator failed to apply her mind to the justness and equitability of compensation when she awarded ten months' compensation. Mr Botha conceded that since the employee's dismissal was substantively and procedurally unfair, he was indeed entitled to compensation, but ten months' compensation is too much. The Applicant is of the view that the employee was entitled to compensation of 3 – 5 months' remuneration.

The test to be applied

- [21] Section 194 of the Act provides for an arbitrator to award compensation in the event that an employee's dismissal is found to be unfair and for such compensation to be just and equitable in all the circumstances and not to exceed 12 months' remuneration.
- [22] It is trite that an arbitrator has a discretion in awarding compensation, taking into consideration all the circumstances and that this discretion is a discretion in the strict sense, also known as a true discretion.
- [23] In *Fouldien and others v House of Trucks (Pty) Ltd*² it was held that:

'The right to compensation is a contingent right which rests on the finding regarding the substantive and procedural fairness of a dismissal. It is a discretionary remedy, although it is hedged by limitations on the quantum which can be ordered. It is, of course, a discretion which must be exercised judicially.'

² (2002) 23 ILJ 2259 (LC) at para 16.

[24] The question is when can this Court interfere with the true discretion the arbitrator exercised when she determined the quantum of compensation awarded.

[25] In *Dr DC Kemp t/a Centralmed v Rawlins*³ Waglay JA (as he then was) held that:

'The importance of the distinction between a discretion that is exercised in terms of section 193(1)(c) and a discretion that is exercised in terms of section 194(1) is how the reviewing court will consider the matter. When the discretion that is challenged is a discretion such as the one exercised in terms of section 194(1) the test that the court, called upon to interfere with the discretion, will apply is to evaluate whether the decision maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether or not the decision maker adopted an incorrect approach'.

[26] In *MEC for Environmental Affairs and Development Planning v Clairison's CC*⁴ the Supreme Court of Appeal described the test that applies to the review of a discretion as follows:

'When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.

..... The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere'.

[27] In short, provided the decision-maker acted in good faith, the threshold for interference is substantive unreasonableness⁵, as per the test set out in *Sidumo v Rustenburg Platinum Mines Ltd and others*⁶.

³ [2009] 11 BLLR 1027 (LAC).

⁴ 2013 (6) SA 235 (SCA) paras 18 and 20.

⁵ Reviews in the Labour Court, A Myburgh and C Bosch, 2016 page 349 – 350.

- [28] In its review application the Applicant did no more than to make a bold and unsubstantiated allegation that the arbitrator failed to take into account relevant factors in deciding just and equitable compensation, which Mr Botha conceded was without merit.
- [29] The remaining case is nothing but a suggestion that compensation of ten months is too much. Whether the amount of compensation awarded is unacceptable to the Applicant is irrelevant as the true enquiry is whether the arbitrator exercised her discretion judicially.
- [30] It is trite that the courts should not too readily interfere with the quantum of compensation where the quantum was determined by the exercising of a discretion. However, in cases where the discretion was not exercised judicially or where it was exercised capriciously or biased or based on the wrong principle or approach or not for a substantial reason, the court may interfere.
- [31] In the application before this Court the Applicant did not make a single averment to the effect that the arbitrator acted capriciously, or upon the wrong principle, or with bias, or that the arbitrator adopted an incorrect approach. All that is evident from the application before me is the Applicant's unhappiness that it was ordered to pay ten months' remuneration as compensation.
- [32] *In casu* the arbitrator was faced with a case where the employer followed no process and afforded the employee no opportunity to be heard before he was dismissed. Furthermore, the Applicant was aware that the employee was dismissed for strike related misconduct and after he was interviewed in March 2015, a vetting and checking process was followed where after an offer was made to the employee in May 2015. The employee resigned from his job to take up the offer and a few days before he was to assume duty, he was dismissed.
- [33] The employee testified about the fact that he was devastated and almost lost everything because of the conduct of the Applicant. The arbitrator considered that there was no attempt whatsoever to comply with the Act, in fact the Applicant showed a total disregard for the law and acted in an abhorrent manner.

^{6 6} 2007 28 ILJ 2405 (CC) at para 110.

- [34] The Applicant and its officials who acted in this manner when dealing with the employee, disregarded the applicable laws and the basic principles of fairness and they are to be blamed for the outcome of this matter. The right to compensation is a contingent right that follows when an employee is dismissed unfairly and this should have been considered by the Applicant before dismissing the employee in the manner it did.
- [35] The Applicant is opportunistic to approach this Court to seek a reduction of the compensation awarded. In fact, this application is an abuse of process, more so where the Applicant dismally failed to make the necessary averments to support its case and where it made out no case for this Court to interfere in the discretion the arbitrator exercised.
- [36] Considering the facts, the only ground for the review and the applicable principles, I am not persuaded that this Court should interfere with the discretion exercised by the arbitrator and the award is not to be reviewed for want of reasonableness.

Costs

- [37] Mr Botha initially submitted that the issue of cost was left in the hands of the Court, but later submitted that the cost should not follow the result. Mr Botha was unable to say why the cost should not follow the result.
- [38] Mr Mokonyama for the employee submitted that the Applicant should be ordered to pay the cost. Mr Mokonyama submitted that the Applicant came to Court on one ground for review only, in Court conceded that there was no merit in the allegations made and the Applicant's only remaining concern was the amount of compensation awarded and in that regard the Applicant was unable to attack the discretion the arbitrator exercised.
- [39] This Court has a discretion in making a cost order, considering the requirements of law and fairness. In my view this is a case where interests of justice and fairness would be served by following the general rule that the cost should follow the result.
- [40] In the premises I make the following order:

Order

1. The application is dismissed with costs.

Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant: Advocate P Botha

Instructed by: Mohlaba & Moshwana Inc Attorneys

For the Third Respondent: Mr O Mokonyama of Makgale Ngwasheng
Attorneys

LABOUR COURT