



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 559/23

In matter between

MALAS (PTY) LTD

Applicant

and

COMMISSIONER JOHAN D STAPELBURG N.O.

First Respondent

**MOTOR INDUSTRIES BARGAINING
COUNCIL (MIBCO)**

Second Respondent

AHMED SAYED HOOSEN

Third Respondent

Heard: 11 February 2025

Delivered: 01 April 2025 (This judgment was handed down electronically by emailing a copy to the parties. The 01 April 2025 is deemed to be the date of delivery of this judgment).

Summary: Immaterial irregularities – effect on award as a whole – amount of compensation – reasonableness when raising amount above amount sought

JUDGMENT

RAMJI, AJIntroduction

[1] The applicant (the company) employed the third respondent (Mr Hoosen) as a product manager from 2 March 2020 until his dismissal on 11 October 2021.

[2] Mr Hoosen referred an unfair dismissal dispute to the second respondent (MIBCO). Mr Hoosen succeeded at arbitration: his dismissal was found to have been substantively unfair in an award made on 27 March 2023 (the award). Mr Hoosen, legally represented, requested relief in the form of compensation and not reinstatement. He specifically requested three months' salary as compensation and the first respondent (the commissioner) raised this to four months' salary, i.e. R98,000. The commissioner then went on to award compensation in the sum of R122,500. This is, as the company pointed out on review, amounts to five months' compensation.

[3] The company seeks an order setting aside the award and substituting it with an order that Mr Hoosen's dismissal was substantively fair, substitution with "*an order that the Court deems fit*".

[4] Mr Hoosen, who was also legally represented at MIBCO, instructed attorneys to oppose the review application. They filed a notice to oppose, and the last correspondence from Mr Hoosen's attorneys was a letter dated 23 September 2023, requesting an indulgence from the company to file an answering affidavit. There is no answering affidavit in the file, and there was no appearance for Mr Hoosen at the hearing, although the notice of set down was e-mailed to his attorneys. I therefore proceeded with the matter on an unopposed basis.

Background

[5] One of Mr Hoosen's responsibilities was to ensure timeously and accurately capturing price changes on the company's system. The company operates every day of the week and at all times of the day; hence, timeously capturing this data amounts to capturing it almost immediately.

[6] On 23 August 2021, Mr Hoosen incorrectly updated a new selling price for a particular product, with the price he entered being 70% less than the amount that he was supposed to enter (the first incident).

[7] On 8 September 2021, Mr Hoosen did not update several price increases on the system (the second incident).

[8] After the incident on 8 September 2021, the company asked Mr Hoosen to explain both incidents.

[9] In respect of the first incident, Mr Hoosen responded to the company that "[t]his was a clear error on my part when opening a batch of code for the Distribution Department". In respect of the second incident, Mr Hoosen responded that he received the instruction on 8 September 2021 at 11h58, checked the file and submitted it to his manager to check. They then discussed the instruction the following morning and Mr Hoosen captured the price changes. In his statement, Mr Hoosen stated that "[t]his should have been updated on 8th of September 2021 but was only updated on the 9th of September 2021".

[10] The company proceeded to charge Mr Hoosen with gross negligence and/or gross derelictions of duty for both incidents. He was found guilty and dismissed, hence his referral to MIBCO.

Finding of substantive unfairness

[11] I can find one irregularity in the award: the commissioner permitted Mr Hoosen to raise an argument of inconsistency even though this deviated from the issues he said that he would raise according to the pre-arbitration minute.¹

[12] To allow and then take into account inconsistency claims was erroneous, but as the Labour Appeal Court (LAC) pointed out in *Mbeje and others v Department of Health, Kwazulu-Natal and others (Mbeje)*, not every error of law warrants that a matter be set aside.² In *Mbeje*, the LAC was also faced with a situation in which a commissioner considered inconsistency in the application of discipline even though this was not stated as a fact in dispute/issue for determination in the pre-arbitration minute. The LAC further agreed with the argument that –

‘to the extent that the main issue that served before the arbitrator was about the harshness of the sanction of dismissal, it did not avail the appellants to dispute [inconsistency in the form of] the receipt of the ultimata and the notice to attend the disciplinary hearing.’³

[13] In the circumstances of this case, this irregularity is also not material: although the commissioner considered allegations of inconsistent application, this was not relevant to his findings on the first incident, and this was not the only factor considered in the second incident.

13.1 Decision on the first incident: The commissioner essentially found that dismissal was too severe a sanction, considering the small financial loss suffered by the company. The commissioner did consider how Mr Hoosen’s changes to his version regarding the first incident affected his credibility, but his credibility was not material to the commissioner’s ultimate approach.

13.2 Decision on the second incident: The commissioner found that Mr Hoosen was not negligent. The commissioner considered that no loss was suffered in the second incident by the time the issue was noticed, and the uncontroverted allegation that the delays in the second incident were caused by Mr Hoosen’s correspondence with his line manager prior to effecting the pricing changes, as opposed to inaction.

¹ *Sibiya v South African Police Service* (2022) 43 ILJ 1805 (LAC); [2022] 9 BLLR 822 (LAC) at para 30.

² (2024) 45 ILJ 2681 (LAC); [2024] 11 BLLR 1111 (LAC) at para 21.

³ *Mbeje* (above) at para 24.

[14] This is not the approach, and these are not the considerations of an unreasonable commissioner.

Compensation awarded

[15] The company complained that the commissioner awarded four months' salary (a total of R98,000), then awarded payment of a sum of R122,500, which is five months' salary. I do not understand this to amount to a reviewable error. This appears to be an obvious error that would ordinarily be resolved through an application to vary the award at MIBCO pursuant to section 144 of the Labour Relations Act⁴ (LRA) and the MIBCO dispute resolution centre rules.

[16] The second aspect of the company's challenge to the amount of compensation awarded is that the commissioner erred or acted unreasonably in making the following finding on the amount of compensation awarded:

'[C]onsidering the applicant's relatively brief period of service on the one hand, and the extent of the unfairness of his dismissal on the other hand, I do not believe the request [Mr Hoosen] made in closing for three months' remuneration is quite sufficient and instead find that four months' compensation would be just and equitable in the circumstances...'

[17] The commissioner therefore, considered two factors: length of service and the extent of the unfairness of the dismissal. The latter is listed in the CCMA Guidelines on Misconduct Arbitration (the Guidelines). The Guidelines list a further 14 factors that a commissioner "*should consider*" when determining compensation for a substantively unfair dismissal. That said, commissioners have a broad discretion when determining an amount of compensation, provided it does not exceed 12 months' pay in terms of section 194(1) of the LRA. Also, the 15 factors are a Guideline – additional factors not listed (e.g. length of service, as was considered here) may be relevant, and certain listed factors may be irrelevant.

⁴ Act 66 of 1995, as amended.

[18] The Labour Appeal Court has held that, although an arbitrator has a broader discretion when determining remedy, it is not an unfettered discretion and the exercise “*remains a value judgment subject to review by the Labour Court on the same basis as any other value judgment made by an arbitrator*”.⁵ The amount awarded in compensation must, therefore be adequately justified and justifiable.

[19] The commissioner provided his two reasons for awarding four months’ salary as compensation to Mr Hoosen. I find that these reasons are unreasonable justifications for raising the compensation to four months, and that they resulted in an unreasonable amount in compensation being awarded. The unreasonableness lies in the following:

21.1. In closing submissions on behalf of Mr Hoosen, his counsel specifically requested only three months of Mr Hoosen’s salary as compensation.

21.2. Mr Hoosen was legally represented when this relief was sought. The company was not legally represented.

21.3. It was unreasonable not to ask why Mr Hoosen’s own representatives, acting in his interests and speaking on his behalf, had determined that they did not wish to pursue reinstatement, and that three months’ compensation would be just and equitable.

21.4. At the very least, a reasonable commissioner considering awarding higher compensation than that sought by the employee would have asked (i) Mr Hoosen whether he had found another job, and if so, its terms and when he secured the job, and (ii) the company what it could afford.

21.5. The commissioner made the deviation despite himself acknowledging Mr Hoosen’s relatively brief period of service, and without acknowledging other evidence before him, including that: (i) there was no evidence of egregious conduct by the employer, (ii) procedural unfairness was not challenged, (iii) Mr Hoosen was not innocent in respect of the first incident but just that the sanction was too severe, and (iv) Mr Hoosen’s failed to state the case he made at the arbitration at the disciplinary inquiry.

21.6. The commissioner also did not consider amounts that have been granted as solatium in similar cases.

⁵ *National Union of Metalworkers of SA on behalf of Motloung and others v Polyoak Packaging (Pty) Ltd and others* (2025) 46 ILJ 552 (LAC); [2025] 3 BLLR 227 (LAC) at para 50.

[20] In the result the following order is made:

Order

1. Paragraphs 31 and 33 of the award are reviewed and set aside.
2. Paragraph 33 of the award is substituted as follows:
'The respondent, Malas (Pty) Ltd, is hereby ordered to compensate the applicant with an amount of R73,500 (less tax and other statutory deductions) on or before 10 April 2023.'
3. Save as mentioned above, the review application is dismissed.

B. Ramji

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Nathan Govender,
Human Resources Manager, Malas (Pty) Ltd

For the Respondent: No appearance