REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1567/10

In the matter between:

PSA obo AH MBIZA **Applicant**

and

OFFICE OF THE PRESIDENCY **First Respondent**

GPSSBC **Second Respondent**

MARTIN SAMBO N.O. **Third Respondent**

Heard: **21 November 2013**

Delivered: **27 November 2013**

Summary: Review – employee dismissed for incompatibility – paid out balance of fixed term contract – whether entitled to compensation).

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Mr A H Mbiza[1], was employed in the Office of the Presidency[2] as a housekeeping manager in the residence of the Deputy President. He was employed on a fixed term contract that was terminated by the first respondent. He referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council.[3] The arbitrator, Mr Martin Sambo[4], found that the employee had been dismissed, despite the employer's argument that his contract had simply terminated. The arbitrator found that the dismissal was for a fair reason, i.e. incompatibility with the then incumbent Deputy President, Ms Baleka Mbete; but that it was procedurally unfair. He ordered the employer to pay the employee compensation equivalent to three months remuneration for the procedural unfairness.

[2] The applicant has no quarrel with the arbitrator's findings on the fact that the employee was dismissed and that it was procedurally unfair, or the amount of compensation ordered in that regard. It argues that the employer failed to establish a fair reason for the dismissal (in the form of incompatibility). He seeks to have the finding on substantive unfairness reviewed and set aside, and substituted with a finding that it was not for a fair reason. He initially sought to be reinstated; at the hearing of the matter, Mr *Van der Merwe* confined the relief sought to compensation.

[3] The employer did not file a cross-review. In his heads of argument, Mr *Mokhari*, for the employer, nevertheless sought to resuscitate the argument that there was no dismissal. He went so far as to state that "the referral of a dispute of unfair dismissal to the Bargaining Council by Mbiza was ill-informed, frivolous and vexatious" and that the allegation that he was dismissed was "preposterous". Yet that is what the arbitrator found, and that finding stands unchallenged.

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[1] Mr Mbiza was represented in these proceedings by the Public Servants Association of South Africa, cited as "the applicant" on behalf of Mr Mbiza. I shall refer to Mr Mbiza as "the applicant" or "the employee".

[2] The first respondent. I shall refer to it as "the first respondent" or "the employer".

[3] The second respondent.

[4] The third respondent.

[4] At the hearing, Mr *Mokhari* quite properly abandoned the argument that he had raised in the intemperate terms quoted above. He was driven to concede that the award of the arbitrator that there was a dismissal, stands. He then curtailed his argument to deal with the question whether the employee is untitled to any compensation, should the dismissal – which is common cause – be found to have been unfair (i.e. not for a fair reason, as its procedural unfairness is also common cause in terms of the undisputed arbitration award on that aspect).

[5] At the commencement of the hearing Mr *Van der Merwe* also clarified the applicant's position and drew the parameters of the argument before the Court. He reiterated that both parties accept the arbitrator's findings that the employee had been dismissed; that it was procedurally unfair; and the award of three months' compensation for that unfair aspect of the dismissal. However, the applicant seeks to review the finding that the dismissal was for a fair reason. He asks the Court to substitute that finding with a finding that the dismissal was not for a fair reason; and to award the employee appropriate compensation. The amount of compensation should take into account that the employee was deprived of the opportunity to establish a rapport with the then newly appointed Deputy President, Ms Mbete.

Condonation

[6] The application for review was delivered one week late. The applicant offered a reasonable explanation thereor. Given the view I have taken on the merits, he had good prospects of success. Condonation is granted in the interests of justice.

Background facts

[7] The employee was initially appointed on a fixed term contract in December 2004. It was initially for a period of six months, but thereafter it was coupled to the term of the office of the Deputy President from time to time. The contract was amended as follows in February 2006:

> "The parties hereby agree that the employee's period of service be extended from 1 March 2006 until two months after the end of term of office of the Deputy President, Ms Phumzile Mlambo-Ngcuka."

[8] The employee started working for then Deputy President Jacob Zuma. He continued to work for the next Deputy President, Ms Phumzile Mlambo-Ngcuka. She resigned in September 2008 and was replaced by Ms Mbete. In December 2008 the first respondent's Director: Accommodation and Household, Ms Xoliswa Boqwana, informed the employee that his contract would be extended until July 2009.

[9] On 8 December 2008 Ms Boqwana told the employee that his contract was terminated due to "incompetence". Two days later she advised him that his contract was terminated, instead, due to "incompatibility" with the Deputy President. In her answering affidavit, Ms Boqwana says that the reason of "incompetence" she gave to the employee for terminating his contract was an error. Instead, it was incompatibility.

[10] On 18 December 2008 the respondent gave the employee a letter under the signature of its Director-General. It reads as follows:

> "**TERMINATION OF EMPLOYMENT CONTRACT: YOURSELF**
>
> This letter serves as notice that your employment contract shall be terminated on 31 January 2009 in terms of Clause 7 of your original contract signed on 6 December 2004 read with the Amendment Agreement dated 24 February 2006. For ease of reference the Amended Agreement stipulates that your original contract is extended until two (2) months after the end of term of the Office of the Deputy President: Ms Phumzile Mlambo-Ngcuka.
>
> As you are aware Ms Phumzile Mlambo-Ngcuka resigned on 24 September 2008 resulting in your contract ending on 30 November 2008. Approval had already been granted that your contract be extended until 31 July 2009 and you had already been informed of this.
>
> As the approval had already been communicated to you, the Office will honor [*sic*] your salary until end of 31 July 2009. It is however required that you should leave the Office with immediate effect."

[11] The employee referred an unfair dismissal dispute to the Bargaining Council.

The arbitration award

[12] The arbitrator correctly pointed out that, in cases where dismissal is disputed, the onus to prove the existence of a dismissal rests on the employee. The arbitrator noted that both witnesses for the employee as well as the respondent's witness, Ms Boqwana, stated that the reason for the termination of the employee's contract was incompatibility. The arbitrator concluded that there was a dismissal; and that the employer had created a legitimate expectation that the employee's contract would be renewed in terms of s 186(1)(b) of the Labour Relations Act.[5]

[13] These findings stand uncontested, as does the arbitrator's finding that the dismissal was procedurally unfair.

[14] The arbitrator then found that the dismissal was for a fair reason, being incompatibility. It is this finding that the applicant attacks on the grounds of unreasonableness.

Review grounds

[15] The applicant submits that there was simply no basis for the arbitrator's finding that the employee was incompatible with the new Deputy President, Ms Mbete. In the absence of any such evidence, the arbitrator's conclusion cannot be a reasonable one.

Evaluation / Analysis

[16] The arbitrator starts off by referring to the correct test in cases of alleged incompatibility. He refers to it as a species of incapacity and, referring to Le Roux & Van Niekerk's *The South African Law of Unfair Dismissal,* notes that it relates to the relationship of an employee and other co-workers within the employment environment, regarding the employee's inability or failure to maintain cordial and harmonious relationships with his peers. With reference to the old Industrial Court cases of *Lubke v*

[5] Act 66 of 1995 (the LRA).

Protective Packaging (Pty) Ltd[6] and *Hopwood v Spanjaard Ltd*[7] the arbitrator noted that the golden rule is that, prior to reaching a decision to dismiss, an employer must make some "sensible, practical and genuine efforts to effect an improvement in interpersonal relationships when dealing with a manager whose work is otherwise perfectly satisfactory." He found that the respondent had not done this and that the dismissal was procedurally unfair. He then turned to the question whether the dismissal was for a fair reason.

Was the dismissal for a fair reason?

[17] The arbitrator summed up Ms Boqwana's evidence to say that:

> "There must be rapport between the principal [i.e. the Deputy President] and the household manager since they work in the personal sphere of the principal. He or she must be comfortable that the employee could be in their bedroom. The applicant was incompatible with Ms Mbete. His contract was terminated due to incompatibility..."

[18] The arbitrator then makes the following findings:

> "It is probable that in this case there was no intolerable conduct on the part of the employee but there could have been uncomfortability [*sic*] or personality differences. The respondent only led testimony that there was incompatibility between the applicant and the principal [i.e. Ms Mbete]. Incompatibility in this instance is comparable to a non-working marriage. It takes one party to decide that the marriage is not working, there is nothing they can do if the other does not want to continue.
>
> Looking at the level of office, the nature of the work and the level of trust and confidence expected, I feel that incompatibility would be a fair ground to terminate the contract. It is therefore my finding that the dismissal was procedurally fair but for a fair reason."

[19] The problem with this finding is that there is no evidentiary basis for it. Ms Mbete did not testify. Only Ms Boqwana did, and she did not even mention incompatibility with Ms Mbete as the reason for dismissal in her evidence in chief. Under cross-examination by the employee's representative, Ms

[6] (1994) 15 *ILJ* 422 (IC) 429 D-E.

[7] [1996] 2 BLLR 187 (IC) 196-7.

Jugroop, this is the extent of her testimony referring to any alleged incompatibility between the employee and Ms Mbete:

> "Ms Jugroop: Okay. So what you are saying now, is that the employee who is sitting here, did not have a good rapport with Ms Mbete?
>
> Ms Boqwana: That is what he was informed of.
>
> Ms Jugroop: That is what he was informed, that he was basically not compatible to her?
>
> Ms Boqwana: Yes, incompatible.
>
> Ms Jugroop: Incompatible, sorry, and based on the incompatibility, his contract was not renewed?
>
> Ms Boqwana: Yes, I think that is the term [iaudible]."

[20] The first respondent laid no basis for a finding that the relationship between the employee and Ms Mbete was indeed incompatible. There is simply no evidentiary basis for such a finding.

Is the arbitration award reviewable?

[21] Commenting on the review test set out in *Sidumo*[8], i.e. whether the award was one that a reasonable decision-maker could not reach, the SCA in *Herholdt v Nedbank Ltd*[9] commented:

> "That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator."

[22] And in the subsequent and recent judgment of the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & others*[10] Waglay JP further commented:

> "Where the arbitrator fails to have regard to material facts it is likely that he or she will fail to arrive at a reasonable decision... But again, this is

[8] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 110.

[9] 2013 (6) SA 294 (SCA); [2013] 11 BLLR 1074 (SCA) para 12.

[10] Case no JA 2/2012, 4 November 2013 at para 21.

considered on the totality of the evidence, not on a fragmented, piecemeal basis."

[23] In the case before this Court, there was simply no evidence to sustain the arbitrator's finding that the employer had discharged the onus of showing that there was a fair reason for dismissal. That stated reason was alleged incompatibility between the employee and Ms Mbete. Yet there was no evidence of such incompatibility before the arbitrator, nor was the employee given any opportunity to establish a rapport with Ms Mbete, should it have been found absent. That part of the award must be reviewed and set aside.

Remit or substitute?

[24] The part of the award finding that there was a fair reason for dismissal, is reviewable. The employer did not establish a fair reason for dismissal. Hence, the dismissal is unfair. But what is the appropriate remedy?

[25] The first question to be asked is whether that is something to be determined by the Bargaining Council or by this Court. Ideally, it should have been decided by the arbitrator acting under the auspices of the Council. But it will serve little purpose to remit this dispute for a decision only on that crisp point. The arbitrator has already decided that the employee had been dismissed for incompatibility; that it was procedurally unfair; and that the employer had to pay three months' compensation for the procedural unfairness. Those findings stand unchallenged. This Court has now also found that the dismissal was not for a fair reason. All the relevant information to decide on an appropriate amount of compensation is before this Court, bearing in mind that the employee no longer seeks reinstatement. No further evidence is therefore necessary to decide whether that would be an appropriate or even a competent remedy.

Compensation

[26] The starting point is s 193 of the LRA:

"193. Remedies for unfair dismissal and unfair labour practice.—(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 re-instate 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 re-instate or re-employ the employee unless—

(a) the employee does not wish to be re-instated 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 re-instate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure."

[27] In this case, the employee does not wish to be reinstated. The amount of compensation to be paid in terms of s 193 (1) (c) must then be decided. And in order to do so, the Court must consider s 194:

"194. Limits on compensation.—(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."

[28] The provisions of s 195 are of specific importance in this case:

"195. Compensation is in addition to any other amount.—An order or award of compensation made in terms of this Chapter is in addition to, and

> not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment."

[29] It is clear that compensation in terms of these sections cannot simply be equated to damages. And more specifically, compensation is in addition to any amount to which the employee is entitled in terms of his contract of employment. Mr *Mokhari* argued that the employee had been paid the amount he is entitled to in terms of clause 7(d) of his contract of employment. That clause reads:

> "Unless stated otherwise elsewhere the Employee will, upon termination of this contract, for whatever reason, be paid pro rata the amount referred to in clause 3.

Clause 3, in turn, refers to his monthly salary. It is common cause that he was paid that salary until his contract was terminated with effect from 31 July 2009. But that does not mean that he is not entitled to compensation, as Mr *Mokhari* argued. One only needs to read the plain language of section 195 to realise the fallacy of that argument in the context of the law of unfair dismissal as opposed to the common law of contract.

[30] What, then, would be an appropriate amount of compensation? Compensation under s 194 is not patrimonial but in the nature of a *solatium.*[11]

[31] In this case, the employee seeks compensation for something lost. That "something lost" is the opportunity to fulfil the legitimate expectation that he had for his contract to be renewed. Had he been given that opportunity, Mr *Van der Merwe* argued, he may well have been able to establish the proper rapport between him and Ms Mbete, as he did with the two previous deputy presidents.

[32] It is difficult to put a value to that lost opportunity in the form of compensation. In attempting to do so, I keep in mind the following factors:

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[11] *Parry v Astral Operations Ltd* [2005] 10 BLLR 989 (LC) para 91; *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* [1998] 12 BLLR 1209 (LAC); (1999) 20 *ILJ* 89 (LAC) para 37 – 41. (*Parry* was overturned on appeal, but on the basis that the Labour Court did not have extraterritorial jurisdiction: *Astral Operations Ltd v Parry* [2008] ZALAC 29).

32.1 The arbitrator has already ordered the respondent to pay the employee three months' compensation for procedural unfairness;

32.2 the employee has been paid until July 2009, even though he left the employ of the respondent in January 2009;

32.3 the maximum amount of compensation payable in terms of section 194 (one) is the equivalent of 12 months' remuneration.

[33] I also take into account that the employee's dignity and the freedom to engage in productive work have been impaired by the unfairness of his dismissal.[12]

[34] Having regard to all these factors, I am of the opinion that compensation equivalent to three months' remuneration will be just and equitable in all the circumstances.

Conclusion

[35] The application for review must succeed. Because there is no application for cross review, the arbitrator's award stands with regard to the findings that there is a dismissal and that it was procedurally unfair. The finding that it was for a fair reason, is reviewed and set aside. It is replaced with a finding that it was not for a fair reason; and the respondent is ordered to pay the employee compensation equivalent to three months' remuneration in respect of that finding.

Costs

[36] Both parties asked that costs should follow the result. I agree. The employee no longer wishes to be reinstated and there is no longer any relationship between the parties.

Order

[37] I therefore make the following order:

[12] *Mogothle v Premier of the North West Province* [2009] 4 BLLR 331 (LC) para [47]; *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA), [2004] 1 All SA 21 (SCA) para [27];

37.1 The award of the second respondent, Commissioner Martin Sambo, is reviewed and set aside to the extent that he found that the dismissal of the employee, Mr A H Mbiza, was for a fair reason.

37.2 The award is substituted with an award that the dismissal of the employee was substantively unfair.

37.3 The first respondent, the Office of the Presidency, is ordered to pay the employee, Mr A H Mbiza, compensation equivalent to three months' remuneration, calculated at his rate of remuneration on 31 July 2009.

37.4 The first respondent is ordered to pay the applicant's costs.

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Steenkamp J

APPEARANCES

APPLICANT:	H A van der Merwe Instructed by Martins Weir-Smith Inc, Sandton.
FIRST RESPONDENT:	W R Mokhari SC Instructed by the State Attorney, Pretoria.