REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Of interest to other judges

Case no: PR 68/2014

In the matter between:

PHUMULELE JONAS	**First Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
EDGAR MQUQO *N.O.*	**Second Respondent**
SOUTH AFRICAN SOCIAL DEVELOPMENT AGENCY	**Third Respondent**
MINISTER OF SOCIAL DEVELOPMENT	**Fourth Respondent**

Heard: 6 September 2016

Delivered: 9 September 2016

Summary: (review-substantively unfair dismissal-appropriate relief)

JUDGMENT

LAGRANGE J

Introduction

[1] In this review application, the applicant seeks to review and set aside an arbitration award in terms of which his dismissal was found to be substantively and procedurally unfair. His complaint on review concerns the relief awarded by the arbitrator. He contends that the arbitrator committed a reviewable irregularity in not reinstating him and only awarding him 10 months' remuneration as compensation.

[2] In the alternative, he claims that his remuneration was incorrectly calculated and accordingly the quantum he was awarded should be altered. He points out that although the arbitrator was clearly aware that his monthly salary was R45, 000 per month and not R 33,650 per month, the arbitrator erroneously calculated his compensation based on the latter amount. Strictly speaking, the correction of that figure is really a matter that should be dealt with by way of a variation order, but I accept that it would be obviously inconsistent for the applicant to attempt to review and set aside the award on the one hand and on the other simultaneously seek to vary it. In any event, the respondent accepts that the arbitrator erred in this regard does not oppose the alternative relief, but opposes the application to set aside the order of compensation and replace it with an order of the reinstatement

[3] The respondent filed its answering affidavit over two months late, though it did seek an indulgence from the applicant which was partially granted. Although the answering affidavit was considerably late I am satisfied that the respondent was not unduly dragging its heels and was attempting to deal with the matter. There is also no prejudice to the applicant complained of by him as a result of the delay. In the circumstances the respondent's late filing of its answering affidavit is condoned.

[4] The applicant had been dismissed principally as a result of grievances lodged by his subordinates for his alleged disrespect, abusive and insolent behavior towards some of them and for improperly, disgracefully and an acceptably shouting at some of them in front of clients or members of the

public. He had also been charged for prejudicing the administration, discipline and efficiency of the agency, in that he intimidate it and victimized employees under his supervision. The nub of the arbitrator's conclusion on the evidence was forthright:

> "In the circumstances, I cannot find any evidence to persuade me to find in favour of the respondent. The evidence in fact gives the overwhelming impression that there are a few dishonest employees which are trying to paint the applicant in a bad light. I find the dismissal to be substantively unfair."

[5] The key question is whether the arbitrator committed a reviewable irregularity by not reinstating the applicant, which is the primary remedy for a substantively unfair dismissal. In order to warrant his non-reinstatement, the arbitrator needed sufficient reasons to justify one of the grounds for not doing so in terms of section 193 (2) of the LRA. Although the arbitrator referred to section 193 (2) (b) and concluded that it was not reasonably practicable to reinstate or re-employ him, it is apparent that his real finding on the facts was that it would be intolerable to reinstate him. Accordingly, the reference to section 193 (2) (b) was misplaced. In one sense, this was a misdirection by the arbitrator in that he applied the incorrect test under that subsection. However, the relief ordered might still be justifiable under section 193 (2) (a) and consequently not unreasonable in the final analysis.

[6] That intolerability was the real reason is apparent from the arbitrator's reference to the LAC judgement in ***Dunwell Property Service CC v Sibande***.[1] In that case the employee had made serious allegations against various managers leading the court to decide that the trust relationship between the employer and employee had broken down irretrievably. What distinguishes this case from that one is that in this instance the alleged defamatory remarks were made by the applicant's subordinates against him, not that he had done anything to undermine his own superiors by making allegedly defamatory allegations against them.

[1] (2011) 32 *ILJ* 2652 (LAC)

[7] However, the arbitrator's reasoning in this regard in essence was that, as a manager, the applicant should not have dealt with a workplace issue by instituting civil action against six of his subordinate's through his attorneys. This was essentially why senior management had rejected the motivations of Mr S Mpako, the first respondent's Labour Relations Manager, to reinstate the applicant according to Mpako's own evidence. He claimed that senior management was frustrated with what it perceived to be the applicant's inability to manage the employees under his control. It believed that he should have followed the normal procedures in dealing with these matters. They felt that he was using the litigation to intimidate the employees and management even decided to assist the employees so that they could be represented in the court proceedings against them. There was no evidence that the employer took any disciplinary steps against the applicant for his alleged misconduct as a manager in this regard.

[8] In his evidence at the arbitration, the applicant said he had not dealt with the alleged defamatory claims of the employees against him using the procedures available to him in the workplace because the nature of the allegations made against him were not work related. By contrast, the employer took the opposite view that they were work related. Related to this issue, an *in limine* objection raised by the employer was that the record was incomplete in that the bundle of documents which contained the summons and the alleged defamatory allegations of the employees was not included as part of the record and the evidence in chief of the employer's first witness was missing from the transcript. The applicant decided that it was not for the purposes of the review application to include the bundles of documents, which makes it somewhat difficult to evaluate to what extent the alleged complaints for which the applicant issued summons against his subordinates were work related or not, though there is some evidence of what those complaints concerned. The employer believed as evidenced by Mr Mpako's evidence that he ought to have filed a grievance against the employees concerned before having recourse to civil litigation. As the applicant chose not to make the record available, I

will assume in the respondent's favour that the alleged defamatory allegations against the applicant did concern work related issues.

[9] I agree with the applicant that in determining whether reinstatement would be appropriate the mere fact that some of the applicant's subordinates had testified they did not want to work under him, particularly where those subordinates had been found to have made false complaints against him would not be a valid consideration. The crux of the matter is whether the arbitrator could reasonably have concluded that the employment relationship between the applicant and the employer had broken down because of the civil proceedings he had instituted against his subordinates. Under cross-examination, Mpako explained that the reason why senior management was resistant to taking the applicant back was that he was not the type of employee who was amenable to discipline himself. However, apart from the ramshackle case which led to the applicant's dismissal, which the arbitrator dismissed in no small part because of the dishonesty of the complainants, there was no evidence adduced to show that the employer had attempted to deal with what it considered to be the applicant's overly strict disciplinary style, which did not conform to its more forgiving approach to indiscipline.

[10] Mr *Simoyi*, who appeared for the employer, submitted that it is not necessarily a requirement that the reason for reinstatement being intolerable needs to emanate from the same events which gave rise to the disciplinary enquiry. That may well be true, but where the employer essentially relies on other factors which might have warranted other disciplinary action, an arbitrator should be wary of falling into the trap of refusing the primary remedy of reinstatement because there might have been other grounds for disciplining the employee which could ultimately have led to his dismissal.

[11] In this case, it would seem that the employer advanced the argument, which the arbitrator accepted, that it would be intolerable to reinstate the applicant because he was not be amenable to moderating his disciplinarian stance, even though it had failed to prove that he had conducted himself unacceptably. In essence, the reason advanced is

scarcely distinguishable, if at all, from some of the charges which the employer was unsuccessful in proving. The other ground relied on by the arbitrator was that the applicant had demanded through his attorneys a copy of a minutes of a meeting between certain other managers in which it was apparently decided that he should no longer preside in disciplinary enquiries. Making such a request through his attorneys undoubtedly would have irritated the applicant's superiors. However, that did not prevent them dealing with it internally with the applicant. Had he then refused to deal with it other than through his attorney and thereby obstructed normal internal communications between himself and senior management that is a matter which might well have given rise to other disciplinary steps against him but that point had not been reached and the mere fact that his approach might be irritating does not transmute into a working relationship which has become intolerable. The evidence before the arbitrator was not sufficient to support this as a conclusion that a reasonable arbitrator could come to.

[12] The LAC has emphasised that it must not be lost sight of that reinstatement is the primary and default remedy unless displaced by factors that serve to outweigh its underlying rationale, namely intolerability or impracticability and that those factors set high thresholds. In this matter, I am not satisfied that the arbitrator considered the question in the clinically objective manner that was required when deciding this issue (See ***DHL Supply Chain (Pty) Ltd v De Beer NO & Others***[2]), and his failure to reinstate the applicant must be set aside.

Order

[13] The relief awarded in paragraphs 141 and 142 of the second respondents arbitration award dated 14 February 2014 is reviewed and set aside and substituted with the following:

> "141.The third respondent must reinstate the applicant with retrospective effect to the date of his dismissal on 20 may 2013 within 14 days of the

[2] **(2014) 35 *ILJ* 2379 (LAC)** at para 21

date of this order on the same terms and conditions that government his employment on the date of his dismissal."

[14] Paragraph 143 of the arbitration award remains unchanged save that it is renumbered as paragraph 142 of the award.

[15] The third and fourth respondents are jointly and severally liable for the applicant's costs, the one paying the other to be absolved.

_____

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	J Grogan, SC instructed by Wheeldon, Rushmere & Cole
SECOND AND THIRD RESPONDENTS:	M Simoyi instructed by the State Attorney, Port Elizabeth.